



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

**PETITION NOS.281 OF 2011, 282 OF 2011 AND 283 OF 2011 AS CONSOLIDATED ON
23/3/2012**

BETWEEN

MILKA WANJIKU KINUTHIA.....1ST PETITIONER

MARGARET WANGUI KINUTHIA.....2ND PETITIONER

RUMBA KINUTHIA.....3RD PETITIONER

AND

THE ATTORNEY-GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. On 23rd March 2012, it was ordered that Petitions Nos.281 of 2011, 282 of 2011, 283 of 2011, 337 of 2011 and 338 of 2011 should all be consolidated and heard together. However, on 14/11/2012 when the hearing commenced, only Petitions Nos.281 of 2011, 282 of 2011, 283 of 2011 and 337 of 2011 were placed before Court and so this judgment is limited to those three Petitions while Petition No.338 of 2011 shall be heard and determined separately.
2. Regarding the present Petitions, they relate to allegations of violations of fundamental rights at separate occasions against members of the Kinuthia Family namely Margaret Wangui Kinuthia, Milkah Wanjiru Kinuthia and Rumba Kinuthia. The circumstances of the alleged violations will be seen shortly.
3. **Petition No.281 of 2011**

The Petitioner, Milkah Wanjiku Kinuthia is the mother of the other Petitioners and by her Petition dated 28/11/2011, she alleges violation of her fundamental rights and freedoms as enshrined in **Section 72, 74, 77, 78, 79, 80 and 82 of the Repealed Constitution**. It is her case in that regard that on 17/10/1990, her children Margaret, Rumba, Joseph and his wife, Mary, were all arrested at their homes in Nairobi and locked up in different Police stations. Margaret and Mary were later charged with the offence of misprision of treason, locked up at Langa'ta Women's Prison but released in December of the same year after the Respondent entered a *nolle prosequi*.

That Rumba and Joseph were charged together with six other persons including Koigi Wa Wamwere and Mirugi Kariuki with the offence of treason and they were thereafter held without bail at the Kamiti Maximum Prison.

4. The Petitioner then alleges that together with other members of a group calling itself “*Mothers of Political Prisoners*” she went on hunger strike while camping at Uhuru Park sometime in March 1992 with the sole aim of highlighting and securing the need for the release of her sons.
5. That after 3 days of the hunger strike, they were attacked and beaten mercilessly by a contingent of armed police officers and this forced them to strip naked in front of the whole world. Not deterred, male police officers receded from the naked women who were in their 50s and 60s and instead police women descended on them with brutality and beat the Petitioner senseless. That she suffered serious injuries to the left leg, chest and stomach as a result thereof. That the injuries nagged her for years thereafter and in 1995 she had to undergo an operation at a cost of Kshs.120,000/-. That thereafter, she suffered regular harassment at her home by Police officers without any reason at all.
6. That for the above reasons she is now seeking the following orders;

“a) A declaration that the brutal assault against the Petitioner among others at Freedom Corner, and the resultant injuries, in or around March 1992 was a gross violation of her Fundamental Rights.

b) A declaration that the subsequent raids on the Petitioner's home and harassment by the Police and Provincial Administration of her and her family was a gross violation of her Fundamental Rights and Freedoms.

c) A declaration that the Petitioner is entitled to special, general, exemplary, punitive and moral damages for atrocities visited upon the Petitioner by the Respondent's security forces for taking part in a peaceful protest before, during and after the Petitioner's children's unlawful arrest and incarceration.

d) A Declaration that the Petitioner is entitled to compensation amounting to Kenya Shillings Twenty Million (Kshs.20,000,000/-) for her horrific suffering but she humbly submits herself to any reasonable Award that this Honourable Court may deem fit to alleviate her unjustified and long- running suffering and psychological and physical anguish.

e) Any further orders, writs, directions as this Honourable court may consider fit, just and appropriated.

f) Costs of this suit plus interest from the date of filing this Constitutional Petition.”

7. Petitions No.282 of 2011 and 283 of 2011

The Petitioner in the two Petitions is Margaret Wangui Kinuthia. In Petition No.282 of 2011 her case is as follows;

8. That on 22/10/1995, she was arraigned before the Chief Magistrate's Court in Nairobi and charged with the offence of misprision of treason on the basis that she had failed to report to the Government that her brother, Rumba Kinuthia together with other persons including Koigi Wa Wamwere and Mirugi Kariuki were planning to overthrow the Government of Kenya by violent means. She denied the charges and was locked up at Langa'ta Women's Prisons after being denied bail.
9. That while at prison, she was subjected to brutal beatings by prison warders who also locked her

in solitary confinement for two months before her release in December 1990. Further, that while in custody she was given raw food once a day and was forced to sleep on a cold concrete floor with no mattress or blanket.

10. She also claims that because of her incarceration, she lost employment with a company called "NOTCO" and after release she was unable to secure employment elsewhere. She 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 prison warders who were Kenyan Government servants, agents, employees and its institutions.

b) A declaration that the brutal and harsh beatings and other inhuman, brutal and degrading treatment at the Langata Women's Prison by prison warders and officers for the two months' period the Petitioner was remanded was a gross violation of her fundamental rights and freedoms.

c) A declaration that the Petitioner is entitled to special, general, exemplary, punitive and moral damages for atrocities visited upon her by Kenya Government's servants, employees, agents and institution (Langata Women's Prison).

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

e) Costs of this suit plus interest from the date of filing this Constitutional Petition."

1. In Petition No.283 of 2011, the Petitioner's case was that like her mother, the Petitioner in Petition No.281 of 2011, she was one of those who were assaulted at Uhuru Park in March 1992 and she claimed that she suffered bodily injuries including a permanent one to the left knee for which she still receives treatment.

2. Her prayers in the Petition are therefore the following;

"a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's police officers who were Kenyan Government servants, agents, employees and its institution.

b) A declaration that the brutal assault against the Petitioner among others at Freedom Corner, and the resultant injuries, in or around March, 1992 was a gross violation of her fundamental human rights.

c) A declaration that the Petitioner is entitled to special, general, exemplary, punitive and moral damages for atrocities visited upon the Petitioner by the Respondent's Security Forces for taking part in a peaceful protest, before, during and after the Petitioners' brothers' unlawful arrest and incarceration.

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

e) Costs of this suit plus interest from the date of filing this Petition."

3. Petition No.337 of 2011

The Petitioner claims that on 22/10/1990, he was arraigned before the Chief Magistrate's Court in Nairobi and charged with the offence of treason together with seven other persons, four of whom he had never met before. He denied the charges and was remanded at Kamiti Maximum Prison where he was held until 19/1/1993 when the Respondent herein entered a *nolle prosequere* and he

was released.

4. It is his evidence that during the two years and three months that he was in custody, he was held in solitary confinement, was not provided with a sleeping mat bed and a decent blanket. That the blankets that he was provided with were torn and infested with lice and bed-bugs and his cell was permanently lit with a bright bulb, day and night.
5. Further, that he was denied reading material and basic medical treatment even when critically ill. He was also denied tooth-paste and a tooth-brush leading to dental complications requiring expensive treatment during and after his incarceration. He also suffered from chronic tonsillitis which necessitated an operation costing Kshs.150,000/- to repair his damaged throat. That during his prison ordeal, he was also locked up in block G which was reserved for hardcore robbery and murder convicts who were awaiting execution for their crimes. Some of the said convicts were deranged and would scream and yell while pleading with the hangman to spare them from their imminent death.
6. It is also the Petitioner's claim that during his incarceration, he was routinely beaten by prison warders for no apparent reason and two warders, one Muturi Mwangi and one Matano, punished him by denying him food and by confining him for 9 days in the "punishment cell" which turned out to be "hell on earth".
7. He also detailed out other acts of torture while at Kamiti Prison which included being left naked for a whole day during the cold season, being assaulted by a warder named Sikuku who, without provocation, delivered a vicious blow to his left ankle and being denied medical treatment thereafter by one Dr. Owino, acting on the instructions of a warder called Lopokoyit.
8. It is the Petitioner's further evidence that upon his release, he had to receive treatment at Nairobi and Matter Hospitals to repair damage to his tonsils and ankle and thereafter suffered health, financial and social losses as a result of his incarceration.
9. For the above reasons, he 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 and Prisons Officers who were Kenyan Government servants, agents, employees and its institutions for a period of two years and three months by their illegal arrest, malicious prosecution, and harsh and inhuman or degrading treatment in Kamiti Maximum Security Prison.

b) A further declaration that the Petitioner's bright future as a law abiding and brilliant lawyer was cut short and irretrievably damaged by the Respondent's illegal actions against him and that the Petitioner has suffered huge financial, business loss and medical expenses and that he (the Petitioner) is entitled to Special, general exemplary and punitive damages past and future against the Respondent amounting to Kshs.25 million, plus costs of this Petition for the unconstitutional conduct by the Kenya Government servants and agents.

c) A declaration that the Petitioner is entitled to a written apology in public media to be directed by this Honourable Court for false arrest, malicious prosecution and illegal confinement of the Petitioner.

d) Any further order writs and directions as this Honourable Court may consider appropriate."

10. Respondent's Answer to Petitions

While the record shows that in each Petition, the Respondent was duly served and was represented on various occasions prior to and during the hearing by Miss Muchiri, a Mr. Kamau, a Mr. Ojwang holding brief for a Miss Wachira as well as Mr. Awino, no response was ever filed in respect of the very serious allegations made by the Petitioners.

I also note that although Mr. Awino cross-examined each of the Petitioners, nothing substantive came out of it and the evidence of the Petitioners was in fact affirmed during that cross-examination.

11. Submissions

On 12/3/2013, I ordered Parties to file submissions but I have combed the record in each file and I see no submissions by either of them and so I will proceed to determine the matter on the basis of the unchallenged Petitions and the oral evidence of each of the Petitioners.

12. Determination

As can be seen from the evidence summarised above, the Petitions resolve around three separate but inter-connected incidents that affected the Kinuthia Family in the early 1990s namely;

- i) *the events of October 1990 when Rumba and Margaret were arrested and separately charged with the offences of treason and misprision of treason respectively.*
- ii) *the alleged violations of Rumba's and Margaret's fundamental rights while incarcerated at Kamiti and Lang'ata Women's Prison.*
- iii) *The events of March 1992 when Margaret and her mother, Milka were allegedly assaulted while on a hunger strike at Uhuru Park, Nairobi.*

The Law

13. The Petitioners have all pleaded violation of **Sections 72, 74, 77, 78, 79, 80 and 82** of the **Repealed Constitutions**. Those Sections provided as follows;

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

- (a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;***
- (b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;***
- (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 offence under the law of Kenya;***
- (f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare; (g) for the purpose of preventing the spread of an infectious or contagious disease;***
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind,***

addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(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) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

(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.

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial. ”

“74. (1) No person shall be subject to torture or to inhuman or Protection from 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 authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.”

“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.

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

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

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

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

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

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

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

(3) When a person is tried for a criminal offence, the accused person or a person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(8) No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law: Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.

(9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

(11) Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority -

(a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings;

or

(b) may by law be empowered or required to do in the interests of defence, public safety or public order.

(12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -

(a) subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts;

(b) subsection (2) (e) to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or

(c) subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding a trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that a court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

(13) In the case of any person who is held in lawful detention, subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in lawful detention.

(14) Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense.

(15) In this section “criminal offence” means a criminal offence under the law of Kenya.

“78. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in

community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage a place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at a place of education which it wholly maintains or in the course of any education which it otherwise provides.

(3) Except with his own consent (or, if he is a minor, the consent of his guardian), no person attending a place of education shall be required to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

(4) No person shall be compelled to take an oath which is contrary to his religion or belief or to take an oath in a manner which is contrary to his religion or belief.

(5) 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 makes provision which is reasonably required -

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practise a religion without the unsolicited intervention of members of another religion, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(6) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.”

“79. (1) Except with his own consent, no person shall be hindered Protection of freedom in the enjoyment of his freedom of expression, that is to say, freedom of expression. to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(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 makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers or upon persons in the service of a

local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

“80. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and association. in particular to form or belong to trade unions or other associations for the protection of his interests.

(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 makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. ”

“82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. discrimination on the grounds of race, etc.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision -

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to

that matter which is applicable in the case of other persons; or

(d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.

(6) Subsection (2) shall not apply to -

(a) anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in subsection (4); or

(b) the giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.

(7) Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging- houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(8) 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 makes provision whereby persons of a description mentioned in subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3).

(9) Nothing in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law. ”

In summary, the rights protected are;

- i) *The right not to be deprived of personal liberty.*
- ii) *The right to a fair hearing.*
- iii) *The right to freedom of conscience.*
- iv) *The right to freedom of expression.*
- v) *The right to freedom of assembly.*
- vi) *The right not to be discriminated against.*

14. Evidence

I have elsewhere above indicated that the facts as set out have not been controverted in any way. Granted, a party alleging anything has the ultimate obligation to prove that allegation to the required standard. But there is also an obligation imposed on a defending party to, at the very least, answer the allegations even in a general denial. Where therefore a party, such as the Respondent herein, appears or is represented in proceedings, purports to contest the evidence tendered but files no response to that evidence, fails to challenge its veracity in cross-examination and worse of all fails to tender submissions even on points of law alone, then it is difficult for the Court not to accept the Petitioners' assertions. In any event, I have seen nothing on the record to warrant my disbelief of that evidence. In the circumstances, I can do no better than quote the words of Majanja, J. in **Lawrence Imunde vs Republic, JR. Petition No.693/2008** where the learned judge stated as follows;

“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.”

15. I take the same position in the Petitions before me.

Whether there have been violations of fundamental Rights

All the Petitioners have made allegations that they were assaulted and subjected to inhuman and degrading treatment. Some have also alleged that they were falsely arrested and maliciously prosecuted.

16. They have also alleged that they suffered physically, emotionally, psychologically and have also suffered economic losses as a result thereof.

17. None of the above allegations have in any way been controverted and it is difficult to see how this Court can refuse to believe them and I have elsewhere above said why. Further in **Jalloh vs Germany, Application No.54810/00**, the European Court of Human Rights while holding that allegations of ill-treatment must be supported by appropriate evidence adopted the position that proof thereof ***“may follow from the co-existence of sufficiency strong, clear and concordant inferences or of similar unrebutted presumptions of fact.”*** I take the same position in the cases before me.

18. With regard to inhuman and degrading treatment, in the **Greek Case 1969 Y.B Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R)** the European Commission on Human Rights stated as follows;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

19. Further **Section 74** of the **Repealed Constitution** provided as follows;

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

30. It is obvious to me that the treatment meted out to the Petitioners by agents of the Government of Kenya was inhuman and degrading, noting the circumstances set out elsewhere above.

31. Having said so however, it must be understood that when a person is taken to a competent Court is charged with a non-bailable offence and is incarcerated as a result thereof, it is difficult to find fault with the actions of the Court, and that is all there is to say on that aspect of the Petitioners' complaints. I also say so well aware that there have been generalised allegations that the Kenyan Courts were complicit and abetted the suffering of accused persons in yester years. That maybe so but in the present cases, no evidence at all to support such an assertion was tendered.

Remedies for violations of Fundamental Rights

32. It is now trite that where fundamental rights are found to have been violated, the victims are entitled to appropriate reliefs including declarations of such violations and also damages. That is what the Petitioners have sought and I have said above that their rights have been violated and they are therefore entitled to the necessary declarations. As for damages and the quantum thereof, In **Jalloh (supra)** the Court noted that in assessing the level of severity of ill-treatment (and I dare add, the quantum of damages payable), the Court must look to the circumstances of each case, the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim.

33. In the instant case, the circumstances of each Petitioner differ save for Margaret and her mother, Milkah who were jointly assaulted at Uhuru Park but Margaret later suffered ill-treatment alone at Lang'ata Women's Prison. Rumba Kinuthia on the other hand suffered solely in different circumstances and I have taken note of the medical evidence tendered to show the injuries that he suffered.

34. I will use the above facts as a basis for computing the damages payable to them. I will also follow previous decisions of the High Court on the same subject matter namely;

i) **Gitobu Imanyara vs The Attorney General in Petition No.78/2010**

ii) **Bedan Mbugua vs the Attorney General in Petition No.80/2010**

iii) **Njehu Gatabaki vs the Attorney General in Petition No.81/2010**

35. However, I must note that save for Milkah Kinuthia and Margaret Kinuthia, Rumba Kinuthia has previously been compensated for certain other episodes of violations of his fundamental rights and the issues raised in the present Petition are the last in a chain of events that are inter-connected. Further, although he claims to have suffered in his profession, no evidence was tendered in that regard.

36. In the event, and for the above reasons, I will exercise discretion and award damages as follows;

i) **Petition No.281/2011**

The Petitioner shall be awarded **Kshs.750,000/-** for violations of her fundamental rights.

ii) **Petitions No.282 and 283/2011**

The Petitioner shall be awarded **Kshs.750,000/-** for violation of her fundamental rights.

iii) **Petition No.337/2011**

The Petitioner shall be awarded **Kshs.1,000,000/-** for violation of his fundamental rights.

37. **Conclusion**

This judgment, it is my hope, will bring to some sort of closure, the pain and suffering that the Kinuthia Family underwent in the 1990s. Damages and declarations may never heal the soul but can assuage the lingering pain of the body and spirit. Regarding the prayer for a public apology

by the Government of Kenya, it is my view that the declarations and award of damages are a sufficient punishment for the excesses of the regime in office at the time the 3rd Petitioner's rights were violated.

38. In the event, the final orders to be made are the following;

a) It is hereby declared that the Petitioners' Fundamental Rights and Freedom were violated by the Government of Kenya through the actions of its agents and servants.

b) The Petitioners are awarded damages for the said violations as follows;

i) Petition No.281/2011

The Petitioner shall be awarded **Kshs.750,000/-** for violation of her fundamental rights.

ii) Petitions No.282 and 283/2011

The Petitioner shall be awarded **Kshs.750,000/-** for violation of her fundamental rights.

iii) Petition No.337/2011

The Petitioner shall be awarded **Kshs.1,000,000/-** for violation of his fundamental rights.

c) The Petitioners shall have costs of their Petitions from the date of judgment until payment in full.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Okindo for Petitioners

Mr. Awino for Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE