REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL APPLI 128 OF 2006

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70 - 83 OF THE CONSTITUTION OF KENYA

(THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006.)

BETWEEN

1. LT. COL. PETER NGARI KAGUME SERVICE NO. 027036

2. LT. COL. DAVID KANAGI THAN'GATE SERVICE NO. 027001

3. CAPTAIN JOSEPH MWANGI MBUGWA SERVICE NO. 027237

4. LT. GAD KAMAU NDEGWA SERVICE NO. 027433

5. W.O.I. JEREMIY MICHAEL GATUGUTA SERVICE NO. 020858

6. S/SGT. JOSEPH GAICHURU CHEGE SERVICE NO. 020531

7. S/SGT. REUBEN KARANGI KIRIMI SERVICE NO.021233

8. CPL PETER NASHON WAMBULWA SERVICE.NO.022984.PETITIONERS

AND

THE ATTORNEY GENERAL .....RESPONDENT

JUDGMENT

The petition before Court is dated 10th March, 2006. The Petitioners are seeking numerous orders which include:-

1. **A DECLARATION THAT PART** Five and the regulations thereunder of the Armed Forces Act Cap. 199 contradicts and offends the provisions and spirit of Chapter 5 of the Constitution thus enabling

gross violation and abuse of the Applicants' constitutional rights by the Respondent.

2. **A DECLARATION THAT** Part Five of the Armed Forces Act Cap. 199 cannot qualify the Bill of Rights provided for under the Constitution and enable the violation with impunity of the Applicants' constitutional rights by the Respondent.

3. **A DECLARATION THAT** the provisions of Part Five of the Armed Forces Act Cap. 199 are not reasonably justifiable in a democratic Society in that they violate the very basis of due process and protection of the law to the Applicants herein.

4. **A DECLARATION THAT** the provisions of Part Five of the Armed Forces Act Cap. 199 were inapplicable to the 3rd - 9th Applicants with effect from 1st of August 1982.

5. **A DECLARATION THAT** the Respondent's purported authority, pursuant to which the Air Force was on the 12th of August 1982 disbanded, was unconstitutional and not reasonably justifiable in a democratic Society.

6. **A DECLARATION THAT** the unconstitutional disbanding of the Air Force on the 12th of August 1982 is null and void for having been done outside the law, arbitrarily, in a capricious manner and in contravention of the Applicants' rights to observance of due process of law not to be subjected to capricious, and arbitrary exercise of power.

7. **A DECLARATION THAT** the unconstitutional disbanding of the Air Force on the 12th of August 1982 infringes on the constitutional rights of the Applicants' to life, liberty security of the person, equal protecting of the law freedom of association, privacy of their homes and property embodied in section S. 70, 72, 73, 74, 75, 76 (1), 77, 80 and 82 of the Constitution and to that extent is discriminatory, ... unconstitutional, unlawful, null and void.

8. **A DECLARATION THAT** the creation of the 82 Air Force was unlawful, unconstitutional and therefore null and void ab initio.

9. **A DECLARATION THAT** there was no power vested constitutionally in the Act 82 Air Force to discharge the Applicants on whatever grounds and that the purported discharge, dismissal and retirement of the Applicants from the Armed Forces contravened the provisions of the section 70, 74, 77 and 82 unlawful, unconstitutional, null and void ab initio.

10. **A DECLARATION THAT** there was no power vested constitutionally in the 82 Air Force to terminate the Commissions of the 1st to 5th Applicants and the purported terminations were unlawful, unconstitutional and void ab initio.

11. **A DECLARATION THAT** the labelling en mass of the Air Force personnel as rebels, discharging, dismissing, and retiring the said personnel and in particular the Applicants was a trampling upon their basic human rights and dignity as was the denial of payment of terminal dues, pensions and other emoluments arising out of the terms and conditions of their employment.

12. **A DECLARATION THAT** the arrest and incarceration of the Applicants was unjustifiable in a democratic society and was a contravention of the provisions of Sections 70, 72, 73, 74, 76, 77 and 80 of the Constitution and was thus unlawful.

13. **A DECLARATION THAT** the arrest and incarceration of the 1st and 2nd Applicants for periods that were unreasonably long and unjustifiable in a democratic society and was a contravention of the provisions of Section 70, 72, 73, 74, 76, 77 and 80 of the Constitution and was unlawful.

14. **A DECLARATION THAT** the arrest and incarceration of the 3rd to 9th Applicants for periods that were unreasonably long was unjustifiable in a democratic society and was a contravention of the

provisions of Section 70, 72, 73, 74, 76, 77 and 80 of the Constitution and was unlawful.

15. **A DECLARATION THAT** the failure of the military authorities to inform the Applicants of the charges facing them in a reasonable time or at all was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

16. **A DECLARATION THAT** the failure of the military authorities to inform the Applicants of the charges facing them in a language they could understand and in detail was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

17. **A DECLARATION THAT** the failure of the military authorities to give adequate time and facilities for the preparation of their defence was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

18. **A DECLARATION THAT** the failure of the military authorities to permit the Applicants to defend themselves in a court of Law was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

19. **A DECLARATION THAT** the failure of the military authorities to permit the 1st, 2nd and 8th Applicants to defend themselves in a court of Law, which was independent and impartial, was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

20. **A DECLARATION THAT** the failure of the military authorities to permit the 2nd Applicant to defend himself in a court of law which was independent and impartial in the Applicant was tried by Officers Junior in rank to him and was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

21. **A DECLARATION THAT** the failure of the military authorities to permit the 1st, 2nd and 8th Applicants to be defended by a legal representative of their own choice was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' right.

22. **THAT** a declaration do and is hereby issued that the failure of the military authorities to frame a charge against the 1st, 2nd and 8th Applicants that disclosed an act or omission that did at the time it took place constitute an offence under the law and was a contravention of their rights under the provisions of S. 77 and the Armed Forces Act was discriminatory in contravention of s. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

23. **A DECLARATION THAT** the framing of a charge against the 1st, 2nd and 8th Applicants by the military authorities that was not defined and the penalty therefore prescribed in a written law was a contravention of their rights under the provisions of S. 77 (8) and the Armed Forces Act was discriminatory and in contravention of S. 82 and thus unconstitutional, unlawful and a gross abuse of the Applicants' rights.

24. **A DECLARATION THAT** the courts-martial were unlawfully and unconstitutionally convened and that the same were merely used as an abuse of the process of the court as against the Applicants.

25. **A DECLARATION THAT** the courts-martial were neither independent nor impartial in their composition and that the same were merely used as an abuse of the process of the court as against the Applicants.

26. **A DECLARATION THAT** courts-martial were unlawfully and unconstitutionally convened and that the same was merely used as an abuse of the process of the court as against the Applicants.

27. **A DECLARATION THAT** the circumstances in which the 1st, 2nd and 8th Applicants were brought before the Court martial were unfamiliar to them and not in accordance with the conventional military practice regarding court-marital and did intimidate, harass and greatly prejudice them in conducting their defence.

28. **A DECLARATION THAT** the failure by the military authorities to provide any or any adequate facilities to the Applicants to enable them lodge an appeal against the conviction and sentence in time or at all was unconstitutional and unlawful.

29. **A DECLARATION THAT** the torture of the Applicants while they were in custody was degrading, inhuman and contrary to Section 74 (1) of the Constitution of Kenya.

30. **A DECLARATION THAT** the failure to pay pension and other terminal dues to the Applicants is unconstitutional, illegal null and void and contrary to Sections 70, 73 and 74 and S. 112, 113 and 125 of the Constitution of Kenya.

31. **A DECLARATION THAT** by virtue of the aforesaid unconstitutional acts on the part of the Respondent the Applicants have been greatly inconvenienced and been rendered impecunious, their lives and reasonable expectations of promotion wasted and their rights under section 73 and 74 of the Constitution have been contravened.

32. **A DECLARATION THAT** the Air Force serving before 1982 the Applicants did generally endeavour their outmost best even over the above the call of duty to subvert the attempted coup.

33. **A DECLARATION THAT** by virtue of the aforesaid unconstitutional acts on the part of the Respondent, the Air Force serving before 1982 and the Applicants have been condemned to undeserved ostracism by society at large and the Armed Forces in particular and that their rights under Section 74 of the Constitution have been contravened.

34. **A DECLARATION THAT** by virtue of the aforesaid unconstitutional acts on the part of the Respondent the members of the Air Force serving before 1982 and the Applicants and have been subjected to ridicule, odium and contempt by society at large and the Armed Forces in particular and their rights under Section 74 of the Constitutional have been contravened.

35. **A DECLARATION THAT** the entire process of dealing with members of the Air Force serving before 1982 in general and the Applicants in particular was entirely skewed, biased, irrational and bereft of any iota of legality.

36. **A DECLARATION THAT** by virtue of the aforesaid unconstitutional acts on the part of the Respondent the Applicants are entitled to special and general damages and compensation for loss of Commissions, earnings, pain and suffering.

37. **A DECLARATION THAT** the Applicants service record be and is hereby rectified to reflect honourable retirement for the 1st Applicant and Honourable discharge from service for 2nd - 8th Applicants.

38. **A DECLARATION THAT** the Applicants service record be and is hereby rectified to read above average conduct instead of fair.

39. **A DECLARATION THAT** do issue that the Applicants are entitled to associate and interact freely with the other serving members of the Armed Forces and to make use of facilities which Honourable discharge or retirement would entitle them to such as use of messes and AFCO facilities.

40. **THAT** it be and is hereby ordered that the Respondents shall pay to the Applicants their dues in the terms contained in the Document named QUANTUM

41. **AN ORDER** the Respondents do forthwith pay the dues stated in paragraph 40 above.

The petition is supported by the affidavits of the petitioners. The petitioners have filed submissions dated 19th May, 2006 and 11th June 2007. The Petitioners, were represented by Mr. Madahana Advocate but later the 6th Petitioner appointed Mr. Mwongela Advocate who filed further submissions for him on 30th October 2008. The petition was opposed by the Respondent vide the grounds of Opposition dated 24th May 006 and field in court on the 7th day of June 2006 replying affidavit sworn by Lt.Col. Elvis Kame Kirriare sworn on 26th September, 2006 and filed in court on 31st December 2006 as well as the further affidavit sworn by Rosemary Atieno Owino on the 21st December 2006 and filed in court on the same day. The Respondent was represented by Mr. Omondi, a state counsel from the Attorney General's Chambers. The grounds upon which the petitioners' prayers are founded are inter alia follows:-_

1. The Petitioners' commissions were terminated as a direct result of the attempted coup.

2. The Petitioners have sworn that they were not in any way implicated in the coup and that they had been deprived their constitutional rights following the subsequent decommissioning which was a continuation of the unconstitutional and unlawful acts by the Respondent against them.

3. Since the Petitioners' commissions were terminable by way of application of section 171 of the Armed Forces Act, the termination of their commissions was fatally flawed because:-

(a) At all times the Petitioners were commissioned officers of the Kenya Air force as by law established.

(b) After the events of 1st August 1982, a new authority was constituted known as the 82 Air Force which was demoted in precedence to Kenya Navy contrary to Chapter 199 Laws of Kenya.

(c) It took a court ruling for the name 82 Air Force to revert to the statutory name of Kenya Air force.

(d) Section 3 of the Armed forces Act does not give the President power to disband the service as it happened in the case of the petitioners.

(e) In the absence of any information as to why the petitioners commission were terminated; the Petitioners are entitled to assume that their termination was a direct result of the attempted coup.

(f) The termination could only have been made by at the recommendation of the Defence council to the President.

A brief factual background of this petition is that all the petitioners were members of the Kenya Air Force up to 1st August, 1982 when there was an attempted coup to overthrow the government. The petitioners were later arrested and incarcerated at Kamiti Maximum Security Prison and other prisons where they were kept in confinement and later moved to Naivasha Maximum Security Prison where each was held in isolation. Later the 1st, 2nd and 8th Petitioners were charged before a court martial where each faced various charges. The 1st petitioner alleged that he was tortured and only found it prudent to plead guilty to the charges which were malicious to escape from being sent back to jail where they feared would end up dying. The 1st and 2nd Petitioners were convicted and served a sentence in a very humiliating manner. The 3rd to 8th Petitioners were never tried in a Court Martial but were kept in custody. Eventually all the Petitioners were dismissed from service without any benefits at all.

The Respondent while opposing this instant Petition raised several grounds of opposition as follows:-

(i) The Petition is made after inordinate delay twenty four (24) years since 1982.

(ii) The Petitioners are circumventing the inordinate delay (limitation period) by filing a constitutional reference instead of a suit claiming wrongful dismissal.

(iii) Fundamental rights and freedoms are subject to the rights of others, the society and public interest, and are not absolute.

(iv) A threat to the constitutional order or acts or omissions likely to cause a constitutional crisis cannot be compromised with individual rights and freedoms.

(v) The Petitioners rights and freedoms were not and have not been infringed.

(vi) The applicants had other remedies under substantive law but slept on their rights to go to court from 1982 to 2006.

(vii) The alleged, suffering, imprisonment, dismissal from employment and present situation of the petitioners is as a result of their wrong doing as they contributed to their condition.

(viii) The Applicants Petition is barred by sections 86(2) and 86(3) of the Constitution.

(ix) The Petitioners have no cause of action under the constitution.

The Petitioners contend that their hopes and aspirations were shattered by the occurrence of the attempted coup on the 1st August, 1982 which wreaked havoc upon their lives together with their families and the effects of the same are still felt up to date.

The Petitioners further contend that they had no power to control the attempted coup unlike the Respondent who neglected and failed to stop the same.

The Petitioners further state that they were subjected to gross violations of their constitutional rights as follows:-

1. Loss of liberty contrary to section 70,72,73,74,77 and 81 of the Constitution.

2. Unlawful detention in notorious prisons contrary to sections 70,71,722,73 and 74 of the constitution.

3. Physical beating contrary to section 70,71 and 74 of the constitution.

4. Physical and mental torture contrary to sections 70 and 74 of the constitution.

5. Deprivation of food, sleep and basic amenities contrary to sections 70,71 and 74 of the constitution.

6. Deprivation of contact with family members and other persons contrary to sections 70,71 and 74 of the constitution.

7. Trial by tribunals which could not in the circumstances be possibly fair or impartial contrary to sections 70 and 77 of the Constitution.

8. Denial of legal representation of their choices contrary to sections 70,77 and 82 of the constitution.

9. Denial of facilities for appealing contrary to sections 70,74 and 77 of the constitution.

The Petitions further argue that, the 1st, 2nd and 3rd petitioners were subjected to court martial while the others were presumably dealt under the provisions of summary trial of charges contrary to sections 78 – 82 of the armed Forces Act. The said sections provide as follows:-

"78(1) Instead of the accused being tried by Court Martial – summarily with the charge if it is for an offence prescribed as one which a commanding officer may deal with summarily;

(b) The appropriate superior authority may deal summarily with the charge if it is for an offence prescribed as one which the appropriate superior authority may deal with summarily.

82(1) After investigating a charge against a servicemen, the commanding officer shall either

(a) If the charge is one which he has power to deal with summarily and he considers that the charge should be so dealt, deal summarily with the charge; or

(b) In any other case, take the prescribed steps with a view to charge being tried by court martial.

(4) Where the commanding officer deals with a charge summarily and records a finding of guilty, the punishment which he may award are, subject to limitations herein after provided, those set out in the following scale-

(a) If the accused is a warrant officer or a non-commissioned officer –

(i) Dismissal from the armed forces;

(ii) ……

(iii) ……..

(iv) ……..

(v) ……

(c) If the accused is a servicemen other than a warrant officer or non-commissioned officer –

(i) Imprisonment for a term not exceeding fourty-two days or, if the accused is or active service, active service punishment for a period not exceeding fourty-two days in aggregate

(ii) Dismissal from the Armed forces . . . "

The Petitioners maintain that those among them that were not tried before a Court Martial, were not to be heard and that their role was only to mitigate on the severity of the punishment which is a contradiction of section 77 of the constitution. The offences which could have been contemplated were related to and connected to the attempted coup and ranged from treason to mutiny which are serious offences of criminal nature. The Petitioners ought to have been informed about the charges which led to their dismissals from the force.

The counsel for the Petitioners contends that the court will have to decide whether the charge against the 1st petitioner was correct to the extent of enabling him to plead guilty.

The Petitioners further argue that the Respondent has continued to breach their rights by besmirching their character which has made it impossible to procure employment and it still haunts them. Indeed the 1st petitioner was for a long time under the Police surveillance and all the Petitioners have been shunned by the society as rebels.

The Petitioners were never paid any retirement dues or terminal benefits. The Respondent has not given any explanation why the dues have not been paid and the intention is to punish the Petitioners for life which amounts to unusual and degrading treatment.

The Petitioners have also contended that their dismissal from service rendered them homeless as they can no longer associate with their contemporaries, visit the base or use any of the facilities that are enjoyed by former officers and servicemen. The Petitioners cannot share experiences with peers and those who came after them which is the most painful and awful reality they must live with.

The Petitioners have argued that the law is now settled that damages are awardable in claims of this nature as it was held in ***HCCC MISC APPLICATION NO. 494 OF 2003 DOMINIC ARONY AMOLO v THE ATTORNEY GENERAL***. According to the Petitioners, an attempt to restore their families, wasted careers and dashed hopes can be made by way of general damages at a sum of 3 million for breach of fundamental rights as guided by the case of ***ARONY CASE as well as POHIVA v PRIME MINISTER AND KINGDOM OF TONGA [1988] LRC 949.*** The Petitioners have further submitted that each is also entitled to Ksh.3 million for defamation and Ksh.10 million each for pain and suffering.

The Respondent vehemently opposed the petition and submitted under chapter V of the constitution, fundamental rights and freedoms are not absolute as they are subject to respect for the rights and freedoms of others and for the public interest. Section 70 of the constitution of Kenya states as follows:-

"**Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour-creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-**

(a) Life, liberty, security of the person and protection of the law;

(b) Freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of his hem and other property and from deprivation of property without compensation.

The provision of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest."

The Respondent has cited a decision by this court in ***NAIROBI HCC MISC CIVIL SUIT NO. 413 OF 2005 KENYA BUS SERVICE LTD & 2 OTHERS v THE ATTORNEY GENERAL & OTHERS*** where it was held inter alia:-

"**The enjoyment of fundamental rights and freedoms contemplate a mutuality and an atmosphere of respect for the law and order including the rights of others and upholding of the public interest. Rights and freedoms can only thrive alongside those of others and the society at large because the alternative would be anarchy"**

The Respondent further cited the decision in ***NAIROBI HCC MISC NO. 343 OF 2000 AMENYA WAFULA & OTHERS v REPUBLIC*** where the court held at page 23:-

"**This case shows the delicate balance between the enjoyment of individual rights vis-à-vis law and order in the wider society. It confirms that the enjoyment of individual rights is not absolute; the state is to a certain extent allowed to regulate enjoyment of rights in order to protect the society's law and order. The case shows acceptable limitations in a democratic society"**

The Respondent contends that the Petitioners are guilty of non disclosure of material facts which may

render that petition being dismissed with costs as held in the above cited **Kenya Bus Services Ltd case**. The Petitioners have not disclosed that at the time of filing this petition, they had a pending case ***NRB HCCC NO. 548 OF 1995 SAMUEL CHEGE GITAU & 248 OTHERS v THE ATTORNEY GENERAL*** which they withdrew on 22nd March 2006, about two weeks after filing the petition herein. The Respondent has also relied on the decisions in NBI ***HCC MISC NO.1052 OF 2004 BOOTH IRRIGATION v MOMBASA WATER PRODUCTS*** *LTD* where the court held inter alia:-

"(i) **Fundamental Principles of law such as estoppel res judicata, waiver, compromise etc apply because the constitution assumes their existence on grounds of public policy, justice, freedom and fair play.**

(ii) Violation of fundamental principle of law can defeat the articulation of applications under section 84 of the constitution.

(iii) An application under section 84 can be dismissed for possible breach of a fundamental principles."

The Respondent submits that there is no evidence to support the petitioners' allegations of violation of fundamental rights and freedoms under sections 70 to 83 of the constitution. There is no proof of:-

1) Physical beatings

2) Physical and mental torture

3) Deprivation of food, sleep and basic amenities

4) Deprivation of contact with family members and other persons.

5) Denial of legal representation of their choices

6) Denial of facilities for appealing

7) Loss of liberty

8) Unlawful detentions in notorious prisons.

The Respondent further contends that the petition was filed after in ordinate delay, after twenty four (24) years. The Petitioners are circumventing the limitation of time for tort against the respondent as well as the limitation of time in filing a normal suit for wrongful dismissal and a claim for compensation.

The Respondent has submitted that the petitioners were convicted under section 102(6) of the Armed Forces Act Chapter 199 Laws of Kenya which provides as follows:-

"**Where an officer is sentenced by a Court Martial to imprisonment, he shall also be sentenced to dismissal from Armed Forces, if the Court Martial fails to sentence him to such dismissal, the sentence of imprisonment shall not be invalid but shall be deemed to include a sentence of such dismissal**"

Accordingly, the Petitioners were not entitled to pension and benefits having been dismissed, as per their terms and conditions of service. The Petitioners are not entitled to any payment of salaries, allowances, increments or at all with effect from 10th August 1982.

The Respondent contends that the Petitioners are barred by section 86(2) and (3) from invoking the provisions of Chapter V of the constitution. The section 86(2) and (3) provides.

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

Before I get into the analysis of this petition, I deem it prudent to first articulate the issues that the court must address. I have carefully gone through the pleadings and the very detailed skeletal arguments and submission by the learned counsel on record and in my view the outstanding issues are as follows:-

1. Whether there is violation of fundamental rights and freedoms of the petitioners under sections 70 and 83 of the constitution?

2. Whether the Petitioners are guilty of non disclosure of material facts in the Petition herein?

3. Whether the Petitioners are guilty of inordinate delay and or whether their claim is time barred?

4. Whether Petitioners are entitled to the remedies sought in the petition?

In the course of going through the pleadings, this is what has clearly

come out with regard to each Petitioner which in my view is important to note

1: In 1st Petitioner – Lt.COL. (RTD) PETER NGARI KAGUME. He was charged before the Court Martial and on 23rd September 1982, with two offences namely:-

"(a) Negligent performance of duty contrary to section 19 of the Armed Forces Act, Chapter 199, Laws of Kenya.

(b) Negligently performing a duty imposed on him contrary to section 19 of the Armed Forces Act Chapter 199, Laws of Kenya."

The 1st Petitioner pleaded guilty to both charges and was sentenced to six months imprisonment on count I- three months imprisonment on count II and dismissal from the armed forces forthwith.

2: 2nd Petitioner: LT COL DAVID KANAGI THAN'GATE.

The Petitioner was charged before the Court Martial with the offence of failing to suppress a mutiny contrary to section 26 of the Armed Forces Act Chapter 199 laws of Kenya. He pleaded guilty and was jailed for four (4) years but the sentence was reduced to two (2) years after he appealed to the High Court.

3: 3rd Petitioner: CAPTAIN (RTD) JOSEPH MWANGI MBUGUA

The Petitioner was never charged before the Court Martial. According to his averments in the supporting affidavit, he was arrested on 4th August after the abortive coup and taken to Kingo'ngo' Prison in Nyeri. He was physically beaten and humiliated after identifying the ring leaders of the attempted coup. He was later taken to Kamiti Maximum Security Prison and also Naivasha Maximum Security Prison where he was kept under deplorable conditions. On 14th March 1983, the Petitioner was taken to Kahawa Barracks and released. He was verbally informed that his services were no longer needed. He had worked in the force for six (6) years.

4: 4th Petitioner: LT. (RTD) GAD NDEGWA M KAMAU

The Petitioner was also not charged and tried in any Court Martial. He alleges that on 4th August, 1982 with others, they were taken to Kingo'ngo' Maximum Prison in Nyeri where he was beaten and humiliated by female Prison wardens. He was later taken to Kamiti Maximum security Prison and after sometime transferred to Naivasha Maximum Security Prison where life was unbearable. In March 1983, the Petitioner was informed that he was Persona non grata in the armed forces and then he was released. He had worked for about three and a half (3½) years in the force.

5: 5th Petitioner: W.O.1 JEREMIY MICHAEL GATUGUTA

The Petitioner joined the Kenya Air Force on 28th March 1966 and rose through the ranks. He was arrested on 3rd August 1982 after the attempted coup of 1st August, 1982 and taken to Nyeri G.K. Prison. He was mistreated, physically beaten and humiliated. He was denied food. Later he was taken to Kamiti Prison. after one month, the Petitioner was taken to Naivasha Maximum Prison where he was held in solitary confinement. The Petitioner was taken to Court Martial as a witness of the state against Corporal Injeni. On 14.3.83 the Petitioner was taken to Kahawa Barracks where he was released but informed that he had been dismissed from the force under section 68 of the Armed Forces Act.

6: 6th Petitioner: SGT (RTD) JOSEPH GAICHURU CHEGE

The Petitioner joined Kenya Air Force on 19th May 1964 and rose through the ranks. After the abortive coup, the petitioner was arrested on 2nd August, 1982. He was physically beaten and subjected to inhuman treatment. He was at first taken to Kamiti Maximum Security Prison and later to Naivasha Maximum Security Prison for more interrogations. The Petitioner was released from incarceration on 14.3.83 and dismissed from service although he was never charged at the Court Martial.

7: 7th Petitioner: S/SGT (RTD) REUBEN KARANGI KIRIMI.

The Petitioner was enlisted in the Kenya Air Force in 1979 and served till 1st August, 1982, the Petitioner was arrested and taken to Nanyuki Police station. He was physically assaulted and humiliated and then taken to Tuntu G.K. Prison in Meru. He was after taken to Kamiti Prison before being transferred to Naivasha. In February, 1983 the Petitioner with others were released while at Kamiti Maximum Security Prison and discharged from the Air Force.

8: 8th Petitioner: CPL PETER NASHON WAMBULWA

The Petitioner was enlisted in the Kenya Air Force on 3rd March 1978 and served till the abortive coup of 1st August, 1982. He was arrested and taken to Tutu G.K. Prison in Meru. He was later returned to Nanyuki on 11th August 1982. On 14th August, 1982, he was taken to Nairobi at Eastleigh KAF and thereafter to Naivasha Maximum Security Prison where he remained till 11th October, 1982. On 12th October, 1982 the Petitioner was charged in the Court Martial and he pleaded not guilty. He awaited trial but it never took place. On 14.3.83 the Petitioner was released and informed that he had been dismissed from the Air Force with effect from 1.8.1982.

I now turn to the issues that the court has to determine. The first issue is whether there were violations of the petitioners' rights under sections 70 to 83 of the constitution. I have keenly gone through the very lengthy affidavits sworn by the Petitioners in support of their allegations and according to them, they seek redress for violation of their fundamental rights and freedoms as follows:-

1. Loss of liberty

2. Unlawful detention in notorious prisons

3. Physical beatings

4. Physical and mental torture

5. Deprivation of food sleep and basic amenities.

6. Deprivation of contact with family members and other persons.

7. Trial by Tribunals which were not fair or impartial.

8. Denial of legal representation of their choices.

9. Denial of facilities for appealing.

Before I examine whether there was violation of the alleged fundamental rights and freedoms, it is noteworthy to state that all the rights and freedoms guaranteed by the Bill of Rights in our constitution are not absolute and are subject to limitation. A limitation is a justifiable infringement. A limitation or justifiable infringement cannot be unconstitutional if it takes place for a reason that is recognized as a justification for infringing such rights in an open and democratic society based on human dignity, equality and freedom. A close scrutiny of sections 70 to 83 of the constitution reveal that all those rights and freedoms guaranteed are limited. The proviso to the said section 70 provides as follows:-

"**The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedom by any individual does not prejudice the rights and freedoms of others and public interest".**

The court is also careful on the limitation of rights and freedoms. Although limitation is recognized by the constitution, not all alleged limitations are acceptable to the court as that would defeat the very entrenchment of rights. The reasons for limiting a right need to be very compelling and must serve a purpose that most people would regard important to outweigh the benefits of the claimant. The court will determine whether a limitation is reasonable by evaluating the evidence on record provided by the party seeking to enforce the rights.

It is clear in the chapter 5 of the constitution that the limitations of the rights and freedoms guaranteed must be by away of written law or an Act of Parliament. In the text, **The Bill of Rights Handbook 4th Edition, 2001 Johan de Waal at p 147** states as follows:-

"A law may legitimately limit a right in the Bill of rights if it is:-

(a) A law of general application.

(b) Reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."

In view of the above, rights and freedoms guaranteed by the constitution can legitimately be limited if authorized by a law of general application. This court considers law to mean and include inter alia Acts of Parliament. In Kenya, the members of the Armed Forces are subject to the Armed Forces Act Chapter 199 Laws of Kenya which govern their matters. The rights of the members of the Armed Forces though guaranteed by the constitution which is superior to the Armed Forces Act, may be limited by the said Act for the wider public interest.

Although the view of the Court is that the Armed Forces Act is a recognised limiting Act for the purpose of fundamental rights as applicable to the members of the Forces it has not been demonstrated or proved by evidence that any of permitted limitations or actions were not proportionate to the objectives intended to be achieved by the Act. I have no doubt that the principle of proportionality does apply to our Constitution and in particular as regards the permitted limitations to fundamental rights - the actions permitted must have a proper balance with the objective intended.

In addition to the above I uphold the contention by the Respondent that section 86(2) and (3) of the constitution in clear language limits the application of section 71, 73 and 74 of the constitution to the members of the disciplined force such as Kenya Air Force where the petitioners worked.

Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioners' affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them. It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.

The second issue is whether the petitioners are guilty of non disclosure of material facts. I have gone through the affidavit of the 1st Petitioner sworn on the 10th March, 2006 and filed in court on 14th March 2006. The 1st Petitioner admits that he was charged before the Court Martial at Langata Barracks but conveniently fails to acknowledge or disclose that he pleaded guilty to the charges levelled against him and further that he did not appeal to the High Court but rather served the entire sentence. The 2nd petitioner in his affidavit sworn on 10th March, 2006 has openly, admitted that he was charged with failing to suppress a mutiny. He pleaded not guilty and went through a trial whereof he was convicted and sentenced to imprisonment for four (4) years. The 2nd Petitioner appealed to the High Court and the sentence was reduced to two and a half years. The 2nd Petitioner made full disclosure of what transpired.

The other Petitioners were never charged or rather tried by the Court Martial and indeed I do not find any concealment of material facts on their party. However it appears to me that prior to filing of this petition, the petitioners and others not before court had filed a civil suit ***NAIROBI HCCC NO.548 FO 1995, SAMUEL CHEGE GITAU AND 248 OTHERS v THE ATTORNEY GENERAL.*** While the said suit was still pending in court, the petitioners field this petition. Later the civil suit was withdrawn from the court. The petitioners have denied that allegation which is advanced by the Respondent. In the case of ***BOOTH IRRIGATION LTD (NO.2) HC MISC CIVIL APPLCITION NO. 1052 OF 2004,*** the court addressed the issue of non disclosure of material facts and stated as follows.

"**I therefore hold that even as regards constitutional application the non disclosure of material facts to the court must lead to their dismissal because the process of the court ought not to be abused by the applicants who appear before it."**

The Petitioners did not disclose that there was a pending suit in the High Court. However, I note that the Respondent was not prejudiced at all by that non disclosure. Further, the Respondent did not provide the court with copies of the pleadings in the **NBI HCCC NO.548 OF 1995** for the court to ascertain whether the petitioners were seeking the same orders or not. In any event, the Petitioners withdrew the said case even before it was heard and by time this petition was heard, there was nothing pending in the High Court. In any case it is trite constitutional law that the existence of other remedies is no bar to actions under s 84 of the Constitution. Consequently, I hold that except the non disclosure of the 1st Petitioner that he had pleaded guilty, I do not really see any concealment as such. In fact even the failure by the 1st Respondent to admit and disclose that he pleaded guilty, in my view would not warrant a drastic decision to entirely dismiss his claim without evaluating it on merit.

The third issue is whether the Petitioners' are guilty of inordinate delay. The issue has generated serious contention between the parties. The Petitioners' argument is that there is no time limit for filing a petition such as this instant one. The Respondent argues that the petition was filed twenty four (24) years

after the alleged cause of action and it is time barred. The enforcement of the fundamental rights and freedoms is governed by section 84 of the constitution which provides as follows:-

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

2. The High Court shall have original jurisdiction-

a) to hear and determine an application made by a person pursuance of subjection (1);

b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3) and may make such orders, issue such writs and give directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive) . . ."

It is correct that section 84(1) of the constitution does not contain any time limit for filing constitutional applications such as the petition herein but a closer scrutiny of the way the section is couched grants the Petitioners the right to seek redress in the High Court. The Petitioners' rights are captured by the words " . . . **person (or that other person) may apply to the High Court for redress**." Whenever, there is no time limit stipulated for doing a certain legitimate act, the court should be able to examine whether the party insisting on taking the action is within a reasonable time otherwise confusion and uncertainty will clog good administrative policies intended for good governance and public interest.

Going by the above, assuming that the Petitioners' rights and freedoms were violated in August 1982 to March 1983, would it be reasonable for the Petitioners to file their claim in court about twenty four (24) years thereafter simply because there is no time limitation in section 84 of the Constitution? The foregoing question is germane and it determines this petition to a great extent.

According to the Petitioners, there is nothing wrong with the Petition having been filed about 24 years after the cause of action arose as there is no express limitation of the period within which to file the constitutional application. The Petitioners relied on the decision in a case decided at Trinidad and Tobago a Commonwealth jurisdiction, ***DURITY v ATTORNEY GENERAL [2002] UKPC 20***. In the said case it was held inter alia:-

"**The inherent jurisdiction of the High Court to prevent abuse of its process applied as much to constitutional proceedings as it did to other proceedings. The grant or refusal of a remedy in a constitutional proceedings was a matter in respect of which the court had judicial discretion. The constitution contained no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow to hold that by that limitation of constitutional proceedings was subject to a rigid and short bar - the very clearest language was needed before a court could properly so conclude."**

Although the above findings by the Privy Council seems to cement the petitioners' argument that their petition is not affected by time, I have also noted in the same case that the court at page 212 stated, as follows:-

"**When the court is exercising jurisdiction under S.14 of the constitution and has to consider whether there has been delay such as would render the proceedings an abuse it would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then failing a cogent explanation, the court may readily conclude that the claimants' constitutional motion is a misuse of the courts constitutional jurisdiction. An**

application made under S.14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

I have considered the above persuasive authority in the light of the circumstances surrounding the Petitioners' claims and I make the following findings.

1. The 1st Petitioner after conviction by the court martial could have appealed to the High Court but he never did.

2. The 2nd Petitioner also had a right to appeal for a second time in the Court of Appeal but he never did.

3. Indeed all the Petitioners could have sued the Respondent for wrongful dismissal from the Kenya Air Force for general and special damages. The Petitioners actually did sue for damages but they withdrew the **NBI HCCC548 OF 1995** in preference to this instant petition.

The appeals as well as a civil suit for unlawful dismissal have time limitation and the Petitioners had to comply with the stipulated time. All the petitioners who filed **NBI HCCC NO.548 OF 1995** were time barred since even if they would have sued under the law of contract or tort, the suit was filed in court 13 years after the date of the alleged cause of action. Time limitation in contractual claims is six (6) years while a claim in tort should be filed within 3 years Could the Petitioners have found out that their claims were time barred and then they craftily jumped the huddle to hide behind the constitution? It is a possibility but I do not wish to speculate. The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the Petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process. I have examined the position in other comparative jurisdictions and found that in most countries, the enforcement of fundamental rights and freedom has time limitation. Some of the jurisdictions I considered are:-

1. United States of America where the person alleging violation of his fundamental rights must file his case within two years after the date of the alleged violation see ***BERRY v THE STATE OF NEW YORK # 2005 – 034.502.***

2. Germany: The rules of the Constitutional Court provide that an application in pursuit of violated fundamental rights must be filed within one month after the alleged violation. However, if the applicant is unable to comply with the time limit through no fault of his or her own, the applicant shall on request be granted restitution in intergrum and be given an opportunity to renew the constitutional complaint. Such a request shall be made within two weeks and the reasons for failure to comply must be substantiated.

3. Thailand: The period for filing a suit to enforce fundamental rights is one year from the date the cause of action accrues. However, the constitutional court held in the case of ***JEERAWAN TRIPHTRANGSIKUL v KURUSAPA BUSINESS ORGANISATION CC NO.8794/2544 OF 2003***, that a deserving party can be granted extension of time where there is necessity.

4. Uganda: Closer home, the constitution of Uganda provides a time limitation of 30 days within which to file a challenge for violated fundamental rights.

See: Constitutional Court decision in ***JOYCE NAKACWA v ATTORNEY GENERAL AND OTHERS CONSTITUTIONAL PETITION NO. 2 OF 2001 [2020] UGCC I.***

In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind,

time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases. I have carefully considered the case of ***DOMINIC ARONY*** alluded to earlier in this judgment where my learned colleagues in a bench of three Judges awarded damages to the Applicant who came to Court to enforce his fundamental rights after about 20 years. With great respect, I wish to depart from their finding concerning limitation. In my view, a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. In addition it would be in the interest of good public administration to adjudicate finally in such matters at the earliest time possible. The claim before me transcends nearly six (6) Parliaments and two political regimes or administrations. Granted that one of the possible reasons for not coming to court was fear of the then regime surely such grave violations as alleged ought to have been instituted so as to test the regime, the courts and the pretence and the commitment of the then regime to adherance to democratic principles. In each phase of history it is a few brave people who have taken change to higher heights. The timid souls have had no place. Surely the applicants were soldiers and made of sterner stuff! If they sat on their rights for 24 years how would ordinary folks fair?

Courage and promptness are important blocks of justice. In my view the reasons behind the well known limitation periods in other branches of law apply with equal force to claims based on contravention of fundamental right. Delays have to be explained and claims brought within a reasonable time depending on the circumstances even where the Constitution does not expressly stipulate the limitation period. The notion that future generations should pay for past sins would be justice turned on its head and the ideal is for each generation to pay for its sins. For example the idea that the independent states, who constituted the endless British Empire where the sun never set, should pay for the British sins in the former colonies is an issue that should be left to the current morality of the British Government and good international public policy. Perhaps in their case the sun should never set on reparation! If the domestic public opinion on the issue of reparation is that the new governments should be responsible, courts of law ought not be blind respecters of public opinion and ought in most cases establish new pathways of justice based on the demands of each situation before them.

On the fourth issue as to whether the Petitioners are entitled to the remedies sought in their petition. In view of the limitation and the claim by the Petitioners being time barred, the Petitioners cannot succeed. However, just in case I am wrong on that issue, I wish to examine the orders sought and specifically address each on its merit or otherwise.

1. The Petitioner seeks a declaratory order that part five and the regulations thereunder of the armed Forces Act Chapter 199 Laws of Kenya contradicts and offends the provisions and the sprit of Chapter V of the Constitution thus enabling gross violation and abuse of the Petitioners Constitutional rights by the Respondent. After careful consideration of the said part V of the Armed Forces Act as well as the regulations there under, I do not find the same unconstitutional. Indeed, the Armed Forces Act is a specific law dealing with the Kenya Armed forces. The sole intention of the Armed Forces Act is to regulate the force. There is no apparent intention to violate or derogate the constitutional rights of the members of the armed forces it is intended to regulate. As I have already noted earlier in this judgment, all rights in the constitution are not absolute and they are enjoyed subject to other peoples rights or a wider public interest as expressed in each donating provision from s 70 - 83 of the Constitution.

2. The Petitioners want this court to make a declaratory order that Part V of the Act cannot qualify the Bill of Rights provided for by the Constitution to enable the violation of the Petitioners rights with impurity. As I have already stated in this judgment, the rights in the bill of rights can be limited by a law pursuant to the public interest as defined in the limitation. The Armed Forces Act and its regulations constitutes such a law of general application whose intention is not to violate the constitutional rights but to secure and safeguard the public policy and interest as regards to the discipline and good administration of the Armed Forces in Kenya. In essence, the Armed Forces Act is a reasonable and justifiable limitation to the rights contained in the Constitution. The limitation of the fundamental rights as applying to the members of the armed forces and as set out in the Act do in my view meet the international principle on the point which is the principle of legality. The said Act applies to all members of the armed forces and does not target any specific person. As already stated, section 86(2) of the constitution qualifies the rights guaranteed by the Constitution and excludes those not applying to the Forces.

3. The third declaration sought appears to be part of the second declaration and in my view, I have already addressed it.

4. The Petitioners want the court to make a declaratory order that Part V of the Armed Forces Act was not applicable to the 3rd to 8th Petitioners with effect from 1st August, 1982. The 3rd to 8th Petitioners were actually not tried and dismissed by the court martial. I have carefully gone through Part V of the Act and I do not agree that the 3rd to 8th Petitioners were not to subject to the said Part V. They have not demonstrated how Part V was not applicable to them. Section 68 of the Armed Forces Act is in Part V and it criminalizes certain conduct. The section provides:-

"**Any person subject to this Act who is guilty of any act, conduct or neglect to the prejudice of good order and service discipline shall be guilty of an offence and later, on conviction by Court Martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act"**

The armed forces in Kenya is governed by the said Act and all members of the forces are subject to its provisions.

5. The Petitioners want the court to declare that the Respondents authority pursuant to which the Air Force was on the 12th August, 1982, disbanded, was unconstitutional and not reasonably justifiable in a democratic society. The High Court on a different occasion has already dealt with that issue and indeed found that the disbanding of Kenya Air force and replacing it with 82 Air Force was unconstitutional and the 82 Air Force reverted to Kenya Air force after that decision. It is superfluous for this court to go making repetitive orders which in the real sense are vanities and of no effect. Further, I find that the 5th declaration sought is of no assistance to the Petitioners and courts do not make orders in vain. One constitutional declaration from the same High Court is sufficient.

6. The sixth declaratory order is well covered in my explanation under Prayer five (5). Indeed that prayer has nothing to do with the alleged violation of the rights of the Petitioners. It is worthy to note that if the Petitioners were only challenging an existing section of law which is in force, the issue of inordinate delay or time limitation would not arise.

7. Considering the disbanding of the Kenya Air Force on the 12th August, 1982, it is not clear how the constitutional rights of the Petitioners were infringed. It is true that the petitioners were arrested and incarcerated but not because of the unconstitutional disbandment of the Air Force but rather on suspicion of having committed offences contained in the Armed Forces Act. The 1st and 2nd Petitioners were actually convicted and jailed while the rest were dismissed from service. In brief, I do not see any connection between the violation of the Petitioners' rights and the disbandment of the Kenya Air Force on 12th August, 1982.

8. As I have stated that the disbandment of the Air force on 12.8.1982 was unconstitutional, it consequently follows that the creation of 82 Air Force was also unconstitutional. However, those are issues that are already moot having been decided on much earlier by this court and can not add any value to this judgment. I do not see any nexus between the creation of 82 Air Force and the abuse of the Petitioners rights.

9. The 9th and 10th declaratory orders are intertwined and I shall examine them together. The Petitioners were not discharged or their commission terminated by the 82 Air force but by the Defence Council created under sections 5 of the Armed Forces Act. Section 6(1) of the said Act provides:-

"**The Defence Council shall, subject to the powers of command of the President as commander-in Chief of the Armed Forces and to this act, be responsible for the overall control and direction of the armed Forces and shall perform the other functions given to it by this Act."**

In the light of the above, it is the Defence Council that has power to discharge the members from the force. However, the Petitioners have not provided for any evidence to show that they were discharged by

the 82 Air force, alleged.

10. The Petitioners have not provided any evidence to show that the Respondent labeled them rebels en masse then discharged, dismissed and retired them denying them their dues, pensions and other emolments arising out of their employment. Each and every Petitioner was dealt with individually and separately. The allegation that the Air Force personnel was labelled en masse as rebels is far from the truth as not every officer in the Air Force was discharged.

11. The 12th, 13th and 14th declaratory orders sought are related and I shall address them together. The arrest and incarceration of the Petitioners for suspected offences cannot be said to be unjustifiable in a democratic society. Indeed, the attempted coup was the point of reference and the petitioners were members of the Air Force which is believed to have hatched the plot to overthrow a constitutionally elected government. In all democracies, elected governments are expected to carry out their mandate until they are replaced after a free and fair election. Since the abortive coup was attempting to disrupt a constitutional order, the arrest and incarceration of those suspected to have been behind was reasonable and justifiable in any democratic society. However, the constitution presumes all suspects to be innocent until proved guilty and it prescribes the time frame within which a suspect of a criminal offence should be charged in court. If the Petitioners were held in custody for longer period than the constitution provides, and there cannot be any reasonable explanation for them hold then their incarceration was would be unconstitutional. However, mere allegation of incarceration without providing evidence of the same does not at all to assist the court. It was incumbent upon the Petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that that the court knows what happened.

15. The constitution provides under section 77(2) (b) as follows:-

"**Every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged."**

If the Petitioners after being arrested and incarcerated were not informed within a reasonable time the offences for which they had been arrested or charged, then it was in contravention of the constitution and it violated the Petitioners rights. However, it appears, like the 1st and 2nd Petitioners were charged and tried for defined offences before the Court Martial and convicted. The 8th Petitioner was also charged but not tried. It may therefore mean that the three Petitioners were informed of the offences they were suspected to have committed. The other five Petitioners may be right that they were not informed of the offences they had committed within a reasonable time but the burden is upon them to prove such allegations which in my view has not been discharged.

16. In my view, the Petitioners' are dishonest in the 16th prayer. I have gone through their affidavits and the annextures thereof. All the Petitioners are persons of reasonable education and are capable of understanding English which is the official language of Court Martial. I believe the 1st, 2nd and 8th Petitioners could understand English because, the annexed documents awarded to each Petitioner confirm that they had been trained them in the English language which must then have been the language of instruction.

17. The 17th and 18th prayers are closely related if not one and the same thing. The Procedure in the Court Martial is different from the ordinary Criminal Courts. I have noted that the 1st Petitioner had a defence counsel at the time of trial. He did not even object that the defence counsel was not his preferred choice. It is too late to allege now that he was not allowed to be represented by a counsel of his choice. The 2nd Petitioner, was also tried but there is nothing on record to show whether he was represented or not. If indeed he was denied legal representation as well as a counsel of his own choice, then that was in contravention of Section 77 of the Constitution. The burden of proof that the 2nd Petitioner was deprived to be represented by a counsel of this choice squarely lies on him.

19. The 19th and 20th prayers in the petition are just similar save that the relate to different petitioners. The argument that the Court Martial was not impartial is a valid allegation but military officers are subject to the Armed Forces Act which establishes the Court Martial. A Court Martial is a competent court for the purposes of trying military officers and its decisions are appealable in the High Court. I have not come across any evidence where the 1st, 2nd and 8th Petitioners objected to the presiding officer at the Court Martial. The 1st and 2nd Petitioner went through all stages without any complaint. The 8th Petitioner only took plea and he never objected that he had no faith in the Presiding Officer. It is too late for the 1st, 2nd and 8th Petitioners to allege that they were subjected to a court of law which was not independent and impartial.

In view of the above, I do not see any discrimination or violation of the Petitioners contrary to section 82 of the constitution. A suspect who is tried by a junior officer in rank is not discriminated especially if the junior officer is competent to try him. Such incidents are common practice in courts.

21. The 1st, 2nd and 8th Petitioners were entitled to be represented or defended by a counsel of their own choice under section 77 of the constitution. If an accused is denied that opportunity, it would be unconstitutional.

The 1st, 2nd and 8th Petitioenrs have merely alleged there was failure on the Respondent to permit them to be represented by a counsel of their own choice. The question that begs is whether they demanded to be represented by a specific counsel and the Respondent refused? In my view, that is not what the 1st, 2nd and 8th Petitioners contend or claim. Failure on the part of the Respondent is not refusal. The Petitioners should tender evidence of refusal as opposed to generalized allegations. The 8th Petitioner was never even tried, how was he denied legal representation of his choice? The 1st Petitioner whose proceedings before the Court Martial are before court does not appear to have insisted on his right. The 2nd Petitioner even appealed to the High Court and the sentence was reduced.

22. The 1st, 2nd and 8th Petitioners were charged with specific offences under the Armed Forces Act and the charges were read to them and they pleaded to those charges. The charges constituted offences prescribed by the said Armed Forces Act and indeed the 1st and 2nd Petitioners were jailed. The conviction against the 2nd Petitioners was not quashed by the High Court on appeal. If the charge did not disclose an act or omission which is an offence, the High Court would have quashed the conviction and set the 2nd Petition at liberty. This instant explanation covers the prayer No.23 sought in this petition.

24. The Court Martial is a competent Court that lawfully exists in Kenya for purposes of trying offences committed by the military officers under the Armed Forces Act. The said court is a creation of both the constitution under section 65(1) as well as section 84 of the Armed Forces Act and the allegation that a Court Martial is unconstitutional or unlawful must be supported by credible evidence possibly in relation to composition but not its mere existence which is entrenched in the constitution.

25. The Court Martial being a subordinate Court in Kenya is not excepted from the provisions of the constitution which required courts to be independent and impartial. However, if an accused forms an opinion that the trial court is biased or has vested interest, he is entitled to object to the Presiding Officer and even ask him to disqualify himself from the case. There is no evidence that the Court Martial that tried the 1st and 2nd Petitioner was not independent and impartial.

26. The twenty sixth (26) declaration sought in the petition is a mere repetition of the twenty fourth (24) one. I do not wish to repeat myself.

27. Perhaps it was the very first time for the 1st 2nd and 8th Petitioners to appear before the Court Martial and they were unfamiliar with the procedures at the Court Martial. What is key is whether they understood the procedure or not. The 1st, 2nd and 8th Petitioners should exhibit evidence of intimidation, harassment or prejudice. Infact, the 1st Petitioner pleaded guilty and was convicted accordingly and one

wonders what defence was prejudiced. The 8th Petitioner was not even tried, what prejudice did he suffer while conducting a defence that never was.

28. The 1st and 2nd Petitioners were convicted by the Court Martial. The 1st Petitioner was sentenced to six months imprisonment on Count I and three months imprisonment io count 2. He served the full sentence. The 1st petitioner has stated the difficulty of filing an appeal in his supporting affidavit sworn on 10th March 2006 paragraph 94 where he depones:-

"**THAT I attempted to appeal against the conviction and sentence was given some pieces of paper by the prison warders to write it out. I however, did not get a response from the prison authorities who in any event had given me their sentiment that it would not be worth the while to appeal in view of the shortness of my jail term"**

Going by the above, it is not the military authorities who failed to provide facilities for appeal but the prison wardens as per the averment of the 1st Petitioner. For the 2nd petitioner, he is on record that he successfully filed an appeal whereof the jail term was reduced.

29. The constitution prohibits the torture of suspects or any person who is entitled to the fundamental rights and freedoms. If the petitioners were tortured, it was totally in contravention of their rights. Unfortunately, I have not seen any evidence of torture on record except the mere averments in the affidavits.

30. The failure to pay pension and other terminal benefits to the Petitioners is a matter which does not fall under the constitution but terms and conditions of service. The Petitioners claim is one which would easily be addressed by a civil suit for wrongful or unlawful dismissal in a civil court.

31. The 31st declaration sought by the Petitioners is a sweeping statement. Inconveniences and lack of promotions cannot basically be violation of the constitution unless clearly demonstrated. It is possible for an employee to be inconvenienced and even retire without promotion but that is in no way a violation of the rights guaranteed by the constitution.

32. The Petitions under this prayer want the court to paint them to have endeavoured to crash the attempted coup. I think that allegation is self serving and it would be asking the court to go overboard. My sentiments herein will take care of declaratory order sought under prayer No.33.

Any attempt to crash the attempted coup would rationally not call for condemnation but it would be an act of duty.

34. The petitioners appear to be asking the court to hold that they have been defamed and their reputations severely diminished in the society. The Court cannot do so in the absence of tangible evidence. The petitioners must tender supporting evidence if they wish the court to make such orders. Besides, defamation which is a tort has nothing to do with fundamental rights. The Petitioners can get redress even in the subordinate court after proving their case.

35. The Petitioners seem to be casting their nets beyond the reasonable parameters. The petitioners are 8 in number and they are asking the court to address the members of the Air Force before 1982. Does the court even know how many members there were? Furthermore, the court cannot issue orders in favour of persons not parties to the proceeding hereof. A court only deals with parties and issues before it.

36. I have no doubts that parties whose constitutional rights have been violated are entitled to damages. There are many authorities on this and the constitution itself empowers this court to grant the appropriate redress in such circumstances. However, the court must be careful and it must be guided by the evidence on record. As I have repeatedly stated the Petitioners did not avail any credible evidence to support their numerous allegations of violation of their constitutional rights. Besides, I have also stated that they are coming to court about twenty (24) years after the cause of action arose. With great respect, they are

guilty of inordinate delay and cannot hide under the pretext that the constitution does not have a limitation period.

37. The court cannot direct the Respondent to amend or rectify the records of the Petitioners because, records are maintained by those concerned and cannot be conferred by the court. The court by granting the declaratory order sought would be overstepping its mandate and the orders granted cannot be supervised by the Court. The court cannot get involved in supervising or administratively manning the armed forces. This can be dealt with under the provision of the relevant Employment Laws. The court's findings herein will abide in the declaratory order sought in prayer No.38.

38. Already covered under prayer No. 37.

39. The declaratory order sought by the Petitioners is way beyond what the court can order. The court cannot force the serving members of the armed forces to associate and interact freely with the Petitioners since every institution has its internal rules and regulations. By making an order that the Petitioners have a right to use the messes and AFCO facilities of the armed forces, it will amount to interference with internal affairs of the armed forces. In my view use of messes and AFCO facilities by former members of the Armed Forces is more of a privilege than a right. Privileges can be withdrawn and they are not enforceable as rights.

40. The Petitioners have made out their purported dues as follows:-

(a) LT.COLT. PETER NGARI KAGUME: KSH 107,439,593.60

(b) LT COL DAVID KANAGI THANGATE: Kshs 116,371,536.20

(c) CAPTAIN JOSEPH MWANGI MBUGWA: KSH. 106,789,735.00

(d) KLT.GAD KAMAU NDGWA KSH. 147,715,119.25

(e) W.O.I. JERMY MICHAEL GATUGUTA: KSH. 99,806,734.10

(f) S/SGT. JOSEPH GAICHURU CHEGE KSH. 21,549,151.63

(g) S/SGT.REUBEN KARANGI KIRIMI KSH. 24,920,773.20

(h) CPL PETER NASHON WAMBULWA: KSH. 32,121,785.73

I have considered the entire Petition and as I have already stated, in my view the petitioners have come to court too late and have in addition not offered any concrete evidence in support of their allegations and they cannot succeed for this reason as well. Apart from the Petitioners being guilty of inordinate delay, the 1st and 2nd petitioners were convicted and dismissed as per and the said section 102 (6) of the Armed Forces Act makes it mandatory that where an officer is sentenced to imprisonment, he shall also be sentenced to dismissal. Since the law is clear that upon imprisonment the 1st and 2nd Petitioners stood lawfully dismissed, I do not see any reason why they would be entitled to their dues. For the 3rd to 8th Petitioners in my view they would have been entitled to some benefits save that they are barred by the inordinate delay. On the issue of violation of the constitutional rights of the Petitioners, had they proved by tendering credible evidence that their fundamental rights and freedoms were infringed, and had come to court within a reasonable time the court would not have failed to redress their violation.

The award of damages for breach of fundamental rights is under public law and quite different from the damages awarded under the private law for instance in breach of contract or tortious liability. Most of the cases comprising our existing jurisprudence have not clearly laid down the heads under which damages can be awarded to a successful claimant whose fundamental rights have been infringed. I have considered the previouns cases that have come to the High Court on the same issues such as ***MARETE v ATTORNEY GENERAL (1987) KLR 690 NAIROBI HCCC NO. 2230 OF 2001 LT COL BENJAMIN***

MWEMA v THE ATTORNEY GENERAL AND 2 OTHERS among other precedents. I would wish to move forward and address the award of damages under the public law. In the Landmark Case of ***MAHARAJ v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO*** earlier alluded to, Lord Diplock at page 680 distinguished the redress available under the Constitution from damages at common law where he stated as follows:-

"**Their Lordships would say something about the measure of monetary compensation recoverable under section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which damages are recoverable at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during incarceration."**

In New Zealand, a Commonwealth Jurisdiction, the Court of Appeal followed the decision in ***Maharaj Case*** in ***SIMPSON & ANOTHER v ATTORNEY GENERAL [1994] 3 NZLR 667*** and held that a cause of action for breach of rights guaranteed by the New Zealand Bill of Rights Act 1990 was not an action in tort and Cooke J held as follows:-

"**We would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed ... As to the level of compensation, on which again there is much international case-law, I think it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasize the importance of the affirmed rights and to deter breaches are also proper considerations but extravagant awards are to be avoided. If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternative approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent awards on any other successful causes of action."**

I have no doubt that going by the above, claimants who come to court seeking to enforce their infringed fundamental rights can claim damages for physical damage which may manifest in various forms of pecuniary loss or intangible harm such as pain, suffering, psychological harm, distress, frustration, humiliation, anxiety among others. Lord Woolf in his paper "**The Human Rights Act 1998 and Remedies in M Andenes and D Fairgrieve (eds), Judicial review in International Perspective: 11(2000), pp 429-436** has suggested some possible principles to be followed while granting relief or a remedy where fundamental rights have been infringed. The principles are:-

1. If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.

2. The court should not award exemplary or aggravated damages.

3. An award should be "of no greater sum than that necessary to achieve just satisfaction."

4. The quantum of the award should be "moderate" and "normally on the low side by comparison to tortious awards."

5. The award should be restricted to compensating the victim for what happened "so far as the unlawful conduct exceeds what could lawfully happen."

6. Failure by the claimant to take preventive or remedial action will reduce the amount of damages.

7. There is no reason to distinguish between pecuniary and non-pecuniary loss. What matters is that the loss should be "real and clearly caused by the conduct contrary to the fundamental rights.

Were the Petitioners successful I would not have awarded the levels of damages claimed for the above reasons. The astronomical figures claimed by the petitioners have absolutely no basis. The petitioners appear to have gone for a kill which is against the principles of awarding damages for infringed fundamental rights.

The petitioners have not even claimed under any head and it would have been difficult to ascertain how the court would have awarded damages if the petitioners were successful.

In conclusion, and considering all that I have said in this judgment, I find that the petition herein has no merit and it is dismissed in its entirely. On the issue of costs, the court is careful not to shut out genuine litigants in constitutional matters for fear of being visited with costs and for that reason I order that each party do bear their own costs.

DATED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF JANUARY 2009.

J.G. NYAMU

JUDGE