REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 338 OF 2009

KAMILYA MOHAMEDI TUWENI AL-KINDY.....PETITIONER

-versus-

1. THE COMMISSIONER OF POLICE

2. THE ATTORNEY GENERAL..... RESPONDENTS

JUDGMENT

Introduction:

1. *Kamilya Mohamedi Tuweni Al-Kindy,* the Petitioner herein, is a female citizen of the United Arab Emirates (hereinafter referred to as ***'the UAE'***). She ordinarily resides in Dubai. She was, however, born in Zanzibar within the United Republic of Tanzania. Whereas she is not married, the Petitioner has three children whom she lives with in Dubai.

2. In the Petition subject of this judgment, the Petitioner alleges that she was, contrary to the Constitution and international instruments which Kenya is a signatory, inhumanly treated by the Kenyan Police when she visited Kenya sometimes in January, 2007. As such, the Petitioner claims several reliefs.

3. The Petition is opposed.

The Petition:

4. The Petition is dated 10th June, 2009. It is supported by an Affidavit sworn by the Petitioner on 18th February, 2009 before a Notary Public in England. In further support to the Petition, the Petitioner filed written submissions dated 25th May, 2018.

5. The Petition was heard by way of *viva-voce* evidence. The Petitioner testified on 14th September, 2015 through a video link. She thereafter closed her case without calling any witness.

6. In the Petition and her testimony, the Petitioner took the Court through how she travelled from Dubai on 7th January, 2007 in the company of two business men to Dar-es-Salaam in Tanzania. The businessmen were known as *Ahmed Kashoub* and *Hassan Mashaani*, both residents of the UAE. The Petitioner had accompanied the businessmen as their interpreter since the businessmen did not speak much English or Kiswahili. She also intended to begin some business after the business trip.

7. It is averred that on 9th January, 2007, the Petitioner and her companions travelled to Kenya as they were interested in exploring the possibility of starting a tea and coffee business in Oman. The trio was led into Kenya by their Kenyan host one *Millie Mary Gakuo* (hereinafter referred to as ***'Millie'***) whom they had met in Tanzania on arrival from the UAE. The Petitioner and the two business men entered Kenya through Nairobi. They obtained the requisite Kenyan Visas. They then, together with Millie travelled by car to Malindi where they checked into Eden Roc Hotel.

8. The Petitioner further avers that while they were in the hotel they were confronted by police officers who burst into their rooms and searched the rooms and their luggage. They also perused their documents. The police told the Petitioners that they were looking for Somali infiltrators. After being satisfied that the five people were in Kenya legally, the police apologized and left. That was around 3:30pm on the very 9th January, 2007.

9. After about three hours later, the Petitioner states, that a contingent of around 15 armed men arrived at the hotel. They introduced themselves as officers from the Kenyan Counter Terrorism Force. The three people who were in the company of the Petitioner were all arrested together with the Petitioner. They were taken to Malindi Police Station. They were later taken to Mombasa by road before being taken to the Police Headquarters in Nairobi the following day. In Nairobi, they were interrogated and thereafter held at Kileleshwa Police Station.

10. The Petitioner pleads that while in custody she was denied access to her family and a lawyer despite her repeated requests. She managed to call her family three days later. Millie also managed to get a lawyer for them. However, the Petitioner further pleads that they were never taken to Court and were severally interrogated.

11. It is the testimony of the Petitioner that on 27th January, 2007 all her three companions were released. Ahmed Kashoub and Hassan Mashaani were sent back to Oman. In the night, while in the company of three men, the Petitioner was driven to Namanga at the Kenya-Tanzania border. The intention was to hand the Petitioner over to the Tanzanian authorities. The Tanzanian authorities, however, declined the request upon perusal of the Petitioner's documentation which included her UAE Passport and the Visa.

12. The Petitioner states that she was then taken to a police station unknown to her where she was held in very terrible and inhuman conditions as she had been informed that she was to be taken back home the following day. In the morning, she was driven to an airport and loaded into a plane together with many other people. She later learnt from the others that they had landed in Mogadishu in Somali. She was with 23 other women.

13. They were held at the Mogadishu airport for ten days. The conditions were extremely dehumanizing and the sounds of bombs and gunfire were all over. They were then taken to Ethiopia where they were also severally interrogated by the authorities including the Americans.

14. The Petitioner was eventually released on 23rd March, 2007. She travelled back to Dubai where she was reunited with her family on 25th March, 2007.

15. While back home, the Petitioner filed complaints with the police in Dubai, the Ministry of Interior and the Ministry of Foreign Affairs. She also learnt that her ordeal had been reported widely in the media and that she was branded a 'terrorist'. She further learnt that while she was held up in police custody in Nairobi her brother contacted the Kenya National Human Rights Commission for assistance.

16. The Petitioner described in detailed how the ordeal affected her entire life and that as a result of the negative publicity she has since then been unable to find any form of employment. She now depends on handouts from well-wishers.

17. The Petitioner also avers that she had been examined by *Dr. Brok Chisholm* in London and a comprehensive report on her condition prepared.

18. The foregoing was reiterated and buttressed in the Petitioner's written submissions which were highlighted on. The Petitioner framed four issues for determination. They are as follows: -

> *1. Whether the Petitioner was entitled to the protection of Kenyan Law despite not being a Kenyan Citizen.*
>
> *2. Whether the rights of the Petitioner were violated, infringed, and denied.*
>
> *3. Whether the Respondents' alleged violation infringement and denial of Human rights contravened the International Human Rights Instruments.*
>
> *4. Whether the Petitioner is entitled to the prayers sought.*

19. On the first issue, the Petitioner submits that she was entitled to protection under the Kenyan Constitution and law and the international treaties including the *Universal Declaration of Human Rights.* The decisions in *Boumediene vs. Bush 533 US 723 (2008)* and *Khosa v. Minister of Social Development and Others 2004 (6) BCLR 569 (CC)* were referred to in support of the submission.

20. Submitting on the second and third issues, the Petitioner argues that she was arrested arbitrarily, not given any reasons for the arrest, she was not charged with any crime, she was kept in deplorable conditions, she was denied medical attention, she was denied to communicate with her family and lawyer, she was severally and severely assaulted, she was illegally detained in various police stations and eventually and unlawfully taken to Somali and Ethiopia before she was released.

21. It is submitted that the Petitioner's rights variously provided for under Sections 72, 74, 77 and 82 of the 1963 Kenyan Constitution were infringed. Further, Articles 27, 29, 50 and 51 of the 2010 Kenyan Constitution were also infringed. Other rights guaranteed under various international instruments were also infringed, it is submitted.

22. The Petitioner referred to various decisions in support of the submission.

23. In the end, the Petitioner prayed for the following orders: -

> *a. A declaration that the petitioner's right under the Constitution were violated.*
>
> *b. A declaration that the Respondents by themselves and as agents of the Republic of Kenya are liable for the violations.*

c. A declaration that Kenya is and be held responsible for the continued violations of the Petitioner's rights while in the custody of Somali and Ethiopian authorities over the entire period she was unlawfully held.

d. An order that the Government of Kenya through the Attorney General or such higher authority do tender a formal apology to the petitioner for the ill treatment she was subjected to at all times of her detention and confinement.

e. An award for General and exemplary damages considering the need for future lifelong dependency on treatment.

f. Costs of this Petition

g. Any other order as the court may deem just and fair to grant in the interest of justice.

The Response:

24. The Petition is opposed by all the Respondents.

25. The Respondents filed a joint response. It is the Replying Affidavit sworn by *ASP No. 231240 Anthony L. Sunguti* on 26th August, 2014. The deponent is attached to the Anti-Terrorist Police Unit (hereinafter referred to as '***the ATPU'***). The Respondents also filed joint written submissions dated 17th September, 2018.

26. The Respondents denied the allegations that the Petitioner travelled from Dubai to Tanzania and then to Kenya with her business companions and that they were hosted by Millie and invited strict proof. They further denied that the Petitioner was arrested as alleged given that the police have no records on such. They called for proof.

27. The Respondents wondered the discrepancies in the Petitioner's copies of some pages of her Passport which she selectively annexed to the affidavit in support of the Petition and averred that the Petitioner is not forthright in her allegations.

28. The allegations of arrest and inhuman treatment of *inter alia* the Petitioner and the claim in general are vehemently denied and strict proof invited.

29. The Respondents submit that the Petitioner did not discharge her duty to prove the case of violation of her rights. It is argued that there is no congent evidence that the Petitioner ever lawfully came to Kenya and that she was arrested and mistreated.

30. In support of the submission, the Respondents referred to the decisions *in A M v Premier Academy (2017) eKLR, Stephen Nyarangi Onsomu & Another v. George Magoha & 7 Others (2014) eKLR, Miller v. Minister of Pensions (1947) 2 All ER, Charles Murigu Muriithi & 2 Others v. Attorney General (2015) eKLR, Kenya Breweries Ltd v. Godfrey Odoyo (2005) eKLR, Mohamed Hassan Musa & Another v. Peter M. Mailanyi & Another (2000) eKLR* and *Florence Amunga Omukanda & Another v. Attorney General & 2 Others (20-16) eKLR*.

31. On the allegation that the Petitioner had legitimate expectation to be treated fairly in Kenya, the Respondents denied that the Petitioner was ever in Kenya. The Court of Appeal rendition in *Justice Kalpana H. Rawal v. Judicial Service Commission & 3 Others (2016) eKLR* was referred to in support of the position that legitimate expectation must be proved.

32. The Respondents also submitted that the doctrine of non-refuolement is not applicable in this case since the Petitioner did not plead to be a refugee or an asylum seeker. Reliance was placed on *Kenya National Commission on Human Rights & Another vs. Attorney General & 3 Others (2017) eKLR*.

33. The Respondents prayed for the dismissal of the Petition with costs.

Issues for Determination:

34. I have carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to. I find the following issues are for determination: -

(i) Whether the Petitioner's case was proved;

(ii) If the answer to (i) above is in the affirmative, whether the Petitioner is entitled to the remedies sought.

35. I will deal with the issues in *seriatim*.

Analysis and Determinations:

(i) Whether the Petitioner's case was proved:

36. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by the Constitution and the law.

37. *Article 159(2)(d)* of the Constitution call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities.

38. *Speaking of the essence of* Article 159(2)(d) of the Constitution, the Supreme Court of Kenya in ***Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others,*** Petition No. 14 of 2013 held that: -

> *Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.*

39. And, in ***Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR*** *the Supreme Court further held that: -*

> *Not all procedural deficiencies can be remedied by Article 159….*

40. The practice and procedure in constitutional Petitions is further provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '***the Mutunga Rules'***).

41. *Rule 20(1)* of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of *affidavits* or *written submissions* or *oral evidence*. *Rule 20(3)* of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. *Rule 20(4)* and *(5)* of the *Mutunga Rules* provide for the summoning and examination of witnesses.

42. The conduct of constitutional Petitions is also guided by various laws. For instance, the **Evidence Act**, Cap. 80 of the Laws of Kenya applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in *Section 2* thereof. The provision provides as follows: -

> *(1) This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.*
>
> *(2) Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.*

43. *Sections 107(1)(2)* and *109* of the Evidence Act are on the burden of proof. They state as follows:

> *107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
>
> and
>
> *109. Proof of particular fact*
>
> *The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

44. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** 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 vs. Republic, (1979) KLR 154: the necessity of a link 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.*

45. Further, a Multi-Judge Bench in the High Court in Mombasa Petition No. 159 of 2018 as consolidated with No. 201 of 2019 ***William Odhiambo Ramogi & Others vs. The Attorney General & Others (2020) eKLR*** addressed itself to the aspect of the probative value of affidavits. The Court stated as under: -

> 196. *On the probative value of the Petitioners affidavits, the applicable law is Order 19 of the Civil Procedure Rules. Rule 1 thereof provides matters to which affidavits should be confined as "to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof". Therefore, the sources of information and grounds of belief are primarily essential for the purpose of veracity of an affidavit, and consequently a failure by the deponent to disclose with particularity the sources of the information he has deposed to, has the effect of weakening the probative value of the information, and may even render it worthless. In* ***A N Phakey vs. World-Wide Agencies Ltd (1948) 15 EACA 1****, it was held that an affidavit drawn on information and belief is worthless without disclosing the source and ought not to be received in evidence.*
>
> 197. *In addition, where the testimony of a witness by affidavit is direct in terms of what the witness actually saw, heard or touched,*

that evidence has probative value where it is definite and supported by the testimony of others. The testimony by the Petitioners in their affidavits was however not direct. Instead, it relied mainly on circumstantial documents from which the facts sought to be proved were meant to be logically or reasonably inferred.

198. *The rules as regards production of and admissibility of documentary evidence are, in this respect, set out in section 35 of the Evidence Act, which provides as follows:*

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say–

(a) if the maker of the statement either–

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.

46. Turning back to this matter, as said, the Petition was heard by way of oral evidence. In preparation thereof, the Petitioner filed a Statement by one *John Kamanda Mucheke* an officer of The Kenya National Commission on Human Rights. The statement is dated 6th February, 2016 and it annexes several documents.

47. The Petition was heard on 14th September, 2015. The Petitioner testified vide a video link. In her testimony, the Petitioner did not produce any document as an exhibit. She also did not adopt the documents in her affidavit as exhibits neither were there any directions nor order to that effect. In essence the documents in her affidavit did not become part of the evidential record of the Court. To confirm the position, the Petitioner stated in part that: -

I will send my original passport if you need.

48. The Petitioner was also cross-examined on her testimony.

49. The Petitioner did not call any witness. As such, the statement of John Kamanda Mucheke and the annexed documents did not as well form part of the evidential record of the Court.

50. The Court of Appeal in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR*** while addressing the issue of production of documents more so when documents are marked for identification but not produced as evidence stated as follows: -

16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?

17. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa –vs- The state (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. ***In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification****……* (emphasis added).

51. In this matter, therefore, since the documents referred to in the affidavit of the Petitioner and those annexed to the statement of John Kamanda Mucheke were not formally produced as exhibits at the trial, the said documents did not form part of the evidential record of the Court. In that case, the said documents cannot be used as a basis of any decision in this matter.

52. Even if this Court finds that the documents annexed to the Affidavit of the Petitioner are part of the evidential record of the Court, still I do not think whether they sufficiently aid the Petitioner's case. I say so for several reasons. **One**, all the annextures were copies which were neither certified, nor produced in accordance with the provisions of Section 68 of the Evidence Act as regards production of secondary evidence. **Two**, the pages of the passport annexed to the affidavit do not show when the Petitioner left Dubai. **Three,** the passport does not show when the Petitioner arrived in Tanzania. **Four**, the stamp marked as '*DIA Tanzania'* in the passport does not indicate that it was an '*Exit'* stamp. **Five,** whereas the passport has a stamp allegedly affixed at the JKIA Airport in Nairobi on 9th January, 2007, the said stamp does not indicate that it was an arrival stamp. **Six**, the time of exiting Tanzania as well as the time of arrival in Kenya is not stated by the Petitioner in her testimony. It is worth-noting that by 3:30pm the Petitioner had checked into a hotel in Malindi and had driven by road from Nairobi to Malindi. **Seven**, no reason was given why the Petitioner and her companions did not fly to Mombasa City which is near to Dar-es-Salaam and Malindi compared to the City of Nairobi given that Millie, the Kenyan contact, was in Tanzania with the Petitioner and the other businessmen.

53. **Eight**, the Petition is supported by copies of newspaper reports. The Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR,*** while addressing the admissibility and credibility of newspapers' reports held as follows**:**

On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of ***Laxmi Raj Shetty -v-State of TamilNadu1988 AIR 1274, 1988 SCR (3) 706,*** *the Supreme Court held that a newspaper is not admissible in evidence.*

54. The newspaper reports do not, therefore, amount to admissible evidence.

55. **Nine**, the report by Dr. Brock Chisolm, Clinical Phycologist, being expert evidence is inadmissible. In ***William Odhiambo Ramogi & Others vs. The Attorney General & Others*** case (supra) the Court discussed expert evidence as follows: -

56. *While expert evidence forms an important part of litigation, and, under section 48 of the Evidence Act, the opinions of science or art are admissible if made by persons specially skilled in such science or art, there are rules as regards the admissibility of such evidence. A 4-Judge Bench of this Court considered the admissibility of expert evidence in* ***Mohamed Ali Baadi and others v Attorney General & 11 Others [2018] eKLR*** *and held as follows:*

'59. The first and foremost requirement of a party who calls an expert witness is to establish the credentials of the person as an

expert, or one who is especially skilled in that branch of science, to the satisfaction of the Court. That, is, the witness should fall within the definition of 'specially skilled' as laid down under section 48 of the Evidence Act.

60. The question whether a person is specially skilled within the above provision is a question of fact that has to be decided by the Court and the opinion of the expert is also a question of fact and if the Court is not satisfied that the witness possesses special skill in the relevant area, his or her opinion should be excluded. Failure to prove the competency of a person a party calls into the witness box as an expert presents a real risk of evidence of such a person being ruled out as irrelevant.

61. The expert witness, in our view, ought to explain the reasoning behind his opinion. In scientific evidence, the reasoning may be based on the following: - site inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts. Opinion expressed must be confined to those areas where the witness is specially skilled. The weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the extent to which he has called in aid the advances in modern sciences to demonstrate to the Court the soundness of his opinion. The opinion of the expert is relevant, but the decision must nevertheless be the judge's.

57. Further, the report relied on several documents mentioned in Paragraph 4 which documents were not produced as exhibits. The report was also prepared on the instructions of Loma McGregory of Redress and not on the instructions of the Petitioner. The interest of the said Loma McGregory of Redress in the matter remains unknown. The report contains several unproved factual narrations. For instance, it mentions names of several people who were not interviewed by the author of the Report and which people did not testify before Court. Of importance is the fact that the report was prepared on 29th January, 2009 which is a period of around 2 years from the alleged ordeal. Given the time lapse between the alleged ordeal and the preparation of the report, the possibility of other intervening causes cannot be overruled. Lastly, despite the expert offering to be cross-examined under paragraph 12.7.2 of the report, no reasons were given why the expert was not availed for cross-examination before Court.

58. Apart from the documents annexed to the affidavit of the Petitioner, there are also other questions which beg for answers. *First*, why is it that Ahmed Kashogo, Hassan Mashauri, Millie, John Kamanda Mucheke or the brother to the Petitioner who allegedly contacted the Kenya National Commission on Human Rights never testified. *Second*, how come that the said Ahmed Kashogo, Hassan Mashauri, Millie, John Kamanda Mucheke or the brother to the Petitioner did not, at least, swear any affidavits. *Third*, the failure by Ahmed Kashogo, Hassan Mashauri, Millie, John Kamanda Mucheke or the brother to the Petitioner to either testify or swear affidavits was not explained.

59. There are several irreconcilable inconsistencies in the evidence. For instance, in paragraph 7 of her affidavit, the Petitioner deponed that *'….. we met our Kenya host, Millie Mary Gakuo, in Dar es Salaam and then travelled by car to Malindi where we checked into the Eden Rock hotel'*. The affidavit evidence significantly contradicts the oral evidence where the Petitioner states that *'… I left Dubai on 7.1.2007 and I went to Dar es Salaam and together with Millie, Ahmed Kashogo and Hassan Mashauri….'*. It is, therefore, unclear where the Petitioner met Millie. Did she travel with Millie from Dubai to Tanzania or did the Petitioner meet Millie in Tanzania? It is also unclear how the Petitioner and her entourage from Tanzania travelled to Malindi. Whereas the Petitioner states in paragraph 7 of the Affidavit that they travelled by car to Malindi, there is an attempt in the oral evidence that they instead flew from Tanzania to Kenya. It is startling that the passports of the rest of the people who accompanied the Petitioner were never availed in Court.

60. The date on which the Petitioner and her companions arrived in Malindi is also startling. The Petitioner states in her oral testimony that they arrived in Malindi on 10th January, 2007 whereas her affidavit evidence states that it was on 9th January, 2007.

61. Deriving from the foregoing and in view of the evidence on record, the totality of the evidence reveals many evidential gaps which go to the root of the matter. Further, given the unresolved contradictions and inconsistencies, there is a serious doubt as to whether the Petitioner was in Kenya either as alleged or otherwise. There is, as well, no evidence that the Petitioner was handed over to the Somali and Ethiopia authorities. Further, the allegation that the Petitioner was with Ahmed Kashogo, Hassan Mashauri and Millie and that she met John Kamanda Mucheke while in custody and that she suffered harm remain unproved. There is also no evidence to support the allegation that the Petitioner was arrested by the Kenyan Police and held in various police stations under inhuman and terrible conditions.

62. There is every reason, therefore, for this Court to safely arrive at the finding that the averments in the Petition are not proved as required in law. The Petition, hence, fails.

63. Having so said, dealing with the second issue in this matter will not aid the Petitioner in any way. Infact, that will be on an academic expedition. The Court's finding is sufficient to wholly dispose of this matter.

64. Consequently, the Petition be and is hereby dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Mohochi, Learned Counsel for the Petitioner.

Mr. Kuria Thande, Learned Senior State Counsel instructed by the Honourable Attorney General for the Respondents.

Elizabeth Wambui – Court Assistant.