



**Awiti (The Administrator of the Estate of Paul Adhu Awiti) v  
Attorney General (Petition 51 of 2019) [2025] KEHC 9927 (KLR)  
(Constitutional and Human Rights) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9927 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 51 OF 2019  
LN MUGAMBI, J  
JULY 10, 2025**

**BETWEEN**

**WILKISTER AKETCH AWITI ..... PETITIONER**

**THE ADMINISTRATOR OF THE ESTATE OF PAUL ADHU AWITI**

**AND**

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

**JUDGMENT**

**Introduction**

1. The Petition dated 11<sup>th</sup> February 2019 is supported by the Petitioner’s affidavit in support of similar date.
2. The instant Petition is founded on the allegations of unlawful detention, torture and prosecution of the deceased due to alleged association with the outlawed Mwakenya Movement of 1987. It was averred that the Respondent’s actions were in violation of Section 72[1], 72[3],72[5],74 [1],77[1], 77[2] and 79[1] of the repealed Constitution and presently, Articles 23, 29, 31, 32 and 39 of the current Constitution.
3. The Petitioner seeks the following relief against the Respondent:
  - i. A declaration that the deceased rights and fundamental freedoms were contravened and grossly violated by the Kenya police in arresting him without a warrant of arrest and thereafter detaining and subjecting him to cruel torture, inhuman and degrading treatment for 33 days.



- ii. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of the deceased's rights and fundamental freedoms of the individual as enshrined in the Constitution.
- iii. General damages and exemplary damages and moral damages on an aggravated scale under Article 23 and 29 of the Constitution [formerly Section 84[2] of the Constitution of Kenya, 1969].
- iv. Any further orders, writs, directions as this Court may consider appropriate.
- v. Costs of the suit and interest.

### **Petitioner's Case**

4. The Petitioner avers that she is the deceased's wife. At the time her husband was arrested, he was then working as the Director of Housing at the Kisumu Municipal Council.
5. The Petitioner depones that the deceased was arrested on 10<sup>th</sup> February 1987 at Kisumu while at work by 10 police officers. Before being detained, the police conducted a search at his office and his home in Kanjira. During the search, the police confiscated some books and magazines related to his work.
6. Upon arrest he was taken to the Divisional Police Headquarters in Kisumu before being transferred to Nairobi, where he was held incommunicado for 33 days.
7. She depones that the family came to learn of his fate on 12<sup>th</sup> March 1987 through the newspaper which reported that he had been imprisoned for four-and-half years. She avers that the previous day, the deceased had on 11<sup>th</sup> March 1987 been charged with two counts being: being a member of unlawful society and neglect to prevent a felony. The deceased had appeared in Court without an advocate, pleaded guilty to the charges and was convicted on the same day. He soon after appealed the conviction and sentence. The sentence was reduced to 3 years.
8. She avers that the deceased informed them that he had been subjected to torture, cruel and dehumanizing treatment at Nyayo House and Kamiti Maximum Prison. In addition, he was denied food and water and placed in waterlogged cells for nights on end. During the ordeal, he was also stripped naked and had to endure freezing air alternated with hot choking air that was pumped into the cells. She notes that his ankles and knees were also hit with broken wooden pieces.
9. She states that the deceased further informed that he underwent interrogation by the special branch police concerning his role in the 1982 coup attempt and his relationship with Raila Amolo Odinga. This interrogation applied torture methods that were contrary to provisions of the Constitution. He was further threatened with death by shooting if he failed to cooperate to be part of Mwakenya group and to implicate his friends and the late Jaramogi Oginga Odinga as being members of the outlawed group.
10. As a result of what he underwent, the deceased developed health complications that included high blood pressure, eye problems, pain in the lower joints and numbness of the body.
11. Upon release, the deceased was closely being monitored and on 13<sup>th</sup> July 1990, they were both arrested and arraigned in Court. When their case was dismissed and they were set free by the Court, they were re-arrested within the Court precincts. This constant harassment caused the Petitioner to flee the Country for Netherlands. He passed away on 15<sup>th</sup> May 2014.



12. The Petitioner depones further that the deceased lost his employment following his arrest while his family suffered due to the physical, psychological and social effects and stigma associated with the experience.
13. The Petitioner asserts that throughout, the deceased was entitled to his rights under Section 72[1], 72[3], 72[5], 74 [1], 77[1], 77[2] and 79[1] of the repealed Constitution and now Articles 23, 29, 31, 32 and 39 of the current Constitution. She contends that these rights were violated by the police from the day he was detained to the day he was released in May 1989 by the manner they treated the deceased.
14. The Petitioner thus seeks this Court's intervention.

### **Respondent's Case**

15. In rejoinder, the Respondent filed Grounds of Opposition dated 11<sup>th</sup> October 2023 on the grounds that:
  - i. The Petition, as filed herein, does not raise any constitutional issues for deliberation as envisaged under the cited Articles and as such should be dismissed with costs.
  - ii. The Petition has not been pleaded with precision; it does not provide adequate particulars of the claim relating to any alleged violation of the Constitution. The Petitioner has equally failed to demonstrate the harm occasioned to them as a result of the violation.
  - iii. The Petitioner was lawfully detained at the time and through proper legal mechanism that the Constitution of Kenya [Repealed] and other Acts of Parliament.
  - iv. Section 70 of the repealed Constitution read 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 the protection of the law;
    - b. Freedom of conscience, of expression and of assembly and association; and
    - c. Protection for the privacy of his home and other property and from deprivation of property without compensation, 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 freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.
  - v. Section 85 of the repealed Constitution provided for the issuance of a detention order in accordance with the Preservation of Public Security Act, Cap. 57.
  - vi. That Regulation 6[1] of the Public Security [Detained and Restricted Persons] Regulations, 1978, gave the relevant Minister power to order the detention of a person, if the Minister was satisfied that such action is in the interest of preservation of public security.



- vii. The Court of Appeal has had the opportunity to pronounce itself on this question; whether detention without trial was properly sanctioned by the repealed *Constitution*. In the case of *Koigi Wamwere v Attorney General* [2015] eKLR [Nairobi Civil Appeal No. 86 Of 2013], the Court of Appeal analyzed this issue as follows;

We find it convenient to deal with the four points we have distilled from the memorandum of appeal in reverse order. We thus need to first decide whether the appellant's two stints in detention had constitutional sanction at the material time. The *retired Constitution* at Section 83 provided for the constitutionality of detention without trial in so far as it legitimized Part III of the *Preservation of Public Security Act*...

Given that clear provision of the *Constitution*, we respectfully are unable to agree with the appellant's submission on the learned judge's reliance on some authorities to buttress her view that the *Constitution* then in place did countenance detention without trial.

Whereas counsel may be entitled to have a certain opinion as to the correctness or otherwise of those decisions, it seems plain to us that they were indicative of the correct position on the limited question of whether or not the detentions in question had constitutional sanction. And they did...

...And this disposes of the third limb of the appellant's complaints as well, as devoid of merit."

- viii. The Petitioner has failed to adduce evidence to support the allegations of inhuman treatment, torture and or harassment on the part of the deceased.
- ix. In the matter *Macharia Wa Kamau & 2 others v Attorney General* [2015] eKLR the Court held that;
- "Having so said, it was the Petitioners' claim that they were tortured by officers of the Kenya Police and the General Service Unit who beat them all over their bodies using batons, rubber whips and they were also tear gassed. In that context and in the specific circumstances of this case, I agree with the Respondent that the law is clear that a party that seeks to rely on a fact bears the burden of proving that fact. In that regard, Section 107[1] of the *Evidence Act* [Cap.80 Laws of Kenya] states as follows; "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Further, Section 109 of the *Evidence Act* provides that; "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular persons. "While it is possible to argue that non-denial of facts by the Respondent is enough to warrant a finding that the facts may be true [and this Court has previously held so] each case must be looked at in its own circumstances and in this case, in all the claims made against the State, the Petitioners failed to adduce any tangible evidence to prove any of the allegations they have made..."
- x. The Petitioner was lawfully detained under the then existing legal regime governed by the repealed *Constitution* and the *Preservation of Public Security Act* as well as the *Public Security [Detained and Restricted Persons] Regulations*. None of his rights were violated.
- xi. The Petitioner's allegations of ill-treatment during his detention only point to the prevailing conditions of all prisons in Kenya at the material time.



- xii. There is no justification for exemplary damages. This was the position in the matter of *Dick Joel Omondi v Honourable Attorney General* [2013]eKLR, where the High Court held that;

The Petitioner also seeks exemplary damages for the violation of his rights by state agents. This Court has previously declined to award exemplary damages in addition to general damages for reasons that there is no justification for such an award in changed political circumstances - See *Benedict Munene Kariuki and 14 Others v the Attorney General* High Court Petition No. 722 of 2009, Samuel Waweru Kariuki [supra]. I adopt the same position in the present case.”

- xiii. Also in the matter of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the Court of Appeal held that;

Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations. We find support in the recent decision of the Supreme Court of Canada in *Vancouver [City] v. Ward*, 2010 SCC 27, [2010] 2 SCR 28 where the Court while considering a colossal award for a Constitutional violation and Sec 24 of the *Canadian Charter*, held that:“... In the end, s. 24[1] damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests...Similarly, in the case of Dandy [supra] the court held that:“...The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.” In the end, we have considered the comparative jurisprudence in this area and the recent decisions of this Court and find no justification to interfere with the learned Judge's exercise of discretion in assessing the damages awarded to the appellants based on the evidence placed before him. We would however point out that even though the learned Judge did not distinguish between public law remedies and private law remedies, he however proceeded correctly and applied the general principles for award of monetary damages in arriving at his decision.”

- xiv. There is no justification whatsoever for the award of exemplary and general damages. In any event award of such damages is discretionary.
- xv. The High Court has been reluctant in awarding exemplary damages for reasons that they are not awardable in changed political circumstances.
- xvi. The Petitioner has failed to demonstrate that the challenged Section 6 of the *Presidential Retirement Benefits Act* is unconstitutional.



## Petitioners' Submissions

16. The Petitioner through Kinuthia Wandaka and Company Advocates filed submissions which are undated. Counsel identified the issues for determination as: whether the Respondent's security officers were entitled to arrest the deceased on suspicion of being a member of an illegal society and detain him for 33 days, whether the Respondent's security officers were justified in arresting the deceased on suspicion of having committed a cognizable offence and if it was lawful of them to detain and torture him for 33 days and whether the Petition is time barred by limitation of actions.
17. Counsel submitted that the deceased had been arrested on a mere suspicion and that the associated group had not even been disclosed in the charge sheet. Counsel stressed that the Respondent had unlawfully detained the deceased for 33 days without charge contrary to Section 72[1], 72[3], 72[5], 74[1], 77[1], 77[2] and 79[1] of the repealed Constitution now Article 23, 29, 31, 32 and 39 of the Constitution.
18. Reliance was placed in Sambelu Kitisia v Republic [2009]eKLR where it was held that:

“However this matter was addressed yet again at some length in the subsequent Court of Appeal case of *Mwangi Murunga v Republic* Criminal Appeal No. 35 of 2006 where it was held that:-

We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves knew the time and date when the accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know whether the arrested person has been in custody for more than twenty four hours in case of ordinary offences and fourteen days in case of capital offences. Under S.72[3] of the *Constitution*, the burden to explain delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. This ruling therefore stated that even where an accused fails to raise any complaint about his unlawful detention in police custody the prosecution, who in any event are well aware of exactly how many days the accused has spent in the police cells, have an obligation to explain this delay to the courts.”
19. On the second issue, Counsel submitted that the deceased had during his 33 day detention been subjected to torture and cruel treatment which violated his rights under Section 74[1] of the repealed Constitution and Article 29 of the current Constitution. Equally, Counsel stressed that the information that was obtained from the deceased during this torture is inadmissible in Court as per Section 9[1] of the Prevention of Torture Act.
20. Counsel relied in David Gitau Njau & 9 Others v Attorney General [2013]eKLR where it was affirmed that:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an "action is barbarous, brutal or cruel" while degrading punishment is "that which brings a person dishonour or contempt.”
21. Counsel submitted that various courts had awarded general damages in such matters as compensation. Dependence was placed in Musa Mbwagwa Mwanasi & 9 others u Chief of the Kenya Defence Forces &



another [2021] eKLR, where the Court cited the following cases: Peter M. Kariuki v. Attorney General where the Court of Appeal awarded the appellant general damages of Kshs.15,000,000/- for violations of his constitutional rights [torture, unlawful pre-arraignment detention of 147 days and violation of the right to a fair trial]. Further in case of Denish Gumbi Osire v Cabinet Secretary, Ministry of Defence & another where the Court awarded a global sum of Kshs.10,000,000/= for pre-trial detention of 86 days and torture. Also in the case of Captain [Rtd] Frank Mbugua Munuku v Kenya Defence Forces, & Another, where Court awarded the petitioner global damages in the sum of Kshs.7,000,000/-for torture and detention without trial for 8 months.

22. On the last issue, Counsel submitted that the Petition had been filed 35 years after the cited violations occurred. Counsel stressed that there is no time limitation for filing claims for violation of human rights. Reliance was placed in Wamwere & 5 others v Attorney General [2023] KESC 26 [KLR] where the Supreme Court held that:

“The position taken by the High Court in the above mentioned cases is what has generally been adopted by the courts of this country which we approve as the correct position in law. It follows therefore that whether a claim for violation of rights has been instituted within a reasonable time is to be determined based on the peculiar circumstances of each case.”

### **Respondent’s Submissions**

23. Litigation Counsel, Christopher Marwa filed submissions dated 13<sup>th</sup> August 2024. On the onset, Counsel pointed out the sole witness, the Petitioner herein had during the hearing of this matter testified that the deceased upon his return from exile, had vied for the position of Member of Parliament and won. It is said that the Petitioner stated that the deceased had not instigated any suit against the government as he was at the time serving in the government.
24. It is alleged that she also admitted that the conviction and sentence that the deceased served was lawful. In his view, the instant Petition is an afterthought and full of unsubstantiated claims which were procured from other and newspapers.
25. In light of this, Counsel highlighted the issues for determination as: whether the Petitioner’s fundamental rights and freedoms were infringed on account of his arrest and subsequent detention and whether the Petitioner is entitled to the reliefs sought in terms of the declarations that are general damages and exemplary damages.
26. In the first issue, Counsel submitted that the deceased been detained lawfully at the time as per the repealed Constitution and other Statutes. He was thereafter lawfully tried, convicted and sentenced. Counsel emphasized that the purported rights were not absolute in the Constitution as is evident from Section 70 of the repealed Constitution. Counsel submitted that the detention had been lawful a matter which the Petitioner has misconceived. Reliance was placed in Section 83 of the Constitution which stated:

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



27. Counsel pointed out that Section 85 of the repealed *Constitution* provided for the issuance of a detention order in accordance with the *Preservation of Public Security Act*, Cap. 57 and in the Petitioner's case issued by the Minister of State in the Office of the President under the *Preservation of Public Security Act* and the *Public Security [Detained and Restricted Persons] Regulations*. Counsel as before relied in Koigi Wamwere [*supra*] to buttress this point. As such, Counsel submitted that the Petitioner's detention of 33 days was lawful according to the prevailing law at the time including his conviction and sentence.
28. With reference to the alleged torture, harassment and inhuman treatment in the second issue, Counsel submitted that the Petitioner had the burden of proving the said allegations which she failed to do. Counsel added that if anything, the deceased had been exposed to the same conditions as all other people who were detained at the time. Considering this, Counsel stressed that the deceased rights had not been violated while in detention.
29. Reliance was placed in *Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others* [2016] eKLR where it was held that:
- “There is no doubt that it is for the Petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision: see Section 107 of the *Evidence Act* [Cap 80] as well as the cases of : *Githunguri Dairy Farmers Co-operative Society Ltd v The Attorney General* [2016]eKLR, *Catholic Commission for Justice & Peace in Zimbabwe v Attorney General* [1993] 2 LRC 279, *Anarita Karimi Njeru v Republic* [1979-80] KLR 154 and *Matiba v Attorney General* [1990] KLR 666. In the case of *Stephen Nyarangi Ouma & Another v George Magoha & 7 Others* [2014] eKLR, the court stated that: “As a basic minimum, a Petitioner is required to cite the provisions of the *Constitution* which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See *Annarita Karimi Njeru v Republic* [1976-1980] 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.”
30. Like dependence was placed in *Macharia Wa Kamau & 2 others v Attorney General* [2015] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
31. On the final issue, Counsel submitted that the Petitioner had not proved the deceased's case to the required standard. Furthermore, that the Petitioner's declarations were not well pleaded. Counsel noted that exemplary damages are issued to punish and deter the perpetrator. Counsel noted that the Court in *Dick Joel Omondi* [*supra*] had held that there was no justification of awarding exemplary changes in changed political circumstances. Like sentiments were echoed by the Court of Appeal in *Gitobu Imanyara* [*supra*].
32. Additional dependence was placed in *Kenneth Stanley Njindo Matiba v Attorney General* [High Court Petition No. 94 of 2014 and *Michael Rubia v Attorney General* [2020]eKLR.

### **Analysis and Determination**

33. In my view the issues that arise for determination in this matter are as follows:
- i. Whether the Petitioner is guilty of inordinate delay in filing this Petition.



- ii. Whether the Respondent violated the deceased rights under Section 72[1], 72[3], 72[5], 74[1], 77[1], 77[2] and 79[1] of the repealed Constitution and now Articles 23, 29, 31, 32 and 39 of the current Constitution.
- iii. Whether the Petitioner is entitled to the relief sought.

**Whether the Petitioner is guilty of inordinate delay in instituting this Petition.**

34. The events that are the basis of filing this Petition are said to have occurred on 10/2/1987 when the deceased [husband to the Petitioner] was arrested by plain clothes police officers at his place of work in Kisumu County whereupon conducting a search at his office in Kisumu Municipal Office and thereafter at his home in Kanjira location within Kisumu County [then Kisumu District]; he was held incommunicado for 33 days until 11/3/1987 when he was charged in Court for being a member of an unlawful movement called Mwakenya and neglect to commit a felony.
35. The Respondent contends that the Petition has been brought after an unreasonably long time which the Petitioner did not explain hence the Petition should be dismissed.
36. The Petitioner on the other hand argued that there is no limitation of time when it comes to constitutional petitions.
37. It is indeed true that in so far as violations of fundamental rights and freedoms are concerned, it now a settled principle is that there is no limitation of time but does that exempt such proceedings from the requirement of being instituted and heard within a reasonable time and where delay has occurred, the same must be explained to the satisfaction of the Court.
38. In Ndambuki v Nungu & 6 others [2024] KEHC 4008 [KLR] held as follows:

“ 36. Although it is now settled that Constitutional violations have no limitation period, it has been held that prolonged delays before seeking enforcement of a right must be explained. The Court of Appeal in *Wellington Nzioka Kioko v Attorney General* [2018] eKLR was on point in asserting this position when it held thus:

“...Whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be a plausible explanation for the delay...”

37. Further, the Court in *James Kanyita Nderitu v AG & Anor* [2019] eKLR held as follows:

“ ... We have considered the appellant’s submission and the learned judge’s finding that there was inordinate delay in the filing of the petition. In this context, the learned judge invoked the principle of laches. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time. [See *Republic of Phillipines v Court of Appeals*, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379]. We are alive to the decision of this Court in *Peter N. Kariuki v Attorney General* [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a



party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in *Kamlesh Mansuklal Damji Pattni & Another v Republic* 2013] eKLR where it was noted that the *Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. [See *Metal Box Co Ltd v Currys Ltd*, [1988] 1 All ER 341....”

38. Sluggishness on the part of the person asserting his or her rights is frowned upon by law and equity, particularly if there is no reasonable explanation for the delay hence the maxim equity aids the vigilant not the indolent.”
39. Where delay is not defined, the test of reasonable time is applied as explained by the Court of Appeal in *MSA v KMKA* [2024] KECA 1222 [KLR] which explained as follows:
- “9. In this case, the factual averments are not disputed. In the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.... In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court.”
40. What is important in considering this question is not just to look at the period, though that is also critical but one must examine this against any reasons given for the delay in taking the action and the prejudice that this has had on the Respondent if any.
41. In the present Petition it was not manifest why this Petition took too long to be filed. The Petitioner did not come out clearly on this issue. While she stated that the deceased husband on whose behalf she filed the Petition was arrested in 1987 and was held incommunicado for 33 days, during which he was tortured and eventually jailed on 11/3/1987 and sentenced to four and half years and which sentence was reduced on appeal to two years, it emerged that the deceased husband fled the Country for Netherlands in 1990.



42. Apart from the affidavit evidence however, at the insistence of Counsel for the Respondent; the Petitioner, Wilkister Aketch testified before this Court orally on 25/7/2024 during which she proffered additional information which was neither in the affidavit nor pleaded in the Petition. She explained while testifying in Chief why her husband did not bring this Petition even after returning from Netherlands indicating thus:

“...Why it took long to file Petition, he came back from Netherlands and joined politics and became Member of Parliament of Karachuonyo and the Minister of Economic Planning so he could not sue the Government he was working with...”

43. Evidently, the deceased prioritized serving in government over his constitutional rights. It was a choice he made and not because the operating environment was hostile. In fact he was a government functionary the reason given that he was in government hence the reason why he could not sue the same government he was serving may also not entirely correct because the Petitioner did not demonstrate that the deceased served his entire lifetime in Government considering that he passed away in 2014 well after the passage of the present Constitution which had removed all pre-existing barriers and made it conducive to anyone seek justice without any form retribution from any quarters. The failure to file the Petition at an appropriate time can thus be attributed to a discretionary choice on the part of the Petitioner or the deceased himself. In fact, even after the death of the deceased in 2014; it took the Petitioner another 5 years to institute this Petition in 2019.

44. I do not think the delay of almost 29 years in bringing this Petition is thus excusable in the circumstances. The Petition thus appears to have been instituted as an afterthought on behalf of the deceased. It is the classical case of delay defeats equity or equity aids the vigilant and not the indolent.

45. Moreover, what was provided in support of the Petition as evidence substantially comprises of hearsay statements that are uncorroborated by any other tangible evidence upon which this Court can base any deductive findings. The substance of the Petition is thus not substantiated by appropriate admissible evidence.

46. In essence, it is the finding of this Court that the Petition lacks merit. I dismiss the same with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY, 2025.**

.....

**L N MUGAMBI**  
**JUDGE**

