REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 403 OF 2006

PETER M. KARIUKI ……..……..…….. PETITIONER

VERSUS

ATTORNEY GENERAL ……..…… RESPONDENT

JUDGMENT

The petitioner was enlisted in the Kenya Air Force as No. 027008 on 12th June, 1964 and commissioned as an Officer on 22nd September, 1965. He rose through the ranks to the position of **Major General** on 14th May, 1981 when he was appointed Commander of the Kenya Air Force.

In his petition filed on 21st July, 2006, the petitioner stated that while performing his command duties as the Kenya Air Force Commander he got to know of allegations of an intended *coup* attempt against the Government of Kenya. On **14th July, 1982** the petitioner was telephoned by **Col. Felix Njuguna**, the Commanding Officer of the Air Force Base at Nanyuki, who informed him that one **Lt. Mwambura** had reported that one Sgt. Ogidi had approached Lt. Mwambura and told him that there was a group being formed to disrupt the Government and that they wanted to recruit Lt. Mwambura into the group.

Upon hearing that, the petitioner immediately telephoned the Deputy Chief of General Staff, **Lt. General Sawe**, and recounted to him what Col. Njuguna had told him. The petitioner told Lt. General Sawe that because the matter was serious and sensitive he would like to go to his office to discuss the same with him. The petitioner also told Lt. General Sawe to inform the Chief of General Staff. Lt. General Sawe told the petitioner to go to his office and the petitioner did so. They both proceeded to inform the Chief of General Staff, **General J.K. Mulinge**, what they had heard regarding the intended *coup*.

After evaluating the matter, General Mulinge, Lt. General Sawe and the petitioner decided that the information be passed on to the Military Intelligence and the Special Branch for full investigations under the co-ordination and direction of the Chief of General Staff.

On **Friday 30th July 1982** the then President Daniel Arap Moi was to officially open the Central Kenya ASK Agricultural Show at Nyeri and as was customary there was to be a fly-past by the Kenya Air Force jets and hence the presence of General Mulinge and the petitioner was necessary. During the said ceremony the petitioner sat at the State pavilion with General Mulinge and the President. At some point the President left the pavilion to tour some agricultural stands and the petitioner and General Mulinge were left at the pavilion.

General Mulinge asked the petitioner whether Lt. Mwambura had been Court Martialled. The petitioner reminded General Mulinge that they had agreed that Lt. Mwambura would assist them with the planned *coup* investigations by agreeing to be used as a decoy to infiltrate the alleged *coup* plotters and for that reason he had not yet ordered for his arrest and arraignment before a Court Martial. General Mulinge told the petitioner to have Lt. Mwambura arrested and presented before a Court Martial and the petitioner agreed to do so on the following Monday since there was a weekend in between.

The petitioner stated that on the **night of July 31st and 1st August, 1982** he was at his farm in Timau, Meru District. On the following morning, he learnt that there had been an attempted *coup*. He then decided to proceed to Nanyuki Air Force Base so as to establish what the situation was. On his way to Nanyuki, the petitioner heard from the radio that the military rebellion had been crashed by military officers led by **Major General Mohammed**. On his way to Nanyuki the petitioner was stopped by a police military officer who told him that he was required to get in touch with the Army Headquarters. Consequently, the petitioner proceeded to Nairobi. Upon arrival at the Army Headquarters at about 4.45 p.m. he went to the Operations Room where he joined other senior military officers and actively participated in the operations to bring calm in the country and commence investigations.

Upon conclusion of investigations the then Commander in Chief, President Daniel Arap Moi, relieved the petitioner of his duties as the Commander of the Kenya Air Force and ordered his arrest.

The petitioner added that during the period in which he participated in duties at the Operations Room in Ulinzi House it became clear to him that the entire exercise had become highly politicized and was targeted at cleansing the Air Force of senior Luo and Kikuyu personnel from the military. He further stated that the decision to stage a Court Martial was to divert attention and hide the true purpose of the post-coup operations so that the then President could have an opportunity to re-constitute the Kenya Air Force. The process saw many highly trained Luo and Kikuyu senior officers removed from the Air Force, he alleged.

Following the petitioner's arrest, he was locked up in solitary confinement at Kamiti Maximum Security Prison for sometime and then transferred to Naivasha Maximum Security Prison where he was again held in solitary confinement for 147 days until 10th January, 1983 when he was taken before a Court Martial and charged with failing to prevent mutiny contrary to **Section 26(a)** of the **Armed Forces Act** and failing to suppress mutiny contrary to **Section 26(a)** of the **Armed Forces Act**. The petitioner lamented that the conditions in the two prisons were harsh, brutal and most inhumane and amounted to torture and extreme violation of his fundamental rights as stipulated under **Section 74(1)** of the repealed **Constitution of Kenya.**

Regarding his stay at Naivasha Maximum Security Prison the petitioner stated that:

(a) He was kept in solitary confinement.
(b) He was allowed only 20 minutes out of his cell in every 24 hours except when he was being interrogated by police and military officers.
(c) He was not allowed to receive any visitors.
(d) He was served with food not fit for human consumption.
(e) He was not allowed any reading material.
(f) He was not allowed any contact with a lawyer.
(g) Caution and inquiry statements were taken from him in total breach of the Judge's Rules.

The petitioner averred that his trial was a malicious travesty of justice that could not be justified on any reasonable grounds and believes he was used as a sacrificial lamb for political purposes. He further alleged that the Court Martial as constituted was neither impartial nor independent. The Court Martial was presided over by **Major General Lenges** as the Presiding Officer and included **Brigadier C.O. Mkungusi, Brigadier D.R. Tonje, Lt. Col. A.R. Khan** and **Lt. Col. M.F.K. Muhindi** and **E.F. Aragon**, (then Senior Resident Magistrate) as the Judge Advocate.

The Court Martial was under the direct control of General Mulinge, to whom the petitioner had made reports of the intended *coup*. In his submissions, the petitioner alleged that the Chief of General Staff in having him charged intended to suppress the truth by using the Court Martial to cover up for his negligence (General Mulinge) in failing to act on the report that had been given to him about the intended *coup* in good time.

Of some of the other officers involved in the Court Martial, the petitioner stated that the order convening the Court Martial was signed by the officer who replaced him as the Commander of the Kenya Air Force, Lt. General Mohamed. In the petitioner's view, that officer had an interest in the case. Further, Lt. General Mohamed had actively participated together with the petitioner in duties at the Operations Room at the Defence headquarters and had openly differed with the petitioner as to the real purpose of the operations and methods being used against officers who had mutinied. Lt. General Mohamed could not therefore be expected to be impartial, the petitioner stated.

The petitioner further stated that when the trial commenced on 11th January, 1983, his advocate, **Mr. Paul Muite**, made an application for adjournment under **Rule 46** of the **Armed Forces Act**. The advocate stated, *inter alia*:

"The grounds on which the application is made are as follows: - I was handed over the abstract of evidence, statements and the charges against my client on Friday last week. I would like to thank the prosecution, particularly Major Mbewa, because since handing the abstract to me, he went out of his way to give me every opportunity to have consultations with my client, Major General Kariuki, so that on Saturday the following day, I was able to see my client for the first time shortly before noon and I spent Saturday afternoon with him at Naivasha Prison. Again Major Mbewa made it possible for me to see my client yesterday evening for two hours at Kamiti prison. There was no failure at all on the part of the prosecution in making it possible for me to have consultation with my client. My client had risen to the position of being Commanding Officer of the Kenya Air Force and held the rank of Major General. Bearing in mind the rank and position of my client, the seriousness of the charges with which he is charged, I feel constrained to do the utmost best I can to assist the court in arriving at the truth. For me, to be able to discharge that duty I most certainly need much more than a weekend. If the hearing continues today I shall be handicapped seriously in my cross examination of the prosecution witnesses without first having seen the witnesses that my client wishes to call in his own defence because for me to be able to effectively cross examine these witnesses I need to take statements from client's witnesses. I cannot, possibly identify my client's witnesses before seeing him and hearing what he has got to say about the charges now against him. So within the short period between Friday and now it has not been possible for me to see the witnesses that we wish to call and thereby bring myself to the position where I can effectively cross examine the witnesses for the prosecution. I may say, Sir, in passing, that we recognize the inconvenience an adjournment would cause to the court which is assembled here for the purpose of trying my client, but permit me to make a submission that for the liberty of a citizen, no price is too high to be paid, and if it is felt that we should meet the price, we would gladly do so. I do not ask for a month. I do not ask for weeks. I ask for the rest of this week during which I will be able to see all the witnesses and take their statements and to have further consultation with my client and to be able to discharge the duty that I feel is on my shoulders, which is that of defending my client and assisting the court in arriving at what I am sure this court wants to do, which is the truth."

The prosecution opposed the application and the Presiding Officer peremptorily rejected Mr. Muite's application for adjournment.

The petitioner contended that the refusal to grant an adjournment was in breach of **Rule 24(1)** of the **Armed Forces Rules of Procedure, Legal Notice No. 249 of 1969** made pursuant to **Section 228** of the **Armed Forces Act** which rule provides that:

"24(1) An accused who has been remanded for trial by Court Martial may be represented by counsel and shall be afforded a proper opportunity for preparing his defence and allowed proper communication with his defending officer or counsel and his witnesses."

The petitioner states that he was denied an opportunity to prepare his defence and to communicate properly with his counsel. That amounted to further breach of his fundamental right to the protection of law under **Section 70(a)** of the repealed **Constitution of Kenya.**

The petitioner further alleged that during the Court Martial his advocate told the court that the petitioner wanted to call General Mulinge as a witness but the Judge Advocate refused to grant the request. The record of the Court Martial proceedings was produced before this court and the exchange between Mr. Paul Muite and the Judge Advocate is well documented. The petitioner wanted to demonstrate to the Court Martial that as soon as he had heard about the intended *coup* he notified General Mulinge about the same and that is why he wanted him to testify. The Judge Advocate was of the view that General Mulinge would be embarrassed if he was called as a witness by the petitioner. The petitioner stated that the failure, refusal and/or neglect to allow him to call General Mulinge negated the very purpose of the Court Martial and occasioned a miscarriage of justice which was a breach of his fundamental right to the protection of the law guaranteed under **Section 70(a)** of the repealed **Constitution of Kenya.**

The petitioner further stated that he was unlawfully held in custody for 147 days before he was taken to court.

On 18th January, 1983 the Court Martial convicted the petitioner and sentenced him to four years' imprisonment on each count, the two sentences were ordered to run concurrently. In addition, he was also dismissed from the Armed Forces, lost his rank, benefits, medals and other decorations. The petitioner held and continues to hold the view that his trial, conviction and sentence and dismissal from the Armed Forces were arrived at in contravention of his fundamental right to a fair hearing within a reasonable time by an independent and impartial court.

In paragraph 64 of the Petition the petitioner stated:

"That from the moment your petitioner's trial commenced on 11th January, 1983 up to the conclusion of the trial on 18th January, 1983 Mr. F.E. Aragon, a senior Resident Magistrate who was appointed by the chief Justice to be the Judge Advocate in your petitioner's trial flagrantly violated the provisions of the Armed Forces Rules of Procedure, and in particular Rule 78.

PARTICULARS

(a) Contrary to Rule 72(2) the judge failed, refused and/or neglected to advise the court that the charge sheet was defective for being duplex

(b) Contrary to Rule 78(7) the Judge Advocate became an active participant in the proceedings acting as an assisting prosecutor instead of ensuring that your petitioner did not suffer any disadvantage as an accused who was held in custody."

Notwithstanding all the above allegations, the petitioner did not prefer an appeal against his conviction and the aforesaid sentence.

When the petitioner was held at Kamiti Maximum Security Prison he was put in solitary confinement in cell number 5 Block E and he alleged that he was held under most inhuman and degrading conditions for the following reasons:

(a) He was locked up in a cell block in which insane inmates were confined.
(b) He was subjected to continuous screaming noise and cries from the insane inmates.
(c) He was served with the same food that the insane inmates were getting.
(d) He was allowed only 20 minutes of exercise every 24 Hours.
(e) His cell was lit with a very powerful bulb 24 hours a day which led to mental anguish and

hallucinations.
(f) He was not allowed to read any book.
(g) He was not allowed to receive visitors.
(h) His confinement was in flagrant violation of prison rules.

These events constituted torture, inhuman and degrading treatment and/or punishment in contravention of **Section 74(1)** of the repealed **Constitution**, the petitioner added.

While serving sentence at Kamiti Maximum Security Prison, the petitioner was served with a letter dated 6th July, 1983 which stated that the Commissioner of Prisons considered that it was in the interest of the reformation and rehabilitation of the petitioner that he be deprived of remission under **Section 46(1)** of the **Prisons Act.** As a result, the petitioner served the full sentence. The petitioner alleges that he was denied the fundamental right to due protection of law guaranteed by **Section 70(a)** and **77(9) of** the **Constitution** in that:

"(a) The decision to take away his statutory right to remission of sentence granted under the Prisons
Act was not arrived at in accordance with the Prisons Act and/or rules of natural justice.

(b) The decision to take away his statutory right to remission was not pursuant to the Commissioner's own discretion as required by law but was a coerced enforcement of a decision taken by the then Attorney-General, Mathew Guy Muli on the instructions of President Daniel Arap Moi."

The petitioner further contended that while serving sentence at Kamiti Maximum Security Prison he was discriminated upon in that while other prisoners serving their sentences were under the control of Commissioner of Prisons and the terms of their imprisonment were set out in the **Prisons Act,** his period of imprisonment was considered of "confidential nature" and in the hands of the Permanent Secretary in charge of Security. This is in view of a letter dated 25th April, 1983 by Major Mbewa on behalf of the Chief of General Staff addressed to his advocate, Mr. Muite. The letter read as hereunder:

"REF PERMISSION TO SEE EX-MAJ. GEN. P.M. KARIUKI

1. I have investigated the possibility of Mrs. Kariuki and her children being allowed to see Ex.-Maj. Gen. Peter Kariuki in prison and the matter appears to be entirely in the hands of the Permanent Secretary in charge of Internal Security within the Office of the President and the Commissioner of Prisons. By all appearances, this department washed its hands clean when the proceedings against Ex-Maj. Gen. Kariuki were concluded and he was handed over to the Prison authorities. We do not even seem to know which prison he is held in.

2. For a start, I suggest you get in touch with Mr. Haji Omar, Assistant Commissioner of Prisons, Prisons Headquarters, who has been the Liaison Officer in respect of all matters concerning the former KAF personnel cases. His telephone number is 720630 or 720232 Nairobi. Because of the confidential nature of this matter, it might be advisable for you to ring Mr. Omar first, make an appointment with him and then go and discuss the matter with him face to face in his office. This would be preferable to discussing the matter straight away with him on the telephone. I am afraid this is the only assistance I can give you in this matter, little as it is.

3. With regard to the record of proceedings, this should reach you within the next 30 days from today's date."

The petitioner stated that his treatment in a discriminatory manner contravened his fundamental rights guaranteed under **Section 82** of the **Constitution of Kenya** in that he was afforded different treatment from other prisoners.

In view of the foregoing, the petitioner sought the following reliefs:

"(a) A declaration that the petitioner's right to the security of his person and the protection of law guaranteed under Section 70(a) of the Constitution was breached and a miscarriage of justice had occurred thereby making the trial a nullity.

(b) A declaration that the petitioner's right guaranteed under Section 72(5) of the Constitution to be released either unconditionally or upon reasonable conditions if not tried within a reasonable period was breached.

(c) A declaration that the petitioner's right guaranteed under Section 74(1) of the Constitution not to be subjected to torture or to inhuman or degrading treatment was breached.

(d) A declaration that the petitioner's right guaranteed under Section 77(1) (c) of the Constitution to be given adequate time and facilities for the preparation of his defence was breached.

(e) A declaration that the petitioner's right guaranteed under Section 77(1) (d) of the Constitution to be permitted to defend himself before the court was breached.

(f) A declaration that the petitioner's right guaranteed under Section 77(9) of the Constitution to a fair hearing by an independent and impartial court was breached.

(g) A declaration that the petitioner's right guaranteed under Section 82(2) not to be afforded different treatment from that afforded to other prisoners at Kamiti Maximum Security Prison was breached.

(h) A declaration that the petitioner is entitled to restoration of his rank, benefits, honours and decorations.

(i) A declaration that the petitioner is entitled to damages as redress in respect of each of the above rights that were breached in relation to him.

(j) An order consequential to the above declarations quantifying the amount of damages in respect of each and every one of the declarations given.

(k) An order restoring the petitioner's rank of Major General in the Kenya Air Force together with all attained benefits, honours and decorations.

(l) Costs.

(m) Interest on (j) and (l).

(n) Further/other orders as the honourable court shall deem just."

On 15th August, 2008 the Attorney-General filed a replying affidavit that was sworn by **Ambassador Nancy Kirui**, the then Permanent Secretary, Ministry of State for Defence. The affidavit contains largely unsubstantiated denials of the petitioner's depositions. The reason for such kind of response, she stated, was that the events recounted in the petition allegedly took place many years ago and the persons involved therein are no longer in employment of the Armed Forces. That notwithstanding, I wish to state that mere denials in a matter of this nature cannot constitute sufficient defence.

With regard to the petitioner's treatment during his stay at the Kamiti Maximum Security Prison, the Permanent Secretary stated:

"That the respondent is saying that the Ministry of State for Defence in the Office of the President cannot be held responsible for the alleged untold suffering by the petitioner at the Kamiti Maximum Prison since his stay and retention at that facility solely falls within the docket of the

Commissioner of Prisons."

The Permanent Secretary further stated that the petitioner was lawfully tried by the Court Martial which was duly convened under the provisions of **Section 86** of the **Armed Forces Act**. She added that the petitioner did not prefer any appeal against the decision of the Court Martial and in the circumstances his petition before this court is belated.

Regarding the petitioner's allegation that there was violation of his various constitutional rights, the respondent stated that **Section 86(2)** and **(3)** of the **Constitution** qualifies the rights and freedoms enjoyed by members of the disciplined forces. The respondent added that the petition had been brought out of time and in bad faith and urged the court to dismiss the same with costs.

On 9th November, 2010 **Mr. Imanyara for the petitioner** and **Mr. Onyiso, Senior Litigation Counsel**, for the respondent agreed by consent that:

"1. The matter to proceed on the basis of the affidavits filed, subject to calling of the Records Officer, if he will not have filed his affidavit within the next fourteen (14) days, limited to the salary details of the petitioner at the time he left service.

2. The respondent do file his submissions within seven (7) days from the date of filing the affidavit of the Records Officer.

3. Thereafter counsel to attend court on 8th December, 2010 at 2.30 p.m. for purposes of highlighting the submissions and thereafter set a date for ruling."

The petitioner's advocates filed their submissions and list of authorities on 15th June, 2010. The respondent filed very brief submissions on 7th February, 2011 but the Records Officer did not file his affidavit until 16th June, 2011. The petitioner's advocate filed supplementary submissions on 25th July, 2011. I have carefully perused all the submissions and affidavits on record. I have also perused the record of proceedings at the Court Martial which was annexed to the petitioner's affidavit.

Mr. Imanyara for the petitioner listed six issues for determination which are as follows:

"(a) Was there a reasonable basis of or the petitioner's arrest?

(b) Was the arrest and subsequent prosecution malicious?

(c) Was the holding of the petitioner for 147 days before being arraigned in court of law lawful?

(d) Were conditions under which he was confined amount to torture, inhuman treatment and degrading and a denial of protection of law?(sic)

(e) Did the trial meet conditions of impartiality and fairness?

(f) Did the treatment of the petitioner while in prison amount to torture, inhuman and/or degrading punishment?"

Before I consider and determine the aforesaid issues, I will highlight the brief submissions made by the Attorney-General. They can be summarized as follows:

- **The petitioner is guilty of laches, having filed his petition after nearly 24 years from the date of his arrest, arraignment before the Court Martial and subsequent conviction and service of a lawful sentence.**
- **The respondent did not appeal against his conviction and sentence by the Court Martial and**

consequently the conviction and sentence cannot be disturbed by this court.

- **The petitioner's trial was lawful and was not denied his right to prepare his defence as alleged.**
- **The right to a fair hearing was not violated as alleged by the petitioner and none of his constitutional rights were violated.**
- **The petitioner cannot be restored to his former rank in the Armed Forces or be given his benefits, honours or decorations since his removal from the Armed Forces was lawful.**
- **The prosecution of the petitioner was in public interest in the prevailing circumstances at the material time.**

I will first deal with the issue of delay in filing this petition and consider whether the delay *per se* renders the petition bad in law.

It is now settled law that although claims regarding violation of constitutional rights ought to be filed within a reasonable period of time from the date when the cause of action arose, mere delay in instituting such claims cannot operate as a bar to prosecution of the same. See **DOMINIC A. AMOLO vs. THE ATTORNEY-GENERAL MISC. APPLICATION NO. 494 OF 2003.** In that case, the court considered an objection that had been raised by the Attorney-General to the effect that the petition was time barred where Hayanga J. held, *inter alia*:

"Section 3 of the Constitution of Kenya excludes the operation of Cap 22 with regard to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation of Actions Act Cap 22."

In **WACHIRA WAHEIRE vs. ATTORNEY GENERAL, High Court Misc. Case No. 1184 of 2003,** the plaintiff had brought his action about 16 years after alleged contravention of his Constitutional rights. The court was emphatic that the provisions of the **Public Authorities Limitations Act** limiting the period for initiating actions against public authorities is inconsistent with the Constitution to the extent that it limits a party's right to seek redress for contravention of his fundamental rights. The court delivered itself thus:

"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 Authorities Limitations Act limiting the period for 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 to 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."

This petition was filed on 21st July, 2006. No sufficient explanation was given for the delay in instituting the same. That notwithstanding, the court cannot hold that the same is time barred. The respondent cannot rely on the provisions of **Section 4** of the **Limitation of Actions Act**.

I will now deal with the first two issues that were raised by the petitioner's counsel, that is, whether there was a reasonable basis for the petitioner's arrest and whether the arrest and subsequent prosecution was malicious.

Section 115 of **The Armed Forces Act Cap 199** states as follows:

"115 (1) Subject to this Part, where a person has been convicted by a Court Martial –

(a) the person convicted may, with the leave of the High Court given pursuant to Section 116, appeal to the High Court against the conviction, or against the sentence, or against both;

(b) the Attorney-General may, in any case, within forty days of the promulgation of the conviction, appeal to the High Court against the sentence.

(2) ……..

(3) The decision of the High Court on any appeal under this Act shall be final and shall not be subject to a further appeal."

The petitioner was tried and convicted in **Court Martial Case No. 329 of 1982.** The matter was finalized on 18th January, 1983 when sentence was pronounced. The petitioner did not prefer any appeal against the conviction and sentence and if at all he did there is no evidence to that effect.

Where an accused person chooses not to exercise his Constitutional right of appeal it is assumed that he is satisfied with the conviction and/or sentence by the trial court. If the petitioner herein was of the view that there was no reasonable basis for his arrest and that the arrest and prosecution were malicious, why did he not prefer an appeal to the High Court? In the absence of any appeal this court lacks jurisdiction to question the legal basis of the petitioner's arrest and subsequent prosecution and conviction by the Court Martial. To do so would be tantamount to assumption of appellate jurisdiction whereas the court is now constituted as a Constitutional Court.

Having carefully perused the record of proceedings of the Court Martial, I am of the considered view that if I were considering an appeal by the petitioner against his conviction and sentence the appeal would have overwhelming chances of success. This view is informed by the sum total of the prosecution evidence tendered before the trial court ***vis a vis*** the defence evidence. A brief summary of the facts of the case as given by the prosecutor contained in pages 57, 58 and 59 of the proceedings would suffice to fortify this opinion.

The petitioner had been charged with two counts, failing to prevent mutiny and failing to suppress mutiny contrary to **Section 26(a)** of the **Armed Forces Act**. The particulars of the first count were that on the 31st July, 1982 at Nanyuki in Laikipia District of the Rift Valley Province, the petitioner, knowing that a mutiny was intended by soldiers of the Kenya Air Force with the object of overthrowing by unlawful means the Government of Kenya, failed to use his utmost endevours to prevent the said mutiny. In count two the particulars of the offence were that on the 1st day of August, 1982 within Timau area of Meru District of the Eastern Province and at Nanyuki in Laikipia District of the Rift Valley province, knowing that soldiers of the Kenya Air Force had mutinied by taking up arms unlawfully and without proper authority with the intention of overthrowing by unlawful means the Government of Kenya, failed to use his utmost endevours to suppress the said mutiny.

It appears to me that the evidence that was tendered by the prosecution witnesses did not support the aforesaid charges. I will not attempt to summarize the entire prosecution evidence but I think it is appropriate that I reproduce the summary of the prosecution case as given by the prosecuting officer, **Major Mbewa**, Advocate. On pages 57, 58 and 59 the prosecutor stated:

"Sometimes in early June 1982, one Sgt. Ogidi approached a Lt. Mwambura to try to recruit him to be a member of a group of people which was planning to overthrow the Kenya Government. Lt. Mwambura reported the matter to Col. Njuguna who was then the Commanding Officer, Kenya Air Force, Nanyuki, who in turn rang the accused in Nairobi and passed the information to him, as the Commander of the Kenya Air Force. The accused contacted Lt. Gen. Sawe and requested him to make an appointment for him with the Chief of General Staff to report the matter. That was on 14th of July, 1982. The same day, the accused and Lt. Gen. Sawe went to the Chief of General Staff's office where the accused reported the matter to the CGS. It was decided at that meeting to pass the matter over to the Special Branch police for thorough

investigation. The accused was directed to put the matter in the hands of the Special Branch. He sent his SO II Intelligence, Major Macharia, to KAF Nanyuki to be briefed by SO I Njuguna. On arrival at KAF Nanyuki, he was briefed by Col. Njuguna and they decided to give a formal report of the matter to the police.

At a meeting held in the District Special Branch Officer's office, Nanyuki, chaired by the Deputy Provincial Special Branch Officer, Rift Valley, it was agreed that Lt. Mwambura be recruited into the group as a double agent so that he could be monitoring the activities of the group and be reporting back. It was intended that once all necessary information about the group, including names of those involved were known, authorities would then crack down on the group. Accordingly, Lt. Mwambura was recruited into the group and the accused was informed of this and he agreed. Two weeks before 1st august, 1982 Lt. Mwambura monitored the activities of the group and kept the Special Branch and the Commanding Officer well briefed.

On 31st July, 1982, while in his house in Nanyuki town, Lt. Mwambura was unexpectedly informed by Cpl. Oriwa that the coup was ripe and was going to take place that night at 2 a.m. Lt. Mwambura felt it his duty to rush to the Base and report this thing to the Commanding Officer without delay. Lt. Mwambura had no money, so he borrowed 40/= from a kind civilian. On reaching the Base and having failed to find the Commanding Officer, Lt. Mwambura went to the Officers' Mess within the Base and, by very good coincidence and very good luck, found the accused who was there having a drink with one Major Kivihya and some guests.

Lt. Mwambura, outside the Mess, informed the accused that there was going to be a coup but before Lt. Mwambura could elaborate the accused stopped him and told him that he knew all about it and would not discuss it. He (the accused) returned to his drinks and later left the Base for his farm at Timau in Meru District. As you all know, Sir, and very true to Mwambura's information, the attempted coup actually took place at 2 a.m. later that night. The accused could then have prevented it all together and his failure to do so is the subject of charge I.

The accused learnt of the coup through one of his employees and heard it over the radio later. Meanwhile, the Army Commander and Deputy Chief of General Staff had issued instructions to Major Nyamagwa of 1KR to send someone urgently to the accused's farm and tell the accused to go to 1KR Nanyuki and contact Army Headquarters using the microwave-communications system. W.O. I Gathachi, who was sent by Major Nyamagwa, passed on the information to the accused, but the accused chose to drive all the way to Nairobi, arriving at Army Headquarters at 5 p.m. the same day. Sir, the basis of charge number II was that the accused, knowing that a mutiny was taking place, did nothing to suppress it. He neither went to the Nanyuki Air Force Base nor to either of the Army units in Nanyuki and did nothing virtually to help suppress."

In the Court Martial proceedings the prosecution witnesses who testified included Lt. General Sawe, Col. Felix Ndungu Njuguna, Lt. Col Alexander Mwangangi, Major Joseph Nyamagwa, W.O. I Fredrick Gathachi, Major Maxwell Kivihya, Lt. Leslie Mwambura, Chief Inspector Jeremy Kamau Kiema and Major Alexander Sitienei.

The petitioner testified and called some witnesses as well.

In his defence, the petitioner testified as to how he had heard about the planned coup and the actions he took as detailed in his petition and affidavit herein. In particular, he testified about his discussions on the issue with General Mulinge at Nyeri during the official opening ceremony of the Agricultural Show by the President. Lt. Mwambura was also alleged to have misappropriated some money and General Mulinge wanted him arrested allegedly for that reason so that he could be interrogated about the intended *coup*. The petitioner had informed General Mulinge that Lt. Mwambura would be arrested on Monday 2nd August, 1982. He further explained that he had been given reports indicating that the Special Branch had investigated the allegations and in their view there was no substance or anything serious about the coup

allegation.

Because of those reports and the fact that he was going to have Lt. Mwambura arrested as directed by General Mulinge he thought that whatever Lt. Mwambura wanted to tell him on the night of 31st July, 1982 could wait until the following Monday when he was going to be further interrogated. Besides, having reported the matter to General Mulinge, he expected that the Chief of General Staff would be briefed accordingly by the Special Branch and Military Intelligence Officers.

It is not in dispute that the petitioner through his advocate sought to call General Mulinge as a witness but his efforts were completely thwarted by the trial court after the then Attorney-General told the court that such a move would embarrass the Chief of General Staff. The petitioner's contention was that he had promptly reported to the Chief of General Staff about the intended *coup* and that the Special Branch had been informed and asked to carry out appropriate investigations.

I would agree with the petitioner that General Mulinge would have been a crucial witness, either for the prosecution or the defence. However, he was the convening order for the Court Martial. That notwithstanding, I think the refusal by the trial court to have General Mulinge testify occasioned a miscarriage of justice and thus dented the strength of the petitioner's defence.

Section 70 of the repealed **Constitution of Kenya** guaranteed the petitioner protection of the law and in the aforesaid circumstances, I think the trial court compromised the petitioner's protection of the law in its determination to save the Chief of General Staff perceived embarrassment in the event that he were to testify.

Section 77(9) of the **Constitution** provided that a court or other adjudicating authority shall be independent and impartial. It appears to me that the trial court did not exhibit the independence and impartiality that was required of it in this particular aspect. A Court Martial, like any other court, is permitted to sit and hear certain witnesses in camera and in this case, the court could have heard the evidence of General Mulinge in camera.

In **NDEGWA vs. REPUBLIC [1985] KLR 534,** it was held that:

"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."

The petitioner, being most sacrosanct individual in the trial, should have been accorded due protection of the law as required under **Section 70(a)** of the repealed **Constitution.**

These, among others, are issues that would have weighed heavily in my mind if I was considering an appeal against the petitioner's conviction. But because I am not sitting as an appellate judge, the decision by the Court Martial to convict the petitioner cannot be disturbed. However, that cannot bar the court from considering the allegations of violation of the petitioner's Constitutional rights and freedoms during his trial and subsequent imprisonment since the petitioner did not seek to challenge the trial court's findings.

As regards issue number 3, that is, whether the holding of the petitioner for 147 days before being arraigned in court was lawful, I have no hesitation in stating that the same was a clear violation of **Section 72(3) (b)** of the repealed **Constitution of Kenya.** See the Court of Appeal decision in **ALBANUS MWASIA MUTUA vs. REPUBLIC, Criminal Appeal No. 120 of 2004**. Under that section, where an accused is not arraigned in court within 24 hours of his arrest the burden of proving that the person arrested has been brought before a court as soon is reasonably practicable rests upon any person alleging that the provisions of the section have been complied with.

However, the respondent contended that the infringement of the petitioner's Constitutional rights

was qualified by the provisions of **Section 86(2)** and **(3)** of the **Constitution** which are as follows:

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

(3) In relation to a person who is a member of a disciplined force raised otherwise than aforesaid and lawfully present in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this chapter."

My understanding of the exemptions made under **section 86(2)** and **(3)** of the repealed Constitution with regard to members of a disciplined force is that the provisions only apply when such a person is being disciplined in accordance with the disciplinary law of a force, in this case, **The Armed Forces Act, Cap 199**. To the extent that a disciplinary action upon a member of the Armed Forces is and/or was done in accordance with the provisions of the Armed Forces Act, such a person cannot argue that the disciplinary action was or is in contravention of any of the provisions of **Chapter V** of the repealed **Constitution,** other than **Sections 71, 73** and **74** which a Court Martial cannot derogate from.

The Armed Forces Act contains express provisions as to how persons suspected to have committed various offences under the Act ought to be dealt with. For example, **Section 72** of the **Act** contains provisions for avoiding delay after arrest. It provides that a person arrested for suspicion of having committed an offence under the Act shall be investigated without unnecessary delay and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest. Subsections (2) and (3) thereof state as follows:

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

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

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

Provided that, where the person is on active service, this subsection need be complied with only so far as is reasonably practicable, having regard to the exigencies of active service.

(3) For the purposes of Section 48(1), the question whether there has been unnecessary delay in taking of the steps for investigating allegations against a person under arrest shall be determined without regard to subsection (2) of this section."

Section 48 of the **Act** deals with irregular arrest and confinement and its object is to ensure that there are no unnecessary delays in undertaking investigations of arrested persons.

As much as possible, the arrest, confinement, prosecution and punishment of an offender under the Armed Forces Act should be in conformity with the provisions of the Constitution of Kenya save for any express exceptions made under the Constitution or any other written law.

It was not demonstrated by the respondent that the provisions of **Section 72** of the **Armed Forces Act** relating to avoidance of delay after arrest were complied with in respect of the petitioner herein. The petitioner was locked up in solitary confinement for 147 days before he was Court Martialled. No reason for such inordinate delay was given by the respondent. The delay was not only a violation of **Section 72**

of the **Armed Forces Act** but also a grave infringement of the petitioner's Constitutional right under **Section 72(3) (b)** of the repealed **Constitution of Kenya.**

But even if it were to be assumed that **Section 86(2)** and **(3)** of the repealed **Constitution** exclude the application of the protection of fundamental rights and freedoms whenever disciplinary cases of members of a disciplined force is done as was alleged by the respondent, **Section 74(1)** of the repealed **Constitution** clearly stated that:

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

The petitioner herein stated that throughout his period of incarceration he was subjected to inhuman or degrading treatment. He described the conditions under which he was held at Kamiti and Naivasha Maximum Security Prisons. That contention was not specifically denied by the respondent. All that the respondent stated was that:

"The Ministry of State for Defence in the Office of the President cannot be held responsible for the alleged untold suffering by the petitioner at the Kamiti Maximum Prison since his stay and detention at that facility solely falls within the docket of the Commissioner of Prisons."

I would agree with Mr. Imanyara that the above statement is a very curious line of defence since the Attorney-General represents even the Commissioner of Prisons in legal claims made against that office. On one hand, the respondent is acknowledging that the petitioner was exposed to untold suffering which in my view amounts to inhuman and/or degrading punishment but on the other hand the respondent seems to point an accusing finger to the office of the Commissioner of Prisons.

In **DOMINIC A. AMOLO vs. THE ATTORNEY-GENERAL (supra),** the Constitutional Court held that the holding of an ex -military officer in a solitary confinement in a cell block preserved for insane prisoners amounted to cruel and inhuman treatment and was a breach of **Section 74** of the **Constitution of Kenya.** The petitioner herein was subjected to continuous screaming noise and cries from insane inmates. The prison authorities must have kept the petitioner in that particular block deliberately.

That the petitioner was confined to a cell with a very powerful electric bulb 24 hours a day, was not allowed to read any book, was not allowed to receive any visitors and was allowed only 20 minutes out of his cell every 24 hours, were further acts of violation of his Constitutional rights which amounted to inhuman and/or degrading treatment. That kind of treatment was also in flagrant violation of Prison Rules.

Article 10 of the **International Convention on Civil and Political Rights** states that all persons deprived of their liberty shall be treated with human dignity and respect. The fact that a person is held in a police cell or a prison does not deprive him of his human dignity. The spirit of **Section 74** of the repealed **Constitution** was carried over to our new Constitution (**the Constitution of Kenya, 2010**) under **Article 51(1)** which states as follows:

"A person who is detained, held in custody or imprisoned under the law, retains all their rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned."

In **COMMANDER OF LESOTHO DEFENCE FORCE & OTHERS vs. RANTUBA & OTHERS**, **[1998] (2) CHRLD 372,** the respondents' husbands, members of the Lesotho Defence Force, were arrested and detained on suspicion of committing mutiny, a military offence punishable by death, pursuant to the Lesotho Defence Force Act No 4 of 1996 (the Act) and the Defence Force (Court Martial Procedure) Rules, 1998. Despite their continued detention (over 35 days at the date of the hearing), they

were not charged with any offence nor allowed access to a lawyer. The respondents brought an application for an order that, *inter alia*, the appellants' failure to charge their husbands breached s 89 of the Act. The application also directed the appellants to allow them immediate access to a lawyer.

Finding that the respondents' husbands should have been charged within 48 hours of the start of the investigation, the High Court directed them to be charged or released from custody within eight days. It also ordered them to be allowed immediate legal access. The appellants appealed claiming that the express provisions relating to legal representation at court martial proceedings in the Act (s 95(2) and the Defence Force (Discipline) Regulations, 1998 (Regs 19 and 36) deprived a detainee of the right to legal access under military law. It was also argued that the first appellant's decision to restrict access to 'immediate families' until the 'situation improves' was justified in light of the prevailing national emergency.

In allowing the appeal in part, it was held that:

A detainee, even under military law, retains his or her fundamental common law right of access to a legal adviser unless that right has been excluded expressly or by necessary implication. The onus of justifying any infraction of the right to a legal access is on the party who seeks to abrogate it. The court further stated that there is nothing in the Act, its Regulations or Rules which purports to remove or limit the right of military detainees to legal access. It would be incongruous if a serving solider detained and awaiting trial under military law were in a worse position than a convicted prisoner serving a sentence in a civil prison. The decision by the first appellant to restrict visits to family members until the situation improved was misconceived and entirely arbitrary. Further, the court held, it was unclear how access to a legal advisor would have had an adverse impact on internal stability and it was not within the first appellant's discretion to consider whether legal access should or should not be allowed at an unspecified future time.

It was further held that the High Court's determination that the respondents' husbands be charged or released within eight days was arbitrary. Given the prevailing circumstances, the scale of the alleged mutiny, the number of persons and separate incidents involved, together with the complexity of military investigations and court martial proceedings, the investigation was bound to be time-consuming. There was, therefore, no 'unnecessary delay' in the investigation within the meaning of s 89(1) of the Act and it was wrong to hold that the respondents' husbands should have initially been charged within 48 hours of the start of the investigation.

In the petitioner's case, the Attorney-General did not advance any explanation at all for the inordinate delay in having the petitioner charged. In the absence of an explanation the court must presume that the reason thereof was to subject the petitioner to extra judicial punishment even before he was tried.

In **CONJWAYO vs. MINISTER FOR JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS [1992] (2) SA 56 at page 63,** the Chief Justice of Zimbabwe stated:

"The critical issue to be resolved is whether the confinement of the applicant, in a small single cell for a minimum of 23½ hours every weekday and 24 hours on Saturdays, Sundays and public holidays (except for half an hour each day in which he is allowed out of his cell to attend to his ablutions) without access to natural light and fresh air, and with only a limited ability to exercise his body, infringes on his fundamental right under Section 15(1) of the Constitution not to be subjected to inhuman treatment."

Answering that self-posed question, the Chief Justice was emphatic that such treatment was plainly offensive to one's notion of humanity and decency and transgresses the boundaries of civilized standards and involves the infliction of unnecessary suffering.

There can be no argument that such treatment is inhuman and degrading. **Black's Law Dictionary** defines the word **"degrading"** to mean:
"Reviling, holding one up to public obloquy; lowering a person in the estimation of the public;

exposing to disgrace, dishonour, or contempt".

Our **Prisons Act (Cap 90)** and the rules made thereunder contain express provisions as to how prisoners ought to be treated. **Part V** of **The Prison Rules** specifically deals with **"Treatment of Prisoners"** and I must state categorically that it could not have been the intention of the Legislature that prisoners, irrespective of their political inclination, background or nature of offence committed, be subjected to dehumanizing and degrading form of treatment while serving sentence in our prisons.

The petitioner also urged the court to declare that his treatment while in prison custody amounted to torture, inhuman and/or degrading punishment. I have already substantially determined this issue hereinabove. I only wish to add that the definition of torture as spelt out under the **United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment,** adopted by the United Nations General Assembly in 1984 is as follows:

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

Considering some of the acts done to the petitioner when he was in prison custody, for example, confining him to a block which was reserved for insane inmates and deliberately lighting the petitioner's cell with a powerful electric bulb 24 hours a day, I hold that such acts among others no doubt amounted to torture as claimed by the petitioner.

The petitioner established that he was discriminated against by the prison authorities in that he was denied remission of his sentence contrary to the provisions of **section 46** of the **Prisons Act.** The petitioner was also refused visitation rights by members of his family for no apparent reason. The letter dated 25th April, 1983 addressed to the petitioner's counsel by Major Mbewa did not disclose any lawful reason for refusing the petitioner's family members from visiting him while he was in prison custody. These acts amounted to violation of the petitioner's right under **Section 82(2)** of the repealed **Constitution** which prohibited treatment in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of a public office or public authority.

In view of the findings hereinabove with regard to violation of the petitioner's constitutional rights, what reliefs is he entitled to?

(a) Prayer for a declaration that the petitioner is entitled to restoration of his rank, benefits, honours and decorations.

Upon completion of the hearing before the Court Martial, the petitioner was sentenced to 4 years' imprisonment on each count and dismissal from the Armed Forces. The dismissal carried with it forfeiture of all service benefits. As earlier stated, the petitioner did not appeal against the decision of the Court Martial. In the circumstances, the trial court's decision cannot be disturbed and consequently, this court cannot make the declaration as sought by the petitioner. The court cannot also make an order restoring to the petitioner the rank of Major General in the Kenya Air Force together with all attained benefits, honours and decorations as sought in prayer **(k)** of the petition.

(b) Did violation of the petitioner's Constitutional right render the trial a nullity?

In ALBANUS MWASIA MUTUA vs. REPUBLIC (supra), the appellant had been unlawfully detained in police custody for eight months before he was arraigned in court for the offence of robbery

with violence contrary to **Section 296(2**) of the **Penal Code**. The appellant's counsel submitted that such violation of the appellant's rights under **Section 77** of the repealed **Constitution** rendered the trial and the conviction a nullity. He sought the acquittal of the appellant on that ground.

The Court of Appeal stated:

"At the end of the day, it is the duty of the courts to enforce provisions of the Constitution, otherwise there would be no reason for having those provisions, in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge … The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."

The court cited an earlier decision in **NDEDE vs. REPUBLIC [1991] KLR 567** and said that in **Ndede's** case:

"The quashing of the conviction must have been on the basis that Ndede's Constitutional right given to him by Section 72(3) (b) of the Constitution had been violated and he was entitled to an acquittal."

However, several years after deciding the **ALBANUS MWASIA MUTUA** appeal, the same court varied the aforesaid jurisprudence in the case of **JULIUS KAMAU MBUGUA vs. REPUBLIC, Criminal Appeal No. 50 of 2008** which was decided on 8th October, 2010. After reviewing several local and foreign decisions on this Constitutional issue, the Court of Appeal came to the conclusion that violation of an accused's Constitutional right does not render the trial a nullity. The accused's remedy in such circumstances lies in a claim for compensation by way of damages.

In one of the many decisions that were considered by the Court of Appeal, **MARTIN vs. TAURANGA DISTRICT COURT (1995) 2 LRC 788**, the accused had made an application in the trial court for an order on grounds of delay; that no indictment should be presented on the three charges against him and directions that he should be discharged or for an order of stay. The application was dismissed. On appeal to the Court of Appeal of New Zealand, Richardson, J. at page 799 stated:

"Where the delay has not affected the fairness of any ensuing trial through; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration under Section 25(a), it is arguable that the vindication of the appellant's right does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25(b) should be met by an award of monetary compensation. That would respect victims' right and the public interest in the prosecution to trial of alleged offenders."

In view of the decision in **JULIUS KAMAU MBUGUA vs. REPUBLIC (supra)** I find and hold that the violation of the petitioner's Constitutional rights did not render his trial a nullity.

(c) The court hereby makes the following declarations:
(a) That the petitioner's right to the security of his person and the protection of law guaranteed under Section 70(a) of the Constitution was breached.

(b) That the petitioner's right guaranteed under section 72(5) of the Constitution to be released either unconditionally or upon reasonable conditions if not tried within a reasonable period was breached.

(c) That the petitioner's right guaranteed under Section 74(1) of the Constitution not to be subjected to torture or to inhuman or degrading treatment was breached.

(d) That the petitioner's right guaranteed under Section 77(1) (c) of the constitution to be given adequate time and facilities for the preparation of his defence was breached.

(e) That the petitioner's right guaranteed under Section 82(2) not to be afforded different treatment from that afforded to other prisoners at Kamiti Maximum Security Prison was breached.

(f) That the petitioner is entitled to damages as redress in respect of each of the above Constitutional rights that were breached in relation to him.

ASSESSMENT OF DAMAGES IN RESPECT OF THE AFORESAID CONSTITUTIONAL VIOLATIONS

In his submissions, Mr. Imanyara cited **DOMINIC A. AMOLO vs. ATTORNEY-GENERAL (supra)** where the Constitutional court, having established that the petitioner's constitutional right to liberty guaranteed under **Section 70** of the **Constitution** was violated and he was held at Kamiti Maximum Security Prison for 9 days after the court ordered his release, that his solitary confinement at the said prison amounted to cruel and inhuman treatment in breach of **Section 74** of the **Constitution**, awarded a global sum of **Kshs.2,500,000/=** as general damages for breach of his fundamental rights. Counsel urged the court to consider that the period of unlawful confinement in the aforesaid case was only 9 days compared to the 147 days in respect of the petitioner herein. In his view, the total damages awarded divided by the number of days the petitioner was unlawfully held at the prison worked out at about Kshs.250,000/= per day. So considering the period spent by the petitioner in solitary confinement, 147 days multiplied by Kshs.250,000/= per day, Mr. Imanyara urged the court to award Kshs.36,750,000/= as general damages.

With respect to the learned counsel, I think the formula proposed by himself cannot be correct. The sum of Kshs.2,500,000/= that was awarded was a global figure in respect of all the constitutional violations that were proved by the plaintiff in the said case.

In **RUMBA KINUTHIA vs. ATTORNEY-GENERAL, HCCC NO. 1408 OF 2004,** the plaintiff was held at Nyayo House Torture Chambers for 14 Days. After undergoing severe torture he was arraigned in court on trumphed up charges which he denied. He was detained at Kamiti Maximum Security Prison in solitary confinement. Subsequently the Attorney-General entered a ***Nolle Prosequi*** as a result of which he was released. The plaintiff filed a case against the Attorney-General seeking special and general damages. The court made a global award of **Kshs.1.5 million**.

In **HARUN THUNGU WAKABA & OTHERS vs. THE ATTORNEY-GENERAL MISC. CIVIL APPLICATION NO. 1411 OF 2004,** 21 people who were also arrested and tortured at Nyayo House Torture Chambers were awarded general damages ranging from **Kshs.1 million** to **Kshs.3 million.** The judgment in the said cases was delivered on 21st July, 2010.

In other related cases, **CORNELIUS AKELO ONYANGO & 8 OTHERS vs. THE ATTONREY-GENERAL, High Court Petition No. 233 OF 2009 Consolidated With 8 Others,** where 9 Nyayo House Torture Chamber victims had sued the Government for general and exemplary damages, this court awarded damages ranging from Kshs.1.5 Million to Kshs.6.5 Million.

Considering all the violations of the petitioner's Constitutional rights as highlighted hereinabove and taking into consideration the aforesaid cases, I am of the view that a global award of **Kshs.7,000,000/=** would be sufficient compensation by way of general damages and hereby award the same. The respondent shall bear the costs of this petition.

In conclusion, I wish to thank Mr. Imanyara for his industry and submissions which were very helpful in preparation of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2011.

D. MUSINGA
JUDGE

In the presence of:
Margaret Muriithi – Court Clerk
Mr. Paul Muite S.C. and Mr. Gitobu Imanyara for the Petitioner
No appearance for the Respondent