



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.133 OF 2011

(As Consolidated with Petitions Numbers 68 of 2011, 39, 40,37 & 35 of 2010)

BETWEEN

JAOKO NOO OORO.....1ST PETITIONER
PHILIP NGUMO GACHOKA.....2ND PETITIONER
PIUS JOHN NJOGU NGUO.....3RD PETITIONER
SAMSON WENDOT KIMOI.....4TH PETITIONER
JAMES MWAURA MUGO.....5TH PETITIONER
SUSAN WANGUI MIRUGI.....6TH PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petition No.133 of 2011

1. The Petitioner filed a Petition dated the 5th May, 2011 together with a supporting affidavit sworn by the Petitioner on the same date. By an order dated the 26th of January, 2012 Petitions Nos. 133/2011, 68/2011, 39/2011, 37/2010, 35/2010 and 36/ 2010 were consolidated and to be heard within Petition 133 of 2011.

Case for the Petitioner

2. It is the Petitioner's case that on or about 1st April, 1989, while attending to the burial arrangements of his late brother, one James Obonyo Noo, he was arrested at Ofafa Memorial Hall

in Kisumu by persons he believed to be plain clothed police officers. He alleges that upon his arrest he was taken to his home in Sakwa, Bondo, where the said plain clothed police officers searched his house and his mother's home and impounded several books that belonged to him. The Petitioner further adds that the officers then proceeded to his house in Mosque Estate House No. R3/77 in Kisumu where they also impounded several books.

3. He also claims that he was then taken to Kisumu Police Station where he was detained overnight, after which he was transferred to Railway Police Station in Nairobi where he also stayed for a night. That thereafter, he was blindfolded, forcibly tossed into a car and driven to Spring Valley Police Station in Nairobi where he was also detained overnight. He was blindfolded again and taken to another place which he later learnt was the Nyayo House Torture Chambers where at the 24th floor he was heavily interrogated by a panel that was chaired by one, James Opiyo.
4. It is the Petitioner's further case that for the days he was held at Nyayo House, he was periodically ordered to strip naked and was beaten with rubber whips, broken chair pieces, tyre whips and blows, slaps and kicks all to compel him to admit that he was a member of the outlawed "Mwakenya" Organization. That after each session of torture he was taken to a waterlogged cell where he was sprayed with hot pressurized water and where he was held for 14 days, without food, a sleeping mat, blankets or drinking water and that during this period he was held incommunicado.
5. He was later released without charge and that although he fell ill because of these atrocious conditions, he was not accorded any medical treatment and to date he states that he walks with a limp, suffers headaches, ulcers, skin rash and poor eyesight. It is for the above reasons that he now seeks the following reliefs:

"a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 1st April, 1989 for 14 days at various Police Stations and thereafter at Nyayo House Torture Chambers.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government, servants and agents be awarded.

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

e) Costs of the suit and interest."

Petition No.68 of 2011

6. The Petitioner alleges that he was arrested on 29th of August, 1990 at his shop in Nyeri Town by the then Deputy Provincial Criminal Investigation Officer, Mr. David Kipkemboi Korir and then taken to the latter's office. At the said office, the Petitioner claims that he was issued with a death threat by the said officer with regard to information held by him relating to the outlawed "Mwakenya" Movement and the alleged misappropriation, by the then Minister of Agriculture, Mr. Elijah Mwangale, of funds within the coffee industry.
7. After this, the Petitioner claims that he was then transferred to Mweiga Police Station where he was held for six days in a cold cell without proper food, a blanket or sleeping mat and that he only received bread and tea once a day for sustenance. That he was then taken to Nyeri Police Station where an identification parade was conducted and he was thereafter remanded in custody.

8. It is the Petitioner's further case that after his ordeal at Nyeri Police Station he was bundled into a car and driven to a place that he later learnt was the Nyayo House Torture Chambers, where he was held in a waterlogged cell in the basement of Nyayo house for 5 days without food. About 10 days later, he claims that he was paraded before a panel of eleven armed soldiers and interrogated about the "Mwakenya" Movement and the alleged misappropriation of coffee funds in Nyeri District.
9. That for the days he was held at Nyayo House Torture Chambers, he was periodically ordered to strip naked and was beaten with rubber whips, broken chair pieces, tyre whips and blows, slaps and kicks and adds that after each session of torture, he was taken to a waterlogged cell where he was sprayed with hot pressurized water. He also alleges that he was held in this waterlogged cell, without food, a sleeping mat, blankets or drinking water. That during that whole period, he was held incommunicado before being released without being charged in any Court of law.
10. The Petitioner asserts that upon his release he had to check into Mathari Consolata Hospital in Nyeri where he alleges that it was found that he was suffering from severe headaches, malaria, high blood pressure, mental fatigue, pneumonia and broken toes and fingers, which prognosis the Petitioner avers, led to his admission at the said hospital for one and a half months. It is for the above reasons that he now seeks the following reliefs:

"a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers and intelligence officers who are Kenyan Government Servants, agents and/or employees in its institutions on 29th of August, 1990 for 22 days at various Police Stations and thereafter at Nyayo House Torture Chambers.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedom.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

e) Costs of the suit and interest."

Petition No.39 of 2010

11. The Petitioner alleges that on or about 10th July 1990, he was arrested at Eva's café along Haile Selassie Avenue, Nairobi by persons he believed to be Special Branch Police Officers and was taken to Kamukunji Police Station where he was held incommunicado for 14 days. That after that he was taken to the Criminal Investigations Department (CID) Headquarters which were at Lower Milimani Road and that while there he was interrogated by a number of policemen, photographed and his fingerprints taken. The Petitioner asserts that he was informed that he would be arraigned in Court for due process to follow, but that never happened and he was subsequently released without charge.
12. The Petitioner contends that he was re-arrested three days after his release by Police Officers who broke into his house and he was taken to Waithaka District Officer's office at Dagoretti and later transferred to Central Police Station. Thereafter he was blindfolded and bundled into a car and taken to a dark cell which he later learnt was at the Nyayo House Torture Chambers.
13. The Petitioner also claims that he was held at Nyayo House for 3 days incommunicado and without food and on the 4th day, he was taken to the 24th floor of the building where he was paraded before a group of Special Branch Police Officers. While there he claims that his hands

were tied behind a chair and he was threatened on his alleged anti-government associations and that after interrogation he was locked up in a cold cell for another two days without food, a sleeping mat, blankets or drinking water and as a result he developed acute asthma.

14. At the end of the two days in the cold cell, the Petitioner alleges that a senior Superintendent of Police by the name Opiyo ordered that he be taken to Kenyatta National Hospital for treatment and afterwards he was returned to Nyayo House and he was released on condition that he would report to the same place at least twice a week, which he claims he did for two months and he was then discharged. It is the Petitioner's case that upon his discharge he was made to sign a document stating that he would not author a book or narrate his ordeal to anybody including the media whether print or electronic. It is for the above reasons that the Petitioner now seeks the following orders;

“a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 10th of July, 1990 for 23 days at Kamukunji Police Station and thereafter at Nyayo House Torture Chambers.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

e) Costs of the suit and interest.”

Petition No.37 of 2010

15. The Petitioner alleges that on or about 10th of July, 1990 at about 5am, he was arrested at Waithaka, Dagoretti by persons he believed to be Administration Police Officers sent by the Chief of Waithaka location. He was taken to the said Chief's camp accompanied by the Administration Policemen and 6 regular policemen. That at about 11 am, persons he believed to be Special Branch Officers came to the camp, blindfolded him, bundled him into a vehicle and drove him to Spring Valley Police Station.

16. On arrival at the said Station, the Petitioner claims that he was locked up with no reasons for his arrest being spelt out to him and neither was an entry made in the Occurrence Book, despite his demands for the same to be done. The Petitioner further claims that while at the police cells in the said station he was tortured by four Special Branch Police Officers who mercilessly beat him with slaps and blows while demanding to know why he was engaged in activities that undermined the Government and he was asked to state where he received funding from, to organize demonstrations challenging the Government of the day. It is the Petitioner's case that he was held at this police station for fourteen days and incommunicado.

17. Thereafter, the Petitioner claims that he was once again blindfolded, bundled into a white Toyota Corolla motor vehicle and taken to the Criminal Investigations Department Headquarters at Lower Milimani Road where he alleges that he was stripped naked, a wooden plaque bearing his names hang around his neck and then photographs of him were taken. From there, he was once again blindfolded, bundled into a vehicle and driven to a dark cell which he later came to know as the Nyayo House Torture Chambers. He was later removed from the cell and taken to the twenty fourth floor of Nyayo House and presented before a panel of interrogators who asked him to reveal where he was receiving funding to finance demonstrations against the Governm

18. It is his further case that for the days he was held at Nyayo House Torture Chambers, he was periodically ordered to strip naked and was slapped, beaten with rubber whips, broken chair pieces, kicks and blows and adds that these sessions went on for each day that he was held at Nyayo House and that after each session he was taken to a waterlogged cell where he was kept without food on some days, a sleeping mat, blanket or drinking period for 28 days and he was also held incommunicado the whole time that he was there.

19. After this period of confinement the Petitioner alleges that he was taken to a vacant house in Upper Hill, tortured again by Special Branch Police Officers, told he was near Kenyatta National Hospital, handed Kshs.50/= and was then set free. It is for these reasons that he now prays for the following reliefs;

“a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 10th of July, 1990 for 28 days at Spring Valley Police Station and thereafter at Nyayo House Torture Chambers.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

e) Costs of the suit and interest.”

Petition No.35 of 2010

20. The Petitioner filed this Petitioner as the wife of the late Mirugi Kariuki who she claims was illegally and unlawfully detained for having differing opinions with the Government of the day. The Petitioner claims that on one night in October in 1986, officers from Nakuru Police Station stormed their home and destroyed important documents such as her children's birth certificates and school testimonials. She adds that her children were traumatized by this incident and they feared attending school the following day for fear of their lives. She further states in her Petition that these officers said in hushed tones that they had not found what they were looking for and as such would strike on another day to look for "it."

21. She also alleges that another search was conducted on their home on or about December, 1990 and again important documents were destroyed on purpose and others carried away, and to date these documents have never been returned. She further claims that after this search, her late husband was arrested and charged with treason, and she was transferred from Rift Valley Province to go and work in Central province. It is the Petitioner's case that this transfer was not in her interests and the children's interest as they were still young and attending school in Rift Valley.

22. The Petitioner, who states that she was a nurse at a Government hospital, goes on further to allege that her salary was withheld for 6 months, her colleagues were warned not to associate with her and one of her children was denied admission to class one because she was the spouse of a man who was classified as anti-government. For these reasons she prays for the following orders;

“a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Police Officers who are Kenyan Government Servants, agents and/or employees.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

e) Costs of the suit and interest.”

Petition No.36 of 2010

23. On or about the 15th of October, 1986, the Petitioner alleges that he was arrested at Bondeni in Nakuru Town and taken to Bondeni Police Station by Special Branch Police Officers. He was then blindfolded and driven for several hours eventually landing in a dark cell at what he later came to learn was the Nyayo House Torture Chambers. Before daybreak, the Petitioner claims that he was taken to the 24th floor in the building and presented before a panel led by a Mr. James Opiyo who asked him to confess on his relationship with, one Koigi wa Wamwere, Karimi Nduthu and Kang'ethe Mungai, who were alleged to be saboteurs and anti- Government.

24. While before that panel, the Petitioner asserts that he was ordered to strip naked, was slapped and beaten using rubber whips, broken chair pieces, kicks and blows, which sessions he alleges were repeated for the fourteen days he was held at Nyayo House. The Petitioner further alleges that after each of these sessions he would be returned to a dark, water logged cell where he would be sprayed with pressurized water for several hours while naked and it is also his case that for these fourteen days he was kept without food, sleeping mat, blankets or drinking water.

25. He confirms and also claims that he was taken to court on the 26th of August, 1986 and charged with sedition but he denied the charges, was returned to Nyayo House and was subjected to more torture and that between the 15th August, 1986 and the 29th August, 1986 when he was released he was held incommunicado. Upon his release, the Petitioner asserts that he was warned never to narrate his ordeal to anyone or the media in whichever form and it is on the above grounds that the Petitioner prays for the following orders;

“a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Police Officers who are Kenyan Government Servants, agents and/or employees.

b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

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

e) Costs of the suit and interest.”

Petition No.40 of 2010

26. It is the Petitioner's case that on or about the 19th of May, 1986 he was arrested by Special Branch Officers who were accompanied by policemen in plain clothes, and was taken to Nakuru Special Branch Offices where he claims he was beaten and starved for about 17 days without being

informed of the reasons for his arrest. The Petitioner also claims that at these offices he was asked by Police Superintendants known as Koskei and Mugwiru why he was publishing and distributing anti-Government leaflets in and around Eldama Ravine township. The Petitioner further claims that he was severely beaten with rubber whips and broken chair pieces, slaps, kicks, blows and starved for another two weeks and given the option to save himself from further torture by admitting to the publication and distribution of the said leaflets.

27. After 18 days of severe torture, the Petitioner asserts that he admitted to the distribution of the leaflets and was then transferred to the Criminal Investigation Department Headquarters in Nairobi after which he was taken to Court on 6th June, 1986 where he was charged with sedition. The Petitioner alleges that he pleaded not guilty, was remanded but bail set at Kshs.100,000/= with two sureties of the same amount and given a condition to report at the Nakuru Criminal Investigation Department office twice a week.

28. The Petitioner avers that the charges against him were later dropped by the State for lack of evidence and he was released and upon his release he heard that the Special Branch Officers were looking for him again, and this is when he made the decision to escape to Tanzania through the Isebania border point and in July, 1988 he was granted asylum in Sweden where he has been residing to date. It is in view of the foregoing that the Petitioner seeks the following orders;

- “a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Special Branch Police Officers who were Kenyan Government Servants, agents and/or employees in its institutions in 1986 for 18 days at Nakuru Police Station and thereafter in Kenyan Prisons***
- b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms.***
- c) General damages, exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969 for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.***
- d) Any further orders, writs, directions as this Honourable Court may consider appropriate.***
- e) Costs of the suit and interest.”***

The Respondent's Case

29. The Respondents filed a Replying Affidavit sworn by Julius Ndegwa In his capacity as a Senior Deputy Commissioner of Police on the 27th of September, 2011 in which the Respondents contend that they have no records to show that the Petitioner known as Jackson (sic) Noo Ooro was ever arrested and detained in either Kisumu or Spring Valley Police Stations or any other police stations in Kenya. He also contends that the Kenyan Police is professional in executing its statutory mandate which it does both professionally and proficiently and it is against police policy to torture suspects in any manner while in police custody.

30. He also adds that the Nyayo House Torture Chambers are alien to the Kenya Police, Special Branch officers or any other police force and as such the allegations as stated by the said Petitioner are unfounded. He adds that Occurrence Books records are destroyed after ten years and cell register records after five years and contends that it would be impractical to locate, retrieve and authenticate the relevant entries in the said books and registers for incidents that allegedly occurred over 22 years ago. That in any event, the said Petitioner eventually pleaded guilty of the offences that he was charged with, and that action, the said Deputy Commissioner swears, was voluntary, and therefore the Petitioner should not come around later to state that his constitutional rights were violated.

There are no responses on record regarding the issues raised in all other Petitions above.

Determination

31. I have taken into account the evidence on record and the fact that the Petitions were all consolidated. They can however be categorized as follows;

- a. *Those where the Petitioners were allegedly arrested, tortured, kept in custody for varying periods of time and released without charge. These are Petitions Numbers 133 of 2011, 68 of 2011, 39 of 2010 and 37 of 2010;*
- b. *Those where the Petitioner was neither arrested, nor tortured physically nor charged in Court but where psychological torture is alleged. This is the case with Petition Number 35 of 2010.*
- c. *Those where the Petitioner was arrested, subjected to torture, charged in Court and released. This is the case with Petitions Numbers 36 and 40 of 2010.*

32. Having so said, it seems to me that the Replying Affidavit of the Respondent in Petition No. 133 of 2011 is not a sufficient answer to any of the very serious claims made by the Petitioner. It is generalized and is escapist and to my mind a non-answer to either of the complaints made. In any event although I gave the Respondent an opportunity to cross-examine each of the Petitioners nothing came out of the cross-examination that would sway my mind to disbelieve the Petitioners. It is also instructive that although I allowed the Respondent an opportunity to file written submissions, I see none on any of the files before me.

33. The above being the case, I can only agree with Majanja, J who stated as follows in Reverend Lawrence Ndege Imunde vs. The Republic JR No. 693 of 2008;

"The facts of this case are set out in the petition and affidavit in support of the petition. These facts are not controverted by the respondent. The effect of this is that I must take the facts set out as true and correct so that the only task before me is to consider whether they constitute a violation of the Petitioner's rights and if so what relief I should grant."

34. I agree and save therefore for Susan Wangui Mirugi, all the other Petitioners were arrested with no reasons of arrest being given; detained for more than twenty four hours, were not arraigned in Court to be charged and for those that were arraigned in Court, no reasonable cause was shown by the State as to why they were not produced in court after twenty four hours. A reading of **Section 72 of the Repealed Constitution** reveals that;

"(1) No person shall be deprived of his personal liberty save as may be authorized by law....."

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

(3) A person who is arrested or detained-

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

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the

provisions of this subsection have been complied with.”

It shows that this Section was breached and in view of the foregoing, I find that the Respondent violated the named Petitioners rights as provided for in **Sections 72 (1), (3) & (5) of the Repealed Constitution.**

32. Further, International Conventions and Instruments such as the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African [Banjul] Charter on Human and Peoples' Rights (Article 5) have established that treatment will be considered inhuman when it causes intense physical or mental suffering; inhuman acts will amount to torture when used to deliberately cause serious and cruel suffering and treatment or punishment will be degrading if it humiliates and debases a person beyond that which is usual from punishment. In the case of **Harun Thungu Wakaba v The Hon. Attorney General, [2010]eKLR** Okwengu J (as she then was) stated that;

“Therefore, the question is whether the various acts to which each of the plaintiff 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.”

I wholly agree and find that the Petitioners rights under **Section 74(1)** were also violated by the Respondents.

33. The Court of Appeal in **Julius Kamau Mbugua -v-Republic Criminal Appeal No.50 of 2008** (unreported); also stated as follows;

"In our view, the right of a suspect to personal liberty before he is taken to court under Section 72 (3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77 (1). The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of Habeas Corpus to secure release (see Section 389 (1) (a) of Criminal Procedure Code and Section 84 (1) of the Constitution). In addition, Section 72 (6) provided a remedy by way of damages to a person who is unlawfully arrested or detained. In contrast, the right to a trial within a reasonable time guaranteed by Section 77 (2) is trial – related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed.”

34. The evidence before me indicates that only two Petitioners, namely Samson Wendott and Peter Kavila were charged in court, the former having his charges dropped, though he was granted bail and the latter's case not proceeding to full trial. I therefore find that both these Petitioners' right to a speedy trial was not violated because their matters never evolved into full trial.

35. However, whatever the case and in any event, in both instances, I find that the Petitioners' right to fair hearing was violated because when a person is tortured, taken to Court, charged with an offence and a few days later, the charges are dropped or no evidence is tendered to support the

charge, it is obvious that the charges were trumped up to further torture the persons psychologically and that, can never, in any society that believes in the Rule of Law, be equated to a fair trial.

36. On the Freedom of Association, that right whether individual or collective right is hinged on the liberty to assemble and pursue common interests, which goes to the derivation of one's individuality because of the right to choose. Indeed the Petitioners' arrest, searches and interrogations were all based on suspicions of their anti-Government associations and yet the State did not go forward and prove those suspicions to the required standard in law but instead resorted to torture as a tool of curtailing that freedom. No court can countenance such conduct and I therefore find that the Respondent infringed on the rights of the Petitioners as provided for in **Sections 79(1) and 80(1) of the Repealed Constitution.**

37. Having so said, the case of Susan Wangui Mirugi must be distinguished from the others because it does not fit in the mould of all the other cases and I have said why. Her claim is hinged on psychological torture and trauma only and I have indicated above that mental suffering is as outlawed as is physical suffering and so I also hold that her rights under **Section 74(1) of the Repealed Constitution** were violated.

38. Further, in the case of **Suresh vs. Canada (Minister of Citizenship and Immigration 2002 SCC 1**, It was stated;

"Torture is defined in Article 1 of the United Nations Convention Against Torture as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials."

39. Similarly, in the case of **Republic -v- Minister For Home Affairs and Others ex parte Sitamze Nairobi HCCC NO, 1652 OF 2004 120081 2 EA 323** Justice Nyamu, after citing various authorities, stated as follows;

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

40. In the case of **Szocik vs. England and Wales (Attorney General) 1480 2012 BCSC The Supreme Court of British Columbia at Paragraph 63** it was held that:

"The notion of physical integrity remains at the same time flexible and capable of catching a broad range of interferences with the integrity of the person and the consequences flowing from them. It is not restricted to narrow situations where blood was drawn or bruises appeared on the body. As nervous shock caused by a very rough police operation was held to be a case of "préjudice corporel" as well as the physical pain and suffering caused by a physical interference with the person, torture leaving no marks on the body would be covered by the definition"

In view of the foregoing, Susan Wangui Mirugi was subjected to non-physical form of torture due to her association with her husband which caused her mental anguish and distress which tantamount to psychological torture and she is also entitled to damages.

41. Lastly, the High Court when faced with a question relating to violation of **Section 72(3)**, the right of an accused person to be brought before a court within a period of 24 hours for a non-capital offence, in the case of **Ann Njogu & 5 Others Vs Republic (Anne Njogu & 5 others v Republic [2007] eKLR.)** held that;

“I dare add that the said section is very clear and specific – that the applicants can only be kept in detention or cells for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants....upon determination that the constitutional rights of the applicants have been violated, any prosecution against them, or any of them, on the basis of the events for which attempted charges were being made this morning is null and void. And that is so and will remain so irrespective of the weight of the evidence that the police might have in support of their case. This is for the simple reason that such a prosecution would be based on an illegality and a null and void case.”

I wholly agree with the Learned Judge and the holding remains true in all the cases before me, save where no physical arrest was made.

42. Having established that there were violations of certain fundamental rights and freedoms of the Petitioners as contained in the Repealed Constitution, the question on quantum of damages must now be answered. **Section 84** of the **Repealed Constitution** provides that;

“(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”

Section 84(3) further provides that;

“(3) The High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).”

43. In **Petition Number 796 of 2008 Bernard Wanjohi Kinga vs. The Attorney General**, the Petitioner was arrested by Special Branch Police officers who took him to his house, conducted a search, and later locked him up in Embu Police Station. The following day he was transferred to Kileleshwa Police Station and at about midnight that day he was blindfolded and taken to the Nyayo House Torture Chambers where he was paraded before a panel of interrogators, assaulted with slaps, rubber whips, broken chair parts, kicks and blows due to his alleged involvement with the outlawed “Mwakenya” movement. He was also locked in a dark cell, kept without food or drinking water and held incommunicado for 17 days. He was later released without any charges being preferred against him. In assessing damages Musinga, J held that;

“Considering the kind of suffering that was visited upon the Petitioner (s) by Special Branch Police Officers, I have no hesitation in making a declaration that their fundamental rights and freedoms were grossly violated. Each Petitioner is therefore entitled to compensation by way of general damages.” (Emphasis added)

44. The **Bernard Wanjohi King case**, (*supra*), is very similar to the cases of Jaoko Noo Ooro, Phillip Ngumo Gachoka, Pius John Njogu Nguo and James Mwaura Mugo and as such I find that they are entitled to compensation by way of damages that I shall compute in my final orders.

46. I have considered the periods and length of time that each Petitioner was kept in unlawful custody and the torture that was inflicted on them. I have also considered the case of Susan Wangui Mirugi which is different from the others. I have also considered previous decisions of this Court on the same subject

matter including;

- i) **Herman Marine Nderi vs The Attorney General; Petition No.115 of 2011.**
- ii) **Njoroge King'ori vs The Republic; Petition No.341 of 2009.**
- iii) **James Mwangi Kariithi vs The Republic; Petition No.343/2009.**
- iv) **Pitalis Owenyo Justus Agutu vs the Attorney General ;Petition No.784/2008.**

47.I have noted there was awards in damages in each of the above cases and I am persuaded on the basis of the foregoing that the final orders to be made in the Consolidated Petition are as follows;

That whereas the prayers made for exemplary and moral damages in each Petition are all hereby dismissed, judgment is entered against the Respondent and in favour of the Petitioners in the following terms;

Petition No.133 of 2011

- a) *A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 1st April, 1989 for 14 days at various Police Stations and thereafter at Nyayo House Torture Chambers.*
- b) *The Petitioner is awarded the global sum of **Kshs.700,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.*
- e) *Costs of the suit and interest.*

Petition No.68 of 2011

- a) *A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers and intelligence officers who are Kenyan Government Servants, agents and/or employees in its institutions on 29th of August, 1990 for 22 days at various Police Stations and thereafter at Nyayo House Torture Chambers.*
- b) *The Petitioner is awarded the global sum of **Kshs1,100,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.*
- e) *Costs of the suit and interest.*

Petition No.39 of 2010

- a) *A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 10th of July, 1990 for 23 days at Kamukunji Police Station and thereafter at Nyayo House Torture Chambers.*
- b) *The Petitioner is awarded the global sum of **Kshs.1,150,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.*
- e) *Costs of the suit and interest.*

Petition No.37 of 2010

a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Special Branch Police Officers who are Kenyan Government Servants, agents and/or employees in its institutions on 10th of July, 1990 for 28 days at Spring Valley Police Station and thereafter at Nyayo House Torture Chambers.

b) The Petitioner is awarded the global sum of **Kshs.1,400,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

e) Costs of the suit and interest.

Petition No.35 of 2010

a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Police Officers who are Kenyan Government Servants, agents and/or employees.

b) The Petitioner is awarded the global sum of **Kshs.250,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

e) Costs of the suit and interest.

Petition No.36 of 2010

a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Police Officers who are Kenyan Government Servants, agents and/or employees.

b) The Petitioner is awarded the global sum of **Kshs.850,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

e) Costs of the suit and interest.

Petition No.40 of 2010

a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Special Branch Police Officers who were Kenyan Government Servants, agents and/or employees in its institutions in 1986 for 18 days at Nakuru Police Station and thereafter in Kenyan Prisons

b) The Petitioner is awarded the global sum of **Kshs.900,000/-** as damages and compensation for the violations and contraventions of his fundamental rights and freedoms.

e) Costs of the suit and interest.

SIGNED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

**DATED, SIGNED AND DELIVERED ON BEHALF OF LENAOLA, J. ON THIS 6TH DAY OF
SEPTEMBER, 2013**

MUMBI NGUGI

JUDGE