REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Suit 1656 of 2005

JAMES MWANGI WANYOIKE & 9 OTHERS..APPLICANT

V E R S U S

THE ATTORNEY GENERAL..RESPONDENT

JUDGMENT

Introduction

1. The 10 applicants in this matter have brought this application by way of Originating Summons seeking various declarations pertaining to breach of their fundamental rights under the constitution following their arrest, detention and trial by court martial following the attempted coup of 1982.

2. In their Amended Originating Summons dated 1st February, 2006 which was deemed as duly filed through a consent order entered into between the parties before Wendoh, J. on 14th December, 2006, the applicants seek the following orders:

1. **A DECLARATION** that the circumstances under which the Applicants were arrested, tried, convicted, imprisoned and treated after conviction following the coup attempt of August, 1st 1982, constituted a breach of the Applicants' rights and freedoms of liberty, security of the person and the protection of the law as provided for in section 70(a) of the Constitution of Kenya.

2. **A DECLARATION** that the period between August, 1, 1982 when the Applicants were arrested, to the date when the Applicants were convicted by the Court Martial sitting at Lang'ata Barracks constituted a period of continuous breach of the Applicants' rights to liberty guaranteed under section 72 of the Constitution of Kenya.

3. **A DECLARATION** that the Applicants were held in servitude in contravention of Section 73(1) of the Constitution of Kenya during the period between August, 1 1982, to the date of conviction of the court martial.

4. **A DECLARATION** that the holding of the Applicants in solitary confinement in a cell block where psychiatric and insane prisoners were held amounted to cruel and inhuman treatment and was a breach of

section 74 of the Constitution of Kenya.

5. **A DECLARATION** that the failure, refusal and/or neglect of the Kenya Air Force to give any benefits to the Applicants for the services rendered to the Republic of Kenya, while in the Air Force constituted cruel and inhuman treatment and was a breach of section 74 of the Constitution of Kenya.

6. **A DECLARATION** that the trials of the Applicants at the court martial were not fair trials within a reasonable time before an independent and impartial tribunal and was a breach of section 77(a) of the Constitution of Kenya.

7. **A DECLARATION** that the so called "82 Air Force" was an illegal entity with no authority to retire, dismiss or terminate the services of the Applicants who were duly employed by the Kenya Air Force, established under the Kenya Armed Forces Act.

8**.** **A DECLARATION** that the purported dismissal of the Applicants from service was null and void, and the Applicants are still members of the Kenya Air Force, established under the Kenya Armed Forces Act.

9. **A DECLARATION** that the Applicants are entitled to salary arrears, and all appurtenant benefits from the date of the unlawful dismissal from service, to date.

10**.** **DAMAGES** consequential upon the above declarations and/or such orders, writs or directions for the purpose of enforcing and securing the enforcement of the provisions herein above disclosed as having been breached in relation to the Applicants.

11**.** Costs of this application.

The application is supported by affidavits sworn by each of the ten applicants on the 15th November, 2005.

2. The respondent opposes the application on the following grounds:

1. **THAT** the petition is made after inordinate delay twenty three (23) years since 1982.

2**.** **THAT** the applicants are circumventing the inordinate delay (limitation period) by filing a constitutional reference instead of a suit claiming wrongful dismissal.

3**.** **THAT** fundamental rights and freedom are subject to the right of others, the society and public interest, and not absolute.

4**.** **THAT** a threat to the constitutional order or acts or omissions likely to cause a constitutional crisis cannot be compromised with individual rights and freedoms.

5. **THAT** applicants' rights and freedoms were not and have not been infringed.

6**.** **THAT** the applicants had other remedies under substantive law but slept on their rights to go to court from 1982 to 2005.

7**.** **THAT** the alleged suffering, imprisonment, dismissal from their employment and present situation of the petitioner is as a result of their wrong doing as they contribute to their condition.

8. **THAT** the applicants' petition is barred by Section 8(2) and 86(3) of the Constitution of Kenya 1963.

9. **THAT** the applicants have no cause of action under the Constitution.

Mr. Mbugua Mureithi appeared for the applicants while the state was represented by Mr. Onyiso.

The Applicants' Case

3. Mr. Mureithi presented the applicants' case as set out in the Amended Originating Summons, the supporting affidavits sworn on 15th November 2005 and the written submissions filed on behalf of the applicants dated 7th July 2011. He submitted that in view of the fact that no relying affidavit was filed by the respondent, the court should take the matters of fact deponed to by the applicants in their respective affidavits as conceded by the respondent. He urged the court to take this position as it was the position taken by the court in the case of **Cornelius Akello Onyango & 8 Others -v- A.G. High Court Petition No. 233 of 2009.**

4. In his oral submissions, Mr. Mureithi first addressed himself to the grounds of opposition filed by the respondent and submitted that the only grounds that required comment were whether the suit is time-barred or whether it is barred by Section 86 of the old Constitution.

5. With regard to whether or not the matter was time barred, Mr. Mureithi submitted that the issue had been dealt with and the State's argument dismissed by this court. In the case of **Dominic Arony-v- the Attorney General High Court Civil Application No. 494/2003**, the court held that the law of limitation does not apply to the enforcement of fundamental rights. The same position was upheld in the case of **Harun Thungu Wakaba –v- A.G Nairobi HC Misc. Appl. 1411 of 2009(OS)** and **Wachira Waheire –v- A.G HC Misc. 1184 of 2003(OS)**. He argued that the decision of Justice Nyamu in **Lt. Col. Peter Ngari Kagume & 7 Others -v- A-G High Court Constitutional Petition No. 128 of 2006** relied on by the respondent is not good law and he asked the court to disregard it.

6. On the factual situation, Mr, Mureithi submitted that all the applicants were officers of the Kenya Air Force at the time of the abortive coup of 1982. They were arrested and all of them detained in pre-arraignment custody for a minimum of 2 months.

Each of the applicants has deponed in a separate affidavit the facts and circumstances surrounding his arrest, detention and dismissal from the Kenya Armed Forces following the attempted coup on 1st August 1982, and I set out below the respective cases of the applicants as they emerge from their affidavits and the joint submissions.

The 1st Applicant

7. **JAMES MWANGI WANYOIKE** avers that he was enlisted into the Kenya Air Force on 12th September, 1979. His service number was 024408. After his training he was posted to Nanyuki Air Base where he was attached to the Armament Squadron. He was woken up in the early hours of 1st August, 1982 by his fellow servicemen who were heavily armed and ordered to arm himself and report to his work station. He was arrested later in the day by Kenya Army servicemen and locked up in the clothing store for four days.

8. On 4th August he was taken to Kamiti Maximum Prison where he was locked up in solitary confinement in a dark cell. From Kamiti Maximum Prison, he was transferred to Naivasha Maximum Prison where he was held in solitary confinement for two weeks. Thereafter he was held for two weeks in an overcrowded cell with more than one hundred inmates before he was sent back to Kamiti Maximum Prison. Fifty five days after his arrest, he was, on the 24th September, 1982, charged before a Court Martial sitting at Lang'ata Barracks and charged with the offence of mutiny.

9. He was assigned a military advocate whom he had never met who advised him to plead guilty to the charges but he pleaded not guilty and was remanded at Kamiti Maximum Prison to await trial. At Kamiti he was detained in Block D which houses death row and insane inmates who would make continuous noise for 24 hours. He was released from Kamiti Maximum Prison on 14th March 1983 and escorted to Kahawa barracks where he was informed that he had been dismissed from service without benefits. He

was given no reasons for his dismissal. He avers that he has never been able to secure meaningful employment since his dismissal. He was detained for about 7 months in total.

The 2nd Applicant

10. **ANTONY NDIANGUI WAIGANJO** was enlisted into the Air Force in 1975, qualified as Grade 1 Tradesman, and was stationed at Eastleigh, Nanyuki and then Defence Headquarters Joint Operation Centre. His service number was 022049. He avers that on the day of the coup, he was at Kitale Police Station where he and other officers had parked convoy for a night stop. He returned to his base in Nairobi and worked until 8th August 1982 when he was arrested and taken to Kamiti Maximum Prison where he was detained without charge for nine days.

11. On 16th August, 1982, he was taken to Eastleigh Air Force Base where he was enrolled in the newly created **"82 Air Force**" under a new Service No. 100584. However, on 11th October, 1982 he was arrested again and taken to Naivasha Maximum Prison where he was detained in solitary confinement for two months without adequate food. On 3rd January, 1983 he was transferred to Kamiti Maximum Prison where he was again locked up in an overcrowded cell until 11th February, 1983 when he was released and informed that he had been discharged from the Kenya Air Force on the ground that his services "***were no longer required."*** He was detained without trialfor a total of four (4) months and 9 days (from 8th to 16th August, 1982 and again from 11th October, 1982 to 11th February, 1983 when he was dismissed from service.

The 3rd Applicant

12. **JOHN KIPSANG LETING** states that he was enlisted in the Kenya Air Force on 3rd March 1978 under Service Number 022993. After training he was posted to Nanyuki Air Base where he rose to the rank of a full Corporal. On 1st August, 1982 he was commanded by some of his fellow servicemen to arm himself and report to his station. When the barracks was overrun by Kenya Army officers he fled and hid in the bush but he surrendered the following day. He was arrested and detained at King'ong'o Prison where he was subjected to severe beatings by army officers and prison warders and sustained a serious head injury.

13. He was thereafter transferred to Kamiti Maximum Prison, then to Naivasha Maximum Prison. After approximately 138 days of detention and imprisonment without charge, sometime in December 1982, he was charged with the offence of mutiny before the Court Martial sitting at Lang'ata Barracks without the benefit of counsel, he was convicted and sentenced to ten months' imprisonment which he served. He was discharged from the Armed Forces on 1st August 1983.

The 4th Applicant

14. **SAMMY KAHARUA NGOMBO** avers that he was enlisted in the Kenya Air Force in September, 1979 and was trained as an Aircraft Technician. He was on a two week leave awaiting deployment after his training when the coup attempt occurred and he only learned of it from the radio. He depones that following a radio announcement that all soldiers should report back to their bases or to the nearest police station, he reported to the Kikuyu Police Station on 3rd August, 1982 from where he was transferred to Kiambu Police Station.

15. On 4th August, 1982, officers from the Kenya Army went to Kiambu Police Station, stripped him naked and beat him severely while interrogating him and demanding that he surrenders firearms. He was later transported while naked in an open truck to Kahawa Barracks where the beatings continued. That night he was transferred to Athi River Prison where he was locked up for two (2) weeks and kept in inhumane conditions with no food, water and toilet facilities. He was thereafter held in Kamiti and Naivasha Maximum Prison for various periods in aggregate 8 months until the 1st of March 1983 when he was escorted to Kahawa Barracks and informed that he had been dismissed from the Kenya Armed

Forces. His Certificate of Discharge shows that he was discharged on the grounds that his ***"services were no longer required."*** He was never charged with any offence.

The 5th Applicant

16. **ROBERT CHELUGO MININGWO** avers that he was enlisted in the Kenya Air force on 22nd June 1970 under Service No. 021311. He was posted to the Kenya Air Force Eastleigh Base at the Air Traffic Control Section. He trained at the Base as an Air Traffic Controller eventually becoming an Air Traffic Instructor. He later attended a cadet officer interview and he avers that on 25th July, 1982 he was informed that he had qualified and was to proceed for further training on 2nd August, 1982 at the Armed Forces Training College at Lanet.

17. On the morning of the coup, he was in his house in Umoja Estate, Nairobi. He was informed by his wife that all the shops were closed and there was commotion. He went outside and was called by name by one Private Ochuka and was then ordered to report to the base immediately. He did as ordered and found armed servicemen in the Operations Room. He was commanded to facilitate swift communications with whoever Private Ochuka wished to communicate with. When he got the opportunity, he sneaked out of the Operations Room and sought refuge at one of his senior officer's house in Buru Buru Estate. He was arrested on 2nd August 1982 by officers from the Kenya Army when he reported to work. He was later that day transferred to Kamiti Maximum Prison where he was severely beaten by the warders and thrown into an overcrowded cell. On the 6th of August 1982 he appeared before the National Screening and Investigations Board and was cleared to report to work.

18. He was released from Kamiti Maximum Prison on 7th August, 1982 and was issued with a Gate Pass by the Screening and Investigations Board and resumed work at the Kenya Air Force Headquarters. However, on the 2nd of September, 1982, he was again arrested by Kenya Army officers and taken to Naivasha Maximum Prison. He was detained without charge at Naivasha and Kamiti Maximum Prison between 2nd September 1982 and 22nd March, 1983 when he was taken to Kahawa Barracks and informed that he had been discharged from service on the ground that ***"his services were no longer required."*** He was detained for nearly 7 months and no charges were ever levelled against him.

The 6th Applicant

19. **SIMON NJIRU KINYUA** was enlisted in the Kenya Air Force in 1978 and his service number was 023469. He served with the Air Defence Artillery, Ground to Air Defence Unit (GADU) based at Embakasi Barracks. On the 1st August, 1982, he was forced at gun point to arm himself with a sub-machine gun with several rounds of ammunition. When the mutiny was quelled by officers from the Kenya Army, the applicant found refuge at his colleague's house in Harambee Estate.

20. On 2nd August, 1982 he decided to heed the President's call for all service men to report to the nearest police station and he reported to Kaloleni Police Station. He was immediately arrested and escorted to the Kenya Army Headquarters where he was stripped naked and transported to Kamiti Maximum Prison. From here he was transferred to Naivasha Maximum Prison. He was detained at Naivasha Maximum Prison for about seven weeks. He was then presented before a panel of Kenya Army Officers who taunted him to confess that he participated in the coup attempt and upon his refusal to do so, he was locked up for three days without food and water in a dark room flooded with water to about 8 inches high while naked . He was also subjected to daily beatings to force him to confess and he avers that he was badly tortured under the supervision of one Corporal Marete to the extent that his legs were numb and swollen and he was unable to walk. Fearing for his life, he signed a prepared statement falsely confessing to his participation in the coup attempt. He was then transferred to Kamiti Maximum Prison and arraigned before the Court Martial at Lang'ata Barracks on 26th October, 1982, 72 days after his arrest, where he pleaded guilty, was convicted and sentenced to twelve years' imprisonment.

21. The applicant served his prison term at Kamiti Maximum Prison and later at Naivasha Maximum

Prison from where he was released on 26th October, 1988 in very poor health and had to be placed on medication until February, 1990. He was also discharged from service of the Kenya Air Force with effect from 1st August, 1982 on the ground of "***Disbandment of the Kenya Air Force***."

The 7th Applicant

22**.** **TITUS TUMBO NGIO** avers that he was enlisted into the Kenya Air Force on 2nd September, 1977 under Service No. 022669. After training, he was deployed at Eastleigh Air Base where he rose to the rank of a Substantive Corporal. He avers that he was commanded by one Private Ochuka on the day of the coup to go to the armoury, arm himself and proceed to the City to patrol and ensure that there was no movement of vehicles either in or out of the City. He was arrested around 6 p.m. while in his house in Embakasi village by Police officers from Embakasi Police Station and escorted to the Police Station where he was detained until 2nd August, 1982. He was then transferred to the Kenya Army headquarters then to Kamiti Maximum Prison while naked and handcuffed.

23. At Kamiti, he avers that he was locked up in an overcrowded cell, interrogated and later transferred to Naivasha Maximum Prison. At Naivasha Maximum Prison, he was detained in a water logged cell, naked and without food and water for 5 days while being coerced to confess his involvement in the failed coup. He succumbed to the torture and signed a dictated statement. On 7th October, 1982 he was transferred to Kamiti Maximum Prison and on 8th October, 1982, two months and 6 days since his arrest, he was charged before the Court Martial sitting at Lang'ata Barracks and was advised to plead guilty to all charges to retain his life. He was sentenced to 20 years' imprisonment.

24. On appeal, the sentence was reduced to twelve years which he served in various prisons until his release on 8th October, 1990. He was discharged from the Kenya Air Force with effect from 1st August, 1982 on the ground that his "***services were no longer required.***" He avers that he has never, because of the stigma resulting from the accusation of involvement in the failed coup, been able to secure any meaningful employment.

The 8th Applicant

25. **STEPHEN MWANGI MARION** avers that he was enlisted into the Kenya Air force on 3rd March, 1978 under Service No. 022461. He was trained and worked as an Armament Technician stationed at Nanyuki Air Base. On the day of the coup, he was coming back from Nanyuki when he was informed that the Government had been overthrown and ordered to arm himself and obey all commands without question. He was also ordered to test armament bombing system of F5 aircraft for a bombing mission in Nairobi.

26. Aware of the magnitude of loss of life and property that would result from such a mission, he avers that he bought time until officers from Kenya Army arrived and arrested him. He avers that he was escorted to Naivasha Maximum Prison where he was detained in a special block with other Air Force Officers. He was continuously interrogated in relation to a detainee who had a name similar to his and any information that might have been disclosed to him by the detainee concerning the coup. He denied ever having any links to the alleged detainee and was locked up, naked, in a water logged cell for three days; that he was denied food, water, toilet and sanitation facilities. He was thereafter forced to sign a statement.

27. On the 21st October, 1982, eighty eight days from the date of his arrest, he was charged before a Court Martial sitting at Lang'ata Barracks, pleaded guilty and was convicted and sentenced to four years' imprisonment. He states that he served the first 2 weeks of his sentence at Industrial Area Prison in a dirty, overcrowded and lice infested cell where he contracted severe pneumonia but was denied treatment. Later, he was transferred in a prison van, handcuffed and standing all the way, to Kodiaga Prison in Kisumu. He was held incommunicado and was not allowed to communicate with his family for more than one and half years. He appealed against his sentence and it was reduced to two years. He was released

from prison sometime in October, 1984.

The 9th Applicant

28. **DEAVANS CHILELO MWANGADE** avers that he was enlisted in the Kenya Air Force in April, 1980 under Service No. 024264. He was trained and qualified as an Air Traffic Control Assistant and served in that capacity at the Eastleigh Air Base until 1st August, 1982. He had reported back to work from annual leave the previous day and attended a pre-wedding party on 31st July 1982. He arrived at the base at 6.00 a.m on 1st August to find the base teeming with armed soldiers. He was ordered to arm himself and wait for orders. When he did not get what he terms as a genuine command from a commissioned officer, he decided to take the weapon back to the armoury and left the Base. He stayed in hiding until the 3rd August, 1982 when he surrendered himself to the military at the Eastleigh Air Base.

29. He was immediately arrested and detained in the cells, then was driven to Kamiti Maximum Prison while stripped naked. At Kamiti, he avers that he was locked up for 5 days while stark naked, in a water logged cell without food and he was only taken out of the cell for interrogation. On the 8th of August, 1982, he was transferred to Naivasha Maximum Prison where he was again detained in a dark-painted cell overflowing with cold salty water while stark naked and without food, water and toilet facilities. He was constantly reminded that death was imminent.

30. On 18th October 1982, he was transferred to Kamiti Maximum Prison and on 19th October, 1982, he was escorted in a crowded lorry to the Court Martial sitting at Lang'ata Barracks. He was advised by a certain Captain at the Court Martial to plead guilty to all the charges to save his life which he did and he was then convicted and sentenced to six years' imprisonment. His appeal was rejected but he was released after serving only two years. No reason was given for his release.

The 10th Applicant

31**.** **MOHAMMED OMARI MWAMANENO** avers that he was enlisted in the Kenya Air Force on 3rd March, 1978 under Service No. 022950. On 1st August, 1982, he was at his house in Nanyuki at around 6 a.m. He was not intending to go to work as he was off duty. He heard a loud knocking on his door which was then broken by his fellow service men. He was forced at gun point into a waiting Land Rover and taken to the Barracks where he was forced to arm himself and report to his work station. He avers that he reported at his work place at the Bomb Dump and remained there until 6.00 p.m when he was arrested by Kenya Army Officers, peacefully disarmed and escorted to the supply station headquarters.

32. He was detained at Nanyuki for about three days while being interrogated and later transferred to Kamiti Maximum Prison where he was detained in an overcrowded cell for one day before being transferred to Naivasha Maximum Prison. At Naivasha Maximum Prison, he was detained in an overcrowded cell for eighty days and was forced to write a statement incriminating himself in the coup attempt. On the 19th October, 1982, two months and nineteen days from the date of his arrest, he was charged before the Court Martial sitting at Lang'ata Barracks where he was provided with a defence counsel who advised him that he had done the right thing by confessing as he would get a light sentence. He was sentenced to six years' imprisonment and served five years in various prisons before his release from Shimo La Tewa Prison sometime in July 1987.

33. All the 10 applicants aver that upon their release from prison, they were dismissed from service without benefits with effect from 1st August, 1982 on the ground that their "***services were no longer required"*** or on ***"disbandment of the air force."*** They have all annexed copies of their Certificates of Discharge. They also all aver that since their dismissal from the force, they have never been able to get any meaningful employment due to the social stigma visited on them by the allegation of involvement in the failed coup.

34. The applicants are therefore seeking several declarations with respect to personal liberty, security of the person freedom from torture, protection of the law, freedom from servitude and a prayer that they are entitled to damages.

35. They were also seeking a declaration that their dismissal from the force was a nullity. Mr. Mureithi submitted that all the applicants were dismissed after the 12th of August, 1982, the date of disbandment of their employer, the Kenya Air Force. A new unit called 82 Air Force was constituted, which is the outfit that dismissed them from service. They argue that Akiwumi J in the case of **Cpt. Geoffrey Kujoga –v- A.G Misc. Application No. 293 of 1993** declared 82 Air Force illegal. They submit that their dismissal was therefore an illegality and they are therefore entitled to terminal dues and all other dues that an employee is entitled to.

36. With regard to their entitlements as employees, Mr. Mureithi submitted that in the case of **Dominic Arony Amollo & Others -v- A-G** (Supra), the computing of the applicants' dues was reserved to a single judge and he submitted that the court could take evidence on the applicants' terminal dues or reserve the computation to a Registrar.

37. On the question of damages payable, Mr. Mureithi submitted that it is now settled that the kind of damage suffered by the applicants is compensable in both general and exemplary damages and referred to the case of **Dominic Arony Amollo & Others -vs-**

A.G ***(supra)*** where he submitted a global award of Kshs 2.5m was made. He also referred to the cases of **Dr. Odhiambo Olel -v- The Attorney General, HC Civil Case No. 366 of 1995 (Unreported) Peter M. Kariuki –v- Attorney-General, HC Petition No. 403 of 2006** *(Unreported).*

38. Mr. Mureithi also referred to the variousNyayo House torture cases, the latest being the case of **Cornelius Akelo Onyango & 8 Others –v- The Attorney General HC. Petition No. 223 of 2009 (Unreported)** and the various awards made by the courts in those cases in both general and exemplary damages. He noted that this court has not yetcome up with clear principles on the award of damages in constitutional cases or breach of fundamental rights. Compared with other Commonwealth jurisdictions such as the Caribbeans, the damages awarded by Kenyan courts are too low. He urged the court to be guided by the principles that the courts in those jurisdictions use in arriving at awards which are much higher than those awarded in Kenya and referred to the case of **Peters –v- Marksman & Another [2001] 1 LRC I.** He urged the court to consider higher awards of damages bearing in mind that the applicants were young officers in the force, most hardly 3 years in the force. They were badly mistreated by the state and lost their careers.

39. With regard to the respondent's argument on section 86 of the Old Constitution, Mr. Mureithi submitted first, that the section does not oust the original and unlimited jurisdiction of this court under section 60 of the Old Constitution. Secondly, section 84 of the old Constitution also gave open access to this court to every person in Kenya to enforce their fundamental rights and did not exclude members of the armed forces or even foreigners. Section 86(2) of the Old Constitution did not even purport to exclude the operation of s 71, 73 and 74 of the Constitution on the right to life, freedom from slavery and servitude and freedom from torture respectively. It purported to exclude s 72 on personal liberty and s 77 on fair trial.

40. Mr. Mureithi contended further that the Armed Forces Act nonetheless contained provisions that prohibit inordinate pre-arraignment detention at section 72 of the Armed Forces Act. The section placed a cap of 8 days and provided that if an officer was not court martialled within this period, a report giving reasons must be made to a senior officer.

41. Mr. Mureithi, referred to section 148 of the same Act which he submitted creates an offence of irregular arrest and confinement relating to the 8 day limit on pre-arraignment detention. Section 86 therefore did not intend to create circumstances of detention without trial for members of the armed forces. He referred to a case from Lesotho referred to in **Peter M. Kariuki –v- Attorney-General** ***(supra)*** in which a similar issue arose where the court observed that the A.G. would need to explain the

delay prior to arraignment of members of the armed forces.

42. With regard to the argument that the state could not get enough information to defend, his response was that the state should have deponed to this in an affidavit to show the difficulty in obtaining the information required. He argued that the state must have the information and so cannot be heard to say that it has no access to records and information.

43. On the respondent's argument that no medical evidence had been tabled by the applicants, the position taken by Mr. Mureithi was that without evidence from the state, the court must take the statements of the applicants with regard to torture. He referred in this regard to the case of **Harun Thungu Wakaba –v- A.G** ***(supra)*** and contended that if the applicants assert injuries, they may require to prove the injuries with medical documents, but if they assert confinement and ill treatment, they do not have to produce medical evidence.

44. With regard to the claim by the applicants for their dues and the position taken by the state that this was a matter for the Industrial Court, Mr. Mureithi submitted that the issue was raised as an aspect of cruel and inhuman treatment. He argued that the court in **Dominic Arony –v- A.G** ***(supra)*** found that to terminate the services of the applicants was cruel and degrading treatment.

The Respondent's Case

45. Mr. Onyiso, in opposing the applicants' case, relied on the grounds of opposition dated 11th July, 2011 and the submissions of the same date. He addressed himself first to the issue of admissibility and asked the court to note that under Section 86(2) and (3) of the old Constitution, the issues of discipline of the armed forces were removed from the jurisdiction of the court. The issues before the court arose out of disciplinary proceedings. Where the applicants were court martialled, there is no indication that they challenged the decision of the court martial in the High Court, meaning that they agreed with the decision and it still stands today.

46. He submitted that there had been inordinate delay in filing the proceedings. The Originating Summons was filed in 2005, yet the violations are alleged to have occurred after the coup in 1982. Under these circumstances, the state is denied a very vital right of fair trial as tracking witnesses to rebut the applicants' allegations or even tracing documents is not easy. In the circumstances, for the state to defend the applicants' allegations is an uphill task, and he asked the court to hold that the state is denied a right to a fair hearing as most documents are destroyed within 5 years.

47. With regard to the issue of dismissal of the applicants from the Air Force, Mr. Onyiso submitted that the issue should not be before the court. It was a matter that should be before the Industrial Court.

48. On the allegations of torture, Mr. Onyiso submitted that there was a lot of material non-disclosure as the medical reports are not there.

49. With regard to the claim for damages, the respondent argued that the court has no material before it to enable it assess the damages to be awarded to each applicant. Evidence of injuries suffered during torture would enable the court assess the damages, but there was none before the court.

50. Mr. Onyiso therefore prayed that the application be dismissed with costs. He submitted, however, that should the court be minded to grant damages, it should grant a nominal figure in the region of the figures awarded in the case of **Harun Thungu Wakaba -v-A-G** ***(supra)***

Issues for Determination

51. From the pleadings and submissions in this matter, I take the view that the issues that arise for determination are in three categories. The first relates to the technical objections raised by the respondent with regard to **admissibility** and **limitation** of the applicants' claim. The second pertains to the **alleged violation of the applicants' fundamental rights and freedoms** as guaranteed under the old

Constitution. The last category relates to the issues pertaining to the **dismissal of the applicants from service with the Kenya Air Force.**

Admissibility

52. The respondent argues that under Section 86(2) and 93 of the old Constitution, discipline of the armed forces was removed from the jurisdiction of the court. Since the issues before the court arose out of disciplinary proceedings and the applicants were court martialled and did not challenge the decision of the court martial in the High Court, they agreed with the decision of the Court Martial and the decision still stands today. On their part, the applicants take the position that section 86 of the Old Constitution does not oust the original and unlimited jurisdiction of this court under section 60 of the Old Constitution and that section 84 of the old Constitution gave access to the High Court to everyone in Kenya to enforce their fundamental rights and did not exclude members of the armed forces or even foreigners.

Section 86(2) of the old Constitution provided as follows:

(2) In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 71, 73 and 74.'

Thus, it is clear that the constitutional guarantees to freedom from deprivation of life, being held in servitude and from torture extended to members of the disciplined forces such as the applicants in this case. However, the section excluded section 72 on personal liberty and section 77 with regard to fair trial.

53. Mr. Mureithi, while conceding this limitation, contended that section 72 of the Armed Forces Act contained provisions that prohibit inordinate pre-arraignment detention. This section provides as follows:

72. (1) The allegations against a person arrested under section 70 or section 71 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest.

(2) Wherever any person subject to this Act is arrested and remains in custody for more than eight days without his being tried by court martial or dealt with summarily -

(a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and

(b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a court martial sits or the offence is dealt with summarily or he is released from arrest:

Section 48 of the armed forces act provides as follows:

(1) Any person subject to this Act who, when another person subject to this Act is under arrest -

(a) unnecessarily delays the taking of such steps as it is his duty to take for investigating the allegations against that other person, or for having the allegations against that other person investigated by his commanding officer or the appropriate superior authority or tried by court martial; or

(b) fails to release, or effect the release of, that other person when it is his duty to do so, shall be guilty of an offence.

54. Clearly, therefore, even though the constitution did limit application of the constitutional provisions in respect of members of the armed forces, the provisions of the statute applicable to the armed forces

protected the right not to be held unduly without being subjected to trial, and indeed made it an offence for a person who is under a duty to do so to fail to take steps for the trial of the arrested person. Indeed, the provisions of section 72 and 48 of the Armed Forces Act were in line with the provisions of the Constitution. Any undue delay would therefore, in my view, give rise to a claim by the officer concerned and I therefore find that the applicants claim is admissible before this court.

Limitation

55. The respondent argues that there has been inordinate delay in filing these proceedings. This issue has been addressed by this court in several decisions, among them **Dominic Arony Amolo -v- The Hon. Attorney General (supra),** ***Harun Thungu Wakaba & Others v The Attorney General*** **Nairobi HC Misc. Appl. 1411 of 2009(OS),** ***Wachira Weheire v The Attorney General*** **Nairobi HC Misc.1184 of 2003(OS),** ***Rumba Kinuthia & Others v The Attorney General,*** **Nairobi HC Misc. Appl. No. 1408 of 2004,** ***Cornelius Akelo Onayngo & Others v The Attorney General*** **Nairobi HC Misc. 233 of 2009 (Unreported),** ***Oduor Ongwen & Others v The Attorney General*** **Nairobi Petition 777 of 2008 (Unreported),** ***Rev Lawford Imunde v The Attorney General*** **Nairobi Petition No. 693 of 2008 (Unreported).**It is therefore, I believe, no longer open to the respondent to raise this issue and cite limitation to defeat a claim for breach of fundamental rights. Indeed, even had the issue of limitation been open, while the respondent submits that the state is prejudiced by the delay in filing the application, it has not tendered any evidence by way of affidavit to show the nature of the prejudice suffered as a result of the delay.

Violation of the Applicants' Fundamental Rights

56. The applicants argue that the circumstances of their arrest, detention, trial, conviction, imprisonment and treatment after conviction following the coup attempt of August, 1st 1982, constituted a breach of their rights and freedoms under the constitution then in force. They cite violation of their right to liberty, security of the person and the protection of the law as provided for in section 70(a) of the Constitution of Kenya, right to liberty guaranteed under section 72; right not to be held in servitude guaranteed under section 73(1) and the right not to be subjected to cruel and inhuman treatment in breach of section 74. They also argue that their respective trials-in the case of those who went through some form of trial- were not fair trials and were in contravention of section 77(a) of the Constitution of Kenya.

57. From the evidence before the court, all the applicants were arrested, detained for lengthy periods, the minimum of which was about 2 months. The 1st applicant was arrested and detained, and though he was arraigned before a court martial and pleaded guilty, he was never tried. The 2nd, 4th, and 5th applicants were never tried. They were arrested, detained and then dismissed from service. The 3rd, 6th, 7th, 8th 9th and 10th applicants were charged before the Court Martial sitting at Lang'ata Barracks, and all pleaded guilty on the advice of Counsel whom they had not freely chosen.

58. The applicants have all detailed the kind of treatment they received after their arrest, during detention and after conviction in the case of those who were charged before a court martial and pleaded guilty. As set out in the analysis of the applicants' respective cases above, the treatment ranged from brutal physical assaults, confinement in solitude, denial of food and water and medical treatment, and detention in water-logged cells or in the same cell as convicted and insane prisoners. Following the lengthy periods of detention, most of them aver that they succumbed and signed self-incriminatory statements on the basis of which they were charged before a Court Martial, pleaded guilty and were convicted on their own pleas of guilty.

59. As noted above, the facts as adduced by the applicants have not been controverted by the respondent. The High Court in the case of **Dominic Arony Amolo –v- The Hon. Attorney General (supra)** cited with approval the decision of the Court of Appeal in **Rashid Odhiambo Allogoh and 25 Others –v- Haco Industries Ltd C.A. No. 110 of 2001** that-

'...if the court had found that the facts were as stated by the appellants, then the court would have to

move to the next stage, namely do the proved or admitted facts constitute or amount to a violation or contravention of the constitution?

In the case of **Cornelius Akelo Onyango** ***(supra)*** the court noted after analysing several cases, that without evidence to controvert the averments by the applicants, the court would have to take them as uncontroverted. This is the position in this case.

60. The post 1st August 1982 period was notorious for the gross violation of human rights that followed the attempted coup. While not conceding that the violation of rights in the form of torture did occur, the respondent tacitly does so by its failure to file any response to controvert the averments by the applicants , and by its contentions in its submissions that '***a threat to the constitutional order or acts or omissions likely to cause a constitutional crisis cannot be compromised with individual rights and freedoms***' thereby seeming to justify the violation of the applicants' rights. There is therefore nothing before me to controvert the averments by the applicants, and I now turn to consider whether the facts presented by the applicants constitute violations of the applicants' constitutional rights.

Detention Before Trial

61. The applicants cite various judicial decisions with regard to the issue of pre-arraignment detention, among them the cases of **Ann Njogu & 5 Others –v- Republic High Court Misc. Appl. Bo. 551 of 2007; Albanus Mwasia Mutua -v- Republic Criminal Appeal No. 120 of 2004(Unreported)** and **Paul Mwangi Murunga -v- Republic Criminal Appeal No. 35 of 2006(Unreported).** This issue has now been comprehensively addressed by the court of Appeal in **Julius Kamau Mbugua -v-Republic Criminal Appeal No 50 of 2008** where in its decision delivered on the 8th of October 2010, the Court, after analysing various past decisions on the matter including the ones cited by the applicants held that a violation of the rights under Section 72(3) (b) entitled the accused person to damages under section 72(6). All the applicants in this case were detained before charge for periods ranging from 2-7 months. No explanation has been given for the detention, and I therefore find and hold that the applicants' rights under section 72(3) were violated and that they are entitled to damages.

Freedom From Servitude

62. The applicants allege that their rights under section 73(1) not to be held in servitude were violated by their being held in pre-trial detention and cite the case of **Dominic Arony Amolo -v- A.G.** ***(supra)*** in support. In that case, the court found that the holding of Amolo in prison for 9 days after the High Court had ordered his release amounted to holding him in servitude. I am, however, unable to follow the decision of the court in that regard in this matter. First, the circumstances of the applicants in this case differ, in my view, from those of the petitioner in the **Dominic Arony Amolo** case where a specific order had been made by the High Court for the release of the petitioner. No such order had been made in respect of the applicants in this case. More importantly, however, I take a different view of the meaning of ***'servitude'*** as used in Section 73 of the old Constitution. The section provides as follows:

73. (1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

The term '***servitude'*** is defined by Black's Law Dictionary as-

The condition of being a servant or slave or the condition of a prisoner who has been sentenced to forced labour. (Penal servitude)

From the evidence before me, there is nothing to indicate that the applicants were held in conditions akin to those of a servant or slave or that they were compelled to engage in forced labour. I therefore find no violation of their right under section 73(1).

Inhuman and Degrading Treatment

63. The applicants allege violation of their rights under Section 74 not to be subjected to cruel and inhuman treatment. I have already set out in some detail the averments of the applicants with regard to their treatment by the respondents while in custody. I would agree with the court in the case of **Dominic Arony Amolo-v-A.G** (supra) citing with approval various decision from other jurisdictions, that in the absence of sensible answers by the respondent to the complaints by the applicants, the conditions to which the applicants were subjected in the various prisons in which they were held following their arrest after the 1982 attempted coup were cruel and inhuman contrary to the provisions of section 74 of the old constitution.

Right to A Fair Hearing

64. The applicants also allege violations of their rights under section 77(1) of the constitution which provides that '***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.'***

The Court of Appeal also addressed itself to the issue of the right to a hearing in the case of **Julius Kamau Mbugua-v-Republic (supra)** when it observed, at page 43 of its judgment, as follows:

'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 trial to ensure that the right to speedy trial is observed.'

The 1st, 2nd, 4th and 5th applicants were not tried at all, so I make no findings with regard to their rights under this provision of the constitution.

65. With regard to the 3rd and the 6th -10th applicants, they were arraigned before a court martial and were convicted on their own pleas of guilty. Given the circumstances in which they were charged before the court martial after lengthy periods in detention, one may well have doubts about the fairness of their trials before the court martial. However, they had a right to challenge the decision of the court martial in the High Court, as the petitioner in the case of **Dominic Arony Amollo -vs- A.G *(supra)*** had done. It is now not open to this court to re-open the decision of the court martials with regard to the applicants. I therefore make no findings with regard to their rights under section 77.

Dismissal By 82 Air Force

66. I will now deal with the argument pertaining to the dismissal of the applicants by an entity known as 82 Air Force. The applicants submit that after the 1982 attempted coup, the Kenya Air Force was disbanded and an entity known as 82 Air Force was purportedly created. They argue that this was an illegal entity and rely on the case of **Cpt. Geoffrey Kujoga Murungi –v-The Attorney General Misc. Application No. 293 of 1993.** They ask the court to declare that their dismissal by this entity was null and void, and the applicants are still members of the Kenya Air Force, established under the Kenya Armed Forces Act. The critical question in this regard is whether the dismissal of the applicants is a constitutional issue that this court should determine, and in my view, the answer is in the negative. The constitutional safeguards in the old constitution were intended to safeguard the fundamental rights and freedoms set out in the constitution. They did not extend to protection of labour relations. The question of the legality or otherwise of the termination of the applicants employment is a question that should have been addressed to a different forum. In this respect, I agree with the submissions of Counsel for the respondent that it is an employment issue and has no place in this application.

Damages

67. Having found as above in this matter, I now turn to consider the remedy that is available to the applicants for violation of their rights in the aftermath of the attempted coup. Mr. Mureithi for the applicants urged the court to award general damages either in a global amount in respect of all the

violations or to award a separate sum for each violation. He also urged the court to award exemplary/vindicatory damages on the authority of the case of **Attorney General –v-Ramanpoop (2005) 4 LRC 301** and **Merson –v-Cartwright and Another (2006)3 LRC 264** and to consider higher awards than those given in this jurisdiction.

68. Mr. Mureithi urged this court to be guided by the principles in the case of **Peters –v- Marksman & Another (supra)** with regard to the award of damages. The damages awarded should be such as to deter repetition of violations, secure effective policing of constitutional rights, and recompense for inconvenience and distress suffered. He proposes the test in arriving on an award of damages as being whether there has been an acknowledgement of the violation and an offer to settle and apologise for the violation.

69. It is well settled that this court has jurisdiction to award damages under Section 84 of the old Constitution, and that the award of damages is within the court's discretion. In considering the award to make in this case, I consider that the violations of the applicants' rights occurred thirty years ago, in the aftermath of an attempted coup against the government, and in circumstances in which the citizenry in general suffered considerably from a one party dictatorship. Those responsible for the violations are not before the court today, and any award of damages would be paid out of the public purse. In my view, therefore, there is a need to balance the rights of the applicants to recompense for the violation of their rights under the constitution and the public interest, and to award the large amounts sought by the applicants in this case would not be in the public interest. Any award made would serve as an acknowledgement of the violation and distress suffered by the applicants, but it cannot act as a deterrent of violations as it would not be directed at, and would not be paid out by, those responsible for the violations.

70. I am also not persuaded to award exemplary damages in this matter. I appreciate the sentiments expressed by the Privy Council in the case of **Attorney General -v- Ramanpoop** ***(supra)*****,** referred to by the applicants that-

'An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches...."

In the current circumstances, I take the view that the award of an additional amount as suggested in the Ramanpoop case is not called for. The award of general damages for the unconstitutional actions against the applicants in the events that followed the 1982 is sufficient acknowledgment of the wrongs committed against them. To award both general and an additional award as exemplary damages would in the circumstances be to make a double award in respect of the same violations.

71. I therefore award general damages to each of the 10 applicants as Follows-

i) **JAMES MWANGI WANYOIKE-Kshs.**3,000,000.00

ii) **ANTONY NDIANGUI WAIGANJO-Kshs.**2,500,000.00

iii) **JOHN KIPSANG LETING** Kshs.2,000,000.00

iv) **SAMMY KAHARUA NGOMBO** Kshs.3,000,000.00

v) **ROBERT CHELUGO MININGWO** Kshs.3,000,000.00

vi) **SIMON NJIRU KINYUA** Kshs.2,000,000.00

vii) **TITUS TUMBO NGIO** Kshs.2,000,000.00

viii) **STEPHEN MWANGI MARION** Kshs.2,000,000.00

ix) **DEAVANS CHILELO MWANGADE** Kshs.2,000,000.00

x) **MOHAMMED OMARI MWAMANENO** Kshs.2,000,000.00

72. The applicants shall also have the costs of this application and interest from the date of judgment till payment in full.

73. In making these awards, I am conscious, from the evidence before me, that some of the applicants were not even on duty at the time of the alleged coup, and never even had a chance to articulate their innocence as they were never brought before a court to plead to the alleged charges against them. The awards can only be an acknowledgment that their rights were violated and can never fully atone for the wrongs inflicted on them by the state.

74. I am grateful to the Counsel appearing for the parties in this matter for their diligence in prosecuting their respective cases.

Dated and Delivered at Nairobi this 15TH day of February, 2012.

Mumbi Ngugi
Judge