Cheruiyot & another v Attorney General (Petition 579 of 2017)
[2023] KEHC 22350 (KLR) (Civ) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

PETITION 579 OF 2017

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

PAUL KIPKOECH CHERUIYOT ..... 1ST PETITIONER

DAVID KIPSANGA BIY ..... 2ND PETITIONER

AND

THE HON ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

1. The petitioners filed the petition dated 24th November 2017 under Articles 19 – 23, 26 – 28, 32, 35, 47 – 51 of the *Constitution*. They seek the following orders:

   i. General damages for compensation for torture and unlawful imprisonment under inhuman conditions by the Government Agents.

   ii. A declaration that the proceedings in the Court Martial were unlawful therefore null and void.

   iii. That the termination from the petitioners of their employment was therefore illegal and void.

   iv. That the orders and directives by the said Eighty Two Air force (82 Air force) was illegal and unconstitutional and therefore null and void.

   v. Any further orders, directions this Honourable Court may deem fit and just to grant.

   vi. Costs of this petition with interest at Court rates.

2. The petitioners who are former employees of the Kenya Air Force claim to have been tortured by government agents and unlawfully imprisoned. They further claim that their employment was wrongfully and unlawfully terminated.

The Petitioner's Case

3. The petition is supported by the 2nd petitioner's sworn affidavit dated 9th November 2015. The 1st petitioner filed a witness statement dated 23rd September 2015. Both petitioners filed a joint verifying affidavit which is undated. The matter proceeded to full hearing on 1st March 2022 when both petitioners testified. The first petitioner who testified as PW1 adopted their verifying affidavit.

4. A summary of this affidavit is that both petitioners were arrested in 1982 by the Kenya Army officers who took them captive under threats. After interrogation they were taken to Naivasha maximum Prison where they were subjected to beatings and locked up in small cells with no ventilation. They were keep incommunicado. After a week they were transferred to Kamiti Maximum prison for two weeks. There they were placed in cold rooms, and were given no opportunity to defend themselves or appeal.

5. They lost their jobs and so sought for compensation for the unlawful dismissal by 82 Air Force which took over from Kenya Air Force. Their certificates were withheld by the same Air Force and they cannot gain any gainful employment. They have therefore suffered mental anguish, physically, emotionally with public ridicule.

6. He further stated that he was enlisted in the Kenya Airforce on 12th September 1979 and was based at Kenya Air Force Eastleigh. His force Number was 024474. He was charged for having had knowledge of the 1982 attempted coup and was convicted and sentenced to five (5) years imprisonment. On appeal in 1993 his sentence was reduced to two (2) years but he had already served the sentence. He was labelled a rebel and so cannot be assisted by any one.

7. Upon cross examination by Mr. Tuitoek for the respondent PW1 stated that he appeared before the court marital but was not given an opportunity to defend himself. He confirmed to not having produced any documents or witness to prove his claims. He stated that once convicted by the Court Martial one is dismissed from the Air Force.

8. In re-examination by Mr. Osoro PW1 stated that being labelled a rebel is very bad. Upon release he was confined at home and could only leave with the chief's permission.

9. The 2nd petitioner testified as PW2. He was enlisted in the Kenya Air Force on 3rd March 1978 under Force No. 023130. He testified that on 1st August 1982 he was at Eastleigh Air Force and was incharge of twelve (12) colleagues. At 2.00 am he heard people walking and there was a lot of movement. He learnt of a war siren. He ran to the armoury and a captain in full uniform issued him with a gun. He boarded a lorry and was brought to town where he joined others at GPO. He returned to Eastleigh, and was taken to Embakasi and retuned to Eastleigh from where he was shot at. Despite surrendering he was hit at on the head with a shotgun. He was stripped naked and the beatings continued. He was placed in a lorry with dead bodies and taken to Langata and placed in a room with other naked officers. Later they were taken to Kodiaga, Kamiti, Naivasha and back to Kamiti prisons.

10. He was later Court Martialed in Langata on the charge of not suppressing a coup and handling a gun etc and sentenced to 12 years. On appeal his sentence was reduced to 4 years imprisonment. He stated that the conditions in Kamiti were bad. Currently he has no meaningful source of livelihood. He was issued with a red document to show he was dangerous. That morning it was the Army which went to the Air Force. He prayed to be paid his benefits.

11. Upon cross examination by Mr. Tuitoek he said he was not in agreement with the assessment in the red document. He denied pleading guilty to the charge of participating in the coup. He however confirmed having been armed which he admitted. He had no medical document to confirm the gunshot wound.

He could not recall those who were beating him. He was released on 7th September 1986 and filed this case in 2015. He confirmed having been dismissed upon conviction.

The Respondent's Case

12. The respondent filed a replying affidavit sworn on 6th March 2018 plus a witness statement both by Major Daniel Muu Kiama, who testified as RW1. By the time of swearing the affidavit he was a staff officer II Records at the Ministry of Defence HQ. He averred that the petitioners were not members of the Armed Forces. He averred that the petitioners had delayed in filing the petition. Further that the petitioners went through the Court Martial process and if dissatisfied they ought to have appealed which they did not do. He denied the allegations of torture presented by the petitioners. Lastly that upon conviction members of the Armed Forces lose their employment.

13. During the hearing on 25th January 2023 RW1 testified that he is now Commanding Officer 76 Amad Batallion Gilgil. He was able to confirm that both petitioners were indeed service members of the Kenya Defence Forces and were dismissed in 1982 after the Court Martial Judgment. They were sentenced to 5 years and 12 years imprisonment respectively. He said he was not in a position to say anything about them having been tortured as no medical documents were shown to him.

14. Upon cross examination by Mr. Osoro he said he joined Kenya Defence Forces in the year 2003. He denied the existence of an entity known as 82 Air Force and he did not also know how the two signed their discharge.

15. In re-examination and in reference to paragraph 9 RW1 said the petitioners did not challenge any proceedings. While answering a question from the court he said any party dissatisfied with a Court Martial decision can appeal to a higher court.

Parties Submissions

The Petitioners' submissions.

16. These are dated 13th March 2018 plus supplementary ones dated 19th April 2023 filed by Osoro Juma & Co. Advocates. Counsel has submitted that the petitioners were subjected to very inhuman treatment which included being placed in water high knee height, locked cells where they could not access the toilets. They were assaulted and injuries caused while their private parts were hit with heavy boots. Counsel submitted that as a result of the torture to their private parts they are not able to perform sexually. Furthermore they were dismissed from the service and their movement curtailed. That its when they heard the Attorney General on the radio saying the government was compensating those members of the Ari Force who were tortured through cases filed in court that they filed this petition.

17. He submitted that the prosecution of the petitioners was not only malicious but they were charged at night around 8.30p.m and sentenced in breach of fundamental rights. Counsel referred to the following decided cases to buttress his arguments:

    i. *John Mureithi Kiagayu vs. The Hon. Attorney General* Petition No. 141 of 2011

    ii. *Joel Benard Lekukuton & 4 others vs. Attorney General* Petition No. 397 of 2015

    iii. *David Gitau Njau & 9 others vs. The Hon. Attorney General* [2013] eKLR.

    In these cases awards ranging from Kshs.2,000,000/= - Kshs.2,500,000/= were made as compensation for constitutional violations, of the nature complained of.

18. Counsel submitted that the Court Martial proceedings were a nullity as the petitioners were never given an opportunity to engage the services of an advocate. He dismissed the 82 Air Force as illegal following the Ruling by Akilano Akiwumi J in HC Misc No. 293 of 1993 a decision he never availed to the Court. He therefore asked the court to award the petitioners Kshs.8,000,000/= with costs and interest.

19. In his supplementary submissions he argued that the records RW1 relied on may have been manipulated. Further that his evidence was inconsistent. It's counsel's submission that RW1 should have availed evidence of the Court Martial proceedings which he did not. Additionally there was no evidence to show that the petitioners upon conviction were not entitled to any compensation. That the petitioners served the government for more than 12 years and were entitled to get benefits. He argues that the respondent's submissions and replying affidavit are contradictory. Finally he contended that the Court Martial proceedings were conducted at night and no record of them was kept.

The Respondent's submissions

20. These were filed by Mr. A. K. Tuitoek Special State Counsel and are dated 13th March 2023. On whether the Petitioners' proved that they were serving members of the Kenya Air Force until the year 1982, he answered in the negative. He argued that the documents produced by the petitioners as a certificate of service issued by Kenya Armed Forces were not authentic. It was upon them to prove they were members of the Kenya Armed Forces. Reliance was placed on the cases of:

    i. *Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro* [2015] eKLR

    ii. *Susan Mumbi vs. Kefala Grebedlin* (Nairobi HCCC No. 332 of 1993).

21. On the issue of delay in filing the case counsel submitted that no sufficient reason had been given for the delay of 35 years. That RW1 was prejudiced in answering questions due to lack of documents and witnesses because of the undue delay. That despite there being no time limit in filing constitutional petitions one should not carelessly delay commencement of such a suit. Further that where there is such a delay there must be a plausible explanation for it.

22. To support this submission counsel cited the case of *Wellignton Nzioka Kioko vs. Attorney General* [2018] eKLR where the Court of Appeal stated as follows:

> "The common thread running through those decisions is that 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. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time

on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent."

23. Counsel further relied on the decision in the case of *Gilbert Guantai Mukindia vs. Attorney General* [2019] eKLR where P. O. Otieno J in a similar case found a delay of 32 years to be inordate delay with no satisfactory explanation similarly the cases of:

    i. *Harun Thungu Wakaba vs. Attorney General* Misc Application No. 1411 of 2004

    ii. *Stanely Waweru Kariuki vs. Attorney General* Petition No. 1376 of 2003;

    iii. *Oduor Ongwen & 20 others vs. Attorney General* Petition No. 777 of 2008;

    iv. *James Kanyiita vs. Attorney General & another* Nairobi Petition No. 180 of 2022 were referred to among many others.

24. On the issue of torture referred to by the petitioners counsel submitted that they failed to produce any documentary evidence to prove their claims. Referring to the case of *John Cheruiyot Rono vs. The Hon. Attorney Vernal* Petition No. 536 of 2015, on definition of torture and inhuman or degrading punishment as defined in the *Black's Law Dictionary*, Article 1 of the *U.N. Convention Against Torture*, counsel submitted that there were no acts of torture committed against the Petitioners. He further relied on the case of *Monicah Wangu Wamwere vs. Attorney General* 2019 where the Court of Appeal stated thus:

    " When a party alleges torture, the expectation of the law is that:

        i. There must be evidence of severity and suffering

        ii. There must be an intent in reckless indifference to the possibility of causing pain and suffering

        iii. Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture.

        iv. The act of torture must involve a public official."

    He referred to many other decided cases and finally submitted that the petitioners had failed to discharge their burden of proof.

25. On alleged unlawful imprisonment counsel submitted that the fact that the sentences were as a result of a Court Martial hearing then the sentence was lawful. That there was no committal sheet annexed to prove their claims. It was further argued that the petitioners had not met the threshold for filing constitutional petitions as set out in the case of *Anarita Karimi Njeru vs. Republic (No.1)* 1979 KLR 154: That the petitioners failed to adduce evidence to show where they were held in custody, for how many days they were held, when they were transferred and when they were finally released.

26. On the claim that the Court Martial proceedings were illegal and void counsel submitted that the petitioners admitted having participated in the attempted coup by going to the armoury and taking guns. Secondly that Court Martial proceedings were conducted in accordance with *Armed Forces Rules*

of Procedure and *Armed Forces (Court Martial Appeal) Rules*. He contends that had the Appeal Court in Kakamega found the proceedings illegal it would have quashed them. It only reduced the sentence.

27. Referring to Section 103(4) of the Armed Forces Act of 1968 (repealed) Counsel submitted that the Court Martial was within the law when it dismissed the petitioners after sentencing them. They were well heard as there is nothing to show they were not heard. Finally counsel submitted that the Petitioners were dismissed by the Kenya Armed Forces and they had failed to show how an entity known as 82 Air Force (whose existence they deny) was involved in their dismissal. He asked the court to dismiss the petition.

Analysis And Determination

28. Upon careful consideration of the Petition, affidavit, evidence, parties submissions, cited authorities I find the issues falling for determination to be as follows:

    i. Whether the petitioners were servicemen in the Kenya Air Force until the year 1982

    ii. Whether the Court Martial proceedings were unlawful.

    iii. Was there inordinate delay in filing the petition?

    iv. Whether the claims of torture, unlawful imprisonment were proved.

    v. Whether the petitioners are entitled to the reliefs sought.

Issue No. (i) Whether The Petitioners Were Servicemen In The Kenya Air Force Until The Year 1982

29. The respondent in the replying affidavit at paragraph 6 averred that the petitioners were not service members of the Kenya Air Force, at any given time. However in their evidence during the oral hearing the deponent of the replying affidavit stated as follows:

> " Paul Kipkoech Cheruiyot & David Kipsang were indeed Service Members of the KDF and were dismissed in 1982 after the failed coup attempt."

For the petitioners to have been taken to the Court Martial for hearing and even for them to be dismissed from the KDF thereafter is a clear confirmation that they had been KDF Servicemen. The certificates of service issued on 15th November 1984 and 12th June 1986 and annexed to the position speak to that assertion. My finding therefore is that both petitioners were servicemen in the Kenya Air Force until the year 1982.

Issue No. (ii) Whether The Court Martial Proceedings Were Unlawful.

30. It is not disputed that there was an attempted coup in 1982. It is also not disputed that the Petitioners were Court Martialed, convicted and sentenced to 5 years and 12 years imprisonment, respectively. Mr. Osoro submitted that the Court Martial proceedings were unlawfully undertaken at night. He therefore urged that the respondent should have produced the said proceedings.

31. It is the petitioners' case that they appealed against the decision of the Court Martial and their sentences were reduced to 2 years and 5 years respectively, by a bench sitting in Kakamega High Court. Two things come out clearly:

    i. For the High Court at Kakamega to have heard the Appeal there must have been a clear record of Appeal containing the proceedings, decision and grounds of appeal.

ii. The Appeal Court only reduced the sentence. It in other words confirmed the conviction. Had there been any issue with the proceedings the Appeal Court would not have confirmed the conviction. Had the petitioners been sincere in their claims they would have availed to this court a copy of the Court Martial proceedings and the High Court decision.

iii. Since the issue of the Court Martial proceedings was dealt with on Appeal, this Court cannot again address it in this petition.

Issue No. (iii) Was There Inordinate Delay In Filing The Petition?

32. The respondent has argued that there was delay in filing of this petition. On the other hand the petitioners have defended themselves stating that there was no way they could have filed the suit when the government that tortured them together with its officers were still in power and in office respectively. There is no dispute that the alleged violations took place in August 1982, and the suit herein was filed in 2017. This is a difference of thirty five (35) years.

33. This issue of inordinate delay in filing petitions claiming violation of constitutional rights has been addressed in a good number of cases. I will look at a few of them.

In the case of *Ochieng Kenneth K'Ogutu vs. Kenyatta University & 2 others* High Court Petition No. 306 of 2012 the Court observed as follows:

[35]" As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner's counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner's rights (which I have not), I would have had difficulty in excusing the 12 years' delay in this matter." (Emphasis added)

34. The court further observed as follows:

[36]" There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra): "Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.

In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the *Constitution* would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the

enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods."(Emphasis added)

35. In James Kanyiita Nderitu vs. Attorney General & another Petition No. 180 of 2011 Majanja J observed as follows:

> " Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the *Constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of it manifestations, should be vexed by an otherwise state claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."

36. When the matter went to the Court of Appeal vide *James Kanyiita Nderitu vs. The Attorney General & another* [2019] eKLR the said Court affirmed Justice Majanja's decision. It stated thus:

> " 33. In the instant matter, the appellant asserts that the delay of over 26 years was explained. We remind ourselves as was aptly stated in David Gitau Njau & 10 Others vs. the AG Petition No. 340 of 2012 that there is no limitation period imposed by the *Constitution* in seeking redress for violation of fundamental rights and freedoms. In this matter, we have examined the record of appeal and more particularly the affidavit in support of the petition. We are unable to discern any specific paragraph which explains the delay in filing the petition. All the appellant submitted on this issue is rehashing the background facts from the date of his arrest to the date when the High Court quashed his conviction. In his written submission, it is urged that by the time the appellant was lodging the petition in 2011, it was shortly after the promulgation of the new 2010 Constitution that ushered in a new regime in the protection and enforcement of the Bill of Rights.
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> 34. Promulgation of the 2010 *Constitution* is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution."

37. Lastly in the case of *Maurice Oketch Owiti Vs. Hon. Attorney General* [2016] eKLR, Mumbi Ngugi J (as she then was) had this to say:

> 37. In the present petition, it is not in dispute that the alleged violations took place from 9th May, 1986 to 27th June 1956. The petitioner filed the instant petition on 12th May, 2014. From the evidence, the petitioner waited 28 years to institute these proceedings. What was his justification for doing so? The petitioner has not given any justification for the said delay but has contented himself with the submission that there is no time limit for instituting cases on violations of fundamental rights and freedoms.

38. This is a position that can no longer be taken as justifying a litigant who waits inordinately, without presenting any justification, before filing his claim for alleged violation of fundamental rights. As the cases cited above illustrate, Courts have frowned upon and refused to accept the justification that because there is no time limit on constitutional petitions, a party can lodge his claim without proffering reasons for the undue delay.

39. Further, as observed in the above cases, delay in cases such as this involving the Nyayo House torture cases may have been acceptable, at least for a time, on the basis that they could not be lodged in view of the politically repressive regime and climate then in place. However, there has been a change of government since 2002, and parties who had suffered under the repressive regime filed and litigated their claims soon thereafter, as the cases relied on by the petitioner illustrate. It cannot be justifiable now to accept that the petitioner could not have filed his claim before the expiry of 28 years after the alleged violations. I am therefore inclined to agree with the AG's contention that there has been inordinate delay in filing the present matter and no reasonable justification has been given by the petitioner.

40. As I observed in the case of *Wamahiu Kiboro Wambugu vs Attorney General*-High Court Petition No. 468 of 2014:

> [46]. "Then there is the period it has taken the petitioner to file this petition. It was filed on 18th September 2014, more than 28 years after the alleged events. The petitioner alleges that he did not file his claim because there was a repressive government in place. However, as pointed out by the respondents, there have been more than three changes in government in the twelve years or so preceding the filing of the petition. A large number of petitions alleging violation of constitutional rights have been filed as far back as 2003 and 2004 by persons who had been arrested, held in Nyayo House, tortured and jailed. Cases in point include the two decisions relied on by the petitioner in his submissions that of Mugo Theuri vs Attorney General and Simon Maina Waweru vs Attorney General. The delay may have been as a result of the petitioner's own doubts about the credibility of his claim. Whatever the reason, however, this is one of the cases in which I would agree with the reasoning of Nyamu J (as he then was) in the case of Lt. Col. Peter Ngari Kagume vs Attorney General (supra) when he stated:
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> > "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."

38. The thread running through all the cited cases and others is that courts have expressed dissatisfaction in the late filing of petitions alleging violations of fundamental rights and freedoms. Such late filing must contain a plausible explanation for the delay. The reason must be a convincing one. In arriving at a decision on this, the court must consider both sides of the coin i.e. the petitioner and the respondent and whether such delay would cause an injustice to the respondent in terms of getting witnesses and documentary evidence.

39. In the instance case this country has had by now three (3) different governments since the Moi era. No good reason has been given to explain why the petition was not filed soon after the then government which is alleged to have tortured them left. If parties are to be let to file constitutional petitions at their

own pace without a safe guard the high court will find itself in a big mess. That is why the petitioners who filed this petition 35 years after the alleged cause of action arose had to give a plausible explanation for the inordinate delay.

My finding is that this petition was filed after an inordinate delay and without any reasonable explanation.

Issue No. (iv) Whether The Claims Of Torture, Unlawful Imprisonment Were Proved.

40. Despite my finding on issue no. (iii) I will consider the remaining issues just incase I am mistaken in my above finding. Counsel for the petitioner in arguing on the violation of the Petitioners' rights submitted severally that the petitioners had each served in the KDF for twelve (12) years. I wish to correct this. The first petitioner was recruited into the KDF on 12th September 1979 and he was discharged in 1982. So he had only served for three (3) years, only. The 2nd petitioner was recruited on 3rd March 1978 and was discharged in 1982. He had served three and half (3 ½) years, only.

41. The petitioners alleged violation of their rights under various Articles of the current Constitution. They have not made mention of any provision under the retired constitution. The incidents complained of occurred in 1982 during the retired Constitution. As was held by the Supreme Court in the case of Samuel Kamau Macharia vs. Kenya Commercial bank & 2 others Civil Application No. 2 of 2011 the 2010 Constitution has no retrospective application. The Articles of the 2010 Constitution cannot in themselves without clear reference to the retired Constitution apply to the petitioners' complaints. This claim must therefore fail and I so find.

Issue No. (v) Whether The Petitioners Are Entitled To The Reliefs Sought.

42. Upon arriving at the above findings, my conclusion is that the petitioners have failed to prove their case and the petition is hereby dismissed. Considering what the petitioners have been through I order each party to bear his own costs.

43. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT