



**Ndolo v Cabinet Secretary, Ministry of Interior and Cordination of National Government & 2 others (Constitutional Petition 4 of 2018) [2024] KEHC 3661 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3661 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CONSTITUTIONAL PETITION 4 OF 2018**

**MW MUIGAI, J**

**APRIL 11, 2024**

**IN THE MATTER OF ARTICLES 2,3,10,19,20,21(1) , 22(1), 23(1)  
&3, 165 (3)(A) (B) (D) (I) (II) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE RIGHTS UNDER ARTICLES 27 (2) (4)  
(5) 25 (A), 27 (1) (2), 28, 29 (C) (D) (F), 49 AND 50 OF THE CONSTUTUTION OF KENYA**

**BETWEEN**

**NDUNGA KUNGA NDOLO ..... PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CORDINATION OF  
NATIONAL GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

1. The Petition is dated 27.03.3018 in which the Petitioner seeks the following prayers;
  - a. A declaration that the Petitioner’s fundamental rights and freedoms were contravened and grossly violated by the Respondent’s employees, agents and/or officers due to harsh, inhuman and/or degrading treatment occasioned to the Petitioner.
  - b. Compensation against the Respondents as may be assessed by this Hon. Court for the gross violations of the Petitioner’s fundamental rights and freedoms



- c. An award of exemplary, aggravated and/or punitive damages for blatant, callous, oppressive and high-handed violation of the Petitioner's constitutional rights by employee, officers, servants and/or agents of the government.
  - d. Costs and interests thereof of this petition,
  - e. Such further, other and consequential orders as this Honorable court may deem fit to make.
2. The Petitioner contends that the Respondents jointly and/or severally violated the Petitioner's rights and freedoms in contravention of Article 2, 25 (a), 27 (1) (2), 28, 29 (c) (d)(f), 51 (1) of the Constitution, 2010 as he was subjected to torture inhuman and degrading treatment by being assaulted by the Respondent's employees, agents and/or officers contrary to the law.
  3. The Petitioner contends that he was subjected to force that was brutal and unreasonable in the circumstances since it led to severe and permanent injuries that would not have been suffered had the Respondent's employees, agents and/or officers applied the rule of law while dealing with him, he was not informed in sufficient detail the allegations against him and afforded a hearing before being subjected to unwarranted and unreasonable use of force, his inherent dignity was violated as he was humiliated by having his genitals assaulted thus interfering with his normal life as a family man and his wife left him as a result compromising his standing in society. He did not benefit from the rights and freedoms provided by the Constitution.
  4. The Petition is supported by the affidavit of Ndunda Kunga Ndolo alias Patrick Ndunda Kunga Ndolo dated 27.03.2018 in which he contended that his son Eric Muli Ndunda was on or about 24<sup>th</sup> May 2011 alleged to have cut down a tree belonging to his neighbor one Anthony Ngotho which information was brought to his attention by the Mumbuni Sub Location Assistant Chief Joseph Musyoki Mbaluka when he visited his home on or about 2300 hours with Mr. Wambua, an employee at Anthony Ngotho's farm. The Assistant chief ordered him to carry an axe and a panga and accompany him to Mbiuni Police together with his son and nephew Anthony Nzivu and Mbatha Kasai, a neighbour's son. He also hit him with his left elbow before they were ferried to the police station in two motorbikes.
  5. He contended that when he arrived at the police station, the assistant chief and Mr. Rugut, a police officer had a brief chat before he heard the Assistant chief tell the police officer that he had brought him 'clients. Eric Muli Ndunda and Mbatha Kasai were ordered by the Assistant Chief to sit on the ground with their legs straight while Anthony Nzivu remained seated. He lost Kshs 10,000 he had with him in the process.
  6. He said that while he was seated on the ground, the Assistant Chief forcefully stepped on his knee, the police officer then came wielding a whip and started beating Eric Muli Ndunda, Mbatha Kasai and the Petitioner. Thereafter he locked up Eric Ndunda and Mbatha Kasai in the cells and told the Petitioner and Anthony Nzivu to go home and return the following morning at 7.30am.
  7. On 26.05. 2011 on his way to the station, they met Mr. Wambua and inquired the genesis of the beatings, he told him that he was not aware and had been informed of the son's alleged tree cutting by the Assistant Chief. He also asked the Police Officer why they were beaten without justifiable cause and evidence that any tree had been cut and the officer told him that the Assistant chief had a habit of taking persons to the police station for them to be beaten and subsequently failed to turn up.
  8. The Assistant chief did not turn up and thereafter Eric Muli Ndunda and Mbatha Kasai were released.



9. Due to the injuries sustained on his back, hands and scrotal region, the Petitioner sought transport to Mumbuni Health Centre where he received first aid and was referred to Mwala District Hospital and Kangundo District Hospital where he received treatment. On 13.12.2011, he reported the matter to Kangundo Police Station under OB 14/13/12/2011 but no action has been taken to date. After failed attempts of getting a P3 Form, the District officer wrote to the Officer Commanding station and P3 Form was issued.
10. Through help from Mbitha Paralegal Network, a letter was written to the Deputy County Commissioner, Mwala Sub County who wrote to DCIO, Kangundo who said he could not prosecute the case as there were two conflicting statements.
11. On 10.11.2015, the Petitioner received a leaflet at his home that had a threat that someone was after his life.
12. On 17.09.2015 he was admitted at P.C.E.A. Kikuyu Hospital where he was diagnosed with right hydrocele and on 18.09.2015 underwent surgery to rectify the injury he had for four years. The Petitioner contended that his wife deserted him in December 2011 as he is unable to fulfil conjugal obligations and had been taking care of his children single/handedly.

### **REplying Affidavit dated 17.07.2019**

13. The Replying affidavit is sworn by Samwel Rugutwho stated that in 2011 he was attached to Mbiuni Police Post and at the time they had no night shifts as the Petitioner alleges to have been arrested and brought at 2330 hours. The Occurrence book has no record of anyone being brought to the Police station by the Assistant Chief or by anyone in the police cells on the said date and time. The Respondent stated that the duty roster shows who is on duty and the allegation that he was the only one on duty at the time is absurd.
14. He contended that the Petitioner made a report on 13.12.2011 to the OCS Kangundo police station that he was assaulted by the police officer on duty and his case was taken to the Chief Investigating Officer. In July 2014, the petitioner reported to the OCS Mainaclaiming he was assaulted by the Assistant Chief and this, according the Respondent meant the allegations against him were false.
15. He denied knowing the Petitioner and said he only became aware of the allegations when together with CPL Jumaand PC Talaamthey were summoned to IPOA to record a statement. He said the petition raised no constitutional issues, there was no evidence of arrest or being detained at Mbiuni Police Post, has not specified how his rights were denied, infringed and violated. The court was urged to dismiss the Petition.

### **Hearing**

16. PW.1 was Patrick Ndunda Kunga Ndolo, a resident of Mbiuni area within Mwala Sub-county and born in 1962 testified that he was tortured by the Area Assistant Chief, one Joseph Musyoka Mbaluka. He adopted the affidavit dated 27/03/2018 in which he said that the Assistant Chief hit him using his elbow before they were ferried in two motorbikes to Mbiuni police post where the Chief had a brief chat with Constable Rugut.He then heard the Assistant Chief tell the police officer that he had brought him “clients’. He said that Eric Muli Ndunda, his son and Mbatha Kasai, the neighbours son were ordered by the Assistant chief to sit on the ground and straighten their feet while Anthony Nzivuremained on the form.
17. It was his testimony that while he was seated on the ground, the Assistant Chief stepped forcefully on her knee before she went to sit on the form, and it is that juncture that the police officer came wielding



- a whip and started beating him, Eric Mulu Ndunda and Mbatha Kasai. He said this was done in the presence of the neighbour's employee and the assistant chief. He said they took them to Mbiuni AP Post where the Assistant Chief ordered the officers to beat them
18. He stated that on 26.05.2011 at 0730 hours when he returned to Mbiuni Police Post, he found the neighbor's employee, Wambua along the way and when he asked him the genesis of the violent beatings he said he was not aware and had also only been informed about the sons alleged tree cutting by the Assistant chief.
  19. When he asked the police officer why they were beaten without justifiable cause and evidence that any tree had been cut, he was told that the assistant chief had formed a habit of taking people to Mbiuni police station for them to be beaten and subsequently failed to turn up. He said Eric Muli Ndunda and Mbatha Kasai were released from custody the next day.
  20. He further said in his oral testimony that the Assistant Chief teamed up with his neighbours and ambushed him early in the morning on allegations that his children had harvested firewood from a neighbour's farm. They seized an axe and a panga. They viciously assaulted him all over the body. He suffered serious injuries on my private parts. They also stole money in the sum of 10,000/-.
  21. It was his testimony that the officer who beat them at the post was one Rugut. He sought treatment at Mbiuni Health Centre then at Mwala District Hospital. X-ray was conducted which revealed the injuries. His hands and genital organs were badly injured. He also got injured on the waist.
  22. He reported at Kangundo police station where a P. 3 form was sought vide OB 14/13/12/2011 and the police promised to take action against the assailants but they were not taken to court as he would have been called to testify. Later he received a threatening letter dropped outside his door that was demanding for his head. He was unable to get any assistance but later Human Rights Organization came to his aid and took him to PCEA Kikuyu Hospital where he was admitted and his private parts were operated on. The doctors alerted him that they had been damaged and he would not sire any children or even engage in a sexual activity.
  23. He said his hands cannot do anything and that his wife was with him and assists him with domestic chores. He wanted to be compensated for the injuries suffered. He maintained that his children did not harvest trees from his neighbour's farm. He produced the following documents; copy of ID card for Ndunda Kunga Ndolo, a photograph, treatment notes from Mwala district hospital, Mumbuni Health Centre, Kangundo District Hospital and a discharge PCEA Kikuyu hospital
  24. Upon Cross-examination, he stated that he was attacked on the hands and private parts while the police officer hit him on the shoulder and buttocks 11 p.m. by the Assistant Chief and a farm hand of my neighbor and after the beatings they took him to Mbiuni AP Post which is about ½ Kilometres away with my three children Erick Muli, Tony Musau and Mbatha Kasai. He confirmed that they only found the lone officer Mr. Rugut. He said his children were also assaulted but he is the one who suffered more injuries. He confirmed that the incident was not booked at Mbiuni AP post and he reported to the police over the issue of being tortured.
  25. In re-examination, he stated that the Assistant Chief who was more violent and he did not see any signs that the police booked the incident at Mbiuni AP Post. He said there were no other police officers at Mbiuni other than Mr. Rugut. Lastly he said that two of my children were locked up and he went home with Tony Musau.
  26. PW2 was DR. David Kaburuwho works as a medical officer at PCEA Kikuyu hospital stated that the petitioner herein had been a patient who was treated by DR Kajumbawho worked with PW2 and he was familiar with his handwriting. He referred to the medical report dated 21/09/2016 and stated that



- he had been admitted at the hospital. He said the complaint was made on 17/09/2015 that he had been assaulted by persons unknown to him. He sustained injuries to the back and scrotum. He developed a scrotal swelling which had lasted for over four years and a procedure was conducted to drain the fluid in the scrotum.
27. He produced the medical report dated 21/09/2016 by Dr. Kajumba whom he used to I used to work with until 2017 and is conversant with his signature. It was his testimony that the hospital had allowed him to testify after producing the employer's letter is dated 6/12/2019 by the hospital chief Executive officer. He also produced the authority letter dated 6/12/2019.
  28. Upon Cross-examination, he stated that the started working in 1997 and came across ailments like those of the petitioner. He said that medical report does not indicate extent of injuries and it is not Dr. Kajumba alone who handled the petitioner. He confirmed that the discharge summary is with the hospital and there was no report on the surgery conducted.PW2 was recalled and he produced the medical Report of 21/9/2016.
  29. Upon Re-examination, he stated that trauma is one of the causes and the report is not detailed as in a discharge summary. He confirmed that the procedure conducted on the patient is indicated.
  30. The matter was part heard before Hon. D.K.Kemei J and this Court took over the proceedings after the typed proceedings were availed to parties/Counsel.

### **Defence Hearing**

31. DW1 was Joseph Mbaluka, he stated that he was the assistant chief of Mwala Sub County since 2006, he adopted his replying affidavit and exhibits in which he stated that on 25.05.2011 he received complaint from Joseph Wambua that his trees were being cut down at a farm where he was working as a manager. They then proceeded to the farm and found trees had been cut. Upon investigations, he said he was informed by Mbatha Kasau that it is the Petitioner's son who was cutting down the trees. He went to Kalia Kundu Primary School where the Petitioner's son schooled and he took him to his father's house.
32. Upon inquiry, the boy denied cutting the trees and because there was a witness, he decided to arrest him and since he was a minor, asked the father to accompany them. He said that the boy was booked in by the police officer and he left with the Petitioner and in fact dropped him near his home. He opined that he did not see the Petitioner being assaulted by the police officer.
33. In his oral testimony he further said that he was the one who arrested the son of the Petitioner because the son cutting trees of the neighbour's farm and the manager reported the matter to him. He said he visited the farm and saw full trees.
34. He said he was there in broad daylight together with the manager of the neighbors' land, the witness and the child/suspect. He was of the opinion that there was no justified caused to warrant the intervention of the court and that the Petitioner had brought the matter to make money. He said the Petitioner was his neighbour as they are from the same village and 15 years ago he separated from his wife. He denied having a problem, grudge or incidents with the Petitioner.
35. PC Samuel Rugutwas DW2, he relied on the Respondent's replying affidavit in which he stated that in 2011 he was attached to Mbiuni Police post under the command of CPL Gerald Juma and at the time the Petitioner alleged to have been arrested, 2330 hours, there had no night shifts. In addition, the occurrence book had no record of anyone who had been brought in by the Assistant chief on the alleged date and time.



36. According to DW2, the allegations by the Petitioner were false because he made a report to OCS Kangundo Police station on 13.12.2011 accusing the officer in charge at the time of assaulting him, which case was taken up by the Chief Investigating officer, Mata and in July 2014 reported to one OCS Maina claiming he was assaulted by the assistant chief. He opined that it was absurd for the Petitioner to allege that he was the only one in the station at the time. He denied ever meeting or seeing the Petitioner before and contended that he met him when they were summoned with CPL Juma and PC Talaam to IPOA to record their statements in August 2018.
37. Upon cross examination, he stated that they were four police officers at Mbiuni Police Post, Gerald Juma in charge, OC Tallam, PC Mutinda and himself. He said that on 25.5.2011 he was on duty during the day and at night they had no officers on duty and at night it was not manned and nobody attended the police post. The OB was managed at night by the stand by officer. He could not recall who was on duty unless Corporal Juma who lived in the police post is called. He said he did not receive any report by Joseph Mbaluka whom he knew as the Assistant chief.
38. He said that as per the record, he did not see him and there is no record. He reiterated that he did not see Joseph Mbaluka. He said he was at the station on 26.5.2011 and he did not see Joseph Mbaluka. He said he was summoned by IPOA in August 2018 pertaining the allegation by the Petitioner on 13.12.2011 at Kangundo police station. The Petitioner alleged that he was assaulted by PC Rugutwo who was on duty that night.
39. He said every section has a duty roster and he perused copy of OB, He was on duty that day. The last entry on the OB shows he was on duty during that day. He wrote it down himself. He could not tell who made the entry of 2355hours. He said he was not aware if the Petitioner reported the incident at Kangundo police station 6 months later. According to him the Petitioner was never denied a P3 form. The covering report shows that the Petitioner recorded his name and there was no PC Rugut at the time. He denied ever meeting with the Petitioner.
40. He said on 26.5.2011 he was around the area but not on duty. He said he was not aware of the injuries the Petitioner sustained and when he reported the matter to the Police station he indicated the injuries.
41. Upon re examination, he said that the day of the incident, he was no day duty and not night duty. He said anyone can ask another officer's name and be told. He said before he was summoned by IPOA he had not met the Petitioner before.

## Submissions

### Petitioner's Submissions

42. The Petitioner filed submissions on 28.07.2023 and submitted on two issues. As to whether the Petitioner's fundamental rights and freedoms as enshrined in *the Constitution* were contravened and/or grossly violated, it was submitted that Article 2, 25 (a), 27 (1) (2), 28, 29 (c) (d)(f) , 51 (1) of *the Constitution* ,2010 were violated as;
  - a. as he was subjected to torture inhuman and degrading treatment by being assaulted by the Respondent's employees, agents and/or officers contrary to the law,
  - b. he was subjected to force that was brutal and unreasonable in the circumstances since it led to severe and permanent injuries that would not have been suffered had the Respondent's employees, agents and/or officers applied the rule of law while dealing with him,



- c. he was not informed in sufficient details the allegations against him and afforded a hearing before being subjected to unwarranted and unreasonable use of force,
  - d. his inherent dignity was violated as he was humiliated by having his genitals assaulted thus interfering with his normal life as a family man
  - e. The departure of his wife left him as a result of the injuries inflicted on him compromising his standing in society and subjected him to hardship.
  - f. He did not benefit from all the rights and freedoms provided by *the Constitution*
43. Secondly, as to whether the Petitioner is entitled to the remedies sought, it was submitted while relying on the case of Irene Wangari Gacheru vs Attorney General [2017] eKLR and Koigi Wamwere vs Attorney General [2015] eKLR that the physical injuries suffered necessitated medical intervention at various medical facilities and he also underwent psychological trauma.
44. He prayed for an award of Kshs 5,000,000 and placed further reliance on the case of Irene Wangari Gacheru vs Attorney General supra where the court awarded Kshs 3,000,000 for brutality meted to the Petitioners by police officers, John Murethii Kiagayu vs Hon Attorney General [2013] e KLR where petitioner was awarded Kshs 2,500,000, Akusala A Boniface vs OCS Langata Police Station [2018] e KLR where the Petitioner was awarded Kshs 2,000,000 when he was roughed up and arrested by a police officer with no justifiable reason and Lucas Omoto Wamari vs Attorney General & Another [2017] e KLR where an award of Kshs 2,000,000 was upheld by the Court of Appeal.

### **Respondent's Submissions**

45. The Respondent filed submissions on 26.10.2023 where it was submitted that arrest and detention are legal processes provided for law and the same do not amount to any infringement on the fundamental rights and freedoms of the arrested person. That the rights claimed under Article 27(1),(2) , 28 , 29(1), 10,19,22,23,48 and 50 are not absolute as they are limited under Article 24 of *the Constitution* of Kenya. Further, that Article 157 (4) mandated the Director of Public Prosecution to direct the Inspector General of Police Service to investigate any information or allegation of criminal conduct. Section 29 of the Criminal Procedure Code provides for arrest without a warrant.
46. It was submitted that the actions of the Respondents were undertaken in good faith. This point was buttressed by the cases of Mandiki Luyeye vs Republic [2015] e KLR and Paul Ole Kuyana & another vs Director of Public Prosecutions & 2 others [2012] eKLR.
47. On the issue of applicability of the doctrine of laches, while relying on the case of Ved Prakash Goel vs S.D. Singh (2020) eKLR it was submitted that the Petitioner took a long time to exercise his legal rights.
48. Thirdly, the Respondent contended that the Petitioner had not met the threshold set out in Section 107 and 108 of the *Evidence Act*. It was submitted that the Petitioner alleges that he had been arrested and brought to the police station at 2330 hours but at the time, there were no night shifts. Further, the occurrence book has no record of anyone being brought to the police station by the Assistant chief or anyone detained in the police cells at the time.
49. The Court was asked to note that the Petitioner reported the alleged assault to the OCS Kangundo police station on 13.12.2011 accusing a police officer on duty at the time of assaulting him and in July 2014 returned to OCS Maina claiming that he was assaulted by the assistant chief. The Respondent contended that this was a clear indication that the allegations against Samwel Rugut were false. Reliance was placed on the case of Rashid Odhiambo Allogoh & 245 others vs Haco Industries Limited [2015] eKLR.



50. The Respondent cited the cases of David Ndi & Others vs Attorney General & others [2021] e KLR, Re Bivae International SA (Bureau Veritas) (2005) 2 EA 43, Centre for Rights Education Awareness (creaw) & another vs Speaker of the National Assembly & 2 others [2017], Uhuru Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others [2017], Gatirau Peter Munya vs Dickson Mwenda Kithinju & 2 others [2014] e KLR and Kenya Human Rights Commission and another vs the Attorney General & 6 others [2019] eKLR and submitted that the Petitioner had failed to show and prove his case and the same ought to be dismissed.
51. It was submitted that where a fundamental right or freedom has been denied or violated, a party invoking this ought to show how the rights have been infringed as well as the basis for his or her grievances.
52. Further, that a conservatory order will normally issue where there is real impending danger to violation of *the Constitution* or fundamental rights and freedoms with consequence that a petitioner of the public at large would suffer prejudice unless the court intervenes.
53. Further reliance was placed on the cases of Republic vs Rosemary Wairimu Munene, Ex parte Applicant vs Thururu Dairy Farmers Co-operative Society Limited, Judicial Review Application no 6 of 2014 Anarita Karimui Njeri vs R (1976-1980), Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013], David Gathu Thuo vs Attorney General & Another and Titus Barasa Makhanu vs Police Constable Simon Kinuthua and 3 others and Gregory Magara vs University of Nairobi [2017] eKLR.

### **Determination**

54. The Court has considered the Petition, the Affidavits and evidence on record as well as the submissions of both parties and find the following as issues for determination;
  - a. Whether the threshold for a constitutional petition has been met
  - b. Whether the doctrine of laches is applicable
  - c. Whether the Petitioner was subjected to inhumane and degrading treatment and other human rights violations
  - d. Whether the Petitioner has established a prima facie case that the Respondent violated his rights.
  - e. Whether the Petitioner is entitled to exemplary, aggravated or punitive damages.
  - f. Who should be awarded costs of this Petition
55. On the first issue of whether the threshold for a constitutional petition has been met, this court will be guided by the case of Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] eKLR when the court remarked as follows:
 

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...



56. The Supreme court in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others [2014] eKLR stated as follows:-

“ Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru link v Republic, (1979) KLR 154: the necessity of a between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

57. In this case, the Petitioner particularized the rights infringed upon and the manifestation of the infringement. The articles said to be violated are Article 2, 25 (a), 27 (1) (2), 28, 29 (c)(d)(f) , 51 (1) of *the Constitution* ,2010 and the manner has been elucidated as follows;

- i. being subjected to torture inhuman and degrading treatment by being assaulted by the Respondent’s employees, agents and/or officers contrary to the law,
- ii. subjected to force that was brutal and unreasonable in the circumstances since it led to severe and permanent injuries that would not have been suffered had the Respondent’s employees, agents and/or officers applied the rule of law while dealing with him,
- iii. not being informed in sufficient details the allegations against him and afforded a hearing before being subjected to unwarranted and unreasonable use of force,
- iv. inherent dignity was violated as he was humiliated by having his genitals assaulted thus interfering with his normal life as a family man
- v. The departure of his wife left him as a result of the injuries inflicted on him compromising his standing in society and subjected him to hardship.

58. I therefore find that the petitioner met threshold required of him as established in Anarita Karimi Njeru case (supra).

59. I now move to the second issue on the applicability of the doctrine of laches. The rationale of the statute of limitation was well captured in the East African Court of Justice appeal case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013) eKLR where it was stated as follows;

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)”.

60. Article 24 of *the Constitution* of Kenya provides that;



- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--
  - (a) the nature of the right or fundamental freedom; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom --
  - (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
  - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
  - (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

61. This Court is guided by the case of *Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others* [2022] eKLR where the court rendered itself as follows on this same issues as follows;

“ 35. Therefore, as to whether the instant petition is time barred, the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of *Joan Akinyi Kaba Sellah and 2 others vs Attorney General*, Petition No. 41 of 2014, the learned judge observed interalia that in a line of cases such as *Dominic Arony Amollo vs Attorney General*, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, *Otieno Mak’ Onyango vs Attorney General* and another, Nairobi HCCC No. 845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.” (emphasis added)

62. I therefore that this petition is not time barred as alleged by the Respondent.

63. As regards whether the Petitioner was subjected to inhumane and degrading treatment and other human rights violations. Article 28 and 29 of *the Constitution* of Kenya, 2010 provides as follows;

28. Every person has inherent dignity and the right to have that dignity respected and protected.
29. Every person has the right to freedom and security of the person, which includes the right not to be:-
  - (a) deprived of freedom arbitrarily or without just cause;
  - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;



- (c) subjected to any form of violence from either public or private sources;
- (d) subjected to torture in any manner, whether physical or psychological;
- (e) subjected to corporal punishment; or
- (f) treated or punished in a cruel, inhuman or degrading manner.

64. Article 19 of *the Constitution* stipulates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

65. Article 2(5) of *the Constitution* provides that the general rules of international law shall form part of the law of Kenya.

66. Article 1 of the Universal Declaration of Human Rights, 1949 provides:-

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 5

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 12

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

67. From the evidence before this court, the Petitioner was arrested without just cause, he was not informed for the reason of his arrest neither was he told why he was being detained in the police station. At the station, he was not questioned but was beaten by the police officer. The chief has owned up to being the one who arrested the Petitioner and he said his reason was that :

“.....on enquiring as to whether he cut the trees, he denied and since there was a witness, I made a decision to arrest him and took him to the Mbiuni Police post and since he was a minor I requested his father, the Petitioner to accompany us to the police post to which he accepted.

....at the police post, the boy was booked in by the police officer on duty.”

68. If he arrested the son of the Petitioner only according to the affidavit, why does DW1 in his testimony again admit that he arrested the Petitioner. Why did he hit the petitioner with his elbow, step on him and then take him to a police station where he was whipped and beaten for no reason. Unfortunately, DW1 had not denied the allegations of DW2 that he is known to take people to the police station to be beaten and then he fails to turn up the next morning despite the victims being told to return the next day. Why was a minor put in the cells overnight? Why does DW1 say that the boy was booked yet there is no entry in the copy of the OB that was produced? The testimony of the Respondent witnesses are contradictory. There was absolutely no reason to subject the Petitioner to such pain that forced him to have bodily injuries.



69. To support this contention, the Petitioner has presented medical evidence before the court; The Medical Letter dated 21/9/2016 from PCEA Kikuyu Hospital indicating that he was diagnosed with Hydrocele and underwent a hydrocetomy on 18.09.2015. This is based on a medical report dated 21.09.2016 from Kikuyu PCEA hospital written by Dr. Kanjumba. A discharge summary, laboratory request form were also attached. The Petitioner came with injuries on his back and scrotal region and had developed scrotal swelling. He was admitted and the surgical team evaluated him and scheduled a hydrocelectomy on 16/9/2015.
70. The Petitioner also presented medical cards from Mumbuni medical Centre from 6.12.2011 upto 2018. There were also general out patient record from Kangundo District Hospital from 03.06.11. This corroborates his oral evidence in which he said that he suffered injuries on his back, hands and scrotal region.
71. From the foregoing, it is not in doubt that the Petitioner sustained injuries on his back and private parts and had to go a surgery at PCEA Kikuyu hospital, an injury he had had for four years. This amounted to torture, inhumane and degrading treatment. The Respondent has not denied that they did not inform the Petitioner of his rights during the arrest. What needs to be determined is whether the dates coincide and find out who caused the injuries sustained by the Petitioner.
72. The Petitioner alleges that he was arrested and he was not informed in sufficient details the allegations against him and afforded a hearing before being subjected to unwarranted and unreasonable use of force. Article 49 (1) of [the Constitution](#), 2010 has a proviso on the rights of arrested persons, it provides that;
- (1) An arrested person has the right--
- (a) to be informed promptly, in language that the person understands, of--
    - (i) the reason for the arrest;
    - (ii) the right to remain silent; and
    - (iii) the consequences of not remaining silent;
  - (b) to remain silent;
  - (c) to communicate with an advocate, and other persons whose assistance is necessary;
  - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
  - (e) to be held separately from persons who are serving a sentence;
  - (f) to be brought before a court as soon as reasonably possible, but not later than--
    - (i) twenty-four hours after being arrested; or
    - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
  - (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
  - (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.



73. In the case of Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR it was observed that;
- “It is the sacrosanct duty of the police to remember that citizens while in their hands are not denuded of their fundamental rights under *the Constitution*. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed but the citizens basic human rights are not crippled so that the police officers can treat citizens in an inhuman manner. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities. The law enjoins the police to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated.”
74. The assistant chief, DW1 has confirmed that he arrested the Petitioner and took him to the police station. There is no evidence that the Petitioner was informed of his rights, or that his arrest was recorded in the OB. Instead, he was hit and was stepped on by the Chief DW1 before he was beaten by the police officer. The manner in which he was arrested was not in line with the law and I find that his right as an arrested person and dignity was violated by the police officer and the assistant chief.
75. That brings me to the fourth issue is whether the Petitioner has proved that the Respondent violated his rights. It is trite law that he who alleges must prove. The Petitioner contends that on 25.11.2011 the Chief DW1 visited his home at 2300hours and informed him that his son had cut down a tree belonging to the neighbor. DW1 was in the company of Mr. Wambua, an employee at the neighbor, Anthony Ngotho's home. This corroborates DW1's testimony that he was in the company of the manager to the neighbour's home. According to the P3 form, he was assaulted on 25/5/2011 at around 11.30pm at Mbiuni Police post. The injuries he sustained were occasioned upon him by the police officer and the assistant chief with no just cause. There were better ways to handle this situation after investigations.
76. DW2 has not denied being attached to Mbiuni Police station in May 2011, DW1 has not denied taking the Petitioner to the police station in the same month . So what happened between the time the Petitioner was taken to the police station and the morning on 26.05.2011 when he returned. DW1 has stated that the Petitioner and his son were held in different cells because the son was a minor. This then corroborates the statement of the Petitioner that he was taken to the police station and some people were held separately from where he was.
77. The Respondent contends that the allegations made by the Petitioner are false because in December 2011 he made a report saying a police officer assaulted him and in July 2014 he said the assistant chief assaulted him. This court does not find that this means the allegation is false but that he was assaulted by both the chief and the police officer.
78. The Respondent witness, Samuel Ruguthas admitted being attached to Mbiuni Police Station in 2011 but contends that there were no night shifts at the time and therefore the Petitioner could not have been arrested and brought to that police station. This statement is strongly contradicted by DW1 who says that after he arrested the minor and the Petitioner, he took them to the police station and had them booked before he left. The Petitioner also stated that he was arrested and taken to the police station. This cannot be far from the truth.
79. From the evidence before this court, and as discussed above, I find that the Petitioner has established a prima facie case that the Respondent violated his fundamental rights . I further find and hold that the first, second and third Respondents are vicariously liable for the actions and or omissions of their officers, Joseph Mbaluka and Samwel Rugut complained of in this petition.



80. As to Whether the Petitioner is entitled to compensation, exemplary, aggravated or punitive damages, I note that one of the remedies in that regard as found in Article 23(3)(c) of *the Constitution* is an order for compensation including by an award of damages. It provides that ;

- “(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including--
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;”
  - (e) an order for compensation; and
  - (f) an order of judicial review.

81. This Court relies on the case of Edward Akong’o Oyugi & 2 others v Attorney General supra where it was stated that;

“The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting ‘compensation’ in proceedings under Article 23 of *the constitution* or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of *the constitution*. See *Kisilu Mutua v Republic* PET No. 91 of 2015.

It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion.

[63] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy



evolved by the Court. The following principles clearly emerged from decided cases;

- [64] Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
- i. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
  - ii. This remedy would be available when it is the only practicable mode of redress available;
  - iii. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of sovereign immunity would be inapplicable.”

82. This court considered the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where this court observed as follows;

“In *Peters v. Marksman & Another* [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in *Fuller v A-G of Jamaica* (Civil Appeal 91/1995, unreported), where the Court held that:

“It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will :

- (1) meaningfully vindicate the rights and freedoms of the claimants;
- (2) employ means that are legitimate within the framework of our constitutional democracy;
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
- (4) be fair to the party against whom the order is made.



83. The issue of damages payable in Constitutional Petition was extensively discussed in the South African case of *Ntandazeli Fose vs Minister of Safety and Security CCT 14/96 (1997) ZACC 6* where the court stated that;

“I would suggest that the nature of a remedy is determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under Section 7(4) (a) differs from the object of a common law remedy... I would add that the harm caused by violating *the Constitution* is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our Constitutional promise...

- (96) Our object in remedying these kinds of harms should, at least, be to vindicate *the Constitution*, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in *the Constitution*. It recognizes that a Constitution has as little or as much weight as the prevailing political culture affords it. The defense of *the Constitution* - its vindication - is a burden imposed not exclusively, but primarily on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyze the nature of a Constitutional infringement, and strike effectively at its source...When something is appropriate it is “specially fitted or suitable”. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates *the Constitution* and acts as a deterrent against further violations of rights enshrined in Chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific.

.....

“The facts surrounding a violation of rights will determine what form of relief is appropriate. [98] I have argued that “appropriate relief” vindicates *the Constitution* and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose...”

84. In the case of *Arnacherry Limited v Attorney General [2014] eKLR Lenaola J*, as he then was awarded General damages of Kshs.3,000,000(Three Million) under Article 23 (3) (e) of *the Constitution* of Kenya 2010 in favour of the Petitioner as against the State being compensation for the State’s violation of the Petitioner’s rights under Article 40 of *the Constitution* of Kenya and Articles 3, 12 and 17 of the Universal Declaration of Human Rights, 1948.
85. The Petitioner seeks compensation of Kshs 5 million and had made reference to the case of *Irene Wangari Gacheru vs Attorney General supra* where the court awarded Kshs 3,000,000 for brutality meted to the Petitioners by police officers, *John Murethii Kiagayu vs Hon Attorney General [2013] e KLR* where petitioner was awarded Kshs 2,500,000, *Akusala A Boniface vs Ocs Langata Police Station [2018] e KLR* where the Petitioner was awarded Kshs 2,000,000 for being roughed up and arrested by a police officer with no justifiable reason and *Lucas Omoto Wamari vs Attorney General & Another [2017] e KLR* where the Court of Appeal upheld an award of Kshs 2,000,000 where the appellant was



unlawfully shot and wounded , unlawfully arrested and unlawfully detained. The Respondent did not propose any amount for compensation.

86. Taking into consideration Article 23(3) of *the Constitution* and the authorities cited, the medical reports confirm the Petitioner sustained blunt soft tissue trauma on the knee chest and hand especially on the thumb as shown by Mwala Sub County Hospital Treatment Card of 3/9 /2018 OB No 06/29/08/2018 and follow up treatment thereafter that culminated with surgery to correct the scrotal swelling. The Medical reports did not confirm the permanent impact it would have on the Petitioner in the future. The Defense controverted the Petitioner's evidence that it is because of the incident that his wife ran away as it was alleged the wife left 15 years ago and the Petitioner had children. For these reasons I note the cited cases include very grievous injuries from gunshot wounds although in the instant case there were serious injuries arising from violation of the Petitioner's Constitutional rights, I am satisfied that an award of Ksh.1 Million is reasonable compensation for the State's gross violations of the Petitioner's fundamental rights and freedoms.
87. Costs of the Petition are awarded to the Petitioner as against the Respondent.
88. Lastly, I note that the Respondent submitted extensively on conservatory orders but that is not one of the prayers sought therefore this court is unable to address its mind to that issue.

### **Disposition**

- a. In the circumstances, A declaration is hereby issued that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's employees, agents and/or officers due to harsh , inhuman and/or degrading treatment occasioned to the Petitioner.
- b. General damages of Kshs.1,000,000 (One Million) under Article 23 (3) (e) of *the Constitution* of Kenya 2010 in favour of the Petitioner as against the State being an award of exemplary , aggravated and/or punitive damages for blatant, callous, oppressive and high handed violation of the Petitioner's constitutional rights by employee, officers, servants and/or agents of the government
- c. Interest on all monetary awards, at Court rates from the date of judgment until payment in full.
- d. Costs of the suit are awarded to the Petitioner.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 11/4/2024 (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

**In the presence/absence of:**

Mr. Kariuki - for thePetitioner

No appearance for theRespondents

Geoffrey/Partrick- Court Assistant(s)

