



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MILIMANI LAW COURTS**  
**PETITION 737 OF 2009**

**KOIGI WAMWERE.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL .....RESPONDENT**

**JUDGMENT**

**Introduction**

1. In his petition dated 30<sup>th</sup> December 2009, the petitioner alleges violation of his constitutional rights as a citizen of Kenya as guaranteed by the former Constitution at **Section 72 (1) 72(3), 72(5), 74(1), 77(1)**. The petition seeks the following order:-

**(a) A DECLARATION** that the petitioner's Fundamental Rights and freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents, employees and in its institutions during the 1<sup>st</sup> and 2<sup>nd</sup> **DETENTIONS WITHOUT TRIALS** and for 8 days at Nyayo House Torture Chambers and in the Attempted Robbery with violence case at **NAKURU CRIMAL CASE NO. 2273/93 RVS KOIGI WAMWERE AND THREE (3) OTHERS**.

**(b) A DECLARATION** that the petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundament rights and freedoms under the aforementioned provisions of **THE CONSTITUTION**.

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

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

**(e)** Costs of the suit, and interest.

The petition is supported by an affidavit sworn by the petitioner on 30<sup>th</sup> December, 2009 and a supplementary affidavit filed by leave of the court sworn on 30<sup>th</sup> June 2011.

2. The petitioner filed written submissions dated 11<sup>th</sup> July 2011 together with a list of authorities of the

same date. The respondent did not file a replying affidavit but filed written submissions dated 21<sup>st</sup> February 2012 and a bundle of authorities that it was relying on in opposition to the petition.

3. The petitioner's case is that he is a citizen of Kenya entitled to the enjoyment of the fundamental rights and freedoms of the individual enshrined in the former constitution of Kenya. He alleges that his rights under **Sections 72 (1) 72(3), 72(5), 74(1), 77(2) and 79(1)** of the former Constitution were violated by special Branch Police Officers and other Kenya Government servants, agents, employees and institutions in four instances. He cites these instances as being:

(i) During his first detention without trial between 9<sup>th</sup> August 1975 to 12<sup>th</sup> December 1978;

(ii) During his second detention without trial from 5<sup>th</sup> August 1982 to 12<sup>th</sup> December 1984;

(iii) During his incarceration at the Nyayo House Torture Chambers for 11 days from 8<sup>th</sup> October 1990 to 19<sup>th</sup> October 1990;

(iv) During his arraignment for fake robbery with violence charges from 5<sup>th</sup> November 1993 to December 1996 in ***Nakuru Chief Magistrate Criminal Case No, 2273/93 R -v- Koigi Wamwere and Three (3) Others.***

4. This being a petition for the enforcement of fundamental rights, the petitioner has the burden of showing which provisions of the Constitution were violated in relation to him by state agents, and the manner in which they were violated. See the case of ***Anarita Karimi Njeru -v- Rep (1979) KLR 154.***

5. The position taken by the respondent is that the petitioner has not proved any case with any probability of success. This, according to the respondent, is because the petition lacks clarity and precision in settling out the alleged violations. The respondent refers to the case of ***Paul Mungai Mimani & 21 Others -v- Attorney General & 2 Others MISC APPL, No. 1366*** for the proposition that a petitioner seeking redress from the High must set out with a reasonable degree of precision that which he or she complains of. The respondent argues that the petitioner has not done this.

6. The respondent also argues that there is no proof that the alleged violations were committed by the officers of the government and submits that it may be that they were committed by private person in which event the government is not liable. The respondent cites the case of ***Alphonse Mwangemi Munga & 16 Others -v-African Safari Club Limited Petition No. 564 of 2004.***

7. The respondent's third argument against the petitioner's case is that although in matters of constitutional petitions for violations of fundamental human rights, a High Court judge has wide discretion as set out in the case of ***Adei Mohammed Abdulkader Al Daihas -V- Attorney General & Others MISC. CIVIL APPL. 1546 OF 2004,*** the petitioner must present before the judge materials to enable the judge exercise his discretion soundly, and in the present case, no such materials have been set out and therefore the judge has nothing to enable him/her exercise discretion. Finally, the respondent contends that the petition is stale and should not be entertained by the Court.

8. I will address the contentions by the respondent in the course of this judgment. I must observe, however, that the first argument by the respondent must fail. The petitioner has set out in great detail in his petition and supporting affidavits, particularly the supplementary affidavit which runs to more than 140 paragraphs, the ways in which he believes his rights under sections **72 (1) 72(3), 72(5),74(1), 77(2) and 79(1)** were violated by the state or state agents. The court is concerned about the contents of some of the paragraphs in the supplementary affidavit, in particular paragraphs 6, 12, 14, 15, 16, 27, 31, and 32 which it will strike out as offending the provisions of Order 19 of the Civil Procedure Rules, 2010 on the contents of affidavits. Similarly, the court is of the view that the contents of paragraph 17 among others, which are based on or refer to material from the petitioner's book, '***Conscience On Trial***' have no probative value. However, the contention by the respondent that the petition lacks clarity is clearly untenable.

9. The petitioner has alleged violation of several provisions of the former Constitution. Section 72 contains the guarantee of personal liberty and provides as follows:

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

***(2).....***

***(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) .....***

10. Section 74 prohibited torture and provided as follows:

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

11. At section 77, the Constitution provided that-

***(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;***

Finally, section 79 (1) provides that-

***‘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 he to the public generally or to any person or class of persons) and freedom, from interference with his correspondence.’***

13. I will deal with the alleged violations of the petitioner’s rights protected by the constitution provisions set out above in relation to the two periods of detention without trial, the incarceration at **Nyayo House and the arrest, trial and imprisonment in Nakuru Chief Magistrate Criminal Case No. 2273/93 R - v- Koigi Wamwere and Three (3) Others.**

### **Detention Without Trial**

14. The petitioner avers that he was detained twice without trial. On the first occasion, he states that he

was arrested on 9<sup>th</sup> August 1975 by Special Branch Officers at Nakuru Town and locked up at Elburgon Police Station. On 3<sup>rd</sup> September 1975, he was detained without trial when he was served with a detention order which he avers was backdated to 15<sup>th</sup> August 1975. The detention order was signed by then Minister for Home Affairs, D.T. Arap Moi.

15. According to the petitioner, the detention order stated as follows:

**“You are detained on the following grounds: that you have consistently been in contact with and work with persons who are hostile to the popularly elected Government of Kenya and his Excellency the president. That your intention with this hostile elements was the overthrow by violence of the Government of Kenya..... In exercise of the powers conferred by Regulations 1966, the minister of Home Affairs being satisfied that it is necessary for the preservation of the public security to exercise control beyond that afforded by a restriction order by Michael Koigi Wamwere, (herein referred to as the detained person) HEREBY ORDERS that the detained person shall be detained’.**

The petitioner argues that the detention order was wrongful as it did not specify the persons he was allegedly conspiring with. He did not attach a copy of the detention order to his affidavit.

16. In the second instance of detention without trial, the petitioner avers that he was arrested on 5<sup>th</sup> August 1982 when he was the Member of Parliament for Nakuru North. He was informed on the 6<sup>th</sup> August 1982 by Police Officers that he had been detained without trial for the second time.

17. The petitioner gives graphic details in his affidavit of the degrading treatment that he underwent while in the prison where he was held during his detention without trial:

***THAT in a nutshell, my detention was unlawful because the detention order unlawfully withheld detailed grounds for my detention as demanded by section 27(2) (a) of the Constitution, detention was executed not to preserve public security as claimed by the detention order but to silence me and suppress democracy that the Constitution did not provide for, the detaining government was an unconstitutional one-party dictatorship that was constitutionally regularized by section 2A in June 1982 and in the process of detaining me, police violated the law and my legal rights.***

18. At paragraph 11 he depones as follows:

***11. THAT my detention was unlawful because, the detention order contrary to Section 27(2) (a) of the Constitution did not disclose to me in detail, the persons that I had communicated with that were hostile to the government, reasons why those persons were hostile to the government, how I shared their hostility to the government and why my alleged association with them was a threat to public security and necessitated my detention.***

19. He also avers at paragraph 19 as follows:

***THAT my detention was also unlawful because though I was arrested and detained on 9<sup>th</sup> August, 1975, I was not given my detention order until 3<sup>rd</sup> September, 1975 in contravention of section 27(2) (1) (a), 25 days after my arrest and detention instead of 5 stipulated by the law.***

20. The petitioner repeats similar averments with regard to the second period of detention.

21. This court takes the view that detention without trial as practiced in the sixties, seventies, eighties and nineties under the constitutional and legislative provisions then in force is a reprehensible violation of the individual's rights and freedoms. Under the Constitution promulgated in 2010, it is permitted, under Article 29, only during a state of emergency, such detention to be subject to the provisions of Article 58 which permits a state of emergency to be declared ***only under Article 132 (4) (d) and only when-***

**(a) The State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and**

**(b) The declaration is necessary to meet the circumstances for which the emergency is declared.'**

Hopefully, the occasions for declarations of states of emergencies will be few and far between, and no Kenyan will have to languish for years in detention without being afforded a fair trial as was the case in the past.

22. However, and this the petitioner recognises tacitly, detention without trial was specifically provided for under the former Constitution. Section 83 provided as follows:

**83. (1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 85** (Emphasis added)

23. Section 83 (2) provides that-

**Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply-**

**(a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;**

**(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized;**

24. Given these provisions of the Constitution and the provisions of the Preservation of Security Act, the detention of the petitioner in both instances was permitted under the Constitution and legislation and was therefore, in and of itself, not in violation of his constitutional rights. Section 4(2) (a) of the repealed **Preservation of Public Security Act, Cap 57** of the Laws of Kenya, read together with the repealed **Public Security (Detained and Restricted Persons) Regulations** provided that if the Minister was satisfied that it was necessary for the preservation of public security to exercise control beyond that afforded by a restriction order over any person, he could order that that person be detained.

25. The reference to the provisions of section 27 of the former Constitution in the petitioner's affidavit is unclear as the section refers to the exercise of the Presidential Prerogative of Mercy. What is clear, though, is that the petitioner deems his detention, though provided for by law, as unlawful for failure to contain specific details for the detention, and for failing to comply with the time lines with regard to the service of the detention order.

26. The question then is whether the failure to give specific details as to the reasons for the detention of the petitioner, and the failure to give him the detention order within 5 days, amounted to a violation of his rights under the Constitution. It is regrettable that the petitioner, though setting out the contents of the detention order, did not deem it fit to annex a copy of the order to the affidavit so that the court can make a proper assessment of the contents of the order. Be that as it may, was the failure to specify the reasons for the detention to him or to serve him with the detention orders within the time specified in the law sufficient to make the detention unlawful?

27. This issue was considered by the High Court almost thirty years ago in the case of **R-v-The Commissioner of Prisons Ex parte Kamonji Kang'aru Wachira & 3 Others Civil Case No. 60 of 1984**.

In that case, **Kamonji Kang'aru Wachira, George Moseti Anyona, Dr, Edward Oyugi, and Koigi wa Wamwere**, the petitioner in this case, had applied for a writ of Habeas Corpus requiring the Commissioner of Prisons to show cause why they should not be released. After considering various judicial precedents, the High Court cited with approval the words of Sir Udo Udoma, CJ in **Uganda v Commissioner of Prison (ex-parte Matovu), (1966) E.A. 514** as follows:

**"Insufficiency of the statement of the grounds of detention served on the applicant is a mere matter of procedure. It is not a condition precedent but a condition subsequent. We therefore hold that it is not fatal to the order of detention made by the minister."**

28. In the same case, the High Court considered the issue regarding - 4, when the detention order should be served on the detained person. It observed as follows:

**"The Public Security (Detained and Restricted Persons) Regulations make provision in Regulation 10(1) for serving a detention order as soon as reasonably practicable and in any case not more than 5 days after the commencement of his detention. The detained persons in the present case were duly served. Detention under the Preservation of Public Security Act commenced in my view on the date of the detention order where the person to be detained is already in custody and in other cases with the services of the detention order."**

29. The court noted that it was fortified in the above view by the words of the court in **Uganda v Commissioner of Prison (ex parte Mato vu) (supra)** in which the court (Sir lido Udoma, O, Sheridan, J. (as he then was) and Jeffreys Jones, J) stated as follows:

**"To constitute a detention under regulation 1 of the Emergency Powers (Detention) Regulations 1966 an order signed by the minister authorizing such a detention must be served on the detainees and it is after such service that it could be said that the person was detained by the minister in the exercise of his powers under the Regulations; and it is only then that the time prescribed under the Constitution would begin to run."**

30. The High Court (A.H. Simpson J) thus made a clear finding that there was no violation of the parties rights arising from their detention without trial or with regard to the contents of the detention orders. The issues raised by the petitioner in this petition with regard to his detention without trial were therefore fully canvassed before a court of competent jurisdiction close to thirty years ago. The decision was never appealed from.

31. The respondent has argued in his submissions that this petition is stale and should not be entertained by the Court as the petitioner has not stated why he slept on his rights, However, this is a question not so much of the petitioner sleeping on his rights, but of the petitioner trying to re-litigate matters which had been litigated and determined by this Court decades ago. The court is being asked not only to inquire into the issue of the petitioner's detention under the law that was in force when the detentions took place, but also, in a sense, to sit on appeal on the decision of Simpson J in **R-v-The Commissioner of Prisons Ex parte Kamonji Kang'aru Wachira & 3 Others (supra)**. The petitioner has explained his failure to take up the issue of his detention until 2009 on the basis that it was not possible to do so during the Presidency of Kenyatta and Moi, and after President Moi left power, he explained the failure to act on the basis that it was not possible to do so without judicial reforms.

32. It is noteworthy, however, that many of the decisions that the petitioner relies on in support of his claim for damages were filed in the early years of this century, around 2003 and 2004, when the petitioner was a Member of Parliament and indeed in government. The judiciary whose reform the petitioner says he was awaiting made decisions that have helped to develop jurisprudence in favour of protecting the fundamental rights and freedoms of the individual under the Constitution. The explanation for the failure to file suit earlier is therefore not tenable and may be better explained by the fact that the petitioner had already filed a suit, with others, on the same issues with regard to his detention which he now seeks determination of.

## **Nakuru Chief Magistrate Criminal Case No. 2273/93**

33. The petitioner alleges violation of his rights under the Constitution following his arrest and charging in court with treason in Nairobi Chief Magistrate's Criminal Case No. 29 of 1991. He was arrested on 8<sup>th</sup> October 1990 and charged in court on 19<sup>th</sup> October 1991 with treason. He avers that while in custody he was kept in **Block G**, a block for condemned prisoners at Kamiti Maximum Security Prison. He avers further that he and his co-accused were saved by the mothers of political prisoners who camped at Uhuru Park's Freedom Corner from January 1992 to 19<sup>th</sup> January 1993. The state thereafter entered a nolle prosequi in the matter on 19<sup>th</sup> January 1993.

34. The petitioner was therefore held in custody for a period of 11 days before he was charged in court. Under the provisions of section 77, he should have been charged before a court within 14 days of his arrest since he was charged with treason, then a capital offence punishable by death under section 40 of the Penal Code. Capital offences were not, under the former Constitution, bailable. Being held in custody for 11 days under the provisions of the former Constitution and the Penal Code, when charged with treason, did not therefore amount to a violation of the petitioner's rights.

35. The petitioner avers that on 5<sup>th</sup> November 1993, he was again arrested and on 9<sup>th</sup> November 1993, he was charged with attempted robbery in Nakuru Chief Magistrate's Court Criminal Case No 2273 of 1993 which he claims was a fabricated criminal offence. He alleges that the trial was full of legal and constitutional irregularities in which his lawyer, relatives, and family friends and members of the public were harassed by police and other state agents and the court refused to record the defence evidence and even banned the accused persons from attending their own trial and judgment which, according to the petitioner, was in violation of his right to a fair trial as provided under Section 77 (1) and 77(2) of the former Constitution.

36. The petitioner avers, however, that in November 1997, both the conviction and sentence were quashed by the High Court in Nairobi and he was set free. He therefore argues that the quashing of the convictions and his release showed that the criminal charges were for persecution purposes and denial of his personal liberty contrary to the provisions of Section 72 (1) of the Constitution.

37. The question that the court must address itself to is whether the circumstances detailed by the petitioner with regard to his trial, conviction, appeal and acquittal of the charges in **Nakuru Chief Magistrate Criminal Case No. 2273 of 1993** indicate a violation of the petitioner's rights under the Constitution, and if so, whether this court should at this stage re-open and pass judgment on the issue. The petitioner states that the High Court heard his appeal and that of his co-accused and quashed his conviction. That the petitioner and the others could file an appeal and get a hearing leading to their acquittal on the charges in the lower court is, in my view, an indication that the legal process was working and that the remedies for the alleged violation of his constitutional rights were available to him. He could at that point in time have raised the issues that he now raises in this petition and filed suit for malicious prosecution if this is what the acquittal implied.

38. However, the acquittal of a person on appeal from a criminal conviction does not in and of itself imply that the trial was malicious or that the charges were fabricated. Malicious prosecution is a tort for which a civil remedy was available to the petitioner, and a suit for malicious prosecution in which evidence could have been called would have been the proper forum for questioning the trial in the magistrate's court. I am therefore unable to make a determination on the violation of the petitioner's rights with regard to this trial.

### **Torture Cruel and Degrading Treatment**

39. The petitioner alleges that he was subjected to various acts of torture while in detention in the two instances detailed above, while in prison and while he was detained for 11 days at the Nyayo House torture chambers. Section 74 of the former Constitution provided that no-one shall be subjected to torture, cruel and degrading treatment. The International Convention Against Torture defines torture in Article 1

as follows:

*For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

40. Within our jurisdiction, the High Court has considered the definition of torture 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** in which Justice Nyamu, after citing various authorities, stated as follows:

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

41. The petitioner has in his supplementary affidavit given details of what he considers to be the acts of torture that he was subjected to. He sets out the alleged acts of torture that he experienced as follows:

**Paragraph 23. THAT in summary, our detention constituted the following tortures:-**

**Para: 23(a) Unlawfully never giving me real political reasons for my detention. This concealment was in order to deny me moral strength to survive detention in the knowledge of my innocence. You break easily in detention when you are made to feel like an ordinary criminal rather than one making a necessary sacrifice for the cause of freedom, justice, democracy and humanity.**

**(c) Being imprisoned while innocent of any crime that caused me indelible hurt and pain.**

**(d) Being detained indefinitely that had the terrible effect of life imprisonment or a punishment without end.**

**(e) .....**

**(f) Wrecking incalculable psychological and mental havoc by keeping me in detention within a prison and treating me worse than a convict when I was innocent that gave me the bitterest taste of injustice.**

**(g) Segregating me from convicted prisoners, isolating me from other detainees, removing me from my family and confining me to a tiny piece of the world called a cell for 23 and half hours daily all combining to deny me life that makes sense only when it is happy.**

**(h) Exposing me to mosquitoes and malaria that revealed to me a deliberate plot by government to kill me.**

**(i) Not allowing my child to see me during visits cause me lots and lots of anguish and pain.**

**(j) Not allowing me to read a newspaper, listen to a radio or in any way know what was happening in the country was forcing me to live in perpetual darkness, in itself a terrible inhumanity.**

42. At paragraph 25, the petitioner avers as follows:

***THAT while under the unlawful detention and solitary confinement, my torture was enhanced with bad, half-cooked ugali and electricity dried, hard and impossible to chew beans that wrecked havoc to my health. When we asked authorities for better food, the diet was never changed under the claim that, as African detainees, we were only entitled to food scale A for Africans and not food Scales B,C or D that were meant for Non-African detainees.***

43. He depones further at paragraph 26 as follows:

***THAT my detention unlawfully subjected me to racial discrimination when it fed me food scale A meant for Africans and reserved better foods for white and brown detainees. In reality, this discrimination denied me foods like rice, potatoes, chapati, tea or coffee and milk, fried vegetables with meat, bread, butter and eggs that I ate at home before detention. According to prison authorities I could only eat ugali, sukuma wiki and porridge without sugar which was a terrible injury to my health and equally terrible insult to my dignity.***

44. 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 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.

45. In any event, however, given that the detention without trial were already before the court in ***R-v-The Commissioner of Prisons Ex parte Kamonji Kang'aru Wachira & 3 Others (supra)*** in which the allegations of torture by the petitioner could have been raised, I find that the matters are not properly before me.

46. The allegations of torture in the period during which he was held in Nyayo House have not been controverted by the respondent who has confined himself to suggesting that they could have been committed by persons other than state agents. The petitioner has averred that he was subjected to acts of torture between the 8<sup>th</sup> and the 19<sup>th</sup> of October 1990 when he was held in Nyayo House, a place that has been recognised as synonymous with torture in independent Kenya. He avers at paragraph 78 of his affidavit that while confined at Nyayo House, he was beaten, denied food and water, kept naked, and suffered beatings with whips and broken chair legs. The court has no basis for disbelieving his averments, and I find and hold that his allegation that he was subjected to torture contrary to the provisions of section 74 of the former Constitution in the period that he was in custody in Nyayo House between the 8<sup>th</sup> and the 19<sup>th</sup> of October 1990 are made out. I find also, that holding the petitioner with condemned prisoners amounted to a violation of his rights under section 74(1). ***See Domic Amolo Arony -v- A.G. Misc Appl. No. 494 of 2003.***

47. The petitioner alleges that the prolonged period during which he was in exile amounts to a violation of his constitutional rights. No authorities were cited to support this contention. However, the decision to go into exile was a decision made voluntarily and no doubt prudently by the petitioner and his family. I can

find no basis in law or the provisions of the Constitution that would enable me to find a violation of the petitioner's rights under the Constitution.

## **Remedies**

48. My analysis of the matters set out in the petition and the supporting documents leads me to the conclusion that while I sympathise with the petitioner for what were clearly long periods during which his rights and freedoms were interfered with, the interferences were, to a large extent, sanctioned by the Constitution or by legislation enacted under the Constitution. Whatever one's views may be about detention without trial and the constitutional limitations on bail for certain offences, it is difficult to find unconstitutionality in acts that had constitutional and statutory underpinnings. Indeed, while there has always been condemnation of the use of detention without trial, it is instructive that it was retained in the new Constitution under Article 29, 58 and 132, albeit only in the case of a declaration of a state of emergency. As I have also indicated, the petitioner's detention has already been considered by a court of competent jurisdiction and it is not open for me to determine the same issue again. I do find, however, that there was violation of the petitioner's rights under section 74 of the Constitution during the period he was held at Nyayo House and while he was held in Block G of the prison with condemned prisoners.

49. The court has held in various cases over the last decade that where violation of rights under section 74 is established, the petitioner is entitled to damages. The quantum of damages awarded has varied, and the petitioner has cited various cases in which the courts gave different amounts.

50. The petitioner submits that his case is unique

**'both in the frequency of violations of his Fundamental Rights through 2 Detentions without Trials and physical and mental and economic suffering caused to him for the 3 yrs and 2 years Detention periods. Further he suffered 5 years of exile. Then he suffered 8 days of Torture at Nyayo House Torture Chambers and 2 years in Remand Prison while awaiting hearing of the Treason case which never took place (October 1990 to January 1993), Then he was in Remand Prison for 4 years from July 1993 to November 1997 when the Attorney General withdrew the charges at the Appeal Level.'**

51. The court has already made its findings above with regard to the detentions without trial. It must be observed also that virtually all the cases that have come before the court have arisen out of the petitioners' political views which were deemed by the government in power to be subversive or as a threat to the political status quo. The situation of the petitioner was, therefore, not very different from that of others who found themselves on the wrong side of state machinery.

52. The petitioner cites the case of ***Mwangi Stephen Muriithi —v-Hon Daniel Arap Moi Nairobi H, C, Petition No 625 of 2009*** and argues that it is similar to his case in all respects. He submits that the court awarded the petitioner in the Muriithi case general damages of Kshs 50 million and asks the court to award him general damages of Kshs.100 million and exemplary damages of Kshs.100 million making a total of Kshs 200 million.

53. I must, respectfully, disagree. Mr. Muriithi's argument in that case, which the court accepted, was that the former President, while using his powers as the President of the Republic of Kenya, without any lawful cause and excuse, ordered and caused his detention without trial for the purpose of illegally and unconstitutionally depriving him of his rights to certain companies in which they had shared interests. His detention was meant to achieve ulterior commercial advantages for the respondent.

54. The facts of this petition are more in line with others in which the court made awards of damages for acts of torture committed in the Nyayo House torture chambers. The petitioner has correctly cited the cases of ***Dominic Arony Amolo-v-Attorney General Nairobi HCCC Misc Application No 494 of 2003; Rumba Kinuthia-v-Attorney General Nairobi HCCC 1408 of 2004; Bernard Wachira Waheire-v-Attorney General Nairobi HCCC No 1184 Of 2003 and Harun Thungu Wakaba & 20 Others v-Attorney General Nairobi HCCC 1411 of 2004 (OS)*** in which general damages ranging between 1.5 and 2.5 m were awarded.

55. The petitioner also seeks exemplary damages for the violation of his rights by state agents. There is a divergence of opinion in our courts on whether or not exemplary damages should be awarded in addition to general damages for unconstitutional action. While Justice Musinga has in the case of ***Cornelius Akelo Onyango & Others - v- A. G. MC. Petition No. 223 of 2009 (Unreported)*** awarded exemplary damages based on the court's decision in the case of ***Obonyo v Kisumu Municipal Council [1971] EA 91***, this court shares the view expressed by Majanja J in the case of ***Benedict Munene Kariuki and 14 Others -v- The Attorney General High Court Petition No. 722 of 2009 that-***

***In my view, these cases under section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor and the court would consider in awarding exemplary damages.***

56. Doing the best that I can in the circumstances of this case, I make a global award of **Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000.00)** for the violation of the petitioner's rights under section 74 of the former Constitution as set out above. The petitioner shall also have the costs of this suit plus interest on damages from the date of judgment until payment in full.

**Dated and Delivered at Nairobi this 28<sup>th</sup> day of March, 2012.**

**Mumbi Ngugi**

**Judge**