



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC.APPL. NO. 1411(OS) OF 2004

**HARUN THUNGU WAKABAPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**CIVIL CASE (CONSTITUTIONAL REFERENCE NO. 1187 OF 2003 (OS)
SAMUEL KABERERE NJENGA.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**MISC. APPL. NO. 35 OF 2005
ALI CHEPTEGEI SALKWAPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**MISC.APPL.NO .36 OF 2005
JAMES MWANGI KARIUKIPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**MISC. APPL. NO. 37 OF 2005
PAUL AMINA.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**MISC. APPL. NO. 1311 OF 2004
SILVANUS OKECH ODUORPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND**

**MISC. APPL.NO. 1309 OF 2004
EDWARD AKONGO OYUGIPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT**

MISC. APPL. NO. 1310 OF 2004

JOE NJOROGÉ.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1312 OF 2004

KIONGO MAINAPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1313 OF 2004

FLORENCE NYAGUTHIE MURAGEPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 34 OF 2005

KAMONYE MANJE.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1743 OF 2004

MUNENE KAMAU.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1741 OF 2004

FREDERICK MURAGE GATHUKU.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1744 OF 2004

STEPHEN MULILI KITUU.....PLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1742 OF 2004

WILSON NDUATI NJOROGÉPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 1745 OF 2004

FRANCIS NDUTHU KARANJAPLAINTIFF
VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO. 56 OF 2005

JAMES H. GITAU MWARA.....PLAINTIFF

VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO.409 OF 2004
GEORGE SITECHI OSUNDWA.....PLAINTIFF

VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO.1183 OF 2003
ZACHARIAH KARIUKI MWATI.....PLAINTIFF

VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO.1182 OF 2003
JACKSON MAINA WANGOMBE.....PLAINTIFF

VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT
AND

MISC. APPL. NO.1189 OF 2003
PETER G. KIHARA.....PLAINTIFF

VERSUS
THE HON. THE ATTORNEY GENERAL.....DEFENDANT

(ALL CONSOLIDATED)

J U D G M E N T

1. What is before me are 21 Originating Summons filed individually by each plaintiff under Section 84(1) & (2) of the Constitution of Kenya. The defendant in all the suits is the Hon. The Attorney General. The suits were consolidated by virtue of orders made by the Hon. The Chief Justice on 30th June, 2009 and 2nd July, 2009. The relief sought by each of the plaintiff is identical. Each seek determination of the following questions:

(i) A declaration that plaintiff's fundamental rights and freedoms under Section 70, 72(3 & 5), 74(1), 77, 78(1), 79(1) & 80(1), 82(3) have been and were contravened and grossly violated by the police officers and other Kenyan Government servants, agents, employees and institutions, on dates which were specified in each case, and diverse dates thereafter.

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

(iii) General damages and exemplary damages on an aggravated scale, under Section 84(2) of the Constitution of Kenya, for the unconstitutional conduct by government servants and agents.

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

(v) Costs of the suit, with interest at Court rates.

2. In support of the originating summons, each plaintiff has sworn an affidavit stating the circumstances in which the alleged breaches occurred. The Honourable the Attorney General who was duly served with each summons entered appearance in each case. Except for the case of Harun Thungu Wakaba, where grounds of opposition were filed on 12th March, 2008, the Attorney General did not file

any responses to the plaintiffs' summons. Pursuant to directions given by the court prior to the order of consolidation, for the parties to file their submissions in each case, submissions were filed on behalf of each of the plaintiffs, but none was filed by the Attorney General. After the suits were consolidated the Attorney General filed written submissions on 22nd July, 2009 in the case of Wakaba and on 11th May, 2010 in all other cases. For the plaintiffs, what was referred to as the 21 plaintiffs' joint written submissions was filed on 29th October, 2009. A list of authorities was also filed by both the plaintiffs and the Attorney General.

3. Each of the respective plaintiffs has sworn a supporting affidavit, which I shall refer to in detail in due course. Generally, the complaints take a similar pattern. Each plaintiff was arrested individually on a particular date, taken to a police station and thereafter to the Nyayo House Basement, where each was held incommunicado in a completely dark cell. Each of the plaintiff was also subjected to interrogation, and various acts of torture, inhuman and degrading treatments, at the Nyayo House. After being held for a number of days, most of the plaintiffs were charged in court, several with treason offences, others with some minor offences. Some pleaded guilty under duress and were convicted and sentenced to terms of imprisonment. Others, pleaded not guilty, and were remanded in custody, where the inhuman and degrading treatment continued. Several of the plaintiffs were released after more than 2 years in custody, when the Attorney General entered *Nolle Prosequi* in their cases. The plaintiffs complain of having suffered physical and psychological torture, and also having suffered loss and damage as a result of the incarceration.

4. No replying affidavit was sworn in response to the facts as deponed to by each plaintiff. Nonetheless, in the case of Harun Thung'u Wakaba, the originating summons was opposed on issues of law as follows:

- (i) That the applications disclosed no cause of action.
- (ii) That the applications were misconceived, incompetent, and bad in law as the prayers sought cannot be granted by this honorable court.
- (iii) That the applications lack merit in its entirety.
- (iv) That the application was otherwise an abuse of court process and ought to be dismissed.
- (v) That the orders sought are not tenable as against the defendant.
- (vi) That the claim for unlawful imprisonment offends the express provisions of section 3 of the Public Authorities Limitation Act.
- (vii) That the claim for malicious prosecution must fail for failing to disclose any particulars of malice, none were pleaded.
- (viii) That the application filed by the applicant was defective in substance, and does not come under any provisions of the law.
- (ix) That the court has no jurisdiction to entertain the application in view of it having been filed out of the time hence are time barred. (sic)
- (x) That the applicants have not identified the perpetrator or the name of the said perpetrator involved in the alleged acts complained of.

5. For the purposes of convenience, although each of the plaintiffs had earlier filed written submissions, reference will be made to the joint submissions filed as these encompass the individual submissions. It was submitted on behalf of the plaintiffs that since there was no replying affidavit filed by the defendant in response to the affidavits sworn by the plaintiffs, the facts as deponed to by the plaintiff in each case, remain unchallenged, unrebutted and uncontroverted. In this regard, reliance was placed on ***HCCC No.1408 of 2004 Rumba Kinuthia vs the Attorney General***, in which Wendo J. held in a similar situation that the court would take the facts deponed to in the affidavits as representing the correct factual position. It was argued that the facts deponed to in the respective affidavits, could not be

challenged through the grounds of opposition which were filed.

6. The proposition that the government was desirous of redressing victims of injustice and past transgressions through the Truth, Justice and Reconciliation Act of 2008, and that the plaintiffs' claims could be addressed in this forum, was rejected on the ground that under Section 60 of the Constitution, a Commission such as the Truth Justice and Reconciliation Commission (TJRC), is inferior to the High Court. Further, it was argued that since the Truth Justice and Reconciliation Act was passed in 2008, after the plaintiffs had filed their suits in court, that Act cannot have any retrospective effect. It was noted that that Act did not make any provision with regard to pending Constitutional References on Violation of Human Rights and Fundamental Rights. It was further submitted that the TJRC had no jurisdiction to award monetary compensation or declaratory reliefs such as was sought by the plaintiffs in their suits.

7. The court was urged to take judicial notice of the existence of the Nyayo House Torture Chambers, given the documentary evidence which was available. It was submitted that the police had no authority under the law to torture a suspect. It was maintained that the physical and psychological torture to which each of the plaintiffs was subjected was contrary to the Police Act, the Criminal Procedure Code, and the Constitutional Rights enshrined in Section 70 to 83 of the Kenya Constitution. In particular, it was submitted that the rights of the plaintiffs under Section 74(1) of the Constitution, which provides that no person shall be subjected to torture or to inhuman or degrading punishment or treatment, was violated. The treatment was also contrary to various international human rights instruments.

8. With regard to the issue of limitation, it was submitted that the rules made under Legal Notice No.133 of 2001, Constitution of Kenya (Protection of Fundamental Rights, and Freedoms of Individual) Practice and Procedure Rules, do not envisage any limitation of an applicant's rights to institute a suit under those rules. In support of that proposition, ***HC.Misc. Appl. No.494 of 2003 Dominic Arony Amolo vs the Attorney General***, was cited. In that case, the court held that claims under the fundamental rights, and the fundamental rights provisions under Section 70 to 83 of the Constitution, cannot be subject to legal wrongs or causes of action under the Limitation of Actions Act Cap 22.

9. The court was urged to apply the International Instruments such as the Convention of Civil and Political Rights, and the African Charter on Peoples' Rights which prohibits torture, cruel and inhuman and degrading treatment. It was further submitted that the plaintiffs' rights under Section 72(2) (b) of the Constitution, was also violated as the plaintiffs were not taken to court within the period prescribed by law, but were held illegally. The court's attention was drawn to Section 76(2) of the Constitution which provides that a person who is unlawfully arrested or detained shall be entitled to compensation.

10. In that regard, the following cases in which general damages were awarded for violation of fundamental rights under the Constitution, were cited:

- ***Dominic Arony Amolo vs The Attorney General (supra)***
- ***Rumba Kinuthia vs Attorney General HCCC 1408 of 2004***
- ***James Njau Wambururu vs Attorney General, HCCC 3829 of 1994.***

11. The court was urged to award exemplary damages because the torture was done by servants of the State who acted with impunity, recklessly, inhumanly and contrary to the law. It was submitted that exemplary damages were awarded in addition to actual damages and do not require to be proved. In that regard, ***HCCC No.1174 of 1994 John Kamau Icharia vs victor Musoga & another*** and ***HCCC No.366 of 1995 Dr. Odhiambo Olel vs Attorney General***, were relied upon.

12. The defendant filed written submissions on 22nd July, 2009, in the leading case of Harun Thung'u Wakaba. On 11.5.2010 written submissions were filed in the other cases. Although the same were filed late, and without leave of the court, I note that the plaintiff also filed the joint written submissions on 29th October, 2009 without leave of the court. In the interest of justice, I will admit both sets of submissions and deem the same as properly filed.

13. In the defendant's written submissions, it was submitted that the facts deponed to by the plaintiffs in their affidavits did not disclose the full facts. For instance, the identity of the policemen who allegedly arrested each plaintiff and locked them up at Nyayo House Basement was not given. It was contended that the averments made by the plaintiffs in their respective affidavits, were bare averments which were oppressive to the defendant. Thus, the defendant was not in a position to respond to the plaintiffs' claims without any specific averments in the affidavits.

14. It was pointed out that several of the plaintiffs did not identify the magistrate before whom they were arraigned, or cite the case number, or the date of the charge, thereby making it impossible for the

defendant to respond to the plaintiffs' allegations. It was further pointed out that the plaintiffs failed to annex the proceedings of the magistrate's court, to explain how their rights were violated. The court was urged that in view of the paucity of evidence, it should grant a stay of proceedings, and direct that the plaintiffs' cases be referred to the Truth Justice and Reconciliation Commission. This is because the TJRC was established under Section 3(1) of the Truth Justice and Reconciliation Act 2008, to determine ways and means of redress for victims of gross human rights violations under Section 5(e) of that Act.

15. It was submitted that parliament promulgated the Truth Justice and Reconciliation Act, as it was concerned that some of the transgressions against Kenya and its people, could not be properly addressed by the Judicial Institutions, due to procedural and other hindrances. It was argued that the plaintiffs' suits were ripe to be addressed by the TJRC. The court was urged to guard against fraudsters who were likely to use the judicial process to enrich themselves. Finally it was pointed out that no medical papers were annexed to the plaintiffs' affidavits to prove the allegations of torture.

16. When Mr. Menge highlighted the submissions, he added that the plaintiffs had filed their suits out of time. He identified the case of Harun Thungu Wakaba, who alleged to have been tortured in the year 1990. He maintained that the delay in filing the suit, had caused the plaintiffs' claims to be stale. The court was urged not to allow stale claims as it would open a floodgate of suits. Mr. Menge relied on **HCC Application No.128 of 2006 Lt. Cannon Peter Kagume & Others vs the Attorney General**. Mr. Menge urged the court not to allow suits filed after inordinate delay, as they would lead to "*the sins of the previous generation being brought forward to the future generation*". He pointed out that in any case, the court had not been given any reason as to why the plaintiffs sat on their rights for so long.

17. Mr. Menge further submitted that the claims filed by the plaintiffs, offend the provisions of Section 3 of the Public Authorities Limitation Act, as the same ought to have been brought within one year. In that regard Mr. Menge cited the case of **Anarita Karimi Njeru vs the Republic (1) [1976-1980] 1 KLR**. Finally, Mr. Menge submitted that fundamental rights or human rights, were not absolute, but are subject to the rights of others and the society. He argued that if indeed the plaintiffs were arrested for being members of an unlawful society, then their rights were subject to the freedoms of others. In support of that proposition, Mr. Menge relied on **Kenya Bus Services Ltd & 2 others vs the Attorney General & 2 others Nairobi Misc. Civil Suit No.413 of 2005**.

18. Having considered the application, the affidavits filed in support, the written and oral submissions, as well as the authorities cited, I have identified the following issues for determination.

(i) Whether the plaintiffs' claims as pleaded in the individual originating summons, are defective, misconceived and bad in law, or disclose no cause of action.

(ii) Whether the facts deponed to in the affidavits filed in support of the originating summons, are sufficient to support the plaintiffs' claim in each case, or whether the plaintiffs are guilty of material non-disclosure such as to vitiate their claim.

(iii) Whether the facts as deponed to in the plaintiffs' affidavits, are undisputed or whether proof of the facts is required.

(iv) Whether the plaintiffs' claims are time barred in view of the Limitation of Actions Act Cap 22, and the Public Authorities Limitation Act Cap 39.

(v) Whether each plaintiff has established violation of fundamental rights and freedoms under Sections 70, 72, 74, 77, 78, 79 80, and 82 of the Constitution.

(vi) Whether the plaintiffs' claims should be addressed through the TJRC.

(vii) Whether the plaintiffs are entitled to general or exemplary damages and if so, how much.

19. I find it convenient to deal with issues nos. (i) and (ii) above together. The plaintiffs have come to this court under Section 84(1), (2) & (6) of the Constitution, seeking redress for contravention of their fundamental rights and freedoms under the Constitution. In the case of **Anarita Karimi Njeru vs Republic (No.1) [1979] KLR 154**, the court observed that it is important for a person seeking redress from the High Court or an order which invokes a reference to the Constitution, to set out with reasonable degree of precision, what he complains of, the provisions of the Constitution infringed, and the manner in

which they are alleged to be infringed. This position was put more forcefully as follows in, **Misc. Application No.666 of 1990 Matiba vs The Attorney General**:

“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him, and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement.”

20. In this case as will be seen from the respective affidavits sworn by each plaintiff (which I shall shortly refer to), the plaintiffs identified specific provisions in the Constitution which they alleged to have been infringed. These provisions included, Sections 70, 72(3) & (5), 74(1), 77, 78(1), 79(1), 80(1) and 82(3). The plaintiffs also gave details of the circumstances showing the manner in which their fundamental rights and freedoms under the Constitution were allegedly infringed. The defendant contended that the information disclosed in the affidavits were not sufficient as the alleged perpetrators of the acts complained of were not identified, nor were their names given. That complaint is not justified. The plaintiffs in their respective affidavits deponed to having been arrested by either uniformed police officers or special branch officers. Thus the identity of the persons who effected the plaintiff's arrest have been disclosed as officers or servants of the government. Although names of the officers were not crucial, some of the plaintiffs have also identified the persons who were involved in the perpetration of the acts complained of. For example the names James Opiyo and C.N. Mungai were mentioned. The police stations to which the plaintiffs were initially taken were identified, as was Nyayo House, where specific acts of violation of the plaintiffs' fundamental rights and freedoms, were alleged to have taken place.

21. I am satisfied that the plaintiffs gave sufficient particulars of their arrest and confinement, and where applicable arraignment in court. The particulars given were sufficient to enable the defendant to know the nature and extent of the complaint leveled against the government and its officers. Even in instances where the name of the trial magistrate or the case number or the date when the plaintiff was taken to court was not given, the defendant cannot claim that it is unable to know the nature and extent of the claim, particularly where information has been given confirming the arrest and arraignment in court.

22. Moreover, as was stated in **HC Misc. Case No.1184 of 2003, Wachira Waheire vs The Hon. Attorney general**, under order XXXVI Rule 9 and 10(1) of the Civil Procedure Rules, the issue of sufficiency of facts set out in summons and supporting affidavits, is a preliminary issue, which ought to have been raised before the hearing of the originating summons, and where necessary, directions of the court sought. The defendant not having complained about the correctness or sufficiency of facts, or sought the court's direction in that regard, it is too late in the day for the defendant to complain. Further, there is need to draw a distinction between information necessary to enable the defendant to respond to the plaintiffs' claims, and information necessary to establish the plaintiffs' claim. I am satisfied that the plaintiffs' claims were properly before the court and that the defendant had sufficient information to enable it respond to the plaintiffs' claim. As to whether the information given was sufficient to establish the plaintiffs' claim, that is an issue that will be addressed shortly.

23. It is evident from the record that the defendant has not filed any affidavit in response to any of the affidavits filed by the plaintiff. In **Misc. Case No.1408 of 2004 Rumba Kinuthia vs the Attorney General**, Wendoh J. considering a similar Constitutional Reference, in respect of which no replying affidavit was filed, stated:

“Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position.”

24. I am in entire agreement with this position. Indeed, the scenario herein is distinguishable from that dealt with by Nyamu J. in **Constitutional Application No. 128 of 2006 Lt. Col. Peter Ngari Kagume & others vs Attorney General**, where one side alleged and the rival side disputed and denied, thereby casting the burden on the one alleging to prove the allegations. No replying affidavits having been filed by the defendant herein, the factual position put forward by the plaintiffs in their affidavits stand unchallenged. Thus, further proof of those facts is not required.

25. The defendant in their submissions pointed out that the affidavits sworn by the plaintiffs offend

the provisions of Order XVIII Rule 3 of the Civil Procedure Rules, as they contain statement of information and belief. It was argued that the paragraphs setting out such information were oppressive to the defendant as he could not respond to the same. The court was urged to strike out the affidavits under Order XVIII Rule 6 of the Civil Procedure Rules. Having considered that submission, I am of the view that the defendant cannot be serious in this submission. For if defendant was serious, the issue would have been raised and argued as a preliminary issue, so that the offending paragraphs are struck out from the affidavits before the originating summons were heard. Moreover, the defendant has not identified the specific paragraphs in the affidavits which are alleged to have contravened Order XVIII Rule 3 of the Civil Procedure Rules.

26. Further, I have perused the respective affidavits, and do find that although the plaintiffs have deponed that what they have stated in the respective affidavits “*is true to the best of my knowledge, save for information whose sources are stated, and belief grounds whereof are stated*”, this averment has been made as a matter of routine. The averment neither adds to the affidavit nor is it prejudicial to the defendant, as the facts deponed to in the affidavits are substantially within the knowledge of the respective deponents of the affidavits. I therefore find no substance in the contention that the affidavits contravene Order XVIII Rule 3 of the Civil Procedure Rules.

27. Except for Peter G. Kihara (Case No.1189 of 2003), who complained of having been arrested in the year 1969, all the other plaintiffs placed the date of their arrests and the acts complained of between the years 1982 and 1997. The suits were all filed in the year 2004. This means that for violations alleged to have occurred in the year 1982, the suits were filed 22 years later, while the most recent suit was filed 7 years later. The question is whether any of the plaintiffs is guilty of inordinate delay or laches, or whether the plaintiffs’ claims are statute barred in view of the Limitation of Actions Act Cap 22 and the Public Authorities Limitations Act Cap 39. This issue was considered in the case of ***Wachira Waheire vs the Hon. The Attorney General*** (supra), wherein the plaintiff had brought his action about 16 years after the alleged contravention. The court noting that the case of ***Col. Peter Ngari & others vs the Attorney General*** (supra), did not rule that there was a limitation period for filing proceedings to enforce constitutional rights, stated as follows:

“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.”

28. I find that that is the position herein, and do adopt the same findings with the result that the plaintiff’s claims are not statute barred. As to whether the delay by the plaintiffs in lodging their claims can be considered an abuse of the court process, I am of the view that this is a matter for the court’s discretion dependant on the circumstances surrounding the reasons for the delay. I take note of the fact that there are a series of similar cases of alleged breaches of fundamental rights and freedoms, committed prior to the year 2002, before the change in government. The explanation that the environment before that change was not conducive to the enforcement of the fundamental rights and freedoms has been accepted. In that regard, I would borrow the following passage from ***Wachira Waheire vs the Attorney General*** (supra):

“The elections held in the year 2002 and the consequent wave of change in this country are a historical fact. The explanation given by the plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after the change, such as Dominic Arony Amolo vs the Attorney General in which the plaintiff’s claim filed in the year 2003 which was more than 20 years after the cause of action arose was allowed. We are therefore not persuaded that the plaintiff’s claim should be defeated because of the delay in filing his claim.”

29. It is necessary at this stage to consider the provisions relating to the fundamental rights and

freedoms of the individual which the plaintiffs allege were infringed. Section 70 of the Constitution asserts that each individual is entitled to enjoy following fundamental rights, subject to the limitation “that the enjoyment of those rights and freedoms of any individual does not prejudice the rights and freedoms of others or the public interest”:

- (a) Right to life, liberty, security of the person and the protection of the law.
- (b) Protection of freedom of conscience, assembly and association,
- (c) Protection for the privacy of one’s home and other property, and from deprivation of property without compensation.

30. It is evident from the above, that the fundamental rights and freedoms of the individual are subject to the rights and freedoms of others, as well as public interest. In the case of the respective plaintiffs, although it is apparent from their affidavits that many were ostensibly held and charged with being members of an unlawful society and treason, which are issues of public interest and security, the defendants have not offered any evidence to demonstrate any threat to public security or public interest so as to justify the infringement of the plaintiffs’ rights under Section 70 of the Constitution. Noting that a good number of the plaintiffs had their cases withdrawn, and others were successful on appeal, this court has no information upon which it can justify the limitation of the plaintiffs’ fundamental rights under that provision.

31. Specific provisions have been provided in the Constitution for each of the fundamental rights and freedoms showing the extent of the rights and the extent to which such right is limited if at all. I will now consider the provisions of the Constitution which are relevant to the plaintiffs’ claims.

Section 72 of the Constitution which deals with right to personal liberty states as follows:

“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

(a) In execution of the sentence or order of a court whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted.

(b)

(c)

(d)

(e) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Kenya.

(2)

(3) A person who is arrested or detained -

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

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence and who is not released, shall be brought before a court of law as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from commencement of his detention, or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of the subsection have been complied with

(4)

(5) If a person arrested or detained as mentioned in subsection 3(b) is not tried within a reasonable time, then, without prejudice to any further proceeding that may be brought against him, he shall unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable condition including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

32. The above provision is explicit that an individual’s right to personal liberty may be limited where there is reasonable suspicion that he has committed or is about to commit a criminal offence under the law in Kenya. However, such a person must be produced in court within 24 hours of his arrest, except where he is held on suspicion of having committed a capital offence, in which case he should be produced in court within 14 days. Except for two plaintiffs who alleged they were not produced in court, most of the plaintiffs deponed that they were arraigned in court, and actually charged. Therefore, it is evident that the plaintiffs’ right to personal liberty appear to have been limited under Section 72(1)(e) of the Constitution, on allegation that they were suspected of having committed criminal offences. Reference to

the affidavits of the individual plaintiffs will show that a few of the plaintiffs were produced in court within the specified period, in which case, there was no infringement of their right to personal liberty. However, there were many instances where in contravention of Section 72(3) of the Constitution some of the plaintiffs were produced in court long after the specified period. No evidence having been availed by the defendant to justify the failure to comply with Section 72(3) of the Constitution, such infringement was a violation of the fundamental right to personal liberty.

33. Section 74 of the Constitution which provides for protection from inhuman treatment states as follows:

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

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistency or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963”

Thus, the right to protection from inhuman treatment is only limited when the punishment inflicted is that authorized by a law which was in force in Kenya on 11th December, 1963. No specific law was cited to me by any of the parties, which authorizes the infliction of a punishment that can be regarded as torture or inhuman punishment. In other words, the defendants have not attempted to justify the violation of this right.

34. The Constitution does not define “torture” or “inhuman” or “degrading punishment”. In Blacks Law Dictionary 8th Edition “Inhuman treatment” is defined in reference to family law as ‘physical or mental cruelty so severe that it endangers life or health’ while “torture” is defined as ‘the infliction of intense pain to the body or mind to punish to extract a confession or information or to obtain sadistic pleasure’. I have also found an apt definition from Article 1 of the UN Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the UN General Assembly in 1984. Article 1 defines torture 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 a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

35. I am of the view that the UN Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, being a legal international instrument which has been ratified by Kenya, it is appropriate to adopt its definition of ‘torture’ in interpreting Section 74(1) of the Constitution. Such an approach would ensure that Kenya as a country moves in tandem with the international community, by invoking the spirit of the international instruments in its domestic laws. Indeed, Section 74(1) of the Constitution is identical to Article 5 of the Universal Declaration of Human Rights which has also been ratified by Kenya.

36. I must add that the offences, for which the plaintiffs were arrested such as treason and being members of an unlawful society, are serious offences which the government through its law enforcement agencies had the responsibility to investigate, carry out arrests and where appropriate, arraign the perpetrators of the offences in court. Nonetheless, the exercise of these responsibilities, particularly by law enforcement agencies, had to be carried out within the confines of the law.

37. It will be noted that none of the plaintiffs provided any medical evidence in support of the allegation that they were tortured or injured. While the medical evidence would have provided appropriate corroboration to the plaintiffs’ allegations, the absence of the medical evidence is not critical, particularly because the plaintiffs’ affidavits were not controverted. Therefore, the question is whether the various acts to which each of the plaintiff was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning of the definition provided in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

38. A perusal of the affidavits sworn by the plaintiffs, reveal that there was actual infliction of severe physical pain, caused by the plaintiffs being physically assaulted, sometimes in intimate and sensitive areas, using various articles. The exposure of the plaintiff to pressurized water, hot and cold air,

as well as the confinement naked in a dark waterlogged cell, were all actions which endangered health. The incessant interrogation and the denial of sleep were all mental or psychological infliction of pain. The infliction of this physical and psychological pain was done at Nyayo House which was a government institution. It was also carried out by government officials. Further, the infliction of the pain was done during the course of interrogation with a view to obtaining information or a confession from the plaintiffs. Thus, all the ingredients of the definition of torture as contained in Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment were present. The actions described in the affidavits would constitute infringement of the right to protection against inhuman treatment as provided under Section 74(1) of the Constitution.

39. One of the rights provided under Section 77 of the Constitution is the right to protection of the law to any person who is charged with a criminal offence, in that he must be afforded a hearing within a reasonable time. Apart from some of the plaintiffs who pleaded guilty to the charges and were convicted, a number of the plaintiffs who pleaded not guilty, were confined in capital remand for more than two years before their charges were withdrawn. In such instances, the plaintiffs were denied a fair hearing within reasonable time by an independent and impartial court, as no reason has been given as to why the suits were not heard or the nolle prosequi entered within a reasonable time.

40. Under Section 78 of the Constitution, the right to protection and freedom of conscience is provided as follows: -

“78(1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section, that freedom includes, freedom of thought and of religion, freedom to change his religion or belief and freedom either alone or in community with others and both in public and in private to manifest and propagate his religion or believe in worship, teaching, practice and observance”.

While under Section 79 of the Constitution the right to freedom of expression is provided as follows:

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

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done Protection of freedom of expression under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

41. In order to establish the violation of the right of protection to freedom of conscience, it is necessary to demonstrate that a person subscribes to a particular school of thought, belief or religion and has been hindered from practicing or enjoying the same. In the case of infringement, of protection of right to freedom of expression, actual interference with the freedom to hold and communicate specific ideas should be demonstrated. Generally, the affidavits sworn by plaintiffs were rather thin in this regard.

42. Section 80 of the Constitution provides for protection of freedom of assembly and association in the following terms:

“80. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

- (2) ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –***
- (a) ***that is reasonably required in the interests of defence, public safety, public order, public morality or public health;***
- (b) ***that is reasonably required for the purpose of protecting the rights or freedoms of other person.”***

In this case, none of the plaintiffs have alleged in their affidavits that their right and freedom to assemble freely or associate with other persons or to form or belong to other associations was interfered with. Generally, the plaintiffs deny the allegation that they were members of any unlawful organization or society. Therefore, the contravention of this right has not been demonstrated in the affidavits.

43. Section 81(1) of the Constitution provides for the protection of freedom of movement as follows:

“81. (1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.

(2) Any restriction on a person’s freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.”

Generally the plaintiffs have not complained about being denied the right to move freely in the country or the right to reside in any part of the country. One or two of the plaintiffs have deponed to having been served with orders of detention under the Prevention of Security Act which was a law then in force. Therefore, the facts in support of the contravention of this fundamental right were wanting.

44. Section 82(1) & (2) of the Constitution provide for protection from discrimination in the following terms:

“82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.”

Again, the affidavits do not demonstrate any law that that was discriminatory against the plaintiffs nor does it reveal any impartial treatment against the plaintiffs attributable to their race, tribe or place of origin. Thus, the infringement of the right to protection from discrimination has not been established.

45. The next issue that I wish to address is as follows: Assuming that the plaintiffs have demonstrated the violation of some or all of the above mentioned fundamental rights and freedoms, should the plaintiffs’ claims be addressed through the TJRC? Firstly, the Truth Justice and Reconciliation Commission Act 2008 came into effect after the plaintiffs had filed their suits. That Act does not make any provision for dealing with matters which are already before the court. Secondly, the plaintiffs have come to this court seeking declaratory relief and monetary redress for violation of their fundamental rights and freedoms under the Constitution. The mandate of this court to deal with the plaintiffs’ claims is provided under Section 84 of the Constitution which is the supreme law of this country.

46. The mandate of this court is not comparable with the mandate of the TJRC whose recommendations and proceedings are subject to this court’s supervisory jurisdiction. Further, the mandate of the TJRC with regard to human rights, abuses and violation is to identify and specify the victims of the violations and make appropriate recommendation for redress. This is a limited mandate as it requires further implementation. It is not therefore a mandate which is adequate to provide the plaintiffs with the instant relief which the plaintiffs require.

47. Moreover, one of the reasons why the TJRC Act was promulgated was the concern that “*some of the transgressions against our country and its people cannot be properly addressed by our judicial institutions due to procedural and other hindrances*”. Therefore, the TJRC route would have been more appropriate if there were procedural or other hindrances affecting the just, fair and effective determination of the issues raised by the plaintiffs. That has not been demonstrated to be the position herein. In my view, it would be an abuse of the court process and a waste of resources to refer the plaintiffs’ claims to the TJRC at this late stage when their matters are a stone throw away from conclusion.

48. The issue of the “redress” that the High Court can grant under Section 84 of the Constitution, was addressed in the case of ***Dominic Arony Amolo vs the Attorney General*** (supra), in which the court

adopted the Privy Council definition in the case of *Maharaj vs AG Trinidad and Tobago* that: **“Redress in its context has its ordinary meaning of reparation, compensation, including monetary compensation; and although the claim was not a claim in private law for damages for tort, but was a claim in public law for compensation, that compensation should be measured in terms of the deprivation of liberty, including consequential loss of earnings and recompense, for the inconvenience and distress suffered during detention.”**

Therefore, this court in exercise of its jurisdiction under Section 84 of the Constitution to provide redress for violation of fundamental rights and freedoms, has the powers to award damages to an individual whose fundamental rights and freedoms have been violated. However, it may not be possible to value or measure in monetary terms what an individual has undergone through violation of his fundamental rights. An award of damages merely serves to vindicate and restore his dignity and also send a clear message to the Executive that it will be held responsible for acts of impunity committed by its servants or agents. I find that in this case, it will be appropriate to make a global award in respect of the violations, taking into account the element of punitive damages. In doing so, the rights violated and the period of violations are relevant. I have also taken note of previous awards that have been made in similar cases such as *Rumba Kinuthia vs the Attorney General*, *Wachira Waheire vs the Attorney General*, and *Dominic Arony Amolo vs the Attorney General*.

49. I will now proceed to consider the facts relating to each of the plaintiffs with a view to establishing whether the individual plaintiffs have established any violation of their fundamental rights and freedoms under the above provisions of the Constitution, and if so, what damages should be awarded.

50. **HARUN THUNG’U WAKABA (Case No.1411 of 2004):** He was arrested on 29th October, 1990 by plainclothes policemen. He was taken to Kileleshwa Police Station where he was held for about 4 hours, and then taken to Nyayo House Basement, where he was held in a dark cell. The next day Wakaba was taken to the 24th floor of the Nyayo House where he was stripped naked and assaulted by being beaten with rubber whips, metal bars, broken chair parts, slaps, kicks and blows, whilst being subjected to interrogation by a panel of interrogators. At the end of heavy interrogation, he was returned back to the dark cell where pressurized water, hot and cold air alternatively were sprayed on him for several hours. He was kept without food and other necessary facilities for a period of 21 days, after which he was arraigned in court on 19th November 1990, where he was charged with being a member of unlawful society. On 11th December, 1990, a charge of treason was substituted in Criminal Case No.4091 of 1990. He pleaded not guilty and was remanded at Kamiti Maximum prison for 2½ years during which period, he was subjected to inhuman treatment. Eventually he was released on 24th June, 1992 pursuant to a *Nolle Prosequi* being tendered by the Attorney General.

51. From the above, it is evident that Wakaba’s rights to protection of personal liberty under Section 70 as read with Section 72 of the Constitution were infringed. In this case, Wakaba appears to have been arrested on suspicion of his having committed a criminal offence. Therefore, Section 72(3)(b) of the Constitution was applicable. Since Wakaba was arrested on 29th October, 1990, and was eventually charged on 19th November, 1990 with being a member of an unlawful society, which is not a capital offence, Wakaba ought to have been produced in court within 24 hours of his arrest. The fact that Wakaba was subsequently charged with the offence of treason on 11th December, 1990, does not change this position as it is evident that the initial charge was not a capital offence. The confinement of Wakaba from 1st November, 1990 to 19th November, 1990, when he was produced in court was therefore unlawful, contrary to the law and a contravention of Wakaba’s fundamental right to personal liberty as provided under Section 72(3) of the Constitution.

52. Wakaba has stated under oath that during the time he was confined, before his arraignment in court, he was subjected to various acts of torture which he has detailed in his affidavit. As I have stated above, the actions such as being stripped naked, assaulted with leather whips, broken chairs, metal bars, slaps, kicks and blows, and being kept in a dark cell with pressurized water, hot and cold air being sprayed on him alternately, as well as being kept without food and other necessities for a long time, were all acts of torture which were a violation of Wakaba’s right to protection from inhuman treatment as provided under Section 74(1) of the Constitution. Wakaba’s right to protection of the law under Section 77 of the Constitution was also violated as he was not afforded a fair hearing within a reasonable time, having been kept in remand for 2½ years only for a *nolle prosequi* to be entered. In the circumstances, I

find that general damages of Kshs.3 million would be appropriate compensation to Wakaba.

53. **SAMUEL KABERERE NJENGA (Case No.1187 of 2003):** He was a 3rd year student at Nairobi University and the secretary general of the student's organization (SONU). He was arrested on 13th November, 1987, taken to Central police Station and then Hardy Police Station. On 14th November, 1987 he was taken to Nyayo House Basement, where he was subjected to interrogation for many hours, being stripped naked and assaulted in the process. He was confined at Nyayo House in a dark waterlogged cell for 14 days, after which he was charged with the offence of behaving in a manner likely to cause a breach of peace and bonded to keep peace for one year. He suffered great loss as he was expelled from the University. These facts reveal violation of Njenga's right to personal liberty (Section 72(3) of the Constitution), and right to protection against inhuman treatment (Section 74 of the Constitution). There is no evidence in support of allegations of violation of Njenga's right of protection of freedom of conscience or protection of the law, or protection of freedom of assembly and association or protection of discrimination. I find that a sum of Kshs.1.5 million would be appropriate to Njenga.

54. **ALI CHEPTEGEI SAIKWA (Case No.35 of 2005):** He was arrested in September 1987, taken to Nyayo House where he was held for a total of 34 days during which period he was tortured physically and psychologically. The torture included being stripped naked and forced to sleep in a waterlogged cell for many days, being interrogated for many hours without sleep. He was also assaulted and injured. He was charged after 61 days, with being a member of an unlawful society for which he was sentenced to 3 years imprisonment. He lost his job without any terminal benefits. These facts establish Saikwa's claim to the extent that Saikwa's right to protection of personal liberty (Section 72(3) of the Constitution), right to protection of inhuman treatment (Section 74 of the Constitution), were violated. In that regard, a sum of Kshs.2.5 million would be appropriate compensation as damages for the violation.

55. **JAMES MWANGI KARIUKI (Case No.36 of 2005):** He was arrested on 13th June, 1986. He was locked up at Naivasha Police Station and later transferred to Kileleshwa Police Station at Nairobi, then Nyayo House Basement where he was interrogated for many hours by police officers identified as James Opiyo and C. N. Mungai. He was held incommunicado, denied food, drinks or sleep. He was kept in a dark cell which was pumped with hot and cold air at different intervals. He was also taken to a wet cell where he was sprayed with very cold water, denied a sleeping mat or blanket or beddings, assaulted by way of slaps, kicks, pieces of timber, and threatened with pistol. He collapsed and lost memory after 8 days of torture, inhuman treatment and denial of food. He was transferred to Buruburu Police Station where he received medical attention and was fed on milk and soft foods. After 5 days, he was taken back to Nyayo House where he was held within the basement in a whitewashed cell until 25th July, 1986 when he was released without any charge. These facts reveal that Kariuki's right to protection of personal liberty under Section 72(1) was violated as he was deprived of his liberty for 43 days without any charges being preferred against him. Kariuki's right to protection from inhuman treatment (Section 74) was also violated. A sum of Kshs.2.2 million would be appropriate compensation to Kariuki as general damages.

56. **PAUL AMINA (Case No.37 of 2005):** A Journalist. He was arrested on 4th August, 1987, locked at Kilimani Police Station for 2 days. He was taken to Nyayo House Basement where locked in a wet basement for 8 days during which days he was denied food, stripped naked and whipped by police officers. He was taken to Nairobi Area Police Headquarters where he was served with a detention order under the Preservation of Public Security act. He was detained at Kamiti Maximum Prison for 6 months. He suffered loss of employment, mental, physical and psychological trauma. Amina was denied right of personal liberty (Section 72(1)) during the ten days in which he was held by the police. His right to protection against inhuman treatment (Section 74(1)) was also violated. An amount of Kshs.1.5 million would be appropriate compensation.

57. **SYLVANUS OKETCH ODUOR (Case No.1311 of 2004):** He was arrested on 25th September, 1986 by 3 plainclothes police officers. He was taken to Kileleshwa Police station and later taken to Nyayo House Basement cells where he was kept in a dark waterlogged cell. He was stripped naked and denied a sleeping mat. He was kept for a total of 77 days during which period he was regularly starved and interrogated. He was tortured by being assaulted, suspended in the air at an angle of 45 degrees, beaten with broken furniture, whips and blows. He was denied access to a doctor lawyer, or relatives. He was arraigned before Chief Magistrate on 9th December, 1986, where he was convicted on his own plea of guilt for being a member of unlawful organization and sentenced to serve 6 years imprisonment. He was committed to Kamiti Security Maximum Prison where he was also subjected to

inhuman and degrading treatment. These facts reveal that Oduor's right to personal liberty (Section 72(3)) was violated when he was held for a period of 77 days before being taken to court. Oduor's right to protection against inhuman treatment (Section 74(1)) was also violated by the various acts of torture which he was subjected to. The period of 6 years that Oduor served at Kamiti Prison following his conviction on his own plea of guilty was legal as he was serving a lawful sentence. I would award Oduor a sum of Kshs.2.5 million for the violations which he suffered.

58. **EDWARD AKONGO OYUGI (Case No.1309 of 2005):** He was a professor of psychology. He was arrested on 15th June, 1982 from a Hotel in Eastleigh. He was dragged to an unmarked saloon car. He was taken to Central Police Station and later to Nyati House where he was locked incommunicado in a waterlogged cell. He was served with an order of detention under the Preservation of Public Security Act and taken to Manyani Maximum Security detention Camp. As a result of his detention without trial, he suffered loss and damage and was dismissed from employment. He was released from detention in December 1985. He was arrested again on 11th July, 1990, driven to his house at Nairobi West which was searched in breach of Section 76(1) of the Constitution then taken to Muthangari Police Station and then Nyayo House Basement Cell where he was locked for 2½ weeks. While at Nyayo House he was subjected to cruel and degrading treatment by being interrogated for many hours without rest. He was forced to strip naked, kept in waterlogged cells, being kicked by police officers and being threatened at gunpoint. He was subsequently charged with the offence of treason which was later reduced to sedition, and he was sentenced to serve 7 years imprisonment. He lodged an appeal against the sentence. His appeal was allowed after the State conceded.

59. These facts reveal that Oyugi's arrest on 15th June, 1982 and detention was done pursuant to the Preservation of Public Security Act which was then a law in force. That law provided for detention without trial on grounds of public security. The subsequent arrest of Oyugi on 11th July, 1990 and his confinement in Nyayo House for 2½ weeks, was a violation of Oyugi's right to personal liberty (Section 72(3)). Oyugi's right to protection against inhuman treatment (Section 74(1)) was also violated while he was confined at Nyayo House. Oyugi has deponed that he was charged and convicted for the offence of sedition, and that he was later released on appeal after the State conceded the appeal. However, Oyugi did not provide copies of the proceedings. It is not clear whether he was convicted on his own plea of guilt or after trial, nor is it clear whether Oyugi raised any issue before the trial magistrate under Section 84(3) of the Constitution. In the circumstances, Oyugi has failed to establish that the court which tried him did not uphold his right under the Constitution. I find that a sum of Kshs.2.5 million would be appropriate compensation to Oyugi for the violation of his right under Section 72(3) and 74(1) of the Constitution.

60. **JOE NJOROGE (Case No.1310 of 2005):** He was arrested on 21st November, 1990 at the Kenya Tanzanian Border Post. He was locked up at Namanga Police Station where he was thoroughly beaten by police officers for having a magazine called "African Events". He was later transferred to Nyayo House where he was beaten by Police Officers who also stepped on his fingers and squeezed his testicles. He was locked in waterlogged cells where he was hosepiped with cold water and kept without food for many days. Subsequently he was charged with criminal Case No.4949 of 1990 for importing 798 copies of 'Africa Event' Magazines which was alleged to be a seditious publication. He was remanded at Kamiti Maximum Security Prison from where he was produced in court severally for about 15 months after which a nolle prosequi was entered by the State. The facts as deponed to by Njoroge does not reveal when he was taken to court and therefore it is difficult to tell whether Section 72(3) of the Constitution was contravened. It is however evident that Njoroge's right to protection against inhuman treatment under Section 74(1) of the Constitution was violated. Njoroge's right to a fair hearing under Section 77(1) of the Constitution was also violated as a criminal case against him was not heard but the proceedings were terminated after 15 months. General damages of Kshs.2 million would be appropriate for Njoroge.

61. **KIONGO MAINA (Case No. 1312 of 2005):** He was arrested on 5th March, 1986 from his house in Nairobi which was thoroughly searched. He was driven to his rural home in Kangema which was also searched. He was transferred to Nyayo House Basement on 6th March where he was detained for 26 days. While at Nyayo House he was interrogated during which period he was tortured by being put in cold waterlogged cells without food or drink. He was physically assaulted and humiliated. He was thereafter taken to court where he was charged with being a member of an unlawful society and sentenced to 5 years imprisonment. In 1990, he was again arrested and taken to Nyayo House where he was thoroughly interrogated and threatened.

62. The facts deponed in the affidavit reveal that Maina's right to personal liberty (section 72(3))

was violated as he was not taken to court within 24 hours. Maina's right to protection against inhuman treatment (Section 74(1)) was also violated as he was subjected to torture and inhuman treatment during the 26 days he was held in the Nyayo House in 1986. As regards Maina's arrest in 1990, Maina has not provided his actual date of arrest, nor has he stated how long he was interrogated at Nyayo House or when he was released. The facts deponed to in the affidavit are therefore not sufficient to establish violation of any right with regard to the alleged arrest of 1990. A sum of Kshs.2 million would be appropriate for violation of Maina's right to personal liberty (Section 72(3) and protection against inhuman treatment (Section 74) in 1986.

63. **FLORENCE NYAGUTHIE MURAGE (Case No.1313 of 2005):** She was arrested on 2nd August, 1990. She was locked up at Langata Police Station. She was taken to Nyayo House where she was confined for 6 hours during which period she was threatened with torture and beatings. She was denied food and water for several days. She was held in a urine waterlogged cell. She was forced to shower with a male police officer guarding the door. She was charged on 10th August, 1990 with being in possession of a seditious publication, remanded at Langata Women's Prison for two weeks after which she was freed on bond. She was released after 6 months when the Attorney general entered a nolle prosequi. Due to her long incarceration, she was interdicted from work and was abandoned by her boyfriend.

64. The facts reveal that Nyaguthie was arrested and detained for a period of more than 24 hours although she was later charged with an offence which was not a capital offence. Therefore Nyaguthie's right to personal liberty under Section 72(1) & (3) of the Constitution were violated. Nyaguthie was also subjected to mental and psychological torture contrary to Section 74(1) of the Constitution. Her right to protection of the law under Section 77 of the Constitution was also violated as she was not accorded a fair hearing within a reasonable time. General damages of Kshs.1.5 million would be appropriate compensation for her.

65. **KAMONYE MANJE (Case No.34 of 2005):** He was arrested on 12th March, 1986 in his office at Kenya Science Teachers College in Nairobi. He was driven to Kilimani Police Station where he was locked in a urinal for 3 hours. At around midnight, he was taken to Nyayo House and locked in the underground cells. While at Nyayo House he was stripped naked and kept in waterlogged cells. He was interrogated, forced to undress and spin on his palm whilst at the same time he was being beaten by broken pieces of timber, whips and slaps. He was also not given food for 3 days after which he was again interrogated, kept again for two days and then subjected to further interrogation. He was not allowed access to a lawyer or relative. On 13th day he was charged before the Chief Magistrate in Nairobi with being in possession of a seditious publication. He pleaded guilty to the charge as he had been threatened with death should he deny the charge. He was sentenced to serve 5 years imprisonment which term was reduced to 3½ years after he appealed to the High Court. He appealed to the court of appeal which quashed his conviction and set aside the sentence.

66. The facts deponed reveal that Manje's right to personal liberty under Section 72(1) & (3) of the Constitution were violated as he was held for a period of more than 24 hours although the charge for which he was arrested was not a capital offence. Manje was also subjected to torture and inhuman treatment during the time that he was held at Nyayo House. His right under Section 74 of the Constitution was therefore violated. A sum of Kshs.1.5 million would be appropriate compensation.

67. **MUNENE KAMAU (Case No.1743 of 2004):** He was a journalist. He was arrested in 1987 from his rural home in Kirinyaga District. His house was thoroughly searched. He was dragged from his house in an unmarked vehicle and taken to Kerugoya Police Station where he was interrogated. He was then driven to Nyayo House Basement where he was bundled into a dark room where he was stripped naked. He was tortured physically, psychologically and mentally. He was interrogated for many hours without sleep and was subjected to various humiliating acts, including his testicles being pierced with a very sharp needle. He lost two of his front teeth in the torture process.

68. From the facts revealed in his affidavit, Kamau did not provide specific details concerning the date of his arrest, how long he was held at Nyayo House Torture Chamber, or when he was released. Therefore, the court has no information concerning how long Kamau was detained, and whether his detention or confinement was contrary to Section 72(1) & (3) of the Constitution. Thus, the facts provided by Kamau do not reveal any violation of his right to personal liberty. Kamau has however given details concerning acts of physical and psychological torture. I am satisfied that his right to protection against inhuman treatment (Section 74(1)) was violated. I would award him a sum of Kshs.1 million as general damages.

69. **FREDRICK MURAGE GATHUKU (Case No.1741 of 2004):** He was arrested on 26th August 1986 at Nairobi. He was held at Kamukunji Police station then taken to Nyayo House Basement where he was held incommunicado for many days. While at Nyayo House, he was interrogated by a team of special branch officers. He was assaulted and tortured during the interrogations. He was taken to a dark waterlogged cells where he was pumped with hot water and cold air and generally held in the most inhuman and unhygienic conditions. He was held for a period more than that permitted by law. He was denied access to drinking water, lawyer or a friend. From the facts deponed to in the affidavit, although Gathuku gave the date of his arrest, he did not give any indication in the affidavit as to the period he was held or when he was released. Therefore, the facts given are not sufficient to establish the violation of Gathuku's rights under Section 72(1) & (3) of the Constitution. Nevertheless, it is evident that Gathuku was subjected to acts of physical and psychological torture. Therefore his right to protection against inhuman treatment (Section 74(1)) was violated. I would accordingly award him general damages of Kshs.1 million.

70. **STEPHEN MULILI KITUU (Case No.1744 of 2004):** He was arrested on 9th October, 1989 at Uhuru Estate. He was locked at Jogoo Road Police Station, then transferred to Kileleshwa Police Station and then Nyayo House Basement where for 30 days he was interrogated by a team of police officers who stripped him naked, beat him with whips and wooden planks and denied him food. He was thereafter charged in court, convicted and sentenced to 4 years imprisonment. He was released on 23rd June, 1992 following a presidential amnesty. The facts reveal that Kituu's right to personal liberty (Section 72(3)) was violated and that he was subjected to inhuman treatment contrary to Section 74(1) of the Constitution. In the circumstances general damages of Kshs.1.5 million would be appropriate.

71. **WILSON NDUATI NJOROGE (Case No.1742 of 2004):** He was arrested on 12th June, 1987 from Kamiti Maximum Prison where he was working as a warder. He was taken to Muthaiga Police Station from where he was transferred to Nyayo house where he was locked in a waterlogged cell for 3 days. Thereafter he was stripped naked by 6 police officers and subjected to inhuman and degrading treatments by being beaten by pieces of wood, metal bars and whips and denied food for several days. He sustained serious injuries during the torture for which he was admitted at Kenyatta National Hospital, where he was kept under guard by a police officer. Thereafter, he was taken to Muthaiga Police Station where he was held for another 24 days. Later upon his release he had to seek specialized treatment in the United States for his injuries. As a result of his incarceration, he was summarily dismissed from his employment and lost all his benefits of his 33 years of service. Although Njoroge has not given the exact date of his release, it is evident from the affidavit that he was held by the police for a period of more than 24 hours. This was a violation of his right to personal liberty under Section 72(1) & (3) of the Constitution. Njoroge was also subjected to inhuman treatment which resulted in his sustaining serious injuries. This was a violation of his right under section 74(1) of the Constitution. A sum of Kshs.1.5 million would be appropriate as general damages.

72. **FRANCIS NDUTHU KARANJA (Case No.1745 of 2004):** He was arrested on 1st January, 1987 in Nakuru Town. He was transferred to Nyayo House Basement where he was held incommunicado in a waterlogged cell for 28 days. During that period, he was interrogated by a team of special branch officers. He was tortured by being stripped naked, being kept in a dark cell where hot and cold air was pumped alternately. He was also sprayed with very cold water, assaulted and generally kept in inhuman and unhygienic conditions. He was arraigned before the Chief Magistrate, where he was charged with an offence of failing to prevent a felony. He sustained serious abdominal injuries, broke leg, teeth and lost eyesight. Although Karanja did not give the date when he was arraigned before the Chief magistrate or the outcome of his criminal case, it is evident that Karanja was held by the police for 28 days. That was a violation of his right to personal liberty as provided under Section 72(1) & (3) of the Constitution. Karanja was also subjected to inhuman treatments contrary to section 74(1) of the Constitution. An award of Kshs.2 million would be appropriate compensation.

73. **JAMES H. GITAU MWARA (Case No.56 of 2004):** He was arrested on 8th October, 1990 at Kariobangi South Estate. He was taken to his house at Langata Civil Servants Estate where the house was searched, then taken to Ruaraka Police Station and then to Nyayo House Basement where he was interrogated. During the interrogation, he was tortured by being stripped naked and battered with rubber whips, broken chairs, and heavy blows. At the end of every interrogation session, he was placed in a dark cell where pressurized water, hot and cold air was pumped for several hours. He was locked in a dark cell for 14 days without food or sleeping mattress or blanket. He was arraigned before the Chief Magistrate on

23rd October, 1990 and was charged with the offence of treason to which he pleaded not guilty. He was remanded at Kamiti Maximum prison for 2½ years during which period he was subjected to torture, inhuman and degrading treatment. He was finally released, following a nolle prosequi entered by the Attorney General on 24th June, 1992. As a result of his incarceration he suffered physically, psychologically and economically.

74. It is evident from the facts deponed to by Mwara that although Mwara was detained for 14 days before being arraigned in court, he was charged with the offence of treason, which is a capital offence. Therefore, his right to personal liberty was not violated as he was produced in court within the required period. However, Mwara was subjected to acts of torture during the time that he was held at Nyayo House Basement. His right to protection against inhuman treatment (Section 74(1)) was therefore violated. Further, Mwara's right to protection of the law under Section 77 was violated as he was remanded in Prison for 2½ years before the State entered a nolle prosequi. Mwara was therefore not afforded a fair hearing within a reasonable time. I would find a sum of Kshs.1.5 million appropriate compensation for Mwara.

75. **GEORGE CHITECHI OSUNDWA (Case No.409 of 2004):** He was arrested on 10th March, 1986 at Mwamba Market. His room was searched then he was taken to his father's house which was also searched. He was locked at Kakamega police station. Thereafter, he was transferred to Nyayo House where he was kept in dark cell frequently pumped with hot and cold air. He was forced to strip naked and made to do all manner of exercises. He was beaten with pieces of timber, slaps and truncheons. He was kept in a waterlogged cell for 4 to 5 days and then taken to court on 27th March, 1986. He was sentenced to 18 months imprisonment, but lodged an appeal and the sentence was quashed on 28th July, 1987. He was not released but was taken to Kamiti for 4 days then handed over to special branch officers who took him back to Nyayo House where he was interrogated and warned never to speak or associate with anyone before being released. Although Osundwa was confined for 7 days before being taken to court, he has not revealed in his affidavit the offence for which he was charged nor has he produced copies of the proceedings. In the circumstances, Osundwa has not established violation of his right to personal liberty. As regards Osundwa's right to protection against inhuman treatment, (Section 74(1)) it is evident that this right was violated as he was subjected to physical and mental torture. I find that a sum of Kshs.1.5 million would be appropriate compensation to Osundwa.

76. **ZACHARIA KARIUKI MWATI (Case No.1183 of 2003):** He was arrested on 18th December, 1988 at a roadblock in Timboroa. The next day, he was taken to Nairobi where he was kept in an underground cell. He was then interrogated during which period he was tortured by being forced to strip naked, beaten, burnt with cigarettes on buttocks, and testicles tied by a nylon string and pulled. He was denied any water or food, fed on a piece of bread every 2 days in a cell contaminated with urine. After 16 days, he was forced to sign a fabricated testimony. On 4th January, 1989 he was charged with being a member of unlawful political society and being in possession of seditious publications. He pleaded guilty under duress and intimidation. He was sentenced to 4 years imprisonment. He served the sentence at Kamiti Maximum Prison and was released on 4th September, 1991. As a result of arrest, detention and police surveillance, he was forced to seek political asylum in Uganda. Mwati was held for 16 days before he was produced in court. This was a violation of his right to personal liberty under Section 72(3) of the Constitution, as he was charged with being in possession of seditious publication which is not a capital offence. It is further evident that Mwati's right to protection against inhuman treatment (Section 74(1)) was violated. A sum of Kshs. 2 million would be appropriate compensation for the injuries he suffered.

77. **JACKSON MAINA WANGOMBE (Case No.1182 of 2003):** He was arrested on 4th October, 1988 at Malaba. He was locked at Busia Police Station before being transferred to Nairobi and taken to Nyayo House Basement, where he was beaten, denied food, and forced to stay in a waterlogged cell. He was confined for 30 days, during which period he was tortured and mistreated after which he was taken to court and charged with being a member of Mwakenya Movement. He was imprisoned for 2 years. As a result of the torture, he sustained injuries for which he was operated on at Kijabe Mission Hospital. Wangombe's right to personal liberty under Section 72(3) of the Constitution was violated as he was held for a period of 30 days before being produced in court. The offence of which Wangombe was charged was not a capital offence and therefore he ought to have been produced in court within 24 hours. Wangombe's right of protection to inhuman treatment (Section 74(1)) was also violated. A sum of Kshs.2 million would be adequate compensation to Wangombe.

78. **PETER G. KIHARA (Case No.1189 of 2003):** He was arrested in 1969 and detained for 2½ years under the Preservation of Public Security Act. He was arrested again on 23rd January 1986 at Githunguri, locked at several police stations, before being taken to Nyayo House Basement. While at Nyayo House Basement, he was put in a cold waterlogged cell for many days without food or drink. He was continuously splashed with cold water at high pressure. He was interrogated by police officers for many hours without sleep. During the interrogation, he was subjected to various acts of torture. After being held for 69 days, he was taken to court where he was charged with being in possession of seditious publication and sentenced to 4½ years imprisonment. Kihara's appeal against conviction and sentence was summarily rejected. On 11th July, 1990, he was arrested again and locked at Nyayo House where he was once again assaulted, humiliated and tortured for 14 days before being released without any charges being preferred against him. The arrest and detention of Kihara in 1969 is justifiable as it was done under the Preservation of Public Security Act which was then in force. However, the arrest of 23rd January, 1986 and confinement for 69 days was a violation of Kihara's right to personal liberty as he ought to have been taken to court within 24 hours, having been charged with an offence which is not a capital offence. The arrest on 11th July, 1990 and confinement for 14 days was further violation of Kihara's right to personal liberty (Section 72) as he was not charged with any offence. Kihara's right to protection against inhuman treatment (Section 74(1)) was also violated as he was subjected to various acts of torture. A sum of Kshs.2.5 million would be adequate compensation to Kihara.

79. The upshot of the above is that each of the plaintiffs has succeeded in establishing the violation of the fundamental rights and freedom as stated hereinabove. Accordingly I give judgment in favour of each plaintiff and issue orders as follows :

(a) A declaration in each case that the fundamental rights and freedoms of the respective plaintiffs under the aforementioned provisions of the Constitution were contravened and grossly violated by police officers and other government agents.

(b) A declaration that each of the plaintiffs is entitled to the payment of damages as compensation for the violations and contraventions of the aforesaid fundamental rights and freedom.

(c) Each of the plaintiffs is hereby awarded general damages as follows:

(i)	Harun Thung'u Wakaba	-	3 million
(ii)	Samuel Kaberere Njenga	-	1.5 million
(iii)	Ali Cheptegei Saikwa	-	2.5 million
(iv)	James Mwangi Kariuki	-	2.2 million
(v)	Paul Amina	-	1.5 million
(vi)	Sylvanus Oketch Oduor	-	2.5 million
(vii)	Edward Akongo Oyugi	-	2.5 million
(viii)	Joe Njoroge	-	2 million
(ix)	Kiongo Maina	-	2 million
(x)	Florence Nyaguthie Murage	-	1.5 million
(xi)	Kamonye Manje	-	1.5 million
(xii)	Munene Kamau	-	1 million
(xiii)	Fredrick Murage Gathuku	-	1 million
(xiv)	Stephen Mulili Kituu	-	1.5 million
(xv)	Wilson Nduati Njoroge	-	1.5 million
(xvi)	Francis Nduthu Karanja	-	2 million
(xvii)	James H. Gitau Mwara	-	1.5 million
(xviii)	George Chitechi Osundwa	-	1.5 million
(xix)	Zacharia Kariuki Mwati	-	2 million
(xx)	Jackson Maina Wangombe	-	2 million
(xxi)	Peter G. Kihara	-	2.5 million

(d) The plaintiffs shall each have interest on the sum awarded from the date of this judgment until payment in full, as well as costs of the suit.

Those shall be the orders of the court.

Dated and delivered this 21st day of July, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Rumba Kinuthia & Ms Kinithi for the plaintiffs

Menge for the defendant

Kajuju - Court clerk