



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 79 OF 2010

BETWEEN

TONY GACHOKA.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, **Tony Gachoka** was the publisher and Editor in Chief of a weekly news magazine known as 'The Post on Sunday'. He has filed this Petition alleging that his fundamental rights and freedoms as contained in **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the Repealed Constitution were breached by agents of the State of Kenya in particular persons believed to be members of the Kenya Police, the Judiciary, Prison Warders and other Servants, Agents and Employees of Government institutions between 1997 and 1999.
2. In the Petition dated the 22nd November, 2010, he has sought the following reliefs;

“(a) That there be a Declaration that the Petitioner's fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1) of the Constitution 2010 Similar provisions were provided under Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1) of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Judiciary, Police Officers, Prison warders and other Kenyan Government servants, agents, employees and institutions by confining in prison Tony Gachoka on the 20th of August, 1999 for 74 days at Athi River Prison and Kamiti Maximum Prison. (sic)

(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the gross violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

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and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 (previously under Section 84(2) of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.

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

(e) Costs of the Petition

(f) Interest.”

The Petitioners case

3. The Petitioner's case is as contained in his affidavit sworn on 22nd November 2010, supplementary affidavit sworn on 8th May 2012 and submissions of 5th June 2012.
4. He claimed that he was first arrested on 21st January 1998 and charged with the offence of contravening Section 6(1) of the Books and Newspapers Act for failing to deliver copies of a publication to the Registrar. He alleged that he was detained in different police cells for 3 days where he was subjected to and suffered inhumane acts. He claimed that he was also put under heavy surveillance of the Criminal Investigation Department (CID) and the National Security Intelligence State Agency (NSIS) for those three days.
5. Later, on or about February 1999, he claimed that 'The Post on Sunday' published a story titled "*Chesoni implicated in Goldenberg cover up: An expose of judicial corruption in Kenya*". After that publication, a police manhunt for his arrest was launched and as a result, he alleged that he was forced into exile in London soon thereafter.
6. On returning to Kenya in June 1999, he was arrested and arraigned in court before a seven judge bench of the Court of Appeal and charged with Criminal Libel under Order 52 of the Supreme Court of England Rules. He claimed that he was denied the right to adduce evidence in his defense and that the prosecution was handled by four senior lawyers from the office of the Attorney General including Bernard Chunga and Muthoni Kimani. He alleged that the seven judge bench was very intimidating and he had to represent himself since no lawyer was willing to represent him. He was subsequently found guilty and sentenced to six months' imprisonment and "The Post on Sunday" was fined Kshs.1,000,000/=, the payment of which allegedly pushed the magazine out of business.
7. He claimed that the Court proceedings were a travesty of justice because three of the judges in the seven judge bench had been adversely mentioned in the aforementioned article that formed the basis of the charges and the subject matter of the case. He also challenges the fact that the Court of Appeal which heard the case was at the time, the Court of last resort and hence he was denied his right of appeal because it acted as a court of original jurisdiction.
8. In prison, he claimed that he was held in solitary confinement at Athi River Prison and later at Kamiti Maximum Security Prison in Block A where political detainees were also held. He claimed that he was locked up in a cell block in which insane inmates were confined; he was subjected to continuous screaming noise and cries from the insane inmates; served with the same food that the insane inmates were getting; not allowed to do physical exercises and his cell was lit with a very powerful bulb 24hours a day which led to mental anguish and hallucinations. Further, that he was subjected to acts of torture while in prison such as regular brutal beatings by special branch policeman, denied medical attention and forced to spend long periods in a cold and inhumane prison cells.
9. That while in prison, his family was evicted out of their house because the money to complete the purchase of the house came from the sale of the magazine and he further claimed that the title deed for his family home was charged to Trust Bank under forged signatures. That Land Board Control consent was never obtained before creation of that charge and subsequently his family was evicted from the home. He alleged that there were no funds that were either lent or borrowed and a suit in that regard is still pending at the Court of Appeal.

10. The Petitioner further claimed that between 1997 and 1999, the offices of the 'The Post on Sunday', were often raided by police officers and he specifically stated that at one time in December 1997, 100,000 copies of the said publication, which were ready for sale, were impounded by police officers. He added that the impounded issue had highlighted the purported looting at the National Social Security Fund (NSSF) and had implicated Retired President Moi, the Late Mutula Kilonzo, Retired President's son, Gideon Moi and a Mukesh Gohil. This impounding culminated into his arrest again and he was taken to Kilimani Police Station where he spent a night and was then charged in Court the following day with the offence of incitement.
11. He claimed he was arrested, harassed by the police and imprisoned on several occasions between 1997 and 1999, and he remained in prison unlawfully. It is the Petitioner's claim that as a result of all the police harassment, arrests and court cases he has lived under acute anxiety and stress since then.
12. He alleged that during his imprisonment at Athi River Prison and Kamiti Prison, he was given dusty blankets and he was confined in a dusty cell which conditions have since caused him to develop chronic bronchitis, a pulmonary disease and rhinitis, a chronic inflammation of the mucous membrane of the nose thus damaging his health permanently and he has since been forced to live on medication daily. He claims that the costs of hospitalization both locally and overseas, including an operation to open up his blocked sinuses after imprisonment plus the permanent medication have run into millions of shillings.
13. With regards to the proscription of 'The Post on Sunday', the Petitioner claimed that his business suffered untold financial losses and that his children suffered trauma and their lives have been affected as he had to transfer them from the GCE system to the 8-4-4 system of education. He alleged that to date he has a debt of unpaid school fees.
14. The Petitioner thus claims that he has carried physical, mental and emotional scars from his long run with the Government and he still suffers post traumatic stress disorder. He now seeks an award of Kshs. 20,000,000/= as compensation for aggravated and punitive damages and a sum of Kshs.100,000,000/= being loss of earnings for the period spent in prison.

The Respondent's Case

15. In opposing the Petition, the Respondent, **The Attorney General**, filed Grounds of Opposition dated 16th June 2011, claiming *inter alia* that the Petition herein lacks clarity and precision in setting out the alleged violations. That the cause of action, subject of this Petition, is stale and ought not be entertained by this Court and further that the Petitioner has failed to prove the actions, subject of the Petition. He also filed written submissions dated 20th July 2012.
16. On the allegation that the Court of Appeal did not have original jurisdiction to conduct the Petitioner's contempt of Court case, the Respondent claimed that under the Judicature Act, the Court of Appeal has jurisdiction to punish contempt of Court and therefore the Petitioner's trial was lawful.
17. As regards the composition of the seven judge bench, the Respondent admitted that it was indeed an unprecedented event in the Judiciary but the decision was informed by the fact that the Court of Appeal was the Court of last resort and therefore the number of judges was to ensure that the decision reached was as unanimous as possible.
18. It is also the Respondent's position that the arrest, search, charge, trial and subsequent incarceration of the Petitioner in relation to the contempt of Court charges were all lawful and therefore cannot be said to have amounted to a breach of the Petitioner's fundamental rights and freedoms.
19. The Respondent further claimed that of all the fundamental rights and freedoms of the Petitioner

alleged to have been breached, only the fundamental right against torture is not limited under the law.

20. He submitted further that the Respondent had failed to provide cogent proof to qualify the allegation of torture, and in any event, the alleged breach took place during his incarceration in prison and therefore there is need to assess the state of the facilities at the time that the Petitioner was held and consider whether those conditions were meted out to the Petitioner in exclusion as opposed to all other inmates and to what extent. He relied on the case of *Harun Thungu Wakaba v Attorney General, Nrb HCCA No. 1184 of 2003* in support of that position.
21. The Respondent further claimed that the Petitioner had failed to prove that he suffered chronic health problems as a direct result of his incarceration by the State through its agents at the prisons where he was held. He also claimed that the Petitioner had failed to prove his allegation that his economic life was ruined as a result of the proscription of his magazine. And in any event, that the magazine business was shut down in compliance with a Court of Appeal decree for failure to pay the lawful fine of Kshs.1,000,000/=. The Respondent therefore claims that the Petitioner cannot claim compensation arising out of non-compliance of a Court Order as was stated by Okwengu, J and Dulu, J in *Wachira Waheire v The Attorney General Nairobi HC Misc. 1184 of 2003(OS)* and in *Harun Thungu Wakaba vs. The Attorney General HC Misc. Appl. 1411 of 2009(OS)* where it was held that the Government, through its law enforcement agencies has the duty to investigate, arrest and where appropriate, charge wrongdoers but the same should be done within the confines of the law.
22. With regard to the alleged loss of his family property to Trust Bank, the Respondent stated that the said case is still pending before the Court of Appeal and he cannot make any submission on a matter pending before Court. That the Petition ought therefore to be dismissed with costs.

Determination

23. Having set out the facts and Parties' submissions as above, I am of the view that there are two issues for determination in this Petition. First, whether the Petition and facts as pleaded disclose any violation of the Petitioner's rights and freedoms. Second, if in the affirmative, determine the appropriate remedy for the Petitioner and if not, the inquiry ends there.
24. However, before I turn to the examination of the issues as framed above, it is very clear that this Petition is grounded largely upon the contempt of Court proceedings at the Court of Appeal. To my mind, and I agree with the Respondent in that regard, this Court cannot enter into the arena of determining whether the Court of Appeal conducted properly itself or not, and for good reason. The Petitioner has also questioned the composition of the Court of Appeal and its exercise of original jurisdiction to determine his contempt of Court case. He is aggrieved that the Court of Appeal by exercising original jurisdiction denied him his right to appeal since it was the the Court of last resort at the time. I have considered that issue and I do not think that the manner in which the Court of Appeal proceeded was in violation of the Petitioner's rights or at all. I say so because **Section 5(1)** above of the **Judicature Act (Cap 8)** provides that;

"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

25. As can be seen from a casual reading of **Section 5(1)** above the Court of Appeal as well as the High Court have original jurisdiction to punish for contempt of Court. Having found so, I do not see anything untold in the manner in which the Court of Appeal proceeded with the contempt of Court case. In any event, this Court has no jurisdiction to re-open the conduct of proceedings by a superior Court and sadly, the issue has come to an end.

Right to Personal Liberty

26. The Petitioner claimed that his rights under section 72(1), (2) and (3) of the repealed constitution were violated. This Section provided for the right to personal liberty as follows;

“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases - in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted; in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal; (Empasis added)

Section 72 (2) and (3) provided as follows;

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

(3) A person who is arrested or detained -

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

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

27. The law as set out above is very clear; That a person arrested for having committed a misdemeanor, like the Petitioner, must be produced in Court within 24 hours of arrest. In the instant Petition, the Petitioner claims that he was arrested and arraigned in Court on 21st January 1998 in relation to an offence relating to failure to deliver copies of a publication to the Registrar under the Books and Newspapers Act. The details of his arrest and torture as alleged are scanty and not clear. He failed to annex the charge sheet in the criminal case he was charged in, though he referred to it in his supplementary affidavit. While the charge sheet would have corroborated the Petitioner's evidence and would have been enough to establish the Petitioner's allegations, to my mind, the absence of such evidence is not fatal because his averments have not been contradicted by the Respondent. At this point, I will do no better than reiterate the reasoning in ***David Gitau Njau & 9 Others v Attorney General Petition No. 340 of 2012*** where this Court stated as follows;

“The fact the Respondent did not deny these allegations under oath indicate that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I so find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the Respondents.”

It is for that reason alone that I believe the Petitioner's evidence that he was detained in different police cells for 3 days without charge, subject to what I will say in later in this judgment with relation to his allegations of torture.

28. In relation to the contempt of court proceedings, he claimed that he was arrested and arraigned in court in ***Republic vs. Tony Gachoka and Another Criminal Application Number 4 of 1999***. He has neither stated when he was arrested nor the date he was arraigned in Court. Sadly therefore there is nothing before me that would enable the Court make a determination as to

whether his right to personal liberty was violated and for how long. That is all there is to say on this aspect of the Petition.

Protection from torture and other cruel and degrading treatment

29. The Petitioner alleged that his right not to be subjected to torture and other cruel and degrading treatment protected under **Section 74(1)** of the Repealed Constitution was violated for the duration he was held in prison after conviction for the contempt of Court charge and for the 3 days he was held in different police stations in relation to the offence under the Books and Magazines Act.

Section 74(1) of the **Repealed Constitution** provided that:

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

30. The Petitioner claimed that he was held in solitary confinement at Athi River Prison and at Kamiti Maximum Prison his cell was lit with a very powerful bulb 24 hours a day which lighting led to mental anguish and hallucinations since he was also locked up with insane inmates.

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, stated as follows with regard to torture:

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

31. In **Blanchard vs Minister of Justice, Legal and Parliamentary Affairs and Another [2000] 1 LRC 671 at 679** it was held that:-

"The same complaint was raised in Le Maire vs Maas (1990) 745 F Supp 623 The Plaintiff, a convicted murderer, serving a life sentence, objected that the twenty four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the eighth Amendment. The defendant, the Prison Superintendent, justified the constant illuminations as a security measure so the disciplinary segregation unit could see into the cell. There was no evidence, however, that there was need to see the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. Panner CJ held (1990) 745 F Supp 623 at 630, "there is no legitimate penological justification for requiring the Plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional."

While I agree with the reasoning of the learned judges with regard to torture generally and while knowing that nothing can justify torture, I am constrained not to find in favour of the Petitioner that the acts he was subjected to while in prison amounted to torture. I say so because, the American case as stated above has demonstrated ideally what ought to happen

while one is held in prison, lawfully. However, one has to take judicial notice of past notorious conditions in Kenyan prisons and they were not pleasant at all. Mumbi Ngugi J. in *Koigi Wamwere v Attorney General (2012) e KLR*, recognised that fact and stated as follows with regard to the claim of violation of the Petitioners rights while held in prison;

“I have set out in detail some of the averments of the petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed against the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change. To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the petitioner's rights under section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention.”

32. This Court also recently stated in *Hon. Gitobu Imanyara & 2 Others v Attorney General, Petition No. 78 of 2010*, as follows;

“Connected with this issue is the conditions under which the Petitioners were held together with insane prisoners and sometimes in solitary confinement, the conditions of our prisons were and may still be appalling. Each inmate, to that extent suffered terribly under those conditions and to isolate the Petitioners case and pay them separately for their pain may well amount to discrimination.”

33. As can be seen, there is nothing untold or special with regard to the Petitioner's situation, and am unable to find that the conditions would *per se* amount to torture. But that is not the end of the matter because the Petitioner has also alleged brutal beatings before and after his arraignment in Court and I will regard that matter as torture and will take it into account while computing damages payable to him. I say so because beatings are personal and have nothing to do with general conditions obtaining.

34. Be that as it may, the Petitioner also claimed that due to the conditions he was held in at the prison including supply of a dusty blanket and dusty prison cell, he has since suffered permanent health problems and in particular bronchitis and rhinitis, and that he has undergone an operation and has been forced to live under daily medication. I have seen a medical report by Dr. Aluoch to the effect that the Petitioner's medical condition will require prolonged follow up in future to cost Kshs.18,450,000/=.

35. Before I determine the probative value of that report, I must state that in all his prayers, the Petitioner failed to make a specific claim for special damages and in that regard, this Court has no basis upon which to determine that issue and the claim for Kshs.18,450,000/=. Special damages, even in Constitutional cases, must be specifically pleaded.

36. Further, the medical treatment notes and payment receipts exhibited in the affidavit of the Petitioner were made from 2010 onwards i.e. ten years after his detention. Clearly, I do not see the nexus between the alleged torture in prison and the treatment he underwent 10 years later. The medical report by Dr. Aluoch was made in 2012 following the filing of this Petition in 2010. The report states in part as follows;

“This is to certify that I have been the medical attendant on several occasions for the above named since 1992. In the last fifteen years or so he has been admitted on various occasions and has consulted me on the average at least once a month in the last ten years or so. He has also been admitted to the Nairobi Hospital on a number of occasions since 1999.”

37. Reading that Report and the receipts for payment of medicine, it is clear that the Petitioner may have developed health problems from 1992 before his arrest. I have also not seen any receipts or medical notes in connection with the alleged bronchitis and rhinitis for the years 1999-2010. In that regard, I must politely, but with respect, dismiss the Report as it has no probative value and has no connection with the alleged acts of torture as pleaded by the Petitioner.

Right to property

38. **Section 75 (1)** of the **Repealed Constitution** provided for right to own property of any description in Kenya. This Section provided as follows;

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where certain conditions are satisfied."

In that regard, the Petitioner claimed that while in prison, his property was charged to Trust Bank Ltd under forged signatures. It is undisputed, that the said case is still pending at the Court of Appeal and for that reason, this Court cannot address any aspect of it. Let the Court of Appeal deal with the issue to its logical conclusion.

39. Further, the Petitioner also claimed that his right to property was violated by the Respondent's acts of proscribing his magazine which was his source of income. That police officers often raided the premises of 'The Post on Sunday' and at one time confiscated 100,000 copies which were ready for sale. On his part, the Respondent denied ever raiding the premises of 'The Post on Sunday' and claimed that the magazine was shut down in compliance with a Court of Appeal decree for its failure to pay the lawful fine of Kshs. 1,000,000/=. I have seen a report by KPMG wherein it is stated that the Petitioner lost earnings estimated to be Kshs.2,688,000/= in connection with the destroyed and confiscated copies of the magazine during the police raids.

40. 'The Post on Sunday' from evidence on record, was a publication of The Post Limited which was a company limited by shares and whose shareholding was initially between the Petitioner and Mr. Njoroge Nani Mungai. To that extent, The Post Limited is a separate legal entity from the Petitioner and has the capacity to sue and be sued for any losses incurred by it and it is not enough that the Petitioner is related, linked or connected to the said company or the said magazine. The Post Ltd or its Board of Directors has not sued for the alleged losses and it is not enough that the Petitioner may sue on account of the association he had with the company as an Editor in Chief.

I will therefore dismiss the claim under this limb.

Right to fair Trial

41. The Petitioner alleges that his right to secure protection under the law as envisaged in **Section 77(1)** of the **Constitution** was violated in particular the right to fair hearing. This section provided as follows; ***"(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."***

42. As can be seen from the affidavit of the Petitioner, he was charged with the offence of failing to produce a copy to the Registrar under the Books and Magazines Act. He has not alleged that at his trial, his rights were violated and in what way. No evidence at all was tendered on this aspect of his claim and the same must fail.

43. With regard to the criminal libel of contempt of Court before the court of Appeal, all I can safely say is that he was allowed to defend himself and in fact represented himself as he alleged that no lawyer was willing to defend him at that time. Clearly, the Respondent is not to blame in that regard. He was later on convicted and sentenced to six months' imprisonment and this Court has no jurisdiction to re-open that trial.

This aspect of his claim must also fail.

Protection of freedom of expression

44. The Petitioner claimed that his rights under **Section 79** of the **Repealed Constitution** were violated. **Section 79 (1)** provided that;

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

45. It is the Petitioner's claim that the offices of the Post on Sunday, a magazine where he was the Editor-in-Chief, were raided and about 200,000 copies of the said magazine impounded by the Police, records were destroyed and computers confiscated. I have already found that the Petitioner cannot make the claim of losses with respect to the destruction or confiscation of the magazine and it follows that he cannot also allege a breach of his freedom of expression. In any event, the Court of Appeal already found him guilty of contempt of Court with regard to the publication and I say so alive to the fact that a Court judgment or order cannot violate the Petitioners' fundamental rights and freedoms. That is why in **Chokolinyo -vs- Attorney General of Trinidad and Tobago (1981) 1 ALL ER 244**, which cited with approval the decision in the case of **Maharaj -v- Attorney General of Trinidad and Tobago (No. 2) [1978] ALL ER 670 at 679** the Court stated that;

".....no human right or fundamental freedom..... is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error." This is the sad reality of the Petitioner's situation and nothing more can be said.

Freedom of Assembly and Association

46. The Petitioner further claimed that his freedom of assembly and association as provided for under Article 80(1) of the Constitution was violated as was not allowed any visitors while in prison. On this aspect of the case, there is no denial of his claim and whereas a prisoner is deemed confined, visitation rights cannot be taken away from him and when this is done, his limited right to association and assembly was certainly violated.

Protection of freedom of movement

47. Section 81 (1) of the Repealed Constitution provided that: ***"(1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya."***

48. The Petitioner has failed to demonstrate how his freedom of movement was violated more so when he was lawfully confined during his incarceration. That being the case, I will not belabour this allegation further.

Damages

49. Having found a violation of the Petitioner's rights under Sections 72, 74 and 80 of the Repealed Constitution, this court must award the Petitioner an appropriate remedy. However, the High Court has been reluctant in awarding exemplary damages for reasons that they are not awardable in changed political circumstances and in a Petition such as the one before me. I do not see any good reason to warrant a departure from that reasoning. In that event, I award the Petitioner **Kshs.1,000,000/=** for violation of his rights under **Sections 72, 74 and 80** of the **Repealed Constitution**. I do so taking into account the period of 3 days which he was in unlawful incarceration, the alleged beatings that he was subjected to and his lack of visitation rights while in lawful confinement. I also do so taking into account awards in the recent past regarding claims of this nature including Koigi Wamwere and Gitobu Imanya (supra).

Conclusion

50. The Petitioner deserves an apology for the delay in delivering this judgment which delay was caused by factors beyond the Court's control. Further, it seems to me that he pegged his whole claim around the contempt of Court trial which this Court has no jurisdiction over and the rest of his claims were peripheral to that issue. If therefore he anticipated a huge award in damages, sadly neither the facts of his case, the circumstances of his arrest and imprisonment would place him in the same category as Nyayo House torture victims. I digressed.

51. The final orders to be made are that judgement is entered in favour of the Petitioner against the Respondent as follows;

- i) That his rights under **Sections 72, 74 and 80** of the **Repealed Constitution** were violated.
- ii) He shall be awarded **Kshs.1,000,000/=** as damages plus costs of the Petition.

52. Orders accordingly.

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

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Musyoka holding brief for Mr. Kounah for Petitioner

Mr. Kaumba for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE