



Mohammad & 2 others v Inspector General of the National Police Service & 2 others (Petition 168 of 2016) [2023] KEHC 22324 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 168 OF 2016

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

**HUSSEIN LOKADELY MOHAMMUD 1ST PETITIONER
SIMON GATONYE GAKUYA 2ND PETITIONER
MOHAMMED MALOBA YUSUF 3RD PETITIONER**

AND

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. The Petitioners jointly filed the Petition dated 27th April 2016 seeking the following prayers:
 - i. A declaration that the brutal arrest, assault and incommunicado pre-arraignment police detention of the petitioners for 3 days between 15th and 18th January 2010 on false, trumped up charges undisclosed to the petitioners without according the petitioners police bond was excessive, oppressive and highhanded violation of the petitioners' fundamental rights to human dignity, personal freedom and liberty, the protection and benefit of the law and the freedom from cruel, inhuman and degrading treatment or punishment guaranteed by sections 70(a) 72(1)(3)(b), 74(1) of the former Constitution and Articles 28 and 29(a), (c), (d) & (f) of [*the Constitution*](#) of Kenya 2010.



- ii. A declaration that the prosecution of the petitioners before the Chief Magistrate’s Court at Nairobi in Criminal Case No. 91 of 2010 on the false, pretended and trumped up charges was an abuse of the criminal law and the process of the Court by the police and an oppressive and malicious prosecution in violation of the fundamental rights of the petitioners as to human dignity and the protection and benefit of the law guaranteed by sections 70(a) 74(1) and 77 of the former constitution and Articles 27(1) and 28 of *the Constitution* of Kenya 2010.
 - iii. Special damages.....Kshs.751,000/=
 - iv. A declaration that the confiscation of the personal possessions of the petitioners by the police without just cause was oppressive and a highhanded violation of the fundamental rights of the petitioners to privacy, the protection and the benefit of the law and the protection against deprivation of property guaranteed by sections 70(c), 75(1), and 76(1) of the former Constitution and Articles 27(1) & (2), 31(b) and 40(3) of *the Constitution* of Kenya 2010.
 - v. General exemplary, aggravated and punitive damages as the court shall assess consequent to the declarations of violations of the fundamental rights and freedoms in prayers (i) to (III) above.
 - vi. Interest on monetary awards.
2. The petitioners allege violation of their rights under various sections of the retired constitution namely 70(a), 7291(3)(b), 74(1), 75 & 77 the equivalent of Articles 27(1)& (2), 28, 29(a) (c) (d) (f), 40(3), 49(1)(f) & 50(2) of the current Constitution.
- The Petition is premised on the supporting affidavits by the petitioners dated 27th April 2016, the 1st petitioners supplementary affidavit, and the further affidavit by the 3rd petitioner dated 13th April 2022. The petitioners further gave oral evidence and were subjected to cross examination by counsel M/s Gathu for the 2nd respondent. There was no appearance by the 1st & 3rd respondents on the day of the oral hearing. In their oral evidence the petitioners reiterated what is in their affidavits.
3. In reply the 1st & 3rd respondents filed on 29th July 2019 undated grounds of opposition. The 2nd respondent filed a replying affidavit dated 11th May 2021 by Becky Arunga a prosecution counsel at the Office of the Director of Public Prosecution.

The petitioners’ case

- 4. The petitioners claim is that on 15th January 2010 as they undertook their lawful daily chores in the streets of Nairobi near the Jamia Mosque they were brutally arrested and assaulted by regular police & GSU officers. They were later detained incommunicado at Central Police Station. They were kept at the station for 3 days before their arraignment with four others in the Chief Magistrate’s Court on 18th January 2010, vide criminal case No. 91 of 2010 to answer to eight (8) counts. Its their case that during the arrest and detention the police officers seized from them several personal items which they retained to date.
- 5. The criminal case proceeded to hearing and they were finally acquitted under Section 215 of the Criminal Procedure Code (CPC). They claimed Kshs.7,000,000/= as loss suffered as a result of the arrest, detention, and malicious prosecution.
- 6. The 1st petitioner in his affidavit deponed that on 15th January 2010 at 12.30p.m he dropped his employer at Ali Yusra Restaurant near Jamia Mosque for lunch. There were rumours of a scheduled protest in the Central Business District (CBD) by Muslim brethren against the arrest and detention of Sheikh Abdala Al Faisal. He therefore parked the car at the Nakumatt basement. At 4p.m he went to



- the car and dropped what he had before proceeding to pick his employer. According to him the area seemed calm.
7. Before reaching his employer he was accosted by armed officers who beat him up and led him to a waiting truck along Kimathi street. He was badly beaten while in the truck and could not walk for 3 days. He found other persons in the truck. They were taken to the station from where his Black Berry mobile phone was taken away.
 8. They were denied police bond, and communication with family, friends and lawyers. When him and his co-petitioners appeared in court on 18th January 2016 they informed the court of their confiscated properties. The police were ordered to investigate and return the said items, which was never done.
 9. He deposed that the trial lasted for 5 ½ years and he spent Kshs.600,000/= hiring an advocate (HLM 3(a) & (b) – receipts for legal fees). That he incurred costs of more than Kshs.100,000/= in terms of transport and other related costs. It's his averment that the criminal case was maliciously prosecuted.
 10. The 2nd petitioner's narrative is similar to that of the 1st petitioner save for the claim of having been beaten by his arrestors. He further averred that his blood stained Kanzu and Motorola mobile phone were taken away from him by the police. He spent Kshs.25,500/= on transport during the hearing of the criminal case. He was a hawker at the time of his arrest.
 11. The 3rd petitioner was working as a field assistant for Muslim Human Rights Forum (MHRF) – MMY1 is his employment ID card. On 15th January 2010 he was with others taking a video footage of demonstrations by Muslim faithful. He noticed running battles between the GSU officers and civilians. The former threw tear gas canisters at the civilians who threw stones at them. The crowds were at the mosque, and city market.
 12. As he continued with his coverage he realized that he was surrounded by about ten (10) police officers in uniform and plain clothes. He was arrested, beaten ruthlessly and dragged to a waiting police truck. Upon search on him he was deprived of his video camera Make Canon valued at Kshs.300,000/=, six (6) video tapes, Nokia mobile phone, cash (Kshs.3,700/=) I.D card and driving licence. The rest of the averments are similar to those of the 1st & 2nd petitioners.
 13. In his supplementary affidavit the 1st petitioner annexed a medical report (HLM – A1) by Dr. P. Ndegwa dated 16th February 2010 in respect of injuries allegedly inflicted on him by police officers. He additionally annexed a certified copy of proceedings and Judgment in Chief Magistrate's Court Criminal case No. 91 of 2010.
 14. In the further affidavit the 3rd petitioner has averred that they were acquitted on four (4) counts under section 210 C.P.C. and placed on their defence on the remaining counts. Thus the State did not discharge its duty of proving its case. He further deposed that the replying affidavit did not disclose it's source of information.

The respondents' case

15. The 1st and 2nd respondents filed the following undated grounds of opposition:
 - i. That the police were well within the law to arrest, charge, investigate and prosecute the petitioners pursuant to sections 24 and 51 of the *National Police Service Act*, which provide for the functions of the police. Particularly section 24(j) that provides for the "apprehension of offenders" and further section 51 (1) that provides that "A police officer shall (i) detect offenders and bring them to justice and (j) investigate crime;" and therefore that their actions as carried out were lawful, reasonable and in good faith.



- ii. That the fact that a person has been acquitted of the criminal charges does not necessarily connote malice on the part of the prosecutor as was held in *Nzoia Sugar Company Ltd. Vs. Fungututi* 1988 KLR 399.
 - iii. That the petition as framed appears to be a claim for malicious prosecution which claim should be filed before the civil court where the petitioners will have the chance to prove the elements of the tort of malicious prosecution as was decided in the case of *Kagane and others vs. Attorney General, Katerregga v. Attorney General and Murunga vs. Attorney General* 1979 KLR 138 as follows:
 - a. The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.
 - b. That the prosecution terminated in the plaintiff's favour.
 - c. That the prosecution was instituted without reasonable and probable cause.
 - d. That the prosecution was actuated by malice.
 - iv. That the petition herein does not meet the threshold set out in the case of *Anarita Karimi Njeru* 1976-1980 KLR 1272 for instituting a Constitutional Petition.
 - v. That the petition herein is therefore misconceived, mischievous, lacks merit and the same should be dismissed by the honourable court.
16. In the replying affidavit by the 2nd respondent which is on record contrary to the Petitioners' counsel's submission it is deponed that from the investigation file and the witness statements there was sufficient evidence for a conviction to be sustained. That there was therefore no malice exhibited. Further that the fact of placement of the petitioners on their defence was a clear sign of a good case for the prosecution.
17. It is also deponed that the trial was fair and there was no infringement of the petitioner's rights. That the adjournment in the lower court and the denial or grant of bail was at the discretion of the lower court.

Parties submissions** ___

The petitioners' submissions

- 18. These were filed by Mbugua Mureithi & co. advocates and are dated 5th April 2023. Counsel has submitted on the weakness of the case before the Chief Magistrate's Court and the final Judgment. He further did an analysis of the evidence adduced before that court, on the various counts. Its his submission that the prosecution counsel Becky Arunga who swore the replying affidavit was not the prosecutor nor the arresting officer in the criminal case for her to aver to the justification of the petitioners' arrest.
- 19. He additionally submitted that the action of the police officers contravened section 72(3)(b) of the retired constitution and section 36 C.P.C since the petitioners were detained for over 24 hours, denied bond and held incommunicado. He further submitted that the petitioners were tortured contrary to section 74(1) of the said Constitution. Only the 1st petitioner produced a medical report to support the claim. Relying on the case of *Huran Thungu Wakaba vs. Attorney General* [2010] eKLR counsel submitted that the other petitioners were entitled to the prayers since their claim was not rebutted by the respondents at all.



20. On the objection that the claim was for malicious prosecution and ought to have been filed in the civil division counsel submitted that the petitioners were seeking to enforce their fundamental rights and were properly before this court. Reliance was placed on the cases of: (i) Jaston Ongule, Onyango vs. Attorney General & another [2015] eKLR (ii) C.O.M. vs. Standard Ground and another, High Court Petition No. 192 of 2011 (iii) Kimunai Ole Kimeiwa & 5 others vs. Joseph Motari Mosigisi (The then District Commissioner, Rongai District) and 3 others [2019] eKLR.
21. Counsel submitted that from the outcome of the criminal case and the evidence of the petitioners in the petition it is explicit that there was absolutely no reasonable, probable or justifiable cause for prosecuting them, and was thus malicious prosecution. He referred the court to the cases of (i) Emmanuel Kuria Wa Gathoni vs. Commissioner of Police & another [2017] eKLR. (ii) Thomas Mboya Oluoch & another vs. Lucy Muthoni Stephen & another [2005] eKLR. He further submitted that malice can either be direct or can be inferred from the circumstances of a prosecution. See Jeremiah Ole Dashi Pllangyo vs. Attorney General & 4 others [2021] eKLR. It's his contention that the petitioners were charged just to cover what had happened, otherwise the activities by the police were not justified at all.
22. On prayer (iii) for special damages and prayer (iv) in respect of confiscation of the personal possessions counsel submitted that the same was never rebutted by the respondents. On general, exemplary, aggravated and punitive damages he asked the court to be guided by the case of Kimunai Ole Kimeiwa (Supra) and Lucas Omoto Wamari vs. Attorney General & another [2017] eKLR where the Court of Appeal held:
- “...Mere declarations without any specific award of damages do not vindicate the appellants neither do they convey a deterrent messages regarding the sanctity of *the Constitution* and the need for protection of fundamental rights and freedoms. Therefore, the omission to make a specific award for these violations, was an error that justifies the intervention of this Court.”
23. Counsel suggested damages to be awarded as follows for each petitioner: General damages Kshs.5,000,000/= for violated rights Exemplary, aggravated, and punitive damages Kshs.1,000,000/= Special damages Kshs.751,000/= as prayed .He prayed for costs of the suit plus interest on the awards.

The Respondents' submissions

24. The 1st & 3rd respondents submissions are dated 13th April 2023 having been filed by State Counsel Eve Mbeda. Counsel citing sections 24 & 51 (K) of the *National Police Service Act* submitted that the 1st respondent acted within the law to apprehend the petitioners who were involved in riots which led to damage of properties. She referred to the case of Mbowa v. East Mengo District Administration [1972] E.A 352 which outlined four requirements for proving malicious prosecution as follows:

“...Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before the judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have



been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge....”

25. It's her further submission that the law is clear that an acquittal does not necessarily connote malice on the part of the prosecutor. To support this she relied on the case of James Kagura Kira v. Joseph Mambourin & 3 others Nairobi C.A No. 171 of 2000 where it was held:

“To prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted.”

Also see: Nairobi HCCC No. 1729 of 2001 – Thomas Mbeya Slouch & another v. Lucy Mutton Stephen & another.

26. Its counsel's submission that this suit is more of a civil claim and should have been filed in a civil court. In other words this court lacks the jurisdiction to deal with this case in line with the case of Owners of Motor Vessel 'Lilian' v. Caltex Oil [1989] eKLR.
27. Additionally she submitted that the petition does not meet the threshold as set out in the case of Anarita Karimi Njeru v. Republic [1979] eKLR which is:

“...the petitioner should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

Based on this she submitted that the claim cannot stand as its premised on Section 70(a), 72(1)(3) (b), 74(1) of the retired Constitution and not the new Constitution. It's thus her submission that the petition lacks merit and should be dismissed with costs.

28. The 2nd respondent's submissions are dated 19th September 2022 and filed by M/s Peris Gathu prosecution counsel. Counsel submitted that this petition has not met the threshold set out in Anarita Karimi Njeru (supra); Matiba vs. Attorney General (1990) KLR 666 and Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR.
29. On whether the petitioners were maliciously prosecuted counsel submitted that the proceedings in the criminal case were instituted upon receipt of complaints, investigations conducted and advice given by the 2nd respondent upon perusal of the file. That the court cannot interfere with the 2nd respondent's discretion in making prosecutorial decisions except in very clear cases. In support she relied on the case of Douglas Maina Mwangi vs. Kenya Revenue Authority and another High Court Constitutional Petition No. 528 of 2013 wherein it was held:

“When dealing with the decision as to whether or not to prosecute, the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to *the Constitution*, in bad faith or amounts to an abuse of process....i do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutae of investigation and prosecution.”

30. She further submitted that granting the prayers sought would amount to usurping the powers of the 2nd respondent to independently consider evidence and prosecute as enshrined under Article 157 of *the Constitution*. Reference was made to the case of Republic v. Director of Public Prosecutions & 2 others Ex-parte Stephen Mwangi Macharia [2014] eKLR.



Further she argued that the law is that an acquittal of a criminal charge does not connote malice on the part of the prosecution.

31. She relied on the case of *Nzoia Sugar Company Limited vs. Fungututi* [1988] KLR 399 where the Court of Appeal held:

“Acquittal of a person on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor...”

32. Submitting on the prosecutorial authority of the 2nd respondent counsel referred to Article 157 of Constitution and Section 5 of the office of Director of Public Prosecution Act. It’s her contention that it’s not the court’s duty to decide who is to be charged and with what offence, as doing so would amount to intermeddling with matters within the province of the 2nd respondent. She referred to the cases of (i) *Republic vs. Attorney General & 4 others Ex Parte Kenneth Kariuki Githu* [2014] eKLR (ii) *Hon. James Ondicho Gesami v. The Attorney General & others* Petition No. 376 of 2011 Nairobi.

Analysis and determination

33. From the petition, all affidavits, submissions, authorities cited and the law I find the issues for determination to be as follows;
- i. Whether the petition has been pleaded with precision
 - ii. Whether this court has jurisdiction to deal with the petition.
 - iii. Whether the petitioners have proved a case of malicious prosecution
 - iv. Whether the petitioners rights were violated as claimed
 - v. Whether the petitioners are entitled to the reliefs sought
 - vi. Who shall pay costs.

Issue No. (i) Whether this court has jurisdiction to deal with the petition.

34. The principle guiding parties in filing petitions claiming violation of constitutional rights and freedoms is well set out in the cases of *Anarita Karimi Njeru (supra)*; *Mumo Matemu* [2014] eKLR & *Communication Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others* [2014] eKLR – Supreme Court. The principle established in the *Anarita Karimi* case (supra) is that a Constitutional petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to have been infringed. The *Mumo Matemu* case (supra) at paragraph 44 simply re-affirmed the principle in the *Anarita* case. The respondents relied on the principle set in the above cases to argue that the petition herein does not meet the requisite threshold for a constitutional petition.
35. The precision required as per the *Anarita* case principle is not absolute. Where the court can with ease identify a petitioner’s claim then determination is to be merit based. See *Peter M. Kariuki vs. Attorney general* [2014] eKLR.
36. Upon perusal of the petition as drawn I find that the petitioners have set out what their claims are i.e. torture, illegal detention, malicious prosecution, among others. They have identified Sections 70(a), 72(1)(3)(b), 74(1), 75, 76, & 77 of the retired Constitution as read with Articles 27(1)(2), 28, 29(a) (c)(d) &(f), 31(b) & 40(3) of *the Constitution*. The petition also describes the manner of the alleged violations.



37. In view of the above I find that the petition does not offend the principle of precision.

Issue No. (ii) Whether the petitioners have proved a case of malicious prosecution

38. This issue was raised by the 1st & 3rd respondents as one of their grounds of opposition. The same was submitted on by all the parties. The main reason given by the respondents is that the petitioners are claiming damages for malicious prosecution which may only be handled in a civil court. They have no issue with this court hearing all the other claims. Inasmuch as I may to some extent agree with the respondents on this I would wish to look at it from a wider perspective (see C.O.M vs. Standard Ground (supra).
39. The foundation of this petition is an allegation of violation of the petitioners' fundamental rights and freedoms as pleaded. The issue of malicious prosecution is one of the seven prayers. Secondly it falls under the allegations of violation of the petitioners' rights to human dignity under Articles 27(1) and 28 of *the Constitution* and Section 74(1) of the retired Constitution.
40. Guided by the Court of Appeal decision in Rashid Odhiambo Alloggoh & 245 others v. Haco Industries Limited, Civil Appeal No. 110 of 2001 among others, I find that the claim on malicious prosecution forms part of the violations complained of herein. Secondly it would not make sense to have this court hear and determine issues on all the other violations raised and transfer the issue of malicious prosecution to the civil court. Thirdly were this court to transfer this petition to the civil court based on the issues raised by the respondents, I am 100% sure the same would be returned to this court for hearing. I therefore find that this matter is properly before this court and I will proceed to determine the issues arising.

Issue no. (iii). Whether the petitioners' rights were violated as claimed

41. Malicious prosecution is defined as a tort of initiating a criminal prosecution or civil suit against another party with malice and without probable cause. The Black's Law Dictionary defines it thus;

“Proper, reasonable and probable cause absent from legal proceedings initiated.”

There is no dispute that the petitioners and others were charged with offences in eight (8) counts before Nairobi Chief Magistrate's Court vide Criminal Case No. 91 of 2010: the record (HLM – A2) shows that on 23rd April 2014 the accused person (petitioners included) therein were placed on their defence on counts I, II, III & VIII. They were acquitted of counts IV, V, VI & VII under Section 210 C.P.C. On 29th April 2015 all the accused persons (the 3 petitioners included) were acquitted under section 215 C.P.C.

42. It is trite law that an acquittal 'per se' does not imply that the prosecution was malicious. The plaintiff / petitioner must show an element of malice on the part of the prosecution.
43. I have carefully read the record and judgment in the criminal case. This is a matter that took five (5) years + 3 ½ months to be finalized. It was handled by over ten (10) Magistrates. Those who heard the witnesses were five (5) of them. The prosecution called twelve (12) witnesses and closed its case. These 12 witnesses were heard by four (4) Magistrates. Hon. E. C. Cheronno who delivered the Ruling on No. case to answer never heard nor saw any of the twelve (12) prosecution witnesses. He however took the defence case of all the accused persons (the petitioners included).



44. In the Judgment the Hon. E. C. Cheronno set out what each of the twelve prosecution witnesses stated. This is what he said of the defence case.

“Upon placed (sic) the accused on their defence on counts I, II, III & VIII they all elected to give sworn testimony (sic). All the six accused persons narrated how they had gone for prayers at Jamia Mosque on 15.01.2010 at 1.00pm and when they were coming out from prayers, they were arrested by police who took them to a waiting police lorry.”

45. After all the above and without doing any analysis of the evidence the Hon. E. Cheronno wrote as follows:

“I have carefully considered the testimony by the twelve (12) prosecution witnesses and the Exhibits produced in support thereto. I have also considered the sworn statement by the six accused person in their defence. From my analysis of the evidence in it’s entirely (sic) I find that the prosecution have not discharged their burden of proof against the accused persons on the required standard. None of all the twelve prosecution witnesses mentioned the six accused persons as having committed the alleged offence (s). In the eight counts they have been charged in this case the accused persons in their defence have explained their presence at the scene during the incident. They said they had gone to Jamia Mosque for prayers and that on their way back they were arrested by police officers. I find their explanation satisfactory and indeed fruitful. In the result I acquit the accused persons for lack of sufficient evidence under section 215 Criminal Procedure Code.”

46. I have deliberately set out the above findings by the trial Magistrate because it’s his finding that the petitioners rely on for the claim for malicious prosecution. If indeed none of the twelve (12) prosecution witnesses mentioned the said (6) accused persons as having committed the alleged offences why did the (learned trial Magistrate) acquit them of counts IV, V, VI & VII under section 210 Criminal Procedure Code and place them on their defence on counts I, II, III & VIII? If indeed they had not been mentioned at all by the twelve (12) witnesses the learned Magistrate should have acquitted them on all counts under section 210 Criminal Procedure Code which he did not.

47. Besides the acquittals it was the duty of the petitioners to point out to this court the elements of malice by the prosecution and/or its officers in their being charged with the said offences. For example was there any bad blood between them, and were there any utterances made by the officers etc that would make one suspect malice? None of these has been exhibited by the petitioners. Without that it would not be proper to have this court blame the prosecutor for the unsuccessful criminal case by terming it a malicious prosecution. This claim by the petitioners does not meet the test for a malicious prosecution.

Issue No. (iv) Whether the petitioners are entitled to the reliefs sought

48. There is no dispute that on 15th January 2010 there were demonstrations by Muslim faithfuls within Nairobi Jamia Mosque and the city market. From the evidence on record these were not peaceful demonstrations. The presence of GSU and police officers in the city is not denied by the respondents. The evidence of PW1, PW2, PW3, PW4, PW7, PW8, PW9, PW11 in the Magistrates’ Court Criminal trial (HLM –A2”) confirms the action they took including arresting suspects. The suspects included the petitioners.

49. The petitioners have submitted that their right to liberty was violated when they remained in custody for 3 days. This is refuted by the respondents.



Section 72(3) & (4) of the retired constitution provided:

- (3) a person who is arrested or detained
 - (a) for the purpose of bringing him before a court in execution of the order of a Court; or
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.
- (4) where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed an offence, he shall not be thereafter held in custody in connection with those proceedings or that offence save upon the order of a court.

50. From the averments and the evidence adduced by the petitioners they were arrested on 15th January 2010 around 4pm. There is no indication of the time when the demonstrations and arrests ceased. However one thing is clear that 15th January 2010 was a Friday. The arrests involved very many other people whom the petitioners found in the police trucks. There was processing of the cases of the arrested persons, which obviously took time. There was therefore no way they would have been arraigned in court within 24 hours since the following day was a Saturday.

51. I have perused the first charge sheet (HLM 1) and noted that all the eight (8) counts are misdemeanors. The petitioners who were mere suspects then ought to have been released on police bond or reasons given for their non-release. There is no explanation given by the respondents to show why the petitioners were detained upto 18th January 2010 when they appeared before the court for plea. They were also kept incommunicado with their families, relatives and even lawyers. This has also not been refuted by the respondents.

52. The petitioners have also claimed that they were never informed of the reason of their arrest even as they remained in police custody. This was also not rebutted by the respondents.

53. Section 72(1) of the retired Constitution provided:

“A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.”

The officers who processed the petitioners were from the Central police station and served under the supervision of the 1st respondent. There is no reason why the 1st respondent could not avail them or their evidence to respond to the allegations by the petitioners as to:

- i. Why they did not release them on bond.



- ii. Why they did not explain to them the reasons for their arrest.
54. On these two issues I find that the petitioners were deprived of their liberty in a manner not contemplated by *the constitution*, in both the retired and current constitutions.
55. The petitioners have further alleged that they were beaten, tortured and made to lie down in the police trucks. That they were also deprived of their personal items like phones, camera, cassettes etc. This is not the first time the petitioners are appearing before a court of law. Annexure (HLM A2) shows that when they first appeared before the Chief Magistrate Hon. G. Mutembei on 18th January 2010 they were represented by Mr. Ndubi Mureithi & Kamau.
56. I have gone through the proceedings for that day and there is no mention AT ALL of any assault, brutality or torture. The first issue raised was kidney illness in respect to the 1st accused (MOHAMED DAGANE ALI) who is not one of the petitioners. The next issue raised was on properties taken away or stolen by police officers from the namely; mobile phones, camera & pairs of shoes. The trial court issued directions in respect of this and the same were complied with as per the record of 20th January 2010.
57. The investigating officer testified in the criminal case as PW9 – Cpl Andrew Odera. He produced the video camera, (EXB 2), Muslim white gown (EXB 5 a-d) and nothing else. These exhibits should have been released to the owners by the court upon delivery of the judgment and expiry of the period of Appeal.
58. I have further perused the record of the defence by the petitioners. The 1st Petitioner in his defence said he was arrested at gun point. He did not mention anything about being assaulted or tortured by anyone. The 2nd petitioner in his defence stated that upon arrest he was beaten by the police as they removed his clothes and shoes. The 3rd petitioner in his defence stated that upon his arrest he was placed inside the police lorry. That the police took his camera, mobile phone, Kshs.3,700/=, and his driving licence.
59. Before this court, all the petitioners claimed to have been assaulted and tortured by the police and even sought to produce the medical treatment documents after filing their pleadings. The 1st petitioner in his supplementary affidavit produced a medical report (HLM – A1) showing he was examined on 5th February 2010. This was after three (3) appearances in court on 18th January 2010, 20th January 2010 & 3rd February 2010. On none of these dates did the 1st petitioner inform the court of any injuries suffered, by him.
60. I further note that the 2nd petitioner who in his defence on 16th march 2015 claimed to have been beaten / tortured did not present anything to confirm those allegations. The issue that remains unanswered is why the petitioners who claim to have been thoroughly tortured, beaten and stepped on by police officers did not inform the court of all these things when they first appeared in court or even during mentions. They appear to have only been concerned about their material items. See Julius Kamau Mbugua vs. Republic Nairobi Criminal Appeal No. 50 of 2008 [2010] eKLR.
61. Considering all the observations above, I am not convinced that the petitioners were brutally assaulted as claimed. They have failed to prove any cruel, inhuman and degrading treatment which would be considered as a violation of their right to protection against inhuman treatment as provided for under section 74(1) of the retired constitution.

Issue No. (iv) Who shall pay costs.

62. As already stated above the only rights that I have found to have been violated are in respect of:



- i. Failure to release the petitioners on bond while detained at the central police station.
 - ii. Failure to inform the petitioners of the reason for their arrest.
 - iii. Keeping the petitioners incommunicado while held at the Central Police Station.
63. Having found that the petitioners' rights were violated as stated above, I must now proceed to determine the amount of damages awardable to them. The petitioners prayed for general, exemplary, aggravated and punitive damages. In his submissions their counsel proposed Kshs.6,000,000/= for each petitioner to cover general, exemplary, aggravated and punitive damages plus Kshs.751,000/= special damages. There is sufficient evidence to show that the petitioners and four (4) others engaged the services of a lawyer whom they paid Kshs,600,000/=. There were also transport and other expenses incurred. I therefore allow the special damage but reduce it by half since those represented were seven (7) while the petitioners are only three (3).
64. In the case of Dominic Arony Amolo [2003] eKLR the Court decided to award a lumpsum global compensation in general damages and stated as follows;
- “For our part we have two options both of which are attractive and reasonable in our view. The first is an award of a lumpsum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lumpsum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, nay impossible to separate each of them and give a fair and reasonable award in respect of each. The alternative approach is to award damages for each of the heads of breach of fundamental rights. The difficulty with the latter in the circumstances of this case has been expressed and this may not be the right place to explore the efficacy of such an approach. We must as we hereby do, come to the firm conclusion that a lumpsum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter. Having said so and taking into account all matters raised herein and aware of the controversial nature of the issue before us, we have determined that in our view an award of Kshs.2,500,000/= would be a fair and reasonable award in damages in the novel situation arising from this case.”
65. Also see the cases of: (i) Jeniffer Muthoni Njoroge and 10 others vs. Attorney General Petition No. 340 to 350 of 2009. (ii) Benedict Munene Kariuki & 14 others vs. the Attorney General High Court Petition No. 722 of 2009.
66. Upon considering the principles stated in the above cases and bearing in mind the violation of the petitioners rights as set out elsewhere above I find that a global award in respect of all the stated violations will be sufficient.
67. I award the 1st, 2nd and 3rd Petitioners Kshs.250,000/= each as general damages. There shall be no award for exemplary damages. The petitioners will have ½ (half) of the costs of this petition plus interest on damages at court rates from the date of judgment until payment in full.
68. Consequently judgment is entered against the respondents as follows:
- i. A declaration that the petitioners' right for human dignity, personal freedom and liberty were violated.
 - ii. Prayer no. (ii) for malicious prosecution is dismissed



- iii. Special damages of Kshs.375,500/= allowed.
- iv. Prayer No. (iv) on deprivation of property dismissed.
- v. General damages for the violated constitutional rights stated at no.(i) is allowed. Each petitioner is awarded Kshs.250,000/=.The claim for exemplary and punitive damages is disallowed.
- vi. Half of the costs of the petition to be paid to the petitioners.
- vii. Interest on the award of damages to be paid at Court rates from the date of Judgment until payment in full.

69. Orders accordingly.

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

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

