OTIENO MAK'ONYANGO …….PLAINTIFF

VERSUS
ATTORNEY GENERAL ……1St DEFENDANT

DANIEL T. ARAP MO……2ND DEFENDANT

JUDGMENT

BACKGROUND,PLEADINGS AND EVIDENCE:

1.The plaintiff, ***OtienoMak'Onyango*** was**,** at the material time a journalist by profession and working with the Standard Newspaper. Hehas filed this suit to recover general as well as punitive and exemplary damages against the two defendants jointly and severally for unlawful and malicious arrest, search and detention during the aftermath of the attempted *coup d'etat* on 1st August, 1982.

2.The plaintiff claims following prayers:-

(a)General damages

(b)Punitive and exemplary damages

(c)Costs of the suit

(d)Interest (a) (b) and (c)

(e)Any other or further relief this Honourable Court deems fit and just to grant

3.The Plaint in its paragraph 12 gives following particulars for malice and lack of reasonable cause for the arrest and search.

"(i) There was no evidence at all linking the plaintiff with the charge.

(ii) Preliminary hearings were abolished because of lack of evidence to conduct a successful preliminary inquiry.

(ii) Attempts were made to amend the Evidence Act to enable the state to hold and prosecute the plaintiff without consideration of constitutional safeguards.

(iv) Abuse of legal process.

(v) The defendants knew that the plaintiff had no role to play in the attempted coup d'etat in relation to the charge.

(vi)Violence and threats were used against the plaintiff in an attempt to obtain an unlawful confession through self-incrimination.

(vii)Unlawful and irregular identification parades were held using photographs of the plaintiff and other members of the parade instead of a physical appearance of members of the parade in the identification parade.

(viii) Senior officers of government including members of the disciplined forces had prior knowledge or intelligence of the planned overthrow of the government and the said officers included Charles MuganeNjonjo and General Mulinge."

4. The particulars for the claim of false or unlawful imprisonment and detention are specified in paragraph 13 of the plaint. They are:-

"(i) The prosecution against the plaintiff was withdrawn by the defendants.

(ii) There was no evidence of real and threatening danger to State security emanating from the plaintiff.

(iii) The defendants knew that the plaintiff was not a threat to security or participant in the attempted coup d'etat."

5. The plaintiff has further alleged that his arrest, imprisonment, detention, search and torture was cruel, inhuman and degrading and he suffered injury, mental anguish, distress and anxiety, embarrassment and desecration of his personal honour and reputation. These actions violated his fundamental rights under ***Sections 70,71,72 and 77*** of ***the Constitution*** (now repealed).

6. The particulars of the contraventions of ***Section 77*** were specified in paragraph 16 of the Plaint as under:

"(i) there was an abuse of the process of the court in the absence of evidence against the plaintiff in respect of the charge of treason.

(ii) Laws were amended or attempts made to amend the law to secure the conviction and/or prosecution of the plaintiff.

(iii)The plaintiff was held incommunicado without access to an advocate or family.

(iv) The case was not afforded a fair hearing within a reasonable time.

(v) The plaintiff was not informed as soon as reasonably practicable in a language he understands and in detail of the nature of the offence with which he was charged.

(vi) The plaintiff was not given adequate facilities for the preparation of his defence."

7. The particulars of punitive and exemplary damages are detailed in paragraph 21 of the Plaint as under:

"(i) The plaintiff suffered arrest, imprisonment and detention.

(ii) The plaintiff's personal dignity and honour was desecrated.

(iii)The Plaintiff was never convicted and sentenced by a court of law of competent jurisdiction.

(iv)The particulars in paragraph 12, 13 and 16 are repeated."

8. In response to the said averments both defendants have filed their respective statements of defence.

9. In brief, the Attorney General, (1st Defendant) denied that the arrest, search and detention of the plaintiff were unlawful,that the public officers and security officers were acting under ordinary course of

their duties and were performing actions to avert (sic) State Security. It was further averred that prosecution of the charge of treason against the plaintiff was withdrawn ***to enable the state to detain him in view of the evidence of real and threatening danger to the State***. The 1st Defendant also averred that the 2nd Defendant in his capacity as the President of the Republic of Kenya was above the law while in office and thus the vicarious liability of Government of Kenya was and is inapplicable. The defence, inshort, averred that it was lawful and within the ***Constitution*** and the ***Preservation of the Public Security Act*** to deny the plaintiff freedom of movement, assembly and association as provided in sections 78, 79 and 80 of the Constitution. The defence has further raised the issue of limitation stating that under ***Section 3(1)*** of the ***Public Authorities Limitations Act (Cap 39)*** the plaintiff's claim is time barred against the 1st Defendant.

10. The 2nd defendant filed the defenceon 12th November, 2003 under protest and did not adduce any evidence at the trial. It is averred in his defence that he was the President and Commandant in Chief of the Armed Forces of the Republic of Kenya at the material time and has been improperly enjoined in these proceedings as head and part of Government on whom the Executive Authority of Government vested; that the claim against him are malicious, an abuse of the court process and in violation of ***Section 14*** of the Constitution. The 2nddefendant has denied the knowledge of the allegations made in paragraphs 7,8,9,10,11,12,13 and 14 of the plaint. It was averred that the AttorneyGeneral is vested with his own powers under ***section 26*** of the ***Constitution*** and other laws and actions of Government cannot give any cause of actions against the 2nd defendant after expiry of his Presidency. In the alternative it is pleaded that if those actions were indeed committed then those officers having committed those actions should be held personally liable and not the 2nd defendant. He also raised the issue of limitation.

11. In short, it is pleaded that the plaint is incurably bad in law, is time-barred, unsustainable, trumpery, scandalous, frivolous, vexatious, defective, an abuse of court process and against the provisions of the Constitution.

12. The plaintiff has joined issues with the above statements of defence by filing reply to them.

13. The agreed issues were filed on 23rd July 2009which are as under:

1. Is the claim against the 1st defendant time barred under the Public Authorities Liability Limitation Act?

2. Is the claim against the 2nd defendant time barred?

3. Does the claim against the 2nd defendant contravene section 14 (2) of the Constitution of Kenya?

i) Is the immunity under Section 14 (2) absolute or temporary and limited?

ii) Is the 2nd defendant personally or otherwise liable for omissions or actions carried out by third persons during his tenure as the President of the Republic of Kenya?

4. Is the 1st Defendant vicariously liable for the acts or omissions of officials in the Police, Prisons Department acting under the ordinary course of their duties or functions, authorized or unauthorized? And, or

i) Is the 1st Defendant vicariously liable for the actions or conduct of the 2nd Defendant, while President of the Republic of Kenya?

ii)Is the 2nd Defendant vicariously liable for the acts or omissions of government officials in the Police, Prisons Department and other Departments of Government acting in their ordinary course of their duties or functions whether authorized or unauthorized?

5. Is the 2nd defendant properly enjoined in the suit and does the claim disclosea reasonable cause of action against him?

6. Was the plaintiff arrested on 17th August, 1982 and charged with the offence of treason contrary to the law? And/or

i) Was the plaintiff tortured, beaten and subjected to cruel, inhuman and degrading treatment and did he suffer physical injury, mental anguish and anxiety, lost his liberty and means of livelihood contrary to Sections 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80 and 82 of the Constitution of Kenya.

7. Is the 2nd defendant justiciable under Section 26 of the constitution of Kenya during and or after his tenure as President?

8. Does the Honourable Court have jurisdiction over the suit?

9. Is the plaintiff entitled to punitive, exemplary, and general damages and what is the quantum of damages?"

14. The plaintiff does not seem to follow up some process like Notice to Produce and notice to admit facts though he had filed necessary documents. However, he had filed a bundle of documents which is agreed by both the counsel for the defendants to be admitted in evidence along with other exhibits produced during the hearing of the suit.

15. The plaintiff and the first defendant filed the witness statements as per the requirement of the Civil Procedure Rules 2010 and they called six witnesses and one witness respectively. The 2nd defendant did not adduce evidence as stated hereinbefore. The plaintiff's statement contained 97 paragraphs.

16. In short, the plaintiff's case is that he was arrested on 17th August, 1982 by the police and other security officers from his workplace, according to him, without any warrant of arrest. On 18th August,1982, the police officers, without a search warrant, searched the plaintiff's residence situate at Buru Buru Estate in Nairobi and took away his books, personal letters, documents and passport and those documents have not been returned to him. Further to the above, it is also admitted by all concerned that there were amendments to Criminal Procedure Code at material time and that Executive Authority of the Republic of Kenya was exercised by the 2nd defendant at all the material time.

17. From 18th August, 1982 to 23rd September, 1982, he was held in incommunicado at the General Service Unit Headquarters and while there, he was tortured by beating, subjected to cruel, inhuman and degrading treatment and threatened to death. On 23rd September, 1982 he was arraigned before the court and charged with the offence of treason. His case being ***Criminal Case No. 2345 of 1982*** was consolidated with two other cases being ***Criminal case Nos. 2346 and 2347 of 1982***. As per the plaint, the Chief Magistrate committed the plaintiff for trial before the High Court on 24th January, 1983. There were several mentions for the case and on 23rd March, 1983, the Attorney General entered a *nolleprosequi.* Thereupon he was discharged by the High Court but was immediately arrested by the Police and detained for four years without trial under the provisions of the ***Preservation of Public Security Act***. Though he has testified that he was discharged on 12th December, 1987, this date is shown as 1986 in the demand letter dated 23rd April, 2003.

18. Before the court, eight witnesses gave evidence. They are: **the plaintiff PW1, Professor Dominic OduorOkello PW2, Alfred Agwanda PW3, Professor Albert Vincent OtienoOsanyo PW4, HonourablePrime Minister RailaOdinga PW5, Dr. Peter Ndegwa PW6 and Mohamed Abdulla PW7**. The 1st defendant called one witness **Julius Ndegwa DW1.**

19. The plaintiff gave very detailed evidence relying on his witness statement and called six witnesses to support his evidence as to the treatment received while at GSU Headquarters on 19th August, 1982 from

the then Commissioner of Police, Mr. Ben Gethi and Commandant of GSU Mr. Peter Mbuthia, his visit to the houses of Prof. Alfred V. O. Osanyaboth at Spring Valley and Ngong,and his whereabouts during the day, evening and night of 31st July, 1982.

20. The plaintiff reiterated the averments made in the plaint. According to his testimony, his problems leading to his arrest in connection with the aborted coup began with events of the disappearance and murder of J. M. Kariuki, the then member of parliament and a popular leader. The public outcry onhis disappearance havingreached fever pitch, the plaintiff investigated and followed the events as a leader of a group of journalists from The Standard and ***contradicted*** the statement from the 2nd defendant in the parliament, who was then the Vice President, to the effect that the late J.M. Kariuki was alive and in Zambia on a business trip. He was accosted thereafter by the then Attorney General, Mr.Charles Njonjo, whothreatened him that he would dearly pay for his investigative journalism.He has made these averments in paragraph 86 of his statement. However, the involvementof the then Attorney General given in his testimony is not included in his witness statement. In support of the aforesaid averment, the plaintiff produced a copy of an article in the ***Daily Nation*** dated 14th March, 1975 written by two journalists named DavidKariuki and BlamuelNjururi. In this article, a demand for truth was made along with the above mentioned statement of the 2nd defendant in the parliament. It alsoreferred together withhis explanation to the said statement as to whereabouts of the late J. M. Kariuki. Two copies of articles in ***The Standard*** were also produced. The article of 12th March, 1975 written by Fred Nyaga, Victor Ritho and Zack M'Mugambi stated that J.M. was dead and that he was a man popular with all. The article written by the plaintiff is published in ***The Standard*** of 17th March, 1975 which gave the details of the burial of J.M. the deceased leader and comments made by the political leaders on the cause of his death.

21. To prove his claim on the physical torture on the night of 19th August, 1982 a medical report dated 7th May, 2010 made by Dr. P. Ndegwa (PW6), a Pathologist was produced. The report stated that two very old scars were found on the sheens of his legs. However in itscolumn of comments from the doctor it was stated that the allegations of torture go back many years and it was difficult to associate the physical scars to the torture allegedly inflicted dating back many years. It is further stated that if there are witnesses to collaborate the allegations that the same couldbe authenticated. No adequate response was given by the plaintiffwhen questioned why he did not complain about the torture during his appearances before the court specially while he was represented by a counsel.However, Prof. Alfred Vincent O. Osanya (PW4) and Hon. RailaAmoloOdinga (PW5) in exactly similar words stated that they were informed by the plaintiff that while held at GSU headquarters, he was kicked on legs by Mr.Mbuthia andMr. Gethi smashed his head on the wall on the night of 20th August, 1982 and that the plaintiff was taken to Nairobi Hospital by Mr. Patrick Shaw who was in charge of investigation of the events of aborted coup. Both these witnesses were held in adjourning cells to the plaintiff's cell at GSU Headquarters and they were similarly asked to record their own statements by the aforesaid officers during that night. As per the record none of them made any confessionary statements and none had made any specific allegations of torture while in custody except to state that they were brutalized.

22. The plaintiff in his evidence has referred to the Report dated 9th November, 1984 made by Judicial Commission Appointed to Inquire into allegations involving Charles MuganeNjonjo. At page 31 of the said Report of the plaintiff's bundle(paragraph 172 and 173), the Commission accepted the evidence of the present Prime Minister Hon. RailaOdinga that Mr. Gethi (mentioned as commissioner Ben Gethi in this proceedings) toreOdinga's statements made while held in GSU headquarters in the aftermath of aborted coup, because they implicated Njonjo in the coup plot. This fact in my view, is not relevant to this matter, but I must note that in his evidence before The Commission, only Prof Albert Vincent OtienoOsanyo (PW4) is mentioned as another person held in custody after the aborted coup. What is relevant for this matter in any event is that Honourable PM RailaOdinga (PW5 in this matter) though was still in detention, did not mention before the commission that he was brutalized while he was asked to write the statements by the Commissioner Gethi now deceased.

23. I may hasten to state that only because the plaintiff's name is not mentioned in the record of the said Commission, I am not for a moment doubting that he was not held in GSU headquarters as stated in the Plaint and in his evidence.

24. The plaintiff in his cross-examination did concede that after his arrest he wrote his statements on 19th August, 1982 before the police after he was given due caution. They are produced by him in his bundle of documents. This statement were recorded at CID headquarters and not at GSU headquarters where he was held. He has denied in those statements any involvement in *coup d'tat.*

25. He further testified that on 20th August, 1982 a team of heavily armed GSU personnel led by Commissioner of Police Ben Gethi and GSU Commandant Peter Mbuthia came to his cell at GSU headquarters. He was threatened, brutalized with physical assault and psychologically tortured. Mr. Mbuthia kicked him on his legs and Mr. Gethi smashed his head against the wall. This assaults made him unconscious. He did not write any confessionary statement asked by the team and he specifically testified that ***when they saw an aide to the 2nd defendant peeping in the cells, they simply ran away.*** He was taken to Nairobi Hospital next day by late Mr. Patrick Shaw. In cross examination, heagreed that torture as alleged by him was not part of the official duties of security personnel.

26. He was kept in incommunicado until 23rdSeptember 1982, when he was arraigned before the Chief Magistrate's Court, Nairobi and charged with treason. It is not in dispute that his case was consolidated with those filed against Prof. Osanyo (PW4) and Hon. RailaOdinga (PW5)

27. The overt acts alleged against all the three are produced by the plaintiff as published in the ***Weekly Review***of 14th January, 1983 as Plaintiff Exh. F (2). They were charged jointly and severally and particulars of overt acts were as under:

a.OtienoMak'Onyango on or about 20th day of July 1982, inspected the house of Albert Vincent Otieno at Ngong Road in Nairobi with a view to obtain the use of the house as command headquarters for a group planning to overthrow the government.

b.OtienoMak'Onyangoon or about the 25th day of July 1982 at his house in Buruburu Estate in Nairobi discussed plans to overthrow the government with one Paul GenoOkello and Robert Odhiambo.

c.RailaOmoloOdinga and OtienoMak'Onyango on the night of 31st July and 1st August 1982 occupied the house of Albert Vincent Otieno at Ngong Road in Nairobi and assisted Senior Private Hezekiah Ochuka and other servicemen to use the house as a centre of operation in their plans to overthrow the government.

d.RailaOmoloOdinga and OtienoMak'Onyango on the 31st day of July 1982, together with one Opwapo brought a lamp and two accumulator batteries to the house of Albert Vincent Otieno at Ngong Road in Nairobi for use in the course of establishing a rebel command centre.

e.RailaOmoloOdinga on or about the 9th day of August 1982 visited the house of Albert Vincent Otieno at Ngong Road in Nairobi to remove a table which had earlier been used by the rebels in the course of attempting to establish the house as a command centre.

f. RailaOmoloOdinga between the 1st day of August, and 11th day of August 1982 assisted in the removal of two accumulator batteries knowing or having reasonable cause to believe that they had been used in connection with the attempted overthrow of the government on 1st August 1982.

g.Albert Vincent Otieno on or about the 20th day of July 1982 showed OtienoMak'Onyango his house at Ngong Road in Nairobi knowing or having reasonable cause to believe that he was inspecting the same with a view to the use as command headquarters by rebels planning to overthrow the government.

h.Albert VincentOtieno on the night of the 31st July and 1st August 1982 permitted his house at Ngong Road in Nairobi to be occupied by rebels for use as centre of operations in their plan to overthrow the

government.

i. Albert Vincent Otieno on or about the 31st day of July 1982 inspected his house at Ngong Road in Nairobi knowing or having reasonable cause to believe that it had been used in connection with the attempt to overthrow the government on 1st August 1982.

j. Albert Vincent Otieno on or about the 3rd day of Agust 1982 removed from his house at Ngong Road in Nairobi at item of evidence, namely a bottle of whisky, knowing or having reasonable cause of believe that it had been used by the rebels while attempting to overthrow the government on 1st August 1982.

28. The plaintiff also denied before this court that he had anything to do with the *coup d' tat* which he averred was planned by members of armed forces.

29. He testified further that he and other two co-accused persons were, after the arraignment before the court, remanded to Kamiti Maximum Security Prison for about eight months and appeared before the court for mention every two weeks.

30. The plaintiff also testified that during their remand, Criminal Procedure Code was amended which removed the process of Preliminary Inquiry before the subordinate courts and introduced the process of preparing and filing committal bundles to be perused and considered by the Magistrates so as to enable them to determine whether *prima facie* case has been shown so as to commit the accused person to trial before the High Court. It was his testimony that this amendment was introduced specially aiming at his case so as to deprive him of an opportunity to question the witnesses at the first opportunity before the subordinate court and prove his innocence. He was obviously referring to the deletion of original sections 230 – 245 (Part VIII of Criminal Procedure Code) and replacement of those sections by new process in Part VIII titled ***"Provisions Relating To The Committal of Accused Persons For Trial Before The High Court".***The pre-trial before the sub-ordinate court was adjourned awaiting the passing of intended amendment by the Parliament. The amendment came into force on 10th December, 1982 vide Legal Notice No. 13 of 1982. It also received assent from the President on the same date.

31. In support of this assertion that the earlier process i.ePreliminary Inquiry was abolished only because there was total lack of evidence against him to conduct a successful preliminary inquiry, he produced the Hansard of the Parliament for 17th and 18th November 1982 (P Exh. D2). The Hansard shows that there were extensive discussions in the Parliament on the issue of committal process to be substituted and also on the amendment to Sec. 41 of The Evidence Act to enable the court to admit a witness statement under some conditions. As is usual, there were presentations in favourand against the proposed amendments and as conceded by the plaintiff, the amended Part VIII of Criminal Procedure Code was passed by the Parliament.

32. It is also on record that all the accused persons including the plaintiff were represented by counsel and that applications for adjournment from the Prosecuting Counsel (the DPP) were not opposed. These applications included those which were based on the awaited amendments to the Criminal Procedure Code.

33. The subordinate court which was presided by the Chief Magistrate, then found vide his Ruling dated 24th January, 1983, that there were sufficient grounds for committing the three accused persons (plaintiff, PW4 and PW5) for trial before the High Court. This Ruling was made under the amended provisions of the Criminal Procedure Code.

34. Although I do not have any record of the High Court trial, it is common ground that on 23rd March, 1983, the Attorney General presented *nolleprosequi* and all the three accused persons were discharged, immediately to be re-arrested by security officials and were on the same evening detained. As per testimony of the plaintiff, he wasinformed by late Philip Kilonzo, the then Provincial Police Commissioner, that the then President had ordered his detention. A Gazette Notice No. 1432 of 11thApril,

1983 signed by one J.S. Mathenge (Permanent Secretary, Provincial Administration and Internal Security) was produced. It stated that:

"<u>In pursuance</u> of Section 83 (2) (b) of the Constitution of Kenya notice is given that <u>OtienoMak'Onyango</u> has been detained under regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulations 1978 (L.N. 234/1978)"

35. He was detained from March, 1983 to December, 1987. He specified that his release was not gazetted and that he was released as a petty criminal. He reiterated that he was arrested only because of his investigation in J.M's death mystery.

36. The plaintiff testified that he met PW5 for the first time at GSU headquarters after his arrest but knew PW4 Professor Albert Vincent OtienoOsanyo. They both were using the same mechanic (late George Odingo) who was also arrested as a suspect in the attempted *coup d' tat*.

37. He gave detailed narration of events of 23rd, 24th and 27th July, 1982 in respect of his meeting with PW4 and visits to latter's house at Ngong Road and Spring Valley. The date 23rd July, 1982 was corrected by him to that of 24th July, 1982.

38. His evidence in short was that he had two reasons to visit PW4's house at Spring Valley. He had a relative who wanted admission at Nairobi University and secondly, a German friend at German Embassy wanted a suitable house to rent and that was the reason he wanted to go to house of PW4 at Ngong which was under repair. He averred that during those visits on 24th and 27th July, 1982 he was with the mechanic late George Ondiga.

39. He further testified on his meetings with one South African Gentleman referred as Mr. John Woolery and stated that he later got information that his name was John Lackley. This person has been referred in the Report of Njonjo Inquiry as an investigator and an ally to Mr. Njonjo. He then stated that he was with the said person upto eve of coup attempt. In those meetings, they talked on several topics including the rumours of coup attempt.

40. Later in the afternoon session, he testified that prior to his meeting with Mr. Woolery on 31st July, 1982, he went to Corner Bar after 12.30 pm with his friends including late Prof. Oninde, late Luke Musinga, late Joseph Ogwanda, General Mane and Prof. Oduor Dominic Okello. This visit has been confirmed from testimony of PW3. He later droppedlate Mr. Ogwanda to his house at Parklands by 5.15 pm and passed through at garage on his way home at Buru Buru, to change and to go to the meeting with Mr. Woolery at 6.00 pm. It is also the evidence of PW7 that he met the plaintiff at around 7.15 pm to Intercontinental Bar who left at about 9.00 pm to go home.

41. His evidence as to visit to Dr. Osanyo's (PW4) houses at Spring Valley and Ngonghave been seriously contested. It is amply on record that the plaintiff gave contradicting testimony as to the date of his visits which he changed from 23rdto 24th July, 1982.

42. He was also questioned on his police statement wherein he had stated that he visited the house of PW4 at Ngong on 31st July 1982, which he denied to be true and responded that he wanted to correct thatportion of his statement to the police which he could not. It was also shown to the plaintiff and he agreed that his version given to the police and that given in his evidence before the court differed from the police statement recorded by late GeorgeOndigo, who had denied that he was ever with the plaintiff either on 24thJuly, 1982 or 31st July, 1982 and that he ever went to any of the houses of PW4 with the plaintiff. I may also note here that PW4 in his evidence also denied having met the plaintiff during those dates. According to his evidence, he only had telephone conversation with the plaintiff who informed him on phonethat one of his (plaintiff's) friends wanted to rent a house and inquired whether his house at Ngong under repair could be so rented.

43. The plaintiff testified that his arrest, charge leveled against him and subsequent detention for four

years after entry of *nolleproseque* left him a traumatized and vilified person. He has been painted as a criminal, who had masterminded the horrible event of 1st August, 1982. He has suffered physical and psychological trauma and has faced social shame. He has not been offered any job and had survived by support from German friends. Those actions violated his fundamental rights. He has lost what was his rightful expectation personally, socially and professionally.

44. PW2 Prof. Dominic OduorOkello testified that on 31st July, 1982, from 1.30 p.m. to 5.00 p.m.he was with the plaintiff and others named by him at Corner Bar, off Muranga/Moi Avenue junction, Nairobi. They used to meet at that place very regularly and have drinks and something to eat. The plaintiff around 5.00 p.m.gave lift to Mr. Ogwanda who lived in Parklands, according to him. He could not believe the news that the plaintiff was arrested on the charge of treason.

45. PW3 Alfred Agwandahails from the same location as the plaintiff. He was staying at Lang'ata Barracks with his uncle Lt. Col. Auro who was a Reverend Pastor.He visited plaintiff's house on 31st July, 1982. He had come to the plaintiff to seek his assistance to get him a job. As per his evidence, the plaintiff came home around 9.00 pm and did not leave the house. He stayed on for several days because of the events which unfolded. The plaintiff was arrested thereafter and came back at his Buru Buru home next day with Special Branch personnel. They searched plaintiff's bedroom and went away with him and some books or magazines or newspapers. He was never questioned by police and had come to testify before this court.He could not explain the evidence of the plaintiff to the effect that he (PW3) had come to stay two days prior to 31st July, 1982 and went away after around 3 days.

46. PW4 Prof. Vincent OtienoOsanyo in his evidence denied ever meeting the plaintiff in the month of July, 1982. But he did testify that he used to meet the plaintiff on and off in city of Nairobi in various places. He only recalled a telephone call from the plaintiff informing that he had a friend from Germany who was looking for a house to rent and inquired whether his house at Ngong was available. He had vacated the house at Ngong which was being repaired.

47. He also denied that he had a house in Spring Valley.He stressed that his house is atShanzu Road, Westlands and the area cannot be described as Spring Valley. He denied that the plaintiff ever went to inspect his house at Ngongor that he went with him. He was only informed that the plaintiff gave lift to George Ondigoto his house at Ngongwho was also his mechanic. This evidence is obviously contradicting the evidence of the plaintiff relating to the visits to Ngong House and his meeting at Spring Valley.

48. He was arrested and was kept at GSU Headquarters. He gave evidence on the events of 20th August, 1982 where the team of security personnel led by late Ben Gethi came to the cells of GSU Headquarters and according to him, he felt as if he was in mortal danger and that he was absolutely terrified by their behavior thinking they would shoot them. He also confirmed that the plaintiff was injured and he could hear plaintiff saying *'stop pushing me and stop kicking me'*.

49. However, according to him, while in GSU cells, food was brought from their houses which did contradict the evidence of the plaintiff that he was totally deprived of any association with family. He also agreed that neither the plaintiff nor himself had anything to do with attempted coup.

50. After the coup attempt he went to Ngong house on 3rd August, 1982 to get some chicken and found a shaken/shivering watchman and house littered with empty bottles of drinks. He took away only one empty bottle of whisky and could not explain the reason for so doing. He neither asked the watchman about those bottles nor took any action against him. Both of them were later arrested. When confronted with police statements made by the watchmen he simply stated that the watchman was lying and thathe was coached by the police. For the purpose of record, the watchman John Nyamanga Okada did state in his police statement that at night of 31st July 1982 army men came and stayed in the house with one **Mr. OnyangoOtieno.**

51.PW5 Hon. RailaOdinga testified that he saw the plaintiff for the first time at GSU headquarters after their arrest and similarly narrated the incident of 20th August 1982 when late Ben Gethi and late Peter

Mbuthia invaded their cells and triedwithout success to record confession from each of them. He further stated that they paid four visits to their cells during that night and threatened and beat them ruthlessly. He said he also was beaten very badly and he could hear wailings in the next cells occupied by the plaintiff and PW4. They were kept incommunicado. He lamented that their proceedings before subordinate court was delayed waiting for the amendment to the Criminal Procedure Code and Evidence Act to get conviction. In his examination in chief, he stated:-

"These amendments, my lady, were basically meant to facilitate easy processing of cases instead of going through a preliminary trial to establish whether there was a case to answer; they (sic) wanted to come with what they call committal trial procedure to make it simple….. this was basically meant to defeat the end of justice."

But he was not sure whether those amendments were eventually enacted.

52. This witness was cross-examined on his biography written by oneBabafemi A. Badejo – titled ***RAILA ODINGA An Enigma in Kenyan Politics***. He agreed that he was present at the function of launch of this book and confirmed that he had neither publicly nor otherwise disowned any of the statements made in the book and stated that the said book was a biography and that he was writing his autobiography wherein he intended to clarify some of the statements made concerning him in the attempted coup. He agreed that the statements in the book andthose made to the police by several persons do coincide. He further testified that he and PW4 are close friends and he had visited his Ngong House very often and could have visited it in July, 1982, though it is on record that it was vacant and under repair in July.

53. When shown the court proceeding of the treason charges, he confirmed that there was no complaint of any harassment, torture, or brutalization to the court even from his counsel in any of the appearances before the court. The witness reiterated that according to him, the 2nddefendant, the President should take personal and political responsibility for what happened to the plaintiff.

54. When shown further the statement of Paul GenoOkelowhich was made to the police during investigation and preparation of committal bundle, the witness stated that he was not told by his Advocate that the said person had linked him to the attempted over-throw of the Government. He was referred to pages 94 – 98 of the bundle of documents produced by the plaintiff. The witness denied veracity of that statement. I would refrain from giving details of the contents of the statement for simple reason that they do not refer to the plaintiff ***except to the fact that it referred to the presence of a journalist OnyangoOtienoduring the night of 31st July, 1982.***

55.PW6 is Dr. Peter Ndegwawho produced his report on two old scars on sheens of his legs which evidence is detailed in earlier part of this Judgment.

56. As per the history mentioned in the report, the alleged torture happened on 19th August, 1982 when the officers kicked him on his legs, his right sheen bone was broken and his head was smashed against the wall. The only medical presumption he could offer was that the scars/wounds were inflicted by a blunt object.

57.PW7 Mohammed Abdullahi was in media business working with East African Standard Newspapers at the material time. He testified that on 31st July, 1982, at about 6.30 pm he was with other friends at Big 5 Restaurant/Café/Bar situate at Intercontinental Hotel. The plaintiff joined them at around 7.30 pm, had drinks with them and left at about 9.00 pm. The Bar was a rendezvous place for journalists. When he heard the news of plaintiff's arrest for his involvement in attempted coup, he was perplexed because in his opinion the plaintiff did not look like somebody who had some grand plan.

58. The above in brief is evidence from the plaintiff.

59. The 1st defendant called one witness, Senior Deputy Commissioner of Police II, Julius Ndegwa who testified that his duties included co-ordination of operations in the country, general operations and other

management of police work from the Police Headquarters. His evidence basically was that the plaintiff had taken long to file the suit wherein he has alleged malicious arrest and prosecution. He tried to look for relevant documents concerning the claims but could not find any. He testified that the Force Standing Orders clearly stipulate the period for which all the offices, formations, Police Stations and posts all over the country are supposed to keep the records of the police cases. The occurrence books are supposed to be kept for 10 years after the use. Similarly, the charge register is also supposed to be kept for five years after the use. After the expiry of the stipulated periods, all the offices, formations, police stations and posts are required to destroy the records. He denied to have any knowledge of arrest, allegation of torture and prosecution made by the plaintiff. The State, according to him because of the delay in filing this suit, is prejudiced in defending the claims of the plaintiff. The plaintiff also is unable to produce any documents to support his claim and Government cannot be made liable for those claims which are not supported in any manner. He produced a document titled Chapter 41 – Records, Provincial Formation, Divisional Headquarters, Stations & Postswhich tabulates the files and documents relating to offence and occurrences in the stations and gives its duration period after which they are required to be destroyed. Item No. 12 of the document states that, case files and completed: (a) penal code file be destroyed within 5 years. However, in respect of cases referred in item 12 (b) like murder, manslaughter, rape and treason, he testified that those cases are always prosecuted by the State Office and they are returned upon advice or direction and to be kept with Police Department upto the completion. Once it is completed, the file is kept for closing and on advice by the DivisionalCommander, the closed files are then destroyed. I may note that as per the document itself those files are to be kept at stations and CID formation and are shown as ***permanent files***.

60. 2nd defendant did not adduce any evidence.

SUBMISSIONS AND CONCLUSION

61. Before I deal with other issues, I may note here that the application by 2nd defendant to strike out the suit against him was not allowed vide Ruling of Hon. Khamoni, J. delivered on 16th February, 2009. It shall also be appropriate that I consider at this juncture the first two issues i.e. whether the suit is time barred against both the defendants.

62. The plaintiff has claimed joint and several liability against the two defendants for alleged actions of agents of state during his arrest and detention.

63. Mr. Onyiso, the Senior Principal State Counsel, appearing for the Attorney General (1st Defendant) has submitted that the plaintiff's claim for malicious prosecution is time barred by virtue of section 3 (1) of the Public Authorities Limitations Act. The said section stipulates:-

"***No proceedings founded on tort shall be brought against the government or a local authority after the end of twelve months from the date on which the cause of action accrued."***

64. The cause of action in this matter arose on 17th August, 1982 while the suit is filed on 14th August, 2003 and plainly the suit is thus time barred. Even after his release from detention on 12th December, 1987 he had upto 12th December, 1988 to file the suit. These facts were relied for submissions that the suit is time barred and be dismissed.

65. I shall reiterate that this suit claims relief and prays for Judgment jointly and severally against both the defendants. It is not in dispute that at all material times the 2nd defendant was the President of the Republic of Kenya. When the plaintiff was released from detention, 2nd defendant was holding that position. It is only in 2003 that the 2nd defendant ceased to be the President of this country.

66. By dint of Section 14 of the Constitution (now repealed), the 2nd defendant enjoyed immunity from any criminal or civil proceedings. Section 14 (2) and (3) provides:-

"(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President.

(3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person."

70. The plaintiff in the circumstances of this case could not have instituted separate suitsagainst the defendants when he is claimingthe joint and several liability.

71. I may cite a passage from the case of***Wachira –vs- Weheire –vs- AG Misc. Civil Case No. 1184/03 (O.S)***

"We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual, under the Constitution of Kenya. Indeed, Section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail. In our view, the provisions of the Public Authority Limitation Act limiting the period of initiating actions against public authorities is inconsistent with the Constitution, to the extent that it limits a party's rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the Constitution and it cannot therefore be used curtail rights provided under the Constitution. We therefore find and hold that the plaintiff's claim arising from violation of his Constitutional rights is not statute barred."

72. With the above clear position in fact and in law, I shall and do find that the plaint filed on 14th August, 2003 is not time barred and I do not uphold issues nos. 1 and 2 of Agreed Statement of Issues and do proceed to reject the same.

73. I must note that I have considered the case of ***Lt. Peter NgariKagume and others –vs- Attorney General [2009] eKLR***cited by the defendant**.** However, I have found that due to the peculiar circumstances of this case involving the claims against the 2nd Defendant, the submissions on the limitation cannot stand. The case is clearly distinguishable on facts.

74. Similarly, I shall also find from the plain interpretation of Sec. 14 (3) of the (repealed) Constitution, that the immunity under Section 14 (2) of the Constitution for the civil liabilities of the President is limited to the tenure of the holder of the post of the President. From the pleadings and evidence led before the court, it is apparent that the case of the plaintiff hinges on following issues which need to be determined, namely:-

(1) Whether his arrest, charge and prosecution were malicious.

(2) If so, whether 2nd defendant is vicariously liable for the malicious prosecution.

(3) Whether the detention of the plaintiff is justified.

(4) If not, whether the defendants are jointly or severally liable for the alleged breach of his fundamental rights granted under the Repealed Constitution.

(5) If so, which reliefs be granted to the plaintiff.

75. The plaintiff made forceful written submissions and eloquently highlighted the same in support of his claims.

76. He submitted that his arrest on 17th August, 1982, search of his house without warrant when his personal documents were confiscated the following day, charge of treason leveled against him on 22nd September 1982, his detention after entry of *nolleprosequi* on 23rd March, 1983upto 12th December, 1987 in the aftermath of the attempted coup were malicious, unlawful, fraudulent and without reasonable or probable cause.

77. He cited reasons in support of the claim of malice and fraud, namely:-

(i) There was no evidence at all linking the plaintiff with the treason charge (See Charge Sheet and Overt Acts 3 – 9 enclosed)

(ii) Preliminary Inquiry (Criminal Procedure Code (Amendment) Bill 1982) were abolished because of lack of evidence to conduct a successful PI

(iii) Attempts were made to amend the Evidence Act (Evidence Act (Amendment) Bill, 1982 to prosecute the plaintiff on the basis of fabricated evidence in utter disregard for the established law and constitutional safeguard.

(iv) The case herein, right from conception through to its entire handling was a gross abuse of the judicial process.

(v) The defendants knew the plaintiff had no role and played none whatsoever in the 1st August, 1982 coup as alleged in the charge.

(vi) Violence and death threats were used on the plaintiff in an attempt to obtain unlawful confession incriminating himself in the alleged crime (See torture episode herein).

(vii) Unlawful and irregular identification parade was staged, using photographs of the plaintiff and the other suspects instead of physical appearance as required in law. The use of an irregular Identification Parade was preferred, the plaintiff submits, because the identifiers knew the plaintiff and were going to say he was not the one involved in the coup attempt. This was, the plaintiff further submits, a case of mistaken identity.

(viii)Senior officers of the Government, among them President Moi, Charles MuganeNjonjo and the members of the disciplined forces, had prior knowledge or intelligence of plans to overthrow the Government but failed to suppress the same. Moi's appointment of the Judicial Commission to probe activities of Njonjo in connection with the coup, attest to the fore-going claim.

He cited passage from **Winfield and Jolowkz on Torts– page 73**to wit**:-**

"A Defendant may be liable for false imprisonment even though he did not personally detain the Plaintiff …For the present, it is sufficient to note that whereas in false imprisonment the plaintiff need prove no more than his detention, leaving it to the defendant to prove its lawfulness …in malicious prosecution, the best known form of abuse of procedure, the plaintiff must prove that the defendant (a) instituted a prosecution of him, (b) ended in his favour and (c) was instituted without reasonable and probable cause" (Auth. 12, Page 73) All three components, the plaintiff submits, exist in his case herein.

78. The above observations are, in any event, trite Principles of Law in the field of malicious prosecutions.

79. According to his submissions there was no evidence with the defendants, even after extensive investigations and Amendment in Criminal Procedure Code, (which in his submissions was doctored to get his conviction without giving him fair hearing), to sustain the conviction. That was the reason the prosecution filed *NolleProsequi* and he was discharged.

80. He stressed further that there was no evidence that he was a real threat to the state security and that he played a part in the attempted coup. Yet he had to undergo inhuman treatment, threat to his life, confinement both at GSU headquarters and Kamiti Maximum Prison next to the cells of Capital Remandees and, at the end of all, the detention.

81. He contended that the evidence led before the court substantiated all the above averments, specially his movements on 31st July, 1982 made it clear that he had nothing to do with the attempted coup. Moreover, the statement of the watchman at PW4's Ngong House talked about one OnyangoOtieno and not himself. His evidence that Mr. Patrick Shaw confided to him that there was no evidence to implicate him and Prof. Osanyawas not contested. DW1, Senior Deputy Commissioner of Police II did not give credible evidence when he said that all the documents were destroyed. This evidence from the 1st defendant, according to him, was an extension of malice and fraud alleged by him. In any event, his testimony could not and did not negate the evidence led by him.

82. Confiscation of his property, which included according to him his testimonials and passport, was malicious aimingat denying him employment and future opportunities in his profession as a journalist and to further defendants' intent to reduce him to a persona non grata.

83. The plaintiff asserted with vehemence that the sole aim to introduce amendment to Criminal Procedure Code was to substitute the process which removed the opportunity at first instance to prove his innocence at Preliminary Inquiry and was thus malicious.

84. He summed up by stating that the defendants through their agents subjected him to the most brutal form of torture as well as cruel, inhuman and degrading treatment only to secure conviction for the crime he did not commit. That was malice pure and simple.

85. The submissions on his immediate detention after discharge from the criminal case also centred on illegality, impropriety and malice from the defendants. He contended that his detention was in breach of the purposes and principle of Preservation of Public Security Act and Sections 83 and 85 of the Constitution. According to the plaintiff, he was simply told by Mr. Philip Kilonzothat he had been ordered by the President to detain him. He was neither given any reasons for his detention nor the procedure under the Constitution and the Act werefollowed. According to him, the detention came at the heels of the realization by the government that it did not have evidence to support the criminal charge of treason and his resultant discharge from the criminal process. He was made to lose his liberty for no reasonable cause and detention,which in reality was a substituted punishment and was imposed without due process.

86. In similar manner, the plaintiff submitted that both the defendants are vicariously liable for all the aforesaid acts, omissions and misconduct of the government officers for following reasons:-

(1)The defendants were instrumentalto the enactment of two unlawful laws i.e. Constitution of Kenya Amendment 1982, which made Kenya a De Jure one party Nation and secondly the Criminal Procedure (Amendment) Bill, 1982.

(2)Retroactive application of the law of procedure.

(3)Unlawful and illegal four years detention.

(4)Failure to gazette his release from detention.

(5) Dereliction of duty under Section 46 of the Constitution by the 2nd defendant to see that unlawful laws were not passed. This point was elaborated by submissions that as a President, the 2nd defendant ought to have refused to sign the unjustified amendment.

87. I may point out that the plaintiff has relied on certain evidence of third parties from the judgment of

several cases, which were neither pleaded nor mentioned in his evidence before the court. There are other submissions like dereliction of the Constitutional duties by the 2nd defendant which are only mentioned during submissions. I must observe here that those submissions made by a party in other cases and relied upon only during submissions cannot be and shall not be considered by me. The allegations or submissions before me on dereliction of duties by the 2nd defendant similarly cannot be taken into account by the court having not been pleaded and substantiated. Although court is required to avoid technicality under Article 159 of the Constitution, it is also required to adhere to the Rule of Law and just and proportionate resolution of the civil dispute. The court has to impart justice and fairness to all the parties before it and it shall be unfair and inequitable to consider those facts against the defendants in the circumstances of this case and I do find so. Even if I am wrong in finding as such, the copies of articles in the ***Daily Nation*** and the ***Standard Newspapers*** do not place the plaintiff as a leader of the group of journalists.It is also relevant to note that the ***Demand of Truth***was made in the ***Daily Nation*** which has no connection with the plaintiff. The two articles in ***The Standard*** are in my opinion not controversial or sensational. His contention thus, that the 2nd defendant chose only him, from those journalists as a victim of his revenge is, to say the least, farfetched and does not meet therequired standard of proofof malice.

88. I may further add that the instances of participation of the plaintiff as a journalist on the event of JM's murder, has also not been pleaded in the Plaint. Its introduction during the evidence, though not objected to by any counsel representing the defendants, cannot be accepted as one of the particulars of malice, which need to be specifically pleaded as per law of pleadings (Order VI Rule 4 of Civil Procedure Rules (repealed) and order 2 of the Civil Procedure Rules 2010).

89. The plaintiff in support of his claim that the defendants are vicariously liable for the damages suffered by him relied on Sections 23 (1), 24 and 25 (2) of the Constitution. The above provisions stipulates:

"23. (1) The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him.

24. Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President.

25. (2) In this section "office in the service of the Republic of Kenya" means office in or membership of the public service, the armed forces of the Republic, the National Youth Service or any other force or service established for the Republic of Kenya.

90. He relied on the case of ***In the matter of an application byHon. Mr. Justice MoijoMataiya Ole Keiwua (J.R Misc. Civil application No. 1298 of 2004).***

On page 54 thereof the court had this to say:

"To support and assist the President in performance of his day to day duties and responsibilities constitutionally he is given the power and authority to appoint certain officers. These officers shall act by the President's authority and in conformity with his orders. It is therefore clear that these officers' acts are the acts of the President."

On page 55 it is observed:

"If public officers including the President fail to act and their failure harms the interest of public and rights of individual citizen, <u>we think</u> their action or omissions are subject to Judicial Review"

91. I shall note here that this case was filed as Judicial Review application to seek orders of *certiorari, prohibition* and *mandamus,* and the court was dealing with the issue raised that the order to appoint a Judicial Tribunal to investigate Justice Ole Keiwua was made by the President and thus the immunity of the President under Article 14 of the Constitution extended to the members of the Tribunal. This case, in my considered view, cannot be relevant to the facts of this case.

92. Picking threads from the above submissions, the plaintiff submitted that the above actions of the defendants also violated his fundamental rights enshrined in the Constitution, namely:-

(1)His illegal arrest, custody incommunicado for 38 days and detention for four years violated his right of liberty under Section 72 of the Constitution and Article 3 of the Universal Declaration of Human Rights.

(2)The brutality and inhuman treatment on the hands of security personnel on 20th August, 1982 contravened his fundamental right enshrined under Sec. 74 of the constitution and Article 5 of Universal Declaration of Human Rights which provide that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

(3)His right to a fair and expeditious trial given under Article 77 was violated. He was kept in Remand without being given opportunity to be tried under process of Preliminary Inquiry as per the existing law to await a passing of a Bill before the Parliament.

(4)Arbitrary confiscation of his properties during the search of his house and also before his release from detention violated his right given under Section 75 and Section 76 of the Constitution.

93. The plaintiff raised further points on violation of his fundamental right to wit: he was discriminated in that he was prosecuted and detained, on suspicion of being involved in coup d'tatwhile in respect of Mr. Njonjo a Commission of Inquiry was established, and that, even after the positive report of his involvement he was pardoned. This different treatment according to him was discriminatory to him and in violation of Sec. 82 of the Constitution.

94. In consequences of all these acts and omissions, the plaintiff has claimed general damages, special damages, exemplary damages and aggravated damages.

95. The plaintiff has argued that as a result of his arrest and detention for alleged involvement in coup d'tat, he has been perceived as subversive person and has lost his personal honour, dignity, integrity, pride, reputation and any chance of getting any gainful employment. He conceded thathe secured a job as an Editor of The African from 2006 to June 2009 and was also elected as MP.

96. In short considering the facts of this case, he has assessed his claim for damages as under:

(a)General damages 260,000,000/=

(b)Special damages 300,000,000/=

(c)Punitive damages 271,000,000/=

(d)Exemplary damages 192,000,000/=

(e)Aggravated damages 230,000,000/=

Total **1,253,000,000/=**

He had detailed his monthly earnings partly based on the letter of termination dated 29th October, 1982 from The Standard:-

(a)Basic salary 8,000/=

(b)House allowance 2,000/=

(c)Water/Electricity 800/=

(d)Medical allowance 2,000/=

(e)Transport allowance 3,000/=

(f) School fees for 3 1,800/=

Total **17,600/=**

The last three items are not in the said letter. He has also not claimed special damages in his plaint.

97. He relied on many authorities to support his claim. I may note that they are all constitutional matters, filed under the provisions of the Constitution. However, in my opinion the principles observed therein should have universal application. Those cases are:-

(1)WachiraWaheire –vs- the Hon. AG*Misc. Civil Case No. 1184/03 (O.S.)*

(2)*Dominic AronyAmolo –vs- Hon. The AG* Misc. Application 494/03

(3)*Peter M. Kariuki –vs- AG* Petition No. 403/06

(4)*Mwangi Stephen Mureithi –vs- Hon. Daniel ToroitichArapMoi EGH &Another* Petition No. 625/09

98. In response to the above submissions by the plaintiff, the learned counsel ***Mr. Onyiso*** appearing for the 1st Defendant contended that the suit by the Plaintiff is incompetent for misjoinder of causes of actions. He stressed that essentially the suit claims damages for malicious prosecution but it also seeks damages for the breach of his fundamental rights which ought to have been instituted by way of an Application under ***Section 84(1)*** of the ***old Constitution***. The Plaintiff cannot claim damages under both heads of the laws. He relied on the following passage of the book, CLERK AND LINDSELL ON TORTS

"It was formerly supposed that exemplary damages could be awarded in almost any case of tort if the defendant's conduct had been particularly outrageous. In 1964, however, the house of Lords, though the speech of Lord Devlin in Rookes –vs- Barnard laid down that exemplary damages as distinct from aggravated damages should only be awarded in two specific categories of cases, unless of course, they were expressly authorized by statute. These categories comprise, first, cases of oppressive, arbitrary or unconstitutionally action by the servants of the government and secondly, cases in which the defendants conduct has been calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff"

99. I may however, state that later decisions of English courts have declined to accept that exemplary damages are limited to those two categories. Obviously, Law always develops. The laws need to be cleaned, wound up and set to true time like the clocks.

100. In response to the claims under alleged malicious prosecution, it was contended that apart from the facts that the prosecution was instituted by the 1st Defendant and a *nolleprosequi* was entered in favour of the Plaintiff, there is lack of proof that the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated with malice. It was argued that there was a coup attempt and civilians as well as military personnel were involved, that the police investigated the case which raised reasonable suspicion that the Plaintiff was involved, that his witnesses could not absolve him completely and there were independent witnesses whose statements were with the police to implicate the Plaintiff. With these factors before the court, it was contended that, the plaintiff has not shown the most important factor to prove the malicious prosecution, namely, there was no reasonable or probable cause.

101. As regards the issue of his detention, it was argued that his detention was lawful as stipulated in provisions of the Preservation of Public Security Act. The actions of the officers cannot be challenged. Lastly it was contended that if the court is minded to grant the damages the case of ***WanyiriKilhoro –vs- Attorney General (Civil Appeal No. 151 0f 1988)*** was cited:-

"***Wherein the Court of Appeal awarded Shs.400,000/- as a reasonable compensation to the Plaintiff who was detained for 74 days in police custody prior to his arraignment before the court."***

102. The 1st Defendant, however, submitted that a sum of Kshs. 1,000,000/- shall be reasonable in the circumstances of this case.

103. ***Miss Kilonzo,*** the learned counsel for the 2nd Defendant took the court through the evidence of the Plaintiff and emphasized on the following parts of his testimony:-

104. The Plaintiff testified that the amendments in the Criminal Procedure Code were targeted to and prejudiced the treason charges against him, PW4 and PW5 but he conceded that the proceedings in the trial showed that his Advocate did not object to the request by the prosecution for adjournment of the matter till the amendments were passed by the parliament, that they were passed for posterity and not limited to himself, that the Chief Magistrate made a finding that there was a *prima facie* case for himself, PW4 and PW5 to be committed to the trial before the High Court that they all entered plea of Not Guilty before the High Court.

105. Although the late Philip Kilonzo, the then Provincial Police Commissioner told him that the 2nd Defendant ordered his detention, a Gazette Notice No. 1432 of 15th April, 1983 was signed by the Permanent Secretary J.J. Mathenge, on behalf of the Minister for Internal Security under the Preservation of Public Security Act (now repealed).

106. The Plaintiff testified that he knew PW4 Prof. Albert Vincent OtienoOsanyo before July 1982 and that they used the same mechanic (late George Ondigo), that he visited his house at Spring valley on 23rd, later changed to 24th July,1982 and visited his house at Ngong House on 24th and inspected it as his German friend wanted to rent the same, however, he wrote statement before the police officer, after due caution, that he visited the Ngong House on 31st July and on 24th July.Moreover, his evidence contradicted with that of PW4 tendered before the court in that PW4 testified that the Plaintiff never visited any of his houses and that he only had a telephone conversation with him on 27th July as regards renting of his Ngong House. The Plaintiff also agreed that his statement before the police differed to that given to the police by late George Ondigo, who denied that he ever went to Spring valley house of PW4 on 24th July and further that he was with the Plaintiff on 31st July at the Ngong House. What the Plaintiff and those witnesses stated before the Police were relevant materials to institute the treason charges against him. Moreover he was also placed at Ngong House at the night of 31st July by the watchman of PW4 in his statement to the police. PW4 in his evidence agreed that when he went to his house at Ngong on 3rd August 1982, the watchman could not talk as he was scared and shaking. PW4 also agreed that he found empty bottles of drinks scattered in the house and that he picked up one empty whisky bottle and carried it away. He conceded that he did not receive any calls from the watchman as regards people coming and drinking in the house.

107. Hon. RailaOdingawho was a co-accused to the charge of treason, agreed in his evidence that there was breakdown of law and order due to failed coup in August. 1982 and that the Government was duty bound to investigate and punish those who were behind the attempted coup d'tat. In response to the questions on his biography book: ***RAILA: AN ENIGMA IN KENYA POLITICS,*** he agreed that statements in that book regarding allegations of other facts of the coup d'tat coincided with those statements of the witnesses recorded by the police and that he did not refute those statements published in the book although he was present at its launch.Before the court, however, he denied his involvement in the attempted coup. The witness also conceded that none of their advocates made any complaint as regards torture while in police custody after their arrests.

108. With the above observations it was submitted that the Plaintiff has failed to prove that he was falsely arrested or imprisoned or maliciously prosecuted and that his detention was actuated by malice on the parts of any of the two Defendants. It was stressed that:-

"The Plaintiff has not proved that he was falsely imprisoned or maliciously prosecuted. Further, that the decision made by the Chief Magistrate's Court, that there was a prima facie case to commit the Plaintiff for charges of treason before the High Court, negatives any inference or evidence of malice, ill will or mala fides on the part of the police who investigated the offence and the 1st Defendant who instituted the criminal charges."

109. The fact that the *nolleprosequi* was entered is not the proof that the Defendants did not have reasonable or probable cause to arrest and prosecute the Plaintiff in view of the finding of the Chief Magistrate that there was a *prima facie* case against the Plaintiff with other two to stand the trial of treason before the High Court. It was further stressed that the committal bundle produced by the Plaintiff has undoubtedly shown that there was sufficient ground for his prosecution to face the charge of treason. In any event, it was stressed that the standard of proof before this court is lower than the criminal courts and hence the fact of what transpired in the criminal matter is not binding on this court.

110. The case of ***Mbowa V. East Mengo Administration [1972] EALR 352*** was relied upon wherein the Court of Appeal at page 354 had observed as under:-

"The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose for the prosecution should be personal and spiteful rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restrain of improper legal proceedings – see WINFIELD ON TORT (7th ed.), P. 704. It occurs as a result of the abuse of the mind of judicial authorities whose responsibility it is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are:-

1. The criminal proceedings must have been instituted by the defendant that is, he was instrumental in setting the law in motion against the plaintiff. It suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority.

2. The defendant must have acted without reasonable or probable cause. Thus there must exist facts, which on reasonable grounds, the defendant genuinely believes that the criminal proceedings are justified.

3. The defendant must have acted maliciously. In other words the defendant must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, he must have had "an intent to use the legal process in question for some other than its legally appointed and appropriate purpose" Pike v. Waldrum, [1952]1 Lloyd's Rep. 431 at p. 452.

4. The criminal proceedings must have been terminated in the plaintiff's favour, that is the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.

111. Second point of law raised on behalf of the 2nd Defendant is that he is not justiciable under Section 26 of the Repealed Constitution.The relevant parts of the said Section stipulate as under:-

26. (1) There shall be an Attorney General whose office shall be an office in the public service.

(3) The Attorney General shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over the continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney General upon the investigation.

(6) The powers conferred on the Attorney General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority.

Provided that where any other person or authority has instituted criminal proceedings, nothing in this section shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(8) In the exercise of the functions vested in him by subsection (3) and (4) of this section and by sections 44 and 55, the Attorney General shall not be subject to the direction or control of any other person or authority.

112. In short it was submitted that the office of the Attorney General is created under the Constitution which has conferred the power on him to institute or to discontinue any criminal proceedings against any person and further that the Attorney General is not subject to the directions or control of any other person or body in exercise of his duties (See sections 26(3), (6) and (8)).

113. Thus no malice or wrongdoing should be attributed to the 2nd Defendant, so far as the prosecution of the Plaintiff was concerned.

114. Further it was submitted that the Plaintiff has failed to prove that his detention was unlawful and/or malicious and in the alternative it was submitted 2nd defendant cannot be held liable for his detention.

115. It may be relevant to cite relevant provisions of the Repealed Constitution and The Preservation of Public Securities Act (Cap 57 Laws of Kenya).

Constitution:

Section 83. (2) 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 specifically 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 provisions of law under which his detention is authorised;

(c) not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the President from among persons qualified to be appointed as a judge of the High Court;

(d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and

(e) at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted

to appear in person or by a legal representative of his own choice.

Preservation of Public Security Act:

116. Ms. Kilonzo submitted that the above provisions were followed:-

Public security includes:

Section 2 (d) ***the prevention and suppression of rebellion,***

(Definition) ***mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the Government or the Constitution.***

Section 5 In this part, "subsidiary legislation" means any regulations made under this Act and any rule or order made under such regulations.

The following provisions of**The Public Security (Detained and Restricted Persons) Regulations**, were also relied upon,

Regulation 2 "Detained person" means a person in respect of whom a detention order is in force.

"Detention order" means an order made under Regulation 6.

Regulation 6 (1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restricted order, over any person, he may order that that person shall be detained.

(2)Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while detained, shall be deemed to be in lawful custody.

(3)The Minister may at any time revoke a detention order.

Section 8 (1) Every document purporting to be instrument made or issued by the President or by any Minister or other authority or person in pursuance of any provision contained in, or having effect under, this Act, and purporting to be signed by or on behalf of the President, or the Minister, authority or person, shall be received in evidence and shall, until the contrary is proved, be deemed to be an instrument made or issued by the President, or by the Minister, authority or person.

117. Ms. Kilonzo stressed that as per the powers vested under Regulation 6(1) of the said Regulations, the Minister issued Gazette Notice No. 1432 of 15th April, 1983 and it showed that it was the notice issued by the Minister who had the power to detain a person, in this case the Plaintiff. It is evident that the event of attempted overthrow of Government on 1st August,1982 came under the purview of the provisions of the Preservation of Public Security Act (See Sec. 2 (d)) and the Government had the power and responsibility to suppress and investigate the said attempt, to arrest and/or detain the persons suspected of being involved in those activities. The detention of the Plaintiff fell squarely under the provisions of the Constitution and relevant laws. Section 83(1) of the Constitution declares that the actions taken in pursuance to the provisions of the said Act were not inconsistent with or in contravention of Sections72, 76,79,80,81 or 82 of the Constitution.

118. It is a trite law that the fundamental rights of the people could be limited if it can be justified in an open and democratic society. Preservation of security of a Nation and its citizens is without doubt a justifiable factor to limit the freedom of a person considered to be a risk to such security and the Minister did arrive at such conclusion. The Minister is holder of a Public Office and exercises his powers at his own discretion by virtue of being a Minister of Internal Security independent of any direction.

119. The repealed Constitution also provided for safeguards and rights of a detained persons as per Section 83(2) and further by establishing an independent Review Tribunal under the Regulations. The Plaintiff has conceded that he appeared before the said Tribunal every six months. He was similarly discharged under Regulation 6(3) of the said Regulation.

120. In the premises, she submitted that this court should hold that since the failed coup was aimed to disturb and break a Constitutional order, the arrest and incarceration of those suspected of participating in such attempt was reasonable and justifiable in any democratic society. [See ***Peter NgariKagume& 7 others V. Attorney General (2009) eKLR].*** Miss Kilinzo added that the Attorney General, the Minister for Internal Security and Detention Review Tribunal carried out their respective duties under the Constitution and relevant law and were not subservient to the 2nd defendant, cannot be held liable for their actions. She stressed that it is the Government, if at all, which is primarily liable for the actions of its officers including the President acting in his capacity as such public officer. Sections 2, 4 and 12 of the ***Government Proceedings Act*** were cited to support this issue. I shall quote them:-

Section 2 (1)

An officer in relation to the Government includes the President, the Vice President, a Minister, an Assistant Minister and any Servant of the Government.

Section 4 (1)

Subject to the provisions of this Act the Government shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity it would be subject:-

(a)In respect of torts committed by its servants or its agents.

(b)In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer.

(c)Provided that no proceedings shall lie against the Government by virtue of paragraph (a) in respect of any Act or omission of a servant or agent of the government unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or his agent or his estate.

Section 4 (2)

Where the government is bound by a statutory duty which is binding also upon persons other than the government and its officers, then, subject to the provisions of this Act, the government shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be subject if it were a private person of full age and capacity.

Section 4 (3)

Where any functions are conferred or imposed upon any officer of the government as such either by any rule of the Common Law or by any Written Law, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the government in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the government.

Section 4 (4)

No proceedings shall lie against the government by virtue of this Section in respect of any act, neglect or default of any officer of the government, unless that office has been directly or indirectly appointed by the government and was at the material time paid in respect of his duties as an officer of the government wholly out of the consolidated fund or was at the material time holding an office

in respect of which the minister for the time being responsible for finance certifies that the holder thereof would normally be so paid.

Section 12

All Civil Proceedings by or against the government shall be instituted against the Attorney General

121. Ms. Kilonzo relied solely on the above provisions to show that 2nd defendant was an officer of the state under Sec. 2 (1) and was carrying on duties of his office as an Executive Head of the Government. If so, the Government shall be liable for his tortious actions, if any.

122. The case of ***Bishop V. Attorney General of Uganda & another EALR 1967*** was cited wherein the Chief Justice Udoma found that:-

"Since both the Government and the Minister in his capacity as Minister could not be made liable for the same tort at the same time, and the Attorney General was already a Defendant, the second Defendant was wrongfully joined in his capacity as Minister and no cause of action had been disclosed against him"

123. I may note here that in this case the Plaintiff has averred specific cause of action against the 2nd Defendant and thus this authority could be distinguished on this fact. Be that as it may, it is contended in addition that the Plaintiff has failed to prove that the 2nd defendant personally authorized his arrest, torture, investigations, prosecution and detention without trial as claimed by him. Several officers with statutory powers had been mentioned by him and the 2nd defendant has been associated with them as the President of the Nation. No misconduct against him as an individual has been proved to show that he acted outside the law or outside the authority of his office as the President.

124. In the case of ***Johnson KobiaM'Mpvi v. Kenya Revenue Authority & another (2008) eKLR*** the High Court held that :-

"***The plaintiff ought to have enjoined the Attorney General in the suits, as the Attorney General is the one who carries all the legal burdens on behalf of the government, so that when officers of the government do wrong to the citizens of this country, the Attorney General is the one to be sued on behalf and instead of such officers."***

125. Lastly it was contended that the Plaintiff has failed to show that the notice of intention to sue was given to the 2nd defendant. I shall not give much weight to this submission simply because the 2nd defendant through his counsel has addressed a letter dated 31stJuly, 2003 (P Exh. 9) to the then counsel of the plaintiff denying the liability or responsibility to the plaintiff. It had referred to a letter dated 23rd July, 2003 from the plaintiff's counsel and it may be pertinent to note that the last paragraph of the said letter states that ***"any ill advised proceedings instituted against the 2nd defendant shall be vigorously defended at the plaintiff's costs."*** I do reject that defence from the 2nd defendant despite the fact that the plaintiff was unable to produce the letter of demand addressed to the 2nd defendant.

126. I shall have to consider the remaining issues, from the evidence and submissions which I enumerated hereinbefore, which are for the sake of clarity culled out as under:-

(1)Whether the plaintiff's arrest and prosecution on the charge of treason was unlawful and/or malicious.

(2)Whether the detention of the plaintiff as alleged was unlawful.

(3)If so, whether the defendants either jointly or severally are/is liable for the said actions.

(4)If so, whether the plaintiff be compensated with damages as prayed.

(5)Who pays costs.

127. Most of the facts in the matter are not disputed. The plaintiff was arrested as averred on 17th August, 1982 in the aftermath of the coup d'tatattempted in the early morning of 1st August, 1982. This court can take judicial notice of the said act and also of the fact that the lives and properties were lost, that the Rule of Law was broken and Security of the State wasthreatened. There was definitely an urgent need and obligation to take immediate and stern actions on the part of security branch of the government to restore law, order and security in the country.

128. The plaintiff was arrested on 17th August, 1982 more than two weeks after the attempted coup. From the facts before me, I am not persuaded to find that the act of his arrest was predicated on his involvement as a journalist in the event of tragic murder of late J.M. Kariuki. With considered evaluation of the evidence leading to his arrest, I am constrained to find, which I hereby do, that his arrest on 17th August, 1982 by the police and other security officer was not unlawful and/or malicious.

129. Then comes his custody at GSU Headquarters and the treatment he faced on the hands of security personnel headed by late Mr. Ben Gethi and Peter Mbuthia.I am only concerned with his allegations of physical torture as made in the plaint. My task becomes more difficult in view of non-availability of any hospital records and inconclusive medical report. I would, however, agree that the circumstances under which the plaintiff was held in custody were most difficult and emotive. The officers could have been more forceful than what they would be in normal circumstances. But the burden to prove the allegations as averred on balance of probability rests squarely on the plaintiff.

130. His averments in the plaint and evidence supported by that of Prof. Osindo and Hon. RailaOdinga are not contested by the defendants. The acts of brutality committed by officers of the state are proved to my satisfaction and I do find that the plaintiff on the night of 20th August, 1982 was subjected to torture and inhuman treatment contrary to Sec. 74 (1) of the Repealed Constitution. I may observe that Sec. 6 of the Transitional and Consequential Provisions (sixth Schedule of the Constitution) gives continued effect to the rights and obligations of the Government or the Republic subsisting immediately before the effective date i.e. 27th August, 2010.

131. I have cited relevant provisions of Government Proceedings Act and reiterate that the officers of the Government violated the provisions of the Constitution and I thus hold 1st defendant liable for the violation of this right of the plaintiff. I shall have to discharge the 2nd defendant from this liability not only because there is no evidence of his direct involvement but also because of the evidence that the perpetrators of this action ran away when they saw an aide of the 2nd defendant.

132. I do further find, on clear and uncontroverted evidence, that the police force after his arrest on 17th August, 1982 kept the plaintiff in police custody upto 22nd September, 1982. This act is in stark violation of Section 72 (3) of the Constitution which obligates the arresting authority to bring a suspect before the court within fourteen days from the date of his arrest. The 1st defendant has not even tried to explain this delay. Without such explanation, I cannot and shall not take any notice of the situation of the nation prevailing at that time and to try to condone that delay. Moreover, the plaintiff contends that he was kept incommunicado during his custody.

133. The plaintiff has vehemently submitted that the charge of treason leveled against him and its prosecution were malicious as there was no reasonable or probable cause to charge him and prosecute him.

134. I have elaborated the evidence and submissions made by the plaintiff. The committal bundle produced by the plaintiff which included his statements and those of other witnesses made during investigation have been considered by me. Although he testified that he wanted to amend his statement made at the CID Headquarters after due caution, that fact cannot help him now. I say so simply because as at the time when he was charged with the offence of treason,the policeand the prosecution had those

facts given in several statements and they were used in charging the plaintiff with the offence of treason.

135. Moreover, on perusal of those statements the Chief Magistrate made a Ruling that the plaintiff be tried for the offence of treason.

136. Much stress was placed by the plaintiff on the fact that the Attorney General in any event entered *nolleprosequi* in his favour and he was discharged. This fact cannot be denied but, for the purposes of claim of prosecution to be malicious to be tenable, I have to consider the salient factor which is whether there was the reasonable and/or probable cause for arrest and prosecution.I cannot, with all sincere efforts, find that the State did not have reasonable or probable cause either to arrest or prosecute the plaintiff and I reject the claim that his arrest or prosecution was malicious.

137. Going further to the succession of events, it is evident that at the time of his arrest and arraignment on the charge of treason, the Criminal Procedure Code stipulated the process of holdingPreliminary Inquiry to commit the accused person to the High Court. That was the process which the plaintiff reasonably expected to undergo when he was charged.

138. What happened instead? His trial before the subordinate court was delayed for about eight months which resulted in extension of his remand period. It is true that the applications by the prosecuting counsel to adjourn the matter awaiting the outcome of expected amendment in the Criminal Procedure Code were not objected to by the counsel representing the plaintiff. But cana consent by a counsel representing an accused person to an unlawful process be a good ground to absolve the breaches of law and constitution? I shall have to respond by averring it loud and clear that an illegality cannot be cured by a consent even if made by the accused person let alone his legal representative.

139. The trial of the plaintiff ought to have proceeded by conducting a Preliminary Inquiry.

140. I do say so in view of clear provisions of Section 23 (3) of Interpretation and General Provisions Act (Cap 2).

141. The relevant part of the said provision stipulates:-

"Where a written law repeals in whole or in part another written law, the, unless a contrary intention appears the repeal shall not –

……

(d) affect an investigation, legal proceeding or remedy in respect of a respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

142. To support my observations, I have several Court of Appeal authorities where the court held that the amendment in Criminal Procedure Code to remove the assistance of Assessors in the Murder Trial cannot be enforced in a trial which proceeded under the repealed provision of the trial with aid of assessors. I may cite few of those cases:-

(1)Pamela Karimi –vs- Republic, Criminal Appeal No. 118 of 2008

(2)Paul Kithinji –vs- Republic, Criminal Appeal No. 310 of 2008

(3)Fredrick OkarareChesebe –vs- Republic, Criminal Appeal No. 272 of 2008

143. By using the process of law in trial not in force at the time of his arraignment before the court on the offence of treason, the State not only contravened the statutory provision of the Interpretation and General Provisions Act, but violated the plaintiff's right of fair hearing within a reasonable time granted under

Section 77 (1) of The Constitution. I do accordingly find so.

144. All these actions which are complained by the plaintiff were undertaken by the officers of the State responsible for investigation and prosecution. The plaintiff except for reiterating his claim that the 2nd defendant was behind or instrumental to enforce those actions through his subordinate officers so that he could take revenge on him, did not proffer any evidence to substantiate the same. Humbly put,I do find this claim farfetched and without any substantiation from any independent evidence. There is total failure to show personal involvement of the 2nd defendant.

145. The plaintiff relied on some passages from the Judgment of the High Court in Judicial Review Miscellaneous Civil Application No. 1294 popularly known as ***'Mr. Justice Ole Keiwua's Case'.***

146. The facts of the said case are completely distinguishable from those of the present case. First of all, the President was not a party in the said matter and the issue before the court was whether any act which is authorized by the President can be attacked. In that matter, it was the President who appointed a Tribunal to investigate the conduct of lateMr. Justice Ole Keiwua under Sec. 62 (5) of the Constitution and the court found that the persons appointed by the President and charged with duties and responsibilities are not immune from judicial review when their acts offends the prescriptions of law.

147. In the present case, the plaintiff imputes personal liability on the President for actions taken as the Head of State. He can, as he has done, file suit against 2nd defendant after he has ceased to hold his office to claim the damages against the 2nddefendant in his personal capacity. Thereafter, as is expected in all civil suits, the plaintiff has to prove his claim as per the law of Evidence and Principles of Standard of Proof.

148. To support his claim, the plaintiff has further relied with emphasis on a recent case of ***Mwangi Stephen Mureithi –vs- Hon. ToroitichArapMoi, EGH & Another (Petition No. 625 of 2009).***

149. The Petitioner in the said case was a business partner of the Ex-President and has filed the petition only against the Ex-President without involving the Attorney General. The petitioner further averred and proved that the reasons for the detention were personal to the Ex-President and were meant to achieve ulterior commercial advantage and that in detaining him without trial, the Ex-President acted in abuse of his office as the President and thereafter caused the petitioner's interests in jointly owned companies to be sold and ravaged without accounting to the petitioner.

150. Needless to state that the facts of ***Mwangi's case (supra)*** revealed that the purpose of his detention was solely based on personal commercial interests between the parties. The present case is dramatically opposed to the said case in facts. The 2nd defendant herein is posited amidst the first ever (and hopefully the last one) attempted coup. It happened after almost 17 years from the tragic death of late J M Kariuki. The plaintiff was a suspect in involvement in the said coup along with two other suspects. All the three were treated in the same measures i.e. they were all arrested, held incommunicado, charged, discharged and detained. The court is not given any justifiable reason or proof to hold that the 2nd defendant abused his office to attain personal interest or gain from the actions taken against the plaintiff.

151. I am not satisfied that he has been successful in proving his claim on 2nd defendant's personal liability. The actions taken against the plaintiff were official actions after the process of law undertaken by authorities empowered under the repealed Constitution. The evidence of personal involvement of the 2nd defendant is completely unavailable to the court.

152. That takes me to the issue regarding detention of the plantiffimmediately after his release from the criminal case because the State entered *NolleProsequi.*

153. The 1st defendant in his defence has averred that the prosecution of the plaintiff was withdrawn to enable him be detained under the Preservation of Public Security Act as there was evidence of real and threatening danger to the State emanating from the plaintiff contrary to the plaintiff's contention in the

plaint.

154. I shall pause here and consider the defence by the 1st defendant. The parties before the court are bound by their respective pleadings and the 1st defendant has overtly averred that the State opted to detain him instead of continuing with his prosecution on the charge of treason. The 1st defendant has also given reason for its choice to detain him which was that the plaintiff posed a real and threatening danger to the state. By doing so, the burden to prove those averments shifts to the 1st defendant which it has miserably failed to discharge. DW1 in his testimony did not adduce any evidence to prove the averments made in the defence of the 1st defendant. The court is simply left with lurking discomfort and suspicion that the 1st defendant chose that option to avoid its responsibility to prove the charge and further to take shelter under a safer provisions of law where the State was not liable to face any legal attack or onus to prove its actions justifiably.

155. If that was not enough, it is clear from the evidence led that the 1st defendant has also failed to show that after the plaintiff's detention, the safeguarding and mandatory provisions of Sec. 83 (2) and (3) of the repealed Constitution were adhered to.

156. The plaintiff has categorically testified that after his detention, he was not furnished with any statement in writing specifying in detail the grounds upon which he was detained. As per the evidence before the court, what he was told before his detention was that he was detained under the directions of the 2nd defendant.

157. The plaintiff further testified that even at the hearing of his case before the Review Tribunal after interval of six months, only questions asked and allowed by the Review Tribunal were in respect of his physical welfare. This evidence remains unchallenged and the court cannot but find, which I hereby do, that the 1st defendant failed to adhere to provisions of sec. 83 (2) (a), (c) and 83 (3) of the Constitution.

158. What was adhered to was the Gazettement of his detention on 11th April, 1983 specified in the earlier part of this Judgment.

159.I shall not consider Sec. 85 of the Constitution on simple reason that no evidence is led to show that the 2nddefendant either initiated its provisions or enforced them.

160. The plaintiff was also discharged unceremoniously on 12th December, 1987 under the President's general amnesty. I do not have any evidence of degazettement of his detention order of 11th April, 1983 as required under Regulation 6 (3) of the Public Security (Detained and Restricted Persons) Regulations.

161. I shall pause here to observe that I do consider the evidence of DW1 unmeritorious simply because it is unbelievable that actions taken by the Government consequent to the aborted coup d'tatwere destroyed despite the fact that as per the document produced in support of the statement of Senior Deputy Commissioner of Police Julius Ndegwa EBS (DW1), the records in respect of cases of treason are classified as permanent. The witness could not satisfy the court with any shade of sincerity and reason why the records of only treason case in the country were not available despite the fact that they are classified as permanent records to be held by the Police Department.

162. Coming back to the issue of validity or otherwise of the detention of the plaintiff, the 2nd defendant relied on the case of ***Republic –vs- The Commissioner of Prisons Ex Parte Wachira (1985) KLR 398***

163. However, I can state without going in detail of the facts of the said case (though I have considered it fully), that the issue before the court was that the grounds given in the statement issued under Sec. 83 (2) were insufficient. The court then held, and I quote:-

"***In my opinion insufficiency of details in a statement furnished under section 83 (2) (a) of the Constitution does not render the detention invalid. Since the object is to enable the detainee to know***

what is being alleged against him the remedy of the detainee is to seek further and better particulars. I agree with the Attorney General that the appropriate forum for such an application is not the High Court but the review tribunal referred to in paragraphs (c), (d) and (e) of section 83 (2)"

164. The case before me is that there was no statement. The plaintiff was not served with any statement, full stop. In other words, despite his discharge from the criminal case, he was left by himself to surmise the reasons for or fix the pieces of puzzle of his detention.

165. The evidence before the court leads to anirresistible conclusion that the detention of the plaintiff was unconstitutional, unjustified and unlawful. It is the sacrosanct obligation of a Judge to read and interpret the fundamental rights of persons guaranteed by the Constitution in a manner which preserves,nay, enhances the aspirations and expectations of the people from a living Constitution.

166. I cannot resist looking at the background of this case. The State after the arrest of the plaintiff had enough time to investigate, and did in fact investigate, on the charge of treason against the plaintiff. After the preparation of committal bundle he was committed to the High Court for trial on 24th January, 1983.On 23rd March, 1983, he was discharged from the treason charges and detained on the same day. I need not repeat the process of detention which was skewed in this matter by any standard of propriety.

167. In the premises, I do find that the plaintiff was deprived of his right of freedom, not justified either under the Constitution or under the Preservation of Public Security Act. I must emphasize that the State cannot shield behind the excuse of protecting and preserving security when it seemed to face the uncertainty in the criminal trial. At least, the facts before the court do not justify the detention of the plaintiff.

168. I cannot even offer my sympathy to the defendants when a very Senior Police Officer comes before the court and testifies that the documents relating to this serious matter were destroyed which in the first place were supposed to be held permanently.

169. Lastly, I may add that as per Sec. 77 (2) of the Constitution, the plaintiff was presumed to be innocent until he was proved guilty. If so, after his discharge, without any further evidence, I fail to fathom how he was detained for being a threat to security of the State? This is, in my view, nothing but sad example of forced punishment without due process of law.

170. It is sufficiently on record that the Gazette Notice of 13th April, 1983 was issued on behalf of the Minister in charge of Internal Security, who is empowered to make such orders as per Part III of the Public Security (Detained and Restricted Persons) Regulations.

171. Regulation 6 (1) of the said Regulationsgrants total discretion on the Minister to order the detention or to revoke the same. Thus if the Minister fails to perform any of his/her responsibilities attributed either under the Constitution or under an Act of Parliament, the liability of any claims arising from such failures rests on the Attorney General under the Government Proceedings Act. To shift the said responsibility to the Head of the State either jointly or severally shall be improper,specially in absence of evidence to show the 2nd defendant's personal participation with bad faith or abuse of his office. Further, the actions complained against him are predicated on his official acts for which, unless shown otherwise, the Attorney General has the obligation to be liable under the Constitution and the Government Proceedings Act.

172. Let me put it on record that this court, or in that respect any court, shall not hesitate to hold the ex-President personally liable for any misuse, excess or abuse of power to the detriment of any person.

173. This case has not given me that opportunity and in the premises I shall absolve the 2nd defendant from all the claims made against him in this plaint. It shall be unjust and unwarranted to make a Head of State personally responsible for failures or misdeeds of the state officers without showing his direct participation or involvement. The law has given sufficient remedies to a claimant by imposing the

liability on the Attorney General which takes care of such claims. The office of Head of the State is not synonymous with the person holding that post unless he is shown to be involved for personal gains or vendetta.

174. In short, I do hold the 1st defendant liable for contravention of the plaintiff's right under Sections 72(1), 72 (3), 74 and 77 (1) of the repealed Constitution in as much he was held in custody at GSU Head Quarters in incommunicado for more than 14 days before his arraignment to the court, unlawfully delaying a criminal trial awaiting an amendment in the Criminal Procedure Code and detention without adhering due process of Constitutional provisions and the relevant law.

175. With the aforesaid observations, the issue left to be determined is whether the plaintiff is entitled to the compensation by way of damages and if so, what shall be the nature and quantum of compensation.

176. It was contended that the plaintiff has not come before the Court under competent procedure of law. He has claimed that his fundamental rights were violated and if so, he was required to come by way of a Constitutional Petition under Sec. 84 of the repealed Constitution. That process was prescribed under Legal Notice 133 of 2001, namely the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 (Popularly known as ***"Chunga Rules").***I was asked not to grant any orders on the alleged violations of fundamental rights.

177. The High Court under the repealed Constitution had unlimited original jurisdiction in Civil and Criminal matters as well as had original jurisdiction to interpret the Constitution and to hear and determine the issues of violation of fundamental rights enshrined in the Constitution.

178. I shall quote Sec. 84 (1) of the Constitution.

87. (1) Subject to subsection (6), if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

179. On simple perusal of the language of the said Section, it is apparent that the Constitution has not barred the High Court to hear and determine any Constitutional issues of violation of fundamental rights by way of any other procedure except that prescribed by the Rules made by the Chief Justice under Sec. 84 (6).

180. I am fortified by the words ***"….. then, without prejudice to any other action with respect to the same matter which is lawfully available ….."*** appearing in the said sub-section.

181. I am of the firm opinion that filing of the Plaint was a procedural action lawfully available to the plaintiff.

182. I shall also consider the wordings of Sec. 84 (6) which allows the Chief Justice to make rules with respect to practice and procedure of the High Court in relation to the jurisdiction under section 84 (1). It begins with ***"The Chief Justice may make rules".*** I can further take judicial notice of the fact that before the enactment of '***the Chunga Rules'***, the High Courts of Kenya had been protecting and preserving the right of the citizens by any lawful procedure under which the claims had been brought before the court. In my considered view, the plaintiff should not be debarred from claiming his rights under the Constitution along with claims under civil law. The appropriate and justifiable disregard of technicality is now subscribed under Section 159 of the Constitution (2010). Even under the repealed Constitution, the High Court had justifiably and progressively interpreted the Constitutional provisions to impart justice.

183. The jurisdiction of the High Court is unlimited and cannot be limited or ousted in this matter. The door of justice before this court cannot be closed with keys of technicality on procedure which is otherwise lawfully available to the plaintiff.

184. With the above observations, I shall now proceed with whether the plaintiff is entitled to claim damages.

185. In the case of ***Albert Ruturi& Others –vs- The Minster for Finance and Another HC Misc. Appl. No. 980 of 2001***, the court had this to state:-

"We must be goal-oriented i.e. vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our socio-cultural, environment and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a Constitutional right which cannot be abrogated or abridged by trazon or subtle schemes or maneuvers."

186. It is clearly shown to the Court that the Government committed breach of Constitutional provisions by violating the fundamental rights of the plaintiff. It is trite that no wrong can be without a remedy. This Court shall only be performing its duty to uphold its constitutional duties by granting appropriate redress to the plaintiff.

187. The plaintiff is clearly wronged, and the only issue now to be left for my consideration is what damages the plaintiff is entitled to receive.

188. The 1st defendant tried to absolve himself from the liability on the grounds that the excess of exercise of powers by the State Officers cannot be visited to the State as it expects its officers to follow the law. I shall, however, cite the observations made in celebrated case of ***Maharaj –vs- AG of Trinidad and Tobago (No. 2) (1972) 1 ALL ER 387*** to the effect that claim of violation of the fundamental rights;

"…..is a claim against the State for what has been done in exercise of a power of the State. This is not vicarious liability, it is liability of the State itself. It is not liability in tort at all, it is liability in the public law of the state….."

189. Nearer to us, in the case of ***Ndegwa –vs- Republic (1985) KLR 534,*** the Court observed:-

"No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."

190. It is not an emotional outburst when I declare that the power of the State originates from its people and protection of people's rights is the most sacred duty of the State.

191. Several cases have been submitted by the plaintiff to assist me make the assessment of damages:-

(1)***WachiraWeheire –vs- AG*** where shs.2.5 million were awarded for confinement at Nyayo House for 16 days.

(2)Similar award to the suspects from Armed officer in the aborted coup was given in the case of ***Dominic AronyAmolo –vs- AG Misc. Appli. No. 494/03***

(3)In ***Mwangi's case*** (supra) the court awarded shs.80,161,720/-

192. The 1stdefendant without much substantiation urged the court to grant shs.1 million.

193. The 2nd defendant relied on the recent case of ***MigunaMiguna –vs- AG Petition No. 16 of 2010*** wherein an official of Nairobi Students' Union claimed violation of his freedom of liberty and against torture and inhuman treatment and was awarded shs.1.5 million. The court also held that in the case of unconstitutional action, it is unnecessary to consider the issue of exemplary damages and I do agree with this observation.

194. It is not in dispute that the plaintiff lost his job as a result of his arrest, lost his liberty from August, 1982 to December, 1987. It is not, however, completely true that he lost his ability to get employment and his repute in the society. It is true though that he was refused employment form his earlier employer, The Standard. However, he does publish a magazine and had been an elect Member of Parliament for one term. The plaintiff has further failed to show how much he had been and is earning since the release from detention.

195. This case has posed its unique circumstances, but whatever, the circumstances of the case, howsoever controversial or difficult they could be, I shall have to be fair and reasonable in awarding damages.

196. I may reiterate words expressed by Lord Nicholls of Birkenhead in ***Rees –vs- Darlington Memorial Hospital NHS Trust (2003 UKHL 52)***

"In this this Appeal, as in the recent case of Mcfarlane –vs- Tayside Health Board [2000] 2 ac 59, your Lordship's House had to make a decision concerning development of the law in a field which is highly controversial and therefore, exceedingly difficult….."

"Judges of course do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and to avoid other pitfalls. But, however, controversial and difficult the subject matter, Judges are required to decide the cases brought before the Court. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness in a novel type of case"

197. I shall further observe that the plaintiff had also claimed damages in tort. However, those claims are not successful as per my findings. What remains are the actions by and from the State officers which, to say the least, were unconstitutional, contrary to fair process of Criminal Law administration and oppressive. He has lost almost five years of life without family or friends. He was punished to suffer solitude and stress without due process of law. It is almost impossible to describe or even to visualize how he would have passed those years without human dignity. Those years cannot be just wished away from his life.

198. It could be even difficult to make heads of damages as the events emanate from his arrest in the aftermath of another tragic blot on the face of our Nation. I shall thus award the lumpsum for all the breaches of his fundamental rights specified hereinbefore. In my considered belief, that method shall be the fairest to adopt in this matter.

199. Considering all the circumstances shown from all sides, I am of an opinion that a sum of ***Kshs. 20,000,000/- (Kshs. Twenty Million)*** is the fair and reasonable award to the plaintiff for violation of his fundamental rights as enumerated hereinbefore.

200. I shall thus make following orders:-

(a)There shall be Judgment for the plaintiff in the sum of Kshs. 20,000,000/- (Kshs. Twenty Million) against the 1st defendant.

(b) The 1st defendant shall pay the said sum of Kshs. 20,000,000/- (Kshs. Twenty Million) with interest at court rates.

(c)The cost to the plaintiff only in respect of disbursements (as he represented himself in person)be paid by the 1st defendant.

(d) The 2nd defendant shall bear his costs of the case.

Orders accordingly.

Dated, signed and **delivered** at Nairobi this 15th day of**June, 2012**

K. H. RAWAL

JUDGE OF APPEAL