REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

Petition No. 822 Of 2008

SALIM AWADH SALIM……..…….…….…….....….1ST PETITIONER

SAIDI HAMISI MOHAMED……..……..…….....2ND PETITIONER

BASHIR HUSSEIN CHIRAG MOHAMED SADER……..…3RD PETITIONER

HASSAN SHABANI MWAZUME…….....…….…....4TH PETITIONER

SWALEH ALI TUNZA…….……..…….....….…....5TH PETITIONER

ABDALLAH HALFAN TONDWE……..….....….....6TH PETITIONER

KASIM MUSA MWARUSI…….…….....….…..…7TH PETITIONER

ALI MUSA MWARUSI…….....…….....8TH PETITIONER

FATMA AHMED CHANDE…….....……...9TH PETITIONER

MUHIBITABO CLEMENT IBRAHIM…….....…….….10TH PETITIONER

MOHAMED ABUSHIR SALIM…….....….....11TH PETITIONER

-VERSUS-

THE COMMISSIONER OF POLICE…….....…...1ST RESPONDENT

THE HON. ATTORNEY GENERAL……..…….....2ND RESPONDENT

AFRICAN EXPRESS AIRWAYS LTD…….....……..3RD RESPONDENT

BLUE BIRD AVIATION LTD…….....….4TH RESPONDENT

JUDGMENT

Introduction

1. The events that give rise to this petition took place some 6 years ago when the petitioners allege that they were arrested by Kenyan security forces, held in custody unlawfully, sent to Somalia and Ethiopia without due process being followed, and tortured while in the custody of Kenyan Somali and Ethiopian security forces.

2. In the petition and the affidavit in support sworn by the 1st petitioner, Salim Awadh Salim, on 22nd December 2008, the 1st -8th petitioners, namely **Salim Awadh Salim**, **Saidi Hamisi Mohamed, Bashir Hussein Chirag Mohamed Sader, Hassan Shabani Mwazume, Swaleh Ali Tunza, Abdallah Halfan Tondwe, Kasim Musa Mwarusi** and **Ali Musa Mwarusi** are described as citizens of Kenya and devout and practicing Muslims. The 9th and 11th petitioners, **Fatma Ahmed Chande** and **Mohamed Abushir Salim,** are described as nationals of Tanzania, while the 10th petitioner, **Muhibitabo Clement Ibrahim**, is said to be a Rwandese national. The 9th -11th petitioners are also described by the 1st petitioner as devout and practicing Muslims.

3. It is alleged in the affidavit sworn by Salim Awadh Salim aforesaid that the petitioners were all arrested on diverse dates in January 2007 in Kenya; detained for various periods in Kenya; and on diverse dates in January and February 2007, they were all removed forcibly from Kenya and taken to Somalia, and thereafter to Ethiopia. They claim that they were all *'renditioned'* without due process as no extradition or deportation process as required by law took place.

4. The 1st petitioner alleges on behalf of the other petitioners that at the time of their arrest, they had just crossed into Kenya from Somalia, running away from a raging war; that they should have been treated as persons seeking refuge, particularly the 9th – 11th petitioners who are nationals of Tanzania and Rwanda respectively, and accorded the status of refugees; that instead, they were held in custody in breach of the provisions of section 72 of the former constitution, transported to Ethiopia in aircrafts owned or operated by the 3rd and 4th respondents, and tortured while in the custody of the Kenyan, Ethiopian and Somali security forces.

5. The petitioners claim that while in the hands of Kenyan security forces, they were all held incommunicado and denied the opportunity to communicate with relatives, friends and lawyers, and that they were informed by police offices in the various police stations where they were held in Kenya that the officers had instructions not to allow them contact with anyone.

6. They allege that their removal from Kenya instead of their being arraigned in Kenyan courts was unconstitutional and discriminatory on the basis of their being Muslims by religion, and were a denunciation of the Kenyan citizenship of the 1st to 8th petitioners on account of their faith.

7. The petitioners claim that following their *'rendition'* from Kenya, they were held in incommunicado detention in Somalia and Ethiopia and denied the opportunity to communicate with the outside world, their relatives, friends, lawyers or officials of the Kenyan Embassy in Addis Ababa; that they were denied the opportunity to pray while in detention in Kenya, Somalia and Ethiopia, and were expressly informed that they would only be allowed the opportunity to pray if they confessed to being international criminal terrorists belonging to Al Qaeda.

8. According to the petitioners, while they were in detention in Addis Ababa, they were randomly beaten up by the Ethiopian officers with fists, kicks and all sorts of crude weapons; detained for days in crowded cells and sometimes in solitary confinement while handcuffed and blindfolded for days; denied toilet facilities and given very little food and hardly any drinking water; and that they were given very flimsy mattresses and blankets and they always suffered extreme cold and cold related ailments.

9. The petitioners allege further that they would be taken in turns for interrogation in a centre run by the American Federal Bureau of Investigations (FBI) where they were subjected to day long interrogation and subjected to untold torture and inhuman and degrading treatment; that they were also interrogated by British and Israeli officers who also accused them of being Al Qaeda terrorists who had gone to Somalia to assist the Islamic Court Union (ICU). They state that after the interrogations, they were all found innocent of any wrong doing. The 1st petitioner avers that the entire experience has left all the petitioners permanently psychologically traumatized. He has annexed to his affidavit in support of the petition medical examination reports in respect of the 1st to 9th petitioners undertaken in October 2008 upon their return to Kenya.

10. The petitioners allege that their arrest and detention in Kenya without charge was arbitrary, unlawful, illegal and in violation of their fundamental rights to personal liberty and due process of the law as guaranteed by the constitution of Kenya; that their forcible abduction by the Kenya Police without due process of law and without extradition proceedings was unlawful, illegal and in violation of their fundamental rights to personal liberty, due process of the law and the prohibition against expulsion from Kenya as guaranteed by the constitution; that their being kidnapped and removed from Kenya instead of being arraigned in courts of law in Kenya as required by law is in the circumstances of this case discriminatory against them on account of their Islamic religion contrary to the constitutional guarantee on non-discrimination.

11. The 1st to 8th petitioners contend that their removal from the jurisdiction by the 1st and 2nd respondents and handing them over to foreign powers without due process of law was unlawful, illegal and unconstitutional and a denunciation of their Kenyan citizenship guaranteed under sections 87, 88 and 89 of the constitution of Kenya.

12. They state that the respondents are jointly and severally liable, under the legal principle of causation, for their unlawful, illegal and unconstitutional detention whilst in the aircrafts to Somalia and Ethiopia, in detention without trial in Somalia and Ethiopia; for the torture, cruel, inhuman and degrading treatment and punishment inflicted on them; and for unlawfully and forcibly facilitating their abduction and subsequent detention.

13. The petitioners claim that the 3rd and 4th respondent owed them a legal duty of care to establish the legality of their transportation from Kenya and to refrain from participating in their illegal and criminal kidnapping from Kenya in violation of the constitution, the Kenya Civil Aviation Act and international law, standards and customs governing civil aviation; and that the respondents are therefore liable in civil and criminal sanctions for the torture, cruel, inhuman and degrading treatment which the petitioners were subjected to.

14. In their petition dated 22nd December 2008, the petitioners seek the following orders:

i) A declaration that the arrests of the Petitioners was in the circumstances arbitrary, unlawful illegal, unconstitutional and in violation of the Petitioners fundamental right against arbitrary arrest guaranteed by sections 70 and 72 of the Constitution of Kenya.

ii) A declaration that the detention of the Petitioners in Kenya for a period longer than twenty four (24) hours without being arraigned in a court of law in Kenya was arbitrary, unlawful, illegal, unconstitutional in violation of the Petitioners' fundamental rights to personal liberty and the protection of law guaranteed by sections 70,72 and 77 of the Constitution of Kenya.

iii) A declaration that the holding of the Petitioners in pre-trial incommunicado detention for a period longer than twenty four (24) hours was arbitrary, unlawful, illegal and unconstitutional in violation of the Petitioners'' fundamental rights as to the integrity, dignity and security of eh personal freedom against torture, cruel,, inhuman and degrading treatment or punishment, protection of law, access to justice and the right to counsel guaranteed by sections 70,74 and 77 of the Constitution of Kenya.

iv) A declaration that the physical assault, verbal abuse, stripping naked and being photographed nude, frequent transfers between police stations whilst blindfolded, mock executions, denial of opportunity to pray and taunting with death in Somalia inflicted on the Petitioners by the Respondents whilst in detention without trial in Kenya was unlawful, illegal and unconstitutional in violation of the Petitioners' fundamental rights as to the integrity and dignity of the person, freedom against torture, cruel, inhuman and degrading treatment or punishment guaranteed by section 70 and 74 of the Constitution of Kenya.

v) A declaration that the forcible removal from Kenya, kidnapping and handing over of the Petitioners to foreign States without due process of law, without extradition proceedings was unlawful, illegal and unconstitutional in violation of the Petitioners'' fundamental rights as to the protection of the integrity, dignity and security of the person, freedom from cruel, inhuman and degrading treatment or punishment, the right to the op=protection of law, the right of access to justice and freedom against expulsion from Kenya guaranteed by section 70, 74, 77 and 81 of the constitution of Kenya.

vi) A declaration that the forcible removal from Kenya, kidnapping and handing over of the Petitioners to foreign States without due process of law, without extradition proceedings without deportation orders, was unlawful, illegal and unconstitutional and in the whole circumstances of this Petition discriminatory of the Petitioners on account of their Islamic religious faith in violation of the Petitioners' fundamental right as to the protection against discrimination guaranteed by sections 82 of the Constitution of Kenya.

vii) A declaration that the forcible transportation of the Petitioners in the aircrafts to Somalia against their will, whilst blindfolded, handcuffed/bound on the hands, manacled on the legs and fastened to the aircrafts whilst being subjected to verbal abuse and taunted "to go and die in Somalia" was in violation of the integrity, dignity and the security of mind and body of the person and amounted to subjecting the Petitioners to cruel, inhuman and degrading treatment or punishment contrary to sections 70 and 74 of the Constitution of Kenya.

viii) A declaration that the 1st and 2nd Respondents action of forcibly removing the 1st to 8th Petitioners from Kenya, kidnapping and handing them over to foreign States without due process of law, without extradition proceedings and condoning the unlawful. Illegal and unconstitutional detention of the 1st to 8th Petitioners by foreign States on the pretence that the 1st to 8th petitioners were not Kenyans was an unlawful and unconstitutional denunciation of the 1st to 8th Petitioners'' Kenyan citizenship in violation of sections 87 to 89 of the Constitution of Kenya and amounted to rendering the 1st to 8th Petitioners' stateless and subjecting them to cruel, inhuman and degrading treatment or punishment contrary to sections 70 and 74 of the constitution of Kenya.

ix) A declaration that the 3rd and 4th Respondents owed the Petitioners a legal duty of care to establish the legality and constitutionality of the Petitioners' forcibly removal from Kenya to a foreign State and are liable to the Petitioners for breach of that duty.

x) A declaration that the forcible removal of the Petitioners from Kenya by the Respondents jointly to foreign States without due process of law, without extradition proceedings amounts to the criminal offence of kidnapping contrary to section 254 of the Penal Doe (Chapter 63, Law of Kenya) for which the Respondents are jointly and severally liable.

xi) A declaration that the decision of the 1st and 2nd Respondent to forcibly remove the Petitioners from Kenya and hand them over for detention without trial by foreign States without due process of law, without extradition proceedings amounts to the criminal offence of abuse of office contrary to section 101 of the Penal Code (chapter 63, Laws of Kenya) for which the 1st and 2nd Respondents are jointly and severally liable.

xii) A declaration that the holding of the petitioners in incommunicado detention without trial in Somalia and Ethiopian in inhuman prison conditions including exposure to extreme elements of

nature, denial of adequate food, adequate drinking and bathing water, toilet facilities, proper beddings, exposure to permanent bright lighting, confinement in overcrowded and solitary confinement, prolonged interrogation periods, coercion to confess to false criminal allegations, exposure to loud vulgar Western Music, denial of opportunity to pray, taunting about rotting in Ethiopia, taunting with rape of spouse and self, false accusation of belonging and/ or associating with a notorious criminal murderous international terrorist group – Al gaeda and some of its masterminds and frequent infliction of physical and mental pain through excessive shackling, blindfolding and beatings amounts to torture, inhuman, cruel and degrading treatment or punishment contrary to sections 70 and 74 of the constitution of Kenya.

xiii) A declaration that the Respondents are jointly and severally liable for the unlawful and unconstitutional period of incommunicado detention without trial of the Petitioners in Somalia and Ethiopia and the torture, cruel, inhuman and degrading treatment and/or punishment inflicting on the Petitioners whilst in the unlawful, unconstitutional detention without trial in Somalia and Ethiopia.

xiv) A declaration that petitioners are entitled to general, exemplary, aggravated and/ or punitive damages against the Respondents jointly and or severally.

xv) An award of such general, exemplary, aggravated and/ or punitive damages as may be assessed by the Honourable Court.

xvi) Costs of this Petition

xvii) Any other order(s) and directions as the Honourable Court shall deem fit and just to grant.

The Petitioners' Submissions

15. In his submissions on behalf of the petitioners, Learned Counsel, Mr. Mbugua Mureithi, relied on the affidavits of the 1st petitioner, Salim Awadh Salim sworn on 22nd December 2008 and 23rd May 2011 and their written submissions and authorities in support.

16. The petitioners' case is based on Section 84 of the former constitution which allows all parties to file petitions before the court alleging violation of fundamental rights (reference in this judgment to the constitution shall be to the former constitution repealed in 2010). Mr. Mureithi submitted that the petitioners' arrest and detention in Kenya and rendition to Somalia and Ethiopia without due process being followed was a violation of the petitioners' rights guaranteed under both the constitution and international instruments. He argued that due to the fact that at the time of their arrest, they had just crossed into Kenya from Somalia, running away from a raging war, the state had an obligation to treat them, particularly the 9th – 11th petitioners who are not nationals of Kenya, as persons seeking refuge in accordance with the Convention on the Status of Refugees and the African Refugee Convention both of which Kenya has ratified.

17. According to Mr. Mureithi, the petitioners had instead been subjected to torture while in the custody of Kenyan, Somali and Ethiopian security forces; that while the 1st and 2nd respondents (also together referred to in this judgment as 'the state') deny subjecting the petitioners to torture and deny liability for any torture that may have occurred in the hands of Somali or Ethiopian security agents, their admission that they arrested and sent the petitioners to the two states makes them liable for any mistreatment the petitioners underwent in those countries.

18. Mr. Mureithi contended that the petitioners were not deported from Kenya as alleged by the state. He submitted that they were *'renditioned'* from Kenya, and that the 1st -8th petitioners could not be deported as they are native Kenyan citizens from the Digo ethnic community, a fact that the Minister should have known from their names; and that at any rate, they were not accorded a hearing before the alleged deportation.

19. The petitioners submit that though the state alleges that they failed to furnish the security officers who arrested them with their identification documents, they surrendered all their identity documents, and the Minister could not have signed their deportation papers, which contained the petitioners' full names, without these identity documents. Mr. Mureithi submitted further that the petitioners did not constitute a security threat as they were unarmed; that the renditions disclose criminal offences of kidnapping; and that their deportations were never revoked, even though they are back in Kenya. With regard to the 9th - 11th petitioners, Mr. Mureithi submitted that the Minister who is alleged to have signed the deportation papers could not have done so with regard to these petitioners as Kenya was obliged not to refoul refugees by returning them to a country where there was war.

20. On the culpability of the 3rd and 4th respondents, Mr. Mureithi submitted that the petitioners were tortured during their flight from Kenya; that they were forced into the flight and manacled during the flight; that Chapter 5, Annex 9 of the Chicago Convention on International Civil Aviation and as well as the Montreal Convention and Section 31 of the Civil Aviation Act attach liability on the 3rd and 4th respondent for the acts of torture inflicted on the petitioners during the flight. Mr. Mureithi also placed reliance on the **United Nations Norms on the Responsibilities of Transnational Corporations** and asserted that the 3rd and 4th respondents were liable to the petitioners jointly and severally with the 1st and 2nd respondents for the violation of their rights. The petitioners therefore seek orders against all the respondents, including compensation for detention in Kenya, Somalia and Ethiopia. They ask that the damages be segregated, and that exemplary damages be awarded for the high handed conduct of the respondents. They have relied on various authorities in support of their case which I shall revert to later in this judgment.

The Response

The 1st and 2nd Respondents' Case

21. The state concedes that the petitioners were indeed deported as claimed. It takes the position, however, that at the time of the deportation, the Kenyan border had been sealed as available intelligence indicated that terrorists from Somalia who had been fighting with the transitional government of Somalia were retreating into Kenya; that the petitioners were among the group that breached the security check point manned by the army and came in by sea; that they were among about 100 persons who were subjected to security checks and asked to identify themselves; that while some were able to identify themselves, the petitioners could not. The 1st and 2nd respondents allege therefore that the petitioners were deported through a legal process.

22. Mr. Opondo, Learned State Counsel, presented the case for the state. He relied on the affidavit sworn on 17th March 2009 by **Mr. Nicholas Kamwende,** a Senior Assistant Commissioner of Police and Head of the Anti-Terrorism Police Unit (ATPU) of the Kenya Police, and the written submissions dated 24th February and 23rd March 2012.

23. In his affidavit, Mr. Kamwende depones that he was involved in the operation that led to the apprehension and expedited deportation of the petitioners back to Somalia. He confirms the 1st petitioner's averments that there was fighting in Somalia between militia of the ICU and the army of the Somalia Transitional Federal Government (STFG) assisted by the Armed Forces of the Republic of Ethiopia.

24. He avers further that according to credible information and intelligence received in Kenya, certain known and wanted international terrorists whom he names as including **Fazzul Mohammed Abdallah, Swalleh Nabhan, Shikh Ahmed Salim Swedan** and **Fahid Mohamed Ally Msalam** (now deceased), were roaming freely and supporting the ICU militia in the war against the STFG and the Ethiopia armed forces; that the Ethiopian forces had overwhelmed the ICU, and as a result, the terrorists and other religious extremists were retreating towards the Kenyan border; that upon realizing the threat to national security posed by the militia fleeing from Somalia, and out of an abundance of caution, the Kenya

government closed the Kenya-Somalia border and suspended all flights into and out of Somalia; that the decision to effect the border closure was informed by the fact that some of the terrorist within the ICU militia ranks and who were on the run heading to the Kenya border were believed to have been behind the August 1998 Nairobi and Dar es-salaam and the September 2002 Kikambala bomb blasts and were likely to hide within the Kenyan population once they crossed the border.

25. The 1st and 2nd respondents observe that the petitioners have admitted that knowing that the border was closed, they used the open waters of the Indian Ocean and entered Kenya through Kiunga; that they were asked to produce documentation in proof of their citizenship or lawful residency in Kenya; that those who did were set at liberty immediately but those who did not were ***'in the interests of public order and safety'*** and due to the threat they posed to national security and the wellbeing of the state briefly incarcerated under Section 8 of the Immigration Act Chapter 172 of the Laws of Kenya (hereafter '**the Act'**, now repealed by Act No. 12 of 2011) while awaiting arrangement for immediate deportation, as even keeping them as refugees was by dint of available intelligence deemed very risky; and their deportation orders were expeditiously processed by the Immigration department. They have annexed as annexure "**NK-2 to 22"** copies of deportation orders and declarations of prohibited immigrant status in respect of all the petitioners. They allege that the petitioners did not at any time between their arrest and deportation produce any identification documents; did not give indication as to where such documents, if indeed available, would be procured; and neither their families or friends approached the authorities to clarify or explain their situation.

26. They maintain that due to the threat posed to the well-being of the state, the need to rid the country of 'undesired elements' was of utmost importance, and this was the reason why the petitioners and others were put on the earliest available flight with an armed escort and taken back to Somalia where they had come from.

27. The 1st and 2nd respondents deny that the petitioners were subjected to any form of torture in Kenya and contend that the confinement meted out on them was in consonance with established norms, standards and international practice employed when handling suspects during situations of such enormity. They assert that as the petitioners had failed to prove that they were citizens or lawfully resident in Kenya, and having flown them out of Kenya and handed them over to the STFG, their role of fending for them and ensuring their security ended and fell on the Somali authorities. They therefore submit that the authorities in Kenya cannot be held liable for what befell the petitioners in Somalia or Ethiopia.

28. The 1st and 2nd respondents claim that after the lapse of a long period of time, persons claiming to be the petitioners' relations ***'emerged mounting all manner of hue and cry and remonstrations'*** about their relatives; that a decision was taken to send officers from the National Registration of Persons Bureau to Addis Ababa, Ethiopia to meet the petitioners and investigate the matter further; that they took fingerprints and statements from the petitioners and cross-checked them with the information relayed from the protesting relations and from records and promptly informed government of their findings; that those like the petitioners who were found to be genuine residents or citizens of Kenya were released after the government engaged the government of Ethiopia to set them free.

29. They assert therefore that the petitioners were the authors of any misfortune(s) that may have befallen them as they were duty bound to identify themselves at the point of apprehension, which they failed to do; and that they therefore left the government with no option but to take the action that it did against them.

30. It is the state's contention that the petitioners were not discriminated against because they are Muslims; that there were other Muslims who identified themselves and were released; that though the petitioners claim that they were not terrorists, they did not identify themselves and the government could not take chances with matters of security. The 1st and 2nd respondents therefore ask that the petition be dismissed with costs.

The 3rd Respondent's Case

31. Mr. Onindo and Mr. Mwenesi presented the case for the 3rd respondent. They relied on the affidavit of **Captain Musa Hassan Bulhan,** a Director and the Chief Executive Officer of the 3rd respondent sworn on 11th March 2009, and the written submissions dated 4th February 2010.

32. The 3rd respondent contends that this petition has no merit as a petition under section 84(1) is for enforcement of fundamental rights specified under Chapter V of the constitution and for challenging alleged violations of the rights and freedoms in sections 70 to 83 of the Constitution. It alleges that instead, this petition has been brought to enforce rights under sections 88 and 89 which arise under Chapter V1 of the constitution.

33. The 3rd respondent notes that the petition seeks only one declaration against it with regard to its alleged duty of care to the petitioners. It asserts that there is no prescribed constitutional right to a duty of care by a party in its position; and that the High Court has no jurisdiction under section 84 of the Constitution to deal with the offence of kidnapping alleged against the 3rd respondent.

34. While conceding that the petitioners were flown on its planes, the 3rd respondent contends that the petitioners flew on a charter service to Mogadishu where only one ticket is issued to the group leader; that the ticket is issued as a requirement for insurances purposes to cover insurance liability during the flight service; that it is a civilian airline and does not keep handcuffs or chains for chaining passengers, nor does it direct the leader of a charter group on how the passengers in his group should be seated.

35. It contends that during the flights on 20th and 27th January 2007, the normal flight procedures were conducted by the flight captain, the purser and the crew for all passengers without discrimination; and that the necessary security checks prior to check-in and boarding were also carried out. It submits that it is not its duty to verify the pre-check-in security as this duty lies with the Immigration Department; that it had no duty to verify the validity or invalidity of the petitioners' identity documents; and that once a person has boarded the plane, it was not its pilot's responsibility to check the seating arrangements as it assumes that all is well.

36. The 3rd respondent submitted that the petitioners have not established a case as against it and asked the court to disallow the petition. It relied on the decision of the court in **Moses Tengenya Omreno –vs-Commissioner of Police & Another** in which the court held that it is the duty of the petitioners to prove that they were inhumanely treated.

37. Mr. Mwenesi submitted that the law applicable to this matter is contained in the Chicago Convention, the Civil Aviation Act and the Air Navigation Act; that it is not the duty of the carrier to check the security of passengers; that all procedures were followed with regard to the carriage of the petitioners in the respondent's plane; that the 3rd respondent is not required to comply with the UN Norms for Air Transportation; that no case has been made against it, and the petition should be dismissed with costs.

The 4th Respondent's Case

38. Like the 3rd respondent, the 4th respondent took the position that the petition as presented is bad in law since applications under Section 84(1) of the constitution may only seek enforcement of Sections 70-83 (inclusive) of Chapter V of the constitution; that the rights sought to be enforced under sections 87, 88 and 89 of the constitution fall under Chapter VI of the constitution and cannot be brought under section 84(1); and that the orders and declarations sought against them cannot issue as the 4th respondent cannot be enjoined into any acts and/or omissions alleged to have affected the petitioners that do not relate directly to its operations as an independent airline carrying out scheduled inland and international flights for reward. It asserts that it carried out its business at all times while fully observing the rules and regulations set out in the Civil Aviation Act and has operated within the conditions stipulated in its Air Service Licenses.

39. Ms Serem, Counsel for the 4th respondent, relied on the affidavit of **Hussein Unshur Mohamed** sworn on 15th October 2010 and written submissions dated 4th November 2011. In his affidavit, Mr. Mohamed avers that as evidenced by the passenger manifest, there were ten (10) other passengers on the same aircraft in which the 6th, 7th and 8th petitioners allege that they were forcibly made to board while handcuffed; that no complaints were lodged with the pilot, Captain M. Aden, or the crew before, during or after the flight; and consequently, the petitioners' allegations are fabrications; that none of the passengers on the flight were handcuffed and/or hooded; and that no investigations either by police or Civil Aviation authorities have been launched against the 4th respondent to ascertain the petitioners' allegations of criminal and negligent conduct.

40. The 4th respondent questions the capacity of the 1st petitioner, even with the authority of the 6th, 7th and 8th petitioners, to swear to events that are alleged to have occurred before and during a flight that he was not on.

41. The 4th respondent admitted that it had ferried the 6th, 7th and 8th petitioners to Somalia. It contends, however, that it ferried the petitioners after being served with their deportation orders. It maintains that its plane was chartered, and this cannot be stretched to include liability for torture and kidnapping. The 4th respondent contends that the petitioners did not complain to the pilot that they were tortured; nor did they prove that they were handcuffed during the flight. Ms. Serem submitted therefore that no relief can lie against the 4th respondent.

42. With regard to the UN Norms on the Responsibilities of Transnational Corporations relied on by the petitioners, the 4th respondent contended that it cannot be held liable under non-existent norms; that the Norms have since been overtaken by events as they were supposed to be crafted and adopted by a large body, but that this was never done.

43. On the claim against the 4th respondent for alleged violation of the petitioners' rights, Ms. Serem submitted, in reliance on the decisions of the court in **Kenya Bus Services –v-Attorney General Misc. Civil Suit No 413 of 2008** and **Karuri & Others -vs Dawa Pharmaceuticals Company Limited & Others (2005) LLR 5994**, that it is only the state which is the guarantor of human rights. She argued therefore that the 4th respondent cannot be held liable for violation of the petitioners' rights and asked that the petition be struck out as the 4th respondent had been improperly joined to the petition.

The Petitioners' Rejoinder

44. In his reply to the submissions by the respondents, Mr. Mureithi conceded that the Kenya-Somali border had been closed, thus making entry through other points the only option. He also conceded that the UN Norms on the Responsibilities of Transnational Corporations are not binding but submitted that they offer a useful tool for interpretation in the area of human rights and non-state actors, and he referred in this regard to the case of **Stephen Mwangi Muriithi –v-Hon Daniel Arap Moi Nairobi H.C. Petition No 625** of **2009.**

45. In response to the submissions by the 1st and 2nd respondents, Mr. Mureithi maintained that the petitioners had identification documents which were confiscated by the police, but that in any event, identification documents are not the conclusive proof of Kenya citizenship since citizenship is purely a constitutional incident based on descent. He also maintained that the petitioners did not pose any threat to the security of Kenya whatsoever and were merely fleeing the war in Somalia.; that they were never informed that they were in Kenya illegally or were to be deported; nor were they accorded any hearing by the Minister for Immigration and Registration of Persons with regard to the alleged deportation. According to Mr. Mureithi, the petitioners were never served with the alleged declarations of prohibited immigrants or the deportation orders which they only saw for the first time in the replying affidavit of Mr. Nicholas Kamwende. They assert further that the Minister could have told, particularly with regard to the 4th to 8th petitioners whose surnames of "Mwazume", "Tunza," "Tondwe" and "Mwarusi" are distinctly indigenous Kenyan names from the Digo tribe, what their nationality was.

46. The petitioners assert that the Minister took no care or precautions to ascertain the citizenship of the persons whose deportation papers he was signing and thus deprived the petitioners of their citizenship; that the fact that the deportation papers had their full and accurate names, as did the declarations of prohibited immigrants, indicates that the names were picked from their confiscated identification documents prior to the "deportation."

47. In response to the averments by Captain Musa Hassan Bulhan in his affidavit sworn on 11th March 2009 on behalf of the 3rd respondent, the petitioners assert that everyone, including the 3rd respondent, is bound by the Bill of Rights; that the other passengers on board the 3rd respondent's flight were fellow detainees from various countries; that the 3rd respondent forcibly flew the petitioners to Somalia knowing that they were detainees and without confirming the legality of their detention.

48. With regard to the claim by the 4th respondent that the 1st petitioner did not have capacity to swear the replying affidavit on behalf of the 6th -8th petitioners, Mr. Mureithi contended that the 1st petitioner had annexed authority to swear the affidavit in support of the petition on behalf of these petitioners. As to the contentions relating to the provisions of section 87 – 89 in Chapter 6 of the constitution, Mr. Mureithi submitted that reliance was placed on these provisions merely to reinforce the petition and the assertion of violation of the petitioners' rights.

Analysis and Determination

49. The petitioners have brought this claim under section 84 of the constitution alleging violation of their rights under sections 70, 72, 74, 77, 81 and 82, and sections 87, 88 and 89 with respect to the 1st - 8th petitioners. Section 84 provided as follows:

84. (1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

50. It is clear that this section contemplated violation of rights provided under sections 70-83 only. Consequently, in determining whether there has been a violation of the petitioners' rights, I will confine myself to the provisions of these sections.

51. I have considered the pleadings in this matter and the parties' respective oral and written submissions and the authorities relied on. In my view, four main issues arise for determination as follows:

i. Whether the detention of the petitioners in Kenya was a violation of their constitutional rights;

ii. Whether the respondents are jointly and severally liable for the detention and alleged acts of torture and other violations of the petitioners' rights that took place in Somalia and Ethiopia;

iii. Whether the 3rd and 4th respondents can be held liable for the alleged violation of the petitioners' rights;

iv. If the answer to all or any of the issues in nos. i-iii is in the affirmative, what relief the court should grant the petitioners.

52. Before dealing with the substantive issues that the petition raises, I believe I am also called upon to first address my mind to one collateral issue raised by the respondents in their pleadings and submissions. This relates to the capacity of the 1st petitioner to depone to the facts pertaining to the

respective claims of the 2nd to the 11th petitioners, in other words, his capacity to present evidence in proof of events that happened to the other petitioners.

Capacity of the 1st Petitioner

53. The respondents have challenged the capacity of the 1st petitioner to swear the affidavit in support of the petition on behalf of the petitioners, and in the case of the 4th respondent, such capacity in respect of the 6th-8th petitioners, asserting that he had no authority to do so. However, in the affidavit in support of the petition dated 22nd December 2008, the 1st petitioner swears that he has the authority of the petitioners to swear the affidavit on their behalf and annexes the said authority marked **"SASI"** to **"SAS3"**. He has also deponed that he makes the averments in the supporting affidavit on the basis of information received from the other petitioners.

54. I believe the objection to the averments of fact by the 1st petitioner goes over and above the giving of authority by the other petitioners to the 1st petitioner to swear the affidavit in support of the petition on their behalf. It goes to the very root of the matter: the admissibility of the affidavit evidence sworn by the 1st petitioner on matters of fact to which he was not a witness and which he can only depone to on the basis of information received from others.

55. The 1st petitioner has made extensive averments of fact with regard to what happened to him in Kenya, Somalia and Ethiopia, but also on the experiences of the other petitioners. His averments are the evidence that the court is expected to rely on in determining whether the petitioners have made out a case of violation of their constitutional rights. In considering the capacity of the 1st petitioner, therefore, I will be assessing the probative value of the averments of fact that he makes. Even though he has the authority of the 1st-5th and the 9th -11th petitioners whose signed authorities he has exhibited in the affidavit in support of the petition, the question is whether the averments that he makes on the basis of information from them are admissible in evidence.

56. The admissibility of his averments must be weighed against the provisions of Section 33of the **Evidence Act (Chapter 80 of the Laws of Kenya),** whichdeals with statements by persons who cannot be called as witnesses, and lays out the kind of statements that constitute exceptions to the hearsay rule by providing as follows:

"Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases…"

57. The exceptions to the hearsay rule under section 33 of the Evidence Act include statements relating to the cause of death; made in the course of business; against the interests of the maker; an opinion as to public right or custom; relating to existence of relationship and relating to family affairs.

58. The question is whether the 1st petitioner could properly adduce evidence in his affidavit regarding the alleged arrest of the other petitioners, the conditions under which they were held, and the alleged acts of torture perpetrated against them.

59. In my view, the averments by the 1st petitioner with regard to what happened to the other petitioners can at best be described as hearsay. There is nothing that has been placed before me to show that the other petitioners were incapable of swearing to the events that are deponed to in the 1st petitioner's affidavit. It is not alleged that they are deceased, or that they could not be found to make the averments of fact that the 1st petitioner purports to make on their behalf, or that for any other reason they could not swear affidavits themselves to place before the court the evidence that they wish to rely on as disclosing the alleged violation of their constitutional rights by the respondents. In any event, the

averments by the 1st petitioner with regard to what happened to the other petitioners does not fall within any of the exceptions allowed by section 33 of the Evidence Act set out above.

60. Consequently, I am unable to accept the averments of facts that the 1st petitioner makes with regard to what happened to the other petitioners as a basis for assessing whether or not there was a violation of their rights under the constitution as alleged. As correctly argued by the 4th respondent, the 1st petitioner does not have the capacity to depone to matters of fact and events that happened when he was not there. There is therefore no evidence before me with regard to the experiences of the 2nd -11th petitioners in Kenya, on the flights to Mogadishu, in detention in Somalia and Ethiopia save, as I illustrate below, as is conceded by the respondents.

Admitted Facts

61. While the respondents have all denied the alleged violation of the petitioners' rights, they have admitted certain facts with regard to all the petitioners. The court notes, first, that the 1st and 2nd respondents concede the arrest of all the petitioners; that they were held in detention in Kenya, and that they were thereafter deported to Somalia. They have also admitted that state agents were sent to Ethiopia in 2008 to verify the identity of the 1st – 8th petitioners. The 1st and 2nd respondents have annexed to the replying affidavit of Nicholas Kamwende documents pertaining to the deportation of all the petitioners. I will therefore consider the allegation of violation of all the petitioners' rights by Kenyan security agents following their arrest on diverse dates and their subsequent deportation to Somalia in light of the admissions by the 1st and 2nd respondents.

62. Secondly, it has been conceded by the 3rd respondent that the 1st-5th and the 9th-11th petitioners were flown to Mogadishu in their plane on 20th and 27th January 2007. The 4th respondent has admitted that the 6th-8th petitioners were flown to Mogadishu in its plane on 10th February 2007. I will therefore consider the alleged liability of the 3rd and 4th respondents with regard to the alleged 'rendition' of the petitioners against these admissions.

63. Finally, I will also consider the allegations of violation of the 1st petitioners rights while in detention in Kenya, on the plane to Somalia, while in detention in Somalia and Ethiopia in its entirety, and the extent of the respondents' joint or several liability for the alleged acts of torture against him while in Somalia and Ethiopia, in light of their admissions with regard to his arrest, deportation and transportation to Somalia and Ettiopia.

Violation of the Petitioners' Rights in Kenya

64. The petitioners contend, and this has been conceded by the 1st and 2nd respondents, that they were arrested and detained in Kenya on diverse dates between the 2nd and 10th of February 2007. In the case of the 1st petitioner, he was arrested on 8th January 2007 and deported on 27th January 2007. The 2nd, 3rd, 4th, 5th, 9th and 11th petitioners were arrested on 8th January 2007 and deported on 27th January 2007, while the 6 - 8th and the 10th petitioners were arrested on 2nd January 2007 and deported on 10th February 2007.

65. The response by the respondents is that the petitioners were deported on suspicion that they were terrorists; that they had posed a security threat by entering the country by sea during a time when the Kenya-Somali border was closed; and that they had failed to provide their identification documents.

66. The court notes from the alleged deportation documents annexed to the affidavit of Nicholas Kamwende that the state used the correct names, or almost the correct names, of all the petitioners. Clearly, therefore, there must have been some identification documents from which the names of the petitioners were taken for the purpose of preparing the deportation documents. It cannot, therefore, be proper for the respondent to have held them for periods ranging between 20 days to one month without

checking, as they ultimately did more than a year later in some cases, to establish that they were lawfully in Kenya as refugees or as citizens.

67. The petitioners contend that the acts of the 1st and 2nd respondents in arresting them and detaining them as aforesaid amounted to a violation of their rights under section 72 of the constitution. This section was in the following terms:

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

(a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offense of which he has been convicted;

(b) in execution of the order of the High Court or the Court of Appeal punishing him or contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offense under the law of Kenya;

…….

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j)….

68. Whether the petitioners were citizens or nationals of other states, were the 1st and 2nd respondents entitled to arrest them and hold them in custody for the periods that they did? The petitioners were constitutionally entitled, if suspected to have committed criminal offences, to be produced in court within 24 hours of their arrest, for it has not been alleged that they were suspected of having committed offences that carried the capital penalty which would have justified their being held for 14 days. They were not charged in court following their arrest, nor were they ever charged in court. It is conceded that after they were released from Ethiopia, they were either taken to their homes in Mombasa or left free to return to their countries, and they have never been charged with any offence. It is therefore clear, on the evidence before me that is corroborated by the documents annexed to the affidavit of Nicholas Kamwende, that the petitioners did produce their identification documents which the state appears to have paid heed to only for the purpose of preparing deportation documents.

69. The petitioners have relied on several cases in support of their claim of violation of the provisions of section 72 - **Ann Njogu & 5 Others vs. The Republic Misc. Criminal Application 551 of 2007**: **Albanus Mwasia Mutua vs. The Republic Criminal Appeal 120 of 2004**: **Murunga vs. The Republic Court of Appeal at Nakuru Criminal Appeal Number 35 of 2006**. I believe that there is no longer any room for dispute with regard to section 72 of the constitution. For the state to hold any person beyond the constitutionally prescribed period is to violate the right guaranteed therein, unless the state discharges the burden imposed by section 72(3)(b) that:

'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.

70. In the present case, no explanation has been attempted. The 1st and 2nd respondents admit arresting the petitioners, detaining them, and then removing them out of the country without subjecting them to any legal process. There can therefore be no doubt that the acts of the security agents in Kenya in 2007 were a violation of the petitioners' rights under section 72(3) of the constitution and I so hold.

Violation of the Right to a Hearing

71. The petitioners allege that the actions of the 1st and 2nd respondents in arresting them, holding them in custody and then removing them from the country was a violation of their right to a fair hearing protected under section 77 of the constitution. This section was in the following terms:

77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

72. As is clear from the above provision, section 77 related to persons who were charged with criminal offences before a court of law. In the present case, the petitioners were never charged with any offence. They were arrested and removed from the jurisdiction, and never had the benefit of presenting their side of the story to any court of law established by the constitution.

73. The state contend that the act of removing the petitioners from Kenya were justified under the provisions of the Immigration Act and were undertaken in the interests of national security. The provisions of the Act relied are as follows:

8. (1) The Minister may, by order in writing, direct that any person whose presence in Kenya was, immediately before the making of that order, unlawful under this Act, or in respect of whom a recommendation has been made to him under section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person to whom an order made under this section relates shall -

(a) be removed to the place from whence he came, or with the approval of the Minister, to a place in the country to which he belongs, or to any place to which he consents to be removed if the Government of that place consents to receive him;

(b) if the Minister so directs, be kept in prison or in police custody until his departure from Kenya, and while so kept shall be deemed to be in lawful custody.

(3) Subject to this section, an order under this section shall be carried out in such manner as the Minister may direct.

74. From the documents annexed to the affidavit of Nicholas Kamwende, it emerges that the declarations under section 8 of the Act, were made, with regard to all the petitioners except the 9th petitioner, on 26th January 2007. In the case of the 9th petitioner, the declaration was made on 19th January 2007. Similarly, the declaration of the petitioners as prohibited persons under section 3 of the Act was made on the same dates. It is clear therefore that the petitioners were in the hands of the state agencies in Kenya for periods in excess of the constitutionally mandated period.

75. The 1st and 2nd respondents contend that they were constitutionally entitled to arrest, hold the petitioners and issue the declarations and deportation orders for reasons of national security. The implication is that it was in order for them to arrest the petitioners, issue the orders under the Act without affording them a hearing, and deport them to Somalia. However, as this court has found in several cases, reasons of national security cannot be a basis for violating the constitutional rights of any person, let alone persons in the position of the 1st-8th petitioners who are citizens of Kenya, or the 9th -11th petitioners who, though non-nationals, had legitimate reasons and valid documentation for their presence

in Kenya.

76. In **Moses Tengeya Omweno vs. The Commissioner of Police and Another Judicial Review Application Number 265 of 2001,** where the applicant had been arrested, detained and extradited to Kosovo without due process being followed, the court (Gacheche J) observed as follows:

"However, I am of the view that the period of detention and his subsequent removal were a grave violation of his following rights:- (i) Protection of right to personal liberty, and (ii) Right to a fair trial or due process. On the right to personal liberty, after his arrest, the applicant was held in unlawful custody both in Kenya and in Kosovo. He ought to have been presented before a court of law of Kenya within 24 hours of the arrest as provided for in section 77 of the Constitution, but he was instead held in custody for 5 days before being taken to Kosovo where he was to be charged."

77. Similarly, in **Leonard Sitamze vs. The Minister For Home Affairs & 2 Others, HC. Misc. Civil Application No. 430 of 2004 (unreported)** Ojwang J (as he then was), in dismissing allegations that the state actions against the applicant were justified on grounds of national security and in quashing the deportation order and prohibiting the applicant's deportation, observed as follows:

"Mr. Kaka for the Respondents opposed the application, for the reason that the Minister was not minded to approve the Applicant's application for the renewal of the permit to stay in the country. Counsel restated the content of the deposition by Damaris Mboya of the Immigration Department (dated 22nd April, 2004), that in considering the Applicant's case for renewal of the permit, some classified information had been received that the Applicant was a threat to national security. I have to note that not much information is given about this threat, and neither the formulation of the relevant affidavit on the question, nor the manner in which counsel communicated this claim before the Court, appeared business-like, done in genuine course of duty or indeed carried any conviction at all. The model of presentation of this charge that the Applicant was a danger to national security was essentially casual, and the Court has no reason to believe it. So in effect, Mr. Kaka is left with bald contentions, that the Applicant must be restricted and deported just because the Minister had by an instrument declared him to be a prohibited immigrant by virtue of Section 3 of the Immigration Act, and then proceeded under Section 8 of the same Act, to make a declaration that the Applicant as a prohibited immigrant be placed in Police custody awaiting deportation. Mr. Kaka then proceeded to argue that the Immigration Act has no place for a hearing to persons being restricted and deported, and that Parliament had not given the Minister any leeway for any hearing to be accorded to such persons.'

78. After analyzing various decisions relied on by the respondent in the case before him, Ojwang J went on to state as follows:

…..It is clear, in my interpretation of the law, that I have preferred the more expansive approach which requires decisions by the Executive, which expose the individual to loss of his fundamental rights, to be subjected to the test of legality as superintended and enforced by the High Court……I must take judicial notice that the precious ingenuity of the common law and its jurisprudence and philosophy, where matters of public law are concerned, is that good governance has judicialism as its partner, and that there are to be no decisions taken by public bodies which derogate from the private rights of individuals where the views of such individuals are entirely disregarded. The richness of the safeguards of a written Constitution, such as that of Kenya, is assured by the philosophy and practices of the common law as maintained by the Judiciary.....

79. The learned judge then went on to hold as follows:

*'**I would hold that it is contrary to law that the Minister should have the Applicant, a family man living in Kenya as his domicile, doing normal business and possessed of relevant certificates of legitimate presence, arrested and detained without any hearing at all, deprived of his own properties, extracted from his family environment, detained for long, and then deported. Such actions are tell-tale instances of violation of the fundamental rights of the individual as set out in detail in Chapter V of***

the Constitution. They also bespeak a failure to observe human rights obligations which Kenya assumed under international law."

80. Similarly, in the case of **Mariam Mohamed & Anor V Commissioner Of Police & Anor Misc. Crim. Appli. No. 732 of 2007 [2007] eKLR,** Ojwang J, while determining a *habeas corpus* application in respect of the applicant who had been extra-legally removed from Kenya and transferred to the United States Military Detention Facility in Guantanamo Bay, Cuba, stated as follows:

"The question raised by the applicants herein, therefore, is a logical one: is it not a violation of the Subject's constitutional rights, that someone in State authority would have him taken out of this Court's jurisdiction, so that he no longer can benefit from the High Court's writ of Habeas Corpus? So that the subject can no longer exercise his fundamental rights, as specified in Chapter V of the Constitution of Kenya? Clearly, by taking the Subject out of the jurisdiction of the Kenyan Courts, the foundation of his enjoyment of constitutional rights had, in a formal sense, been taken away; for those rights are enforced by the Courts which have jurisdiction in Kenyan territory.

That the subject should always have access to the safeguards of the Constitution of Kenya, is a right; and so the person who made it impossible for the subject to enjoy those rights, committed a constitutional and a legal wrong against him."

81. In **Iche Chukwu Ntinu vs. In the matter of Immigration Act, HC. Misc. App. 367 of 2002 (unreported),** Hayanga, J, (as he then was), considered the issue of deportation and stated as follows:

"I believe that an act of deportation may in certain cases involve issues of National Security and public interest to be balanced against compassionate circumstances. I believe further that the principles of administrative law apply and there is a requirement as to fair hearing. It is a fundamental rule of administrative law that a person must be accorded a fair hearing and normally the courts would expect a fair hearing to any deportee unless there are good reasons not to require a hearing but where the Government relies on the issue of National Security there usually ought to have been established some evidence to support it."

82. National security considerations were also cited in the case of **Zuhura Suleiman –vs- The Commissioner of Police & 2 Others High Court Misc. Apllication No. 441 of 2010 [2010] eKLR**, in which the subject was arrested in Kenya and extra-judicially removed to Uganda without extradition proceedings. In holding that the removal was unlawful and unjustifiable and thus a violation of his fundamental rights, even on the ground of suspicion of engaging in terror activities, Muchelule J stated as follows:

"The subject was arrested at 10.30 p.m on Friday and on the following day, a Saturday, he was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m. There was certainly no opportunity afforded for him to apply to the Kenyan courts for release, for instance. There was no formal communication with his family or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya. Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country's commitment to the rule of law and human rights……..I find that no exceptional circumstances, whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. These rights and liberties cannot be given up for expedience's sake."

83. I agree with the position taken by the learned judges in these matters. It is clearly a violation of the

petitioners' rights to arrest them as they flee from a war, detain them in violation of the constitution, and then remove them from the jurisdiction of the court and hand them over to a foreign power in disregard of their rights under the constitution. I do find and hold therefore that the arrest, detention and removal of the petitioners from Kenya was in violation of their right to due process.

Violation of Section 74 of the Constitution

84. Mr. Mureithi has submitted on behalf of all the petitioners that the acts of the respondents during the period of the petitioners' incarceration in Kenya, during the flight to Somalia and Ethiopia, and during their detention in these countries amounted to a violation of their constitutional protection from being subjected to cruel and degrading treatment guaranteed under section 74 of the constitution, which provided that:

74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.

85. As a State party to international human rights treaties, Kenya is under an obligation not to subject any person to torture or other cruel and degrading treatment prohibited under these conventions. The **Universal Declaration of Human Rights (UDHR),** atArticle 5, prohibits torture in the following terms:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

86. Similarly, the **International Convention on Civil and Political Rights (ICCPR)** prohibits, at Article 7, acts of torture or other cruel, inhuman or degrading treatment or punishmentby providing as follows:

"***No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'***

87. At the regional level, the **African Charter on Human and People's Rights** provides at Article 5 that:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman of degrading punishment and treatment shall be prohibited.'

88. In its **General Comment No. 20,** adopted in its Forty-fourth session on 10 March 1992, the Human Rights Committee observes as follows with regard to the provisions of Article 7 of ICCPR:

[2] The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

89. At Article 3, the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** states as follows:

'For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any ind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

90. Article 2 of **CAT** is particularly apt for the matter before me. It provides as follows:

2(1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2(2) <u>No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency</u> may be invoked as a justification of torture.'

91. The question that I must address myself to is whether the acts of the 1st and 2nd respondents in this matter were consonant with the above provisions of international conventions which Kenya has ratified; and whether they were in keeping with the state's obligation to *'**protect both the dignity and the physical and mental integrity of the individual.'***

92. As indicated above, the only evidence properly before the court with regard to the treatment of the petitioners by security forces, save for the matters admitted by the respondents, is the evidence of the 1st petitioner with regard to what happened to him following his flight from Somalia after war broke out in that country. In considering this issue therefore, I will do so first, with regard to the 1st petitioner and thereafter consider the matter with regard to the 2nd - 11th petitioners.

93. The 1st petitioner depones that he and his wife, **Fatma Ahmed Chande,** the 9th petitioner, relocated to Mogadishu, Somalia in search of jobs and livelihood in August 2006; that when the war broke out in December 2006, they decided to flee to safety in Kenya, and they started the journey back on 31st December 2006.

94. The 1st petitioner has given in some detail the course of their journey from Somalia until they landed in the hands of the Kenya government security forces. What is relevant to this decision is that he and his wife started fleeing in a large group of people who were all unknown to them; that they first headed to the Liboi border point but found it closed; that they spent the night at Poblo, the Somali border point opposite Liboi; that they proceeded the next day to Kulbio border post which they also found closed; then walked to Kiamboni escorted by security offered by the ICU. At Kiamboni, they found a fiber boat which could accommodate about 10 persons and they sailed on it to the Kiunga border point.

95. According to the petitioner, the group arrived at the Kenya coastline near Kiunga on 7th January 2007 and slept in the bush overnight; that the next day he sought transport to Lamu in Kiunga and found a boat whose owner was willing to take them to Lamu but who advised that they should get an authorization letter from the Area Chief or the Officer Commanding Station (OCS), Kiunga Police Station. He states that their attempts to get authorization from the Chief that day were not successful; that they again sought authorization on 8th January 2007 from the Chief and the OCS, Kiunga Police Station; that upon arrival at the Kiunga Police Station, the OCS asked them to identify themselves; that he and his wife did so by furnishing the OCS with his wife's original Kenyan Dependency Certificate and its official receipt, her Tanzanian identity Card and Tanzanian Passport; the 1st petitioner's Kenyan Identity Card No 10958315 and his Kenyan Passport No A888761. He alleges, however, that the OCS immediately confiscated their identification documents and ordered that they be locked up; and that he accused them of being Al Quaeda terrorists and members of the ICU.

96. The 1st petitioner has narrated how, later that day, he was interrogated by police officers from the ATPU who included the Unit's commanding officer, one **Nicholas Kamwende**; that he was held and

interrogated for four days at the Kiunga Police Station and beaten up by the ATPU officers; that on 11th January 2007, he and three others were flown by helicopter from Kiunga Police Station to the GSU Airstrip in Lamu; that they were detained at the airstrip for about 3 hours after which they were flown to Wilson Airport in Nairobi, and from there were driven to the Inland Cargo Container Depot Police Station. He states that while at this police station, he was interrogated for 8 days for 3 to 4 hours per day; that the police officers insisted that he was an Al Qaeda terrorist; that he was beaten and threatened with mock execution using pistols and at one point was stripped naked and photographed.

97. The 1st petitioner avers that although he had furnished the officers with his Kenyan Identity card and passport, they claimed that as there was no outcry in the media from his relatives about his arrest, he was not Kenyan. On the night of Saturday 27th January 2007, he was removed from the cells at the Inland Cargo Container Deport Police Station and driven to the airport; that upon arrival at the airport, he found very many other detainees, all Muslims and dressed in Islamic garb, and very many police officers; that he and the other detainees were searched by the police officers and all their belongings confiscated; that they were handcuffed with their hands behind their backs, blindfolded, forced on board an aircraft flight number AXK 527 owned and managed by the 3rd respondent; and that their legs were manacled to the aircraft seats.

98. The 1st petitioner alleges that all along, they were wailing and protesting to the officers and the pilot and crew that they were innocent citizens of Kenya who should not be forcibly removed from Kenya but their cries were unheeded. He has annexed as annexure **"SAS5"** a copy of the aircraft's flight passenger manifest.

99. The 1st and 2nd respondents have denied that the 1st petitioner was subjected to torture while in the hands of Kenyan security agents. However, the detailed averments by the petitioner and the fact that he was held for an inordinately long period of time in violation of his rights under section 72(3) of the constitution, can lead to no other inference than that his being held in custody for that period of time was consistent with his being subjected to torture, and was a violation of his rights under section 74 of the constitution. As the court observed in the case of **Harun Thungu Wakaba & 20 Others –vs- The Attorney General Nairobi HCCC 1411 of 2004 (OS):**

"Therefore, the question is whether the various acts to which each of the plaintiffs was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning of the definition provided in Article 1 of the Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment. The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain ……Further, the infliction of pain was done during the course of interrogation with a view to obtaining information or a confession from the plaintiffs. Thus, all the ingredients of the definition of torture as contained in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were present. The actions described in the affidavits would constitute infringement of the right to protection against inhuman treatment as provided under Section 74(1) of the Constitution."

100. I believe a similar conclusion can safely be drawn with regard to the other petitioners, even though they have not filed depositions on the acts that they were subjected to while in the hands of Kenyan security forces. It has been admitted by the 1st and 2nd respondents that all the petitioners were arrested and held in custody for various periods by the state; and that they were, in the interests of national security, declared prohibited immigrants and flown out of Kenya. The state has also supplied documents to support its contention that it complied with the law in detaining and removing the petitioners from Kenya.

101. The court notes that the declarations under section 3 and 8 of the Immigration Act were made in all the cases except one on 26th January 2007, and in the case of the 9th respondent, on 19th January, 2007. Even in the absence of evidence of physical torture of the petitioners, it is clear that they were all subjected, at the very least, to psychological torture in the period during which they were incarcerated in Kenya and deprived of their liberty prior to their alleged deportation. I therefore find and hold that the 2nd

- 11th petitioners were subjected to torture in violation of the right guaranteed under section 74 of the constitution.

Detention in Somalia and Ethiopia

102. The 1st petitioner alleges that he and the others were flown to Mogadishu under the escort of the Kenya Police officers; that they were in excruciating discomfort, pain and morbid fear due to the manner they had been blindfolded, handcuffed with their hands behind their backs, and their legs tied to the aircraft seats. He alleges that they were also subjected to ceaseless verbal abuse from the officers. He states that in Mogadishu, he and the others were handed over to the combined Ethiopian and STFG troops; that they were detained in an open makeshift prison at the airport; that they were exposed to extreme hear during daytime and extreme cold during the nights; that they had no bedding, food, water or toilet facilitates; and that they were detained in the makeshift prison in Mogadishu airport for ten (10) days or thereabout together with the other petitioners and other detainees, all Muslims of various nationalities.

103. The 1st petitioner has deponed that after the 10 days in Mogadishu, they were, on or about 6th February 2007, flown to Baidoa Airport, and on 7th February 2007, they were forced into an Ethiopian military aircraft in conditions similar to those they experienced on the flight to Mogadishu from Kenya, and flown to Addis Ababa, Ethiopia where they were detained in a prison called Jarmede Federal Prison.

104. The 1st petitioner has deponed at some length on the conditions under which he was personally held in Addis Ababa, and the treatment that he was subjected to while in the prison there. He states that after three days in prison in Addis Ababa, he was transferred to solitary confinement in a room which had one bright light that was on throughout the day and night; that he was handcuffed with his hands behind his back and manacled for 24 hours a day for 4 days; that he was provided with a flimsy mattress and a worn out blanket; and that he stayed in this situation for two months.

105. He alleges that four days after he was put in solitary confinement, he was taken by Ethiopian intelligence officers, blindfolded, put in a car and driven to an isolated house where he was interrogated by about 15 white men, whose Head he believes was an Israeli officer; that he was interrogated for long hours without food and water and with inadequate time to sleep; and that the interrogation went on consistently for three weeks. He avers that he was thereafter put through a lie detector test on two consecutive occasions by an Israeli Mossad agent, and that he passed on both occasions; that he was subjected to other threats and torture including threats against his wife and so he agreed to cooperate and to accept whatever the interrogators wanted. He states that thereafter, on 26th May 2007, two officers who identified themselves as members of the American Criminal Intelligence Agency (CIA) visited him at the Ethiopia National Security Headquarter in Addis Ababa where he was being detained and apologized to him, indicating that they had received information from his country that he was a dangerous terrorist.

106. Ultimately, according to the 1st petitioner, he and the other Kenyan detainees were visited on 5th August 2008 by ATPU officers in the prison in Addis Ababa ostensibly to confirm their Kenyan nationality; that the officers wrote down their names and took their fingerprints; that they interrogated them again about their sojourn in Somalia and promised to have them released from the prison and returned home in two weeks' time.

107. He states that he and the 2nd -8th petitioners were eventually released from prison in Addis Ababa on 2nd October 2008 at about 11 p.m. and driven to the Kenya–Ethiopia border at Moyale where they were handed over to ATPU officers at about 8 a.m. on 3rd October 2008. They were finally driven to their respective homes in Mombasa and Kwale District on the night of 3rd October 2008. They have never been charged with any offence. According to the 1st petitioner, the 9th – 11th petitioners had been released within 6 months of their arrest following the intervention of their governments.

108. While the respondents have denied the acts of torture alleged by the 1st petitioner set out above,

they have conceded that the petitioners were flown to Somalia under the escort of officers of the 1st and 2nd respondents, in the planes operated by the 3rd and 4th respondents. They have also averred that they sent officers to Ethiopia to interview the 1st-8th petitioners, took their fingerprints, and established that they were Kenya citizens.

109. The issue that confronts the court is whether, should it accept the allegations of torture against the security organs of Ethiopia and other nationalities such as the Israeli, American or British security agents made by the 1st petitioner, it can properly lay responsibility for such acts at the feet of the Kenyan security forces? Further, can the 3rd and 4th respondents be held jointly liable with the 1st and 2nd respondents for the acts of torture allegedly inflicted on the 1st petitioner by the authorities in Somalia and Ethiopia?

The Liability of the 3rd and 4th Respondents

110. Mr. Mureithi submitted that under the doctrine of causation, liability can be laid at the feet of the respondents jointly and severally. He also relied on Draft United Nations Norms on the Liability of Transnational Corporations with regard to the liability of the two airlines, conceding, however, that these Norms were only drafts for discussion and adoption, and that they were never adopted.

111. I have considered the averments and submissions made by the parties with regard to the liability of the 3rd and 4th respondents. I am, however, unable to find a basis for imputing liability on them. They have averred that they were not responsible for checking the documents used by the passengers in their flights, and that they had chartered the flights to the state. Unlike the case of the company in the United States Court of Appeals for the 9th Circuit case of **Mohamed v. Jeppesen Dataplan Inc. 614 F. 3d 1070,** where the defendant corporation was alleged to be fully aware of the torture of passengers who were being rendered on its planes, there is no evidence before me from which I can conclude that the 3rd and 4th respondents knowingly participated in the rendition and torture of the petitioners. In the absence of clear evidence on their culpability, I am unable to find them liable for the violation of the petitioners' rights as a result of their planes being used to fly the petitioners to Somalia.

The Liability of the 1st and 2nd Respondents

112. In considering this aspect of the matter before me, an examination of the State's responsibility where it sends a person to another state where he is likely to suffer ill-treatment or torture, or where he in fact faces inhuman or torturous acts, is called for.

113. I believe that the general principle of law is that a State is under an obligation not to send ('refoul') to other states persons who are likely to face torture in the receiving State. It matters not whether the refouling State is doing so in protection of its 'national interest.' Case law shows that the reason for the extradition, or the fact that the person extradited is in fact a terrorist or a threat to national security, does not exonerate the State from its responsibility under international law not to refoul a person to a state where he may be subjected to torture.

114. As indicated above, the constitution in force at the time the events in this matter occurred, as well as the Constitution of Kenya 2010 and International Human Rights law to which Kenya is a party, guarantee to everyone the right not to be subjected to torture or inhuman treatment.

115. At Article 3, the **International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** states as follows:

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall

take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

116. I have earlier in this judgment made reference to **General Comment No. 20 of the Human Rights Committee** adopted in its Forty-fourth session on 10 March 1992. The Human Rights Committee observes further in that General Comment with regard to the provisions of Article 7 of ICCPR that:

[3] The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."

117. At Para. 9 of the General Comment, the Committee states as follows:

"In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end."

118. The United Nations Human Rights Committee Against Torture in interrogating the implementation of **Article 7** of the ICCPR had this to say;

"The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law."(CCPR/C/CAN/CO/5; 85th Session)."

119. The **African (Banjul) Charter on Human and Peoples' Rights** provides, at **Article 12**, that:

"3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

120. Finally, the **1951 Convention Relating to the Status of Refugees** enunciates at Article 33 the principle of non-refoulement in the following terms:

'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

121. It is also useful to consider the position in other jurisdiction with regard to this matter. The **European Convention on Human Rights (ECHR)** at Article 3 provides that:

"No one shall be subjected to torture or to inhuman or degrading treatment or punished."

122. Article 7 of the European Convention on the Suppression of Terrorism (Adopted 27 January 1977, which entered into force on 4 August 1978) states that:

"Contracting State in whose territory a person suspected to have committed an offence […] is found […] shall, if it does not extradite that person, submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution."

123. In line with the above provisions of the law, judicial precedents are clear that it would be breach of a person's rights to send him to a country where there is the likelihood that he will be subjected to torture and other cruel and degrading treatment. The leading authority in this regard is the judgment of the European Court of Human Rights in the case of **Soering v the UK (1989) 11EHRR 439.** The case established the principle that a State would be in violation of its obligations under the European Convention on Human Rights if it extradited an individual to a state, in this case the United States, where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Article 3. In that case, the applicant, a German national, was wanted in the United States to face murder charges in the state of Virginia, and an order for his extradition was issued. In his application, he claimed that extradition from the UK to the USA where he was likely to fact the death penalty and conditions in death row would constitute a violation of Article 3 of the European Convention. The ECHR found a violation of article 3, and stated:

"The question remains whether the extradition of a fugitive to another state where he would be subjected to or likely to be subjected to torture or to inhuman and degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3… It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also intends to cases in which the fugitive would be faced in the receiving state by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article."

124. The 1st and 2nd respondents have sought to justify their actions on the basis that there were terrorists linked to Al Qaeda who were fleeing from Somalia, and it was therefore in the national interest that the petitioners be returned to Somalia. There is no evidence before me that indicates that any of the petitioners was linked to terrorism, and they were in fact eventually freed without any charges being leveled against them. However, even had they been linked to terrorism, I believe that it would not have been lawful to refoul them to a state where they were likely to be subjected to torture. This emerges from the application of the principle against refoulment established by the case of **Soering v UK** in **Chahal v UK [1996] ECHR 54.**

125. This case concerned the prospective deportation to India of a Sikh nationalist, who had entered the United Kingdom illegally but his stay in the UK was later regularized under a general amnesty for illegal entrants. He had been politically active in the Sikh community in the UK, and it was alleged that he was involved in terror. He was arrested but not convicted for conspiracy to kill the then Indian Prime Minister, and was later convicted for assault and affray but the conviction was set aside. A deportation order was issued because of his political activities and the criminal investigations taken against him, and he was detained until the ruling of the ECHR.

126. The applicant claimed that his deportation to India would result in a real risk of torture, inhuman or degrading treatment which would violate Article 3 of the European Convention. He also claimed a violation of his right to freedom of liberty guaranteed by Article 5.

127. The Court rejected the British government's claim that the obligation established in **Soering v. UK** could be modified to take into account considerations of national security. It also found that it would not

have been a relevant consideration if it had actually been shown that the complainant had engaged in terrorism. The European Court found that there was sufficient evidence of a real risk of ill-treatment and underlined that to return a person in these circumstances would be a breach of Article 3. It found that the application of Article 3 was absolute: it contained no exceptions within it, nor could it be derogated from in times of national emergency under Article 15. The court stated at Para. 80:

The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

128. The approach adopted in **Chahal v. UK**was later endorsed by the UN Committee Against Torture in **Agiza v. Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).** The complainant, Mr. Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national, was suspected of terrorist activities and removed to Egypt after diplomatic assurances had been obtained. He claimed that his removal by Sweden to Egypt on 18 December 2001 violated article 3 of the Convention. The Committee made clear that:

…the Convention's protections are absolute, even in the context of national security concerns…

129. Similarly, in the case of **Mutombo v. Switzerland, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994),** Mr. Balabou Mutombo lodged a complaint with the Committee Against Torture established under Article 17 of CAT challenging the decision of Switzerland to return him to his country. The applicant, a Zairian citizen who had flown to Switzerland to escape from torture as he was a member of the political movement, ***Union pour la démocratie et le progrès social*** **(UDPS)**, claimed to be a victim of a violation by Switzerland of Article 3 of the Convention against Torture; and sought an order that the Swiss authorities should refrain from expelling him because a real risk existed that he would be subjected to torture or that his security would be endangered if he were to be returned to his country; and that there was evidence that there exists a consistent pattern of gross and massive violations of human rights in Zaire, which, according to Article 3, paragraph 2, of CAT are circumstances which a State party should take into account when deciding on expulsion. This section is in the following terms:

"No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

130. The Committee found that the expulsion or return of the applicant to Zaire in the prevailing circumstances would constitute a violation of Article 3 and concluded that:

"[10]. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture."

131. In **Tapia Paez v. Sweden CAT/C/18/D/39/1996**, Mr. Gorki Ernesto Tapia Paez, a Peruvian citizen and a member of ***Shining Path***, an organization of the Communist Party of Peru, resided in Sweden, where he was seeking recognition as a refugee. He claimed that his return to Peru would constitute a violation by Sweden of Article 3 CAT and stated that police in Peru usually torture people in cases concerning "terrorism and treason". The applicant asked the Committee to request Sweden not to expel him while his communication was under consideration by the Committee. The State party on the other hand argued that no sufficient evidence exists to demonstrate that the risk of the applicant being tortured is a foreseeable and necessary consequence of his return. The Committee, in considering whether Mr. Paez was in danger, stated as follows:

"[14.2] The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that Mr. Tapia Paez would be in danger of being subjected to torture upon return to Peru. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

132. The Committee further noted at Para 14.5:

"The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. <u>The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."</u> (Emphasis added).

133. The UN Human Rights Committee has also interpreted the unconditional nature of the equivalent torture prohibition in Art. 7 of the ICCPR to include the *non-refoulement* obligation. In General Comments No. 20 it stated:

"In the view of the Committee, State Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

..the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

134. Finally, with regard to alleged involvement in torture, Security Council **Resolutions 1456** and **1556** made clear that:

"States must ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".

135. The threat posed by terrorism is beyond dispute, but it cannot be used as an excuse for weakening fundamental human rights enshrined in international law such as article 3 of CAT, as well as in domestic constitutions such as ours. As the Special Rapporteur on Torture observed:

"However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and peremptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signaling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists."

(*Special Rapporteur to 3rd Committee of the General Assembly, 8/11/01, Annex III, UN Doc. E/CN.4/2002/76, p.14*).

136. What, in my view, emerges from the above decisions and resolutions is that even where there are national security concerns such as are cited by the 1st and 2nd respondents, and even where it is alleged, as in this case, that the petitioners were involved in terrorism, to remove the petitioners to a country where they were likely to be subjected to torture ***<u>while knowing</u>*** that they were likely to face torture would be a violation of their rights under Article 3 of CAT and section 74 of the constitution. The state cannot cite national security concerns to justify its acts, particularly at this point in time when the Constitution of Kenya 2010 clearly spells out at Article 25 that the right not to be subjected to torture and other cruel and degrading treatment cannot be derogated from, which I believe was also the case with regard to section 74.

137. However, as is also clear from the decisions cited above, there must be substantial evidence on the basis of which it can be said that the persons being removed were likely to face torture in the countries that they were removed to. The question is whether, in this case, the 1st and 2nd respondents knew, or ought to have known, that the petitioners would be taken from Somalia to Ethiopia, and be subjected to torture at the hands of security officers from various nations. The evidence before me does not assist in arriving at a decision whether or not the state had such knowledge when it removed the petitioners from Kenya and transported them to Somalia. In the circumstances, I am unable to find the respondents liable for the alleged torture of the 1st petitioner while in the hands of Somali and Ethiopian security forces.

Violation of Article 82

138. The petitioners have claimed that the acts of the respondents were discriminatory and directed at them because of their Muslim faith. Section 82 of the constitution did prohibit discrimination on any ground, including religion or creed. The 1st petitioner has averred that all the petitioners are of the Muslim faith, and that the other detainees with whom he was removed to Somalia were of the same faith. It would indeed be a matter of concern if all the petitioners in this case, who were deprived of their liberty for so long without the state bothering to establish their identity and citizenship, were of the Muslim faith, and were specifically targeted because of their faith. However, the evidence before me is insufficient to enable me make a finding of discrimination against the petitioners because of their faith, particularly given the fact that the only evidence before me is that of the 1st petitioner. The 1st petitioner and the 1st and 2nd respondents have all deponed that there were other persons who were fleeing from Somalia who were arrested but were later released. There is however, no evidence to show that all these other persons were non-Muslims so as to justify a finding of discrimination against the petitioners on the basis of religion.

Relief

139. Having found that the 1st and 2nd respondents were liable for violation of the petitioners' rights under sections 72 and 74 of the constitution, and that they violated the petitioners' rights to due process, I hereby issue the following declarations:

i. The arrest of the petitioners was, in the circumstances, arbitrary, unlawful, and unconstitutional and in violation of their fundamental right against arbitrary arrest guaranteed by sections 70 and 72 of the Constitution.

ii. The detention of the petitioners in Kenya for a period longer than twenty four (24) hours without being arraigned in a court of law in Kenya was unconstitutional and in violation of their fundamental rights to personal liberty and the protection of law guaranteed by sections 70 and 72 of the Constitution.

iii. The holding of the petitioners in incommunicado detention for a period longer than twenty four (24) hours was arbitrary, unlawful, and unconstitutional and in

violation of their fundamental rights to the integrity, dignity and security of the person and freedom against torture, cruel,, inhuman and degrading treatment or punishment guaranteed by sections 70 and 74 of the Constitution.

iv. The physical and verbal assault of the 1st petitioner whilst in detention without trial in Kenya was unlawful and unconstitutional and in violation of the 1st petitioner's fundamental rights to the integrity and dignity of the person, freedom against torture, cruel, inhuman and degrading treatment or punishment guaranteed by section 74 of the Constitution.

v. The forcible removal from Kenya of the petitioners to foreign States without due process was unlawful and unconstitutional and in violation of their fundamental rights to the protection of the integrity, dignity and security of the person, protection of law, the right of access to justice and freedom against expulsion from Kenya guaranteed by section 81 of the constitution of Kenya.

140. I must observe in closing that the state displayed what can only be termed a rather callous disregard for the rights of the petitioners who appear to have been simple innocent people who had gone to Somalia in search of a livelihood. For the state to deprive them of their liberty and only bother to ascertain their identity when their relatives complained, months later, demonstrates an attitude that is totally out of touch with the duty of the state towards its citizens. It is conduct that is not acceptable, even in the face of international terrorism.

141. The petitioners have asked the court to award them damages under several heads should it find that there has been a violation of their rights by the respondents. They have also asked that such damages should be segregated. However, as this court ruled in the case of**Dominic Amolo Arony-v- The Attorney General High Court Misc, Civil Application No. 494 of 2003:**

' For our part, we have two options both of which are attractive and reasonable in our view. The first is an award of a lump sum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lump sum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, nay impossible to separate each of them and give a fair and reasonable award in respect of each…….We must as we hereby do, come to the firm conclusion that a lump sum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter.

142. I am also guided in arriving at an appropriate award to the petitioners by the decision of the court in **Peters v. Marksman and Another [2001] 1 LRC** where the court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995**, **unreported)**:

"It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable……Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

143. Taking all factors into consideration in this matter, including the petitioners' respective periods of unlawful detention and the evidence available to the court with regard to the violation of their rights, and bearing in mind the caution in **Peters v. Marksman** above, I make global awards to each of the petitioners as follows

i. Salim Awadh Salim- Kshs 4,000,000.00

ii. **Saidi Hamisi Mohamed-3,500,000.00**

iii. **Bashir Hussein Chirag Mohamed Sader-3,500,000.00**

iv. **Hassan Shabani Mwazume-3,500,000.00**

v. **Swaleh Ali Tunza-3,500,000.00**

vi. **Abdallah Halfan Tondwe-3,500,000.00**

vii. **Kasim Musa Mwarusi-3,500,000.00**

viii. **Ali Musa Mwarusi-3,500,000.00**

ix. **Fatma Ahmed Chande-Kshs 2,000,000.00**

x. **Mohamed Abushir Salim-2,000,000.00**

xi. **Muhibitabo Clement Ibrahim-2,000,000.00**

144. The petitioners shall also have the costs of this petition against the 1st and 2nd respondents as well as interest on damages from the date hereof till payment in full.

145. I am grateful to the parties for their well-researched submissions and authorities. If I have not made reference to them in the judgment, it is not because they were not of assistance to the court.

Dated Delivered and Signed at Nairobi this 31st day of July 2013.

MUMBI NGUGI

JUDGE

Mr. Mbugua Mureithi instructed by the firm of Mbugua Mureithi & Co. Advocates for the Petitioners

Mr. Opondo, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd Respondents

Mr. Onindo and Mr. Mwenesi instructed by the firm of Musalia Mwenesi & Co. Advocates for the 3rd Respondent

Ms. Serem instructed by the firm of Archer & Wilcock Advocates for the 4th Respondent