REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 240 OF 2014

PRESTON KARIUKI TAITI.....1ST PETITIONER

AGGEO MUTHENGI GITHURANTHI.....2nd PETITIONER

CHARLES KAGO KIBIKU.....3RD PETITIONER

FRANCIS MURIRA WARUKENYA.....4TH PETITIONER

PAUL MWANGI KURU.....5TH PETITIONER

WILFRED WAITIKI GAKURE.....6TH PETITIONER

STEPHEN CHARO KOI.....7TH PETITIONER

FRANCIS GAKONGO NTWIKI.....8TH PETITIONER

STEVE BIRGEN.....9TH PETITIONER

MATTHEW NTHIGA NYAGA.....10TH PETITIONER

-VERSUS-

THE CHIEF OF THE KENYA DEFENCE FORCES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The respective 1st to 10th petitioners namely Preston Kariuki Taiti, Aggeo Muthengi Githuranthi, Charles Kago Kibiku, Francis Murira Warukenya, Paul Mwangi Kuru, Wilfred Waitiki Gakure, Stephen Charo Koi, Francis Gakongo Ntwiki, Steve Birgen and Matthew Nthiga Nyaga were all serving in the Kenya Armed Forces (now Kenya Defence Forces) at the time of the attempted coup on 1st August,1982.

2. As per the provisions of the Kenya Defence Forces Act, 2012, the 1st Respondent, the Chief of the Kenya Defence Forces, is in charge of the command, operations and discipline of the Kenya Defence Forces.

3. The 2nd Respondent, the Attorney General, is the principal legal adviser to the Government of Kenya pursuant to Article 156(4) of the Constitution.

4. Following the failed coup on 1st August, 1982, the petitioners were arrested between 1st and 4th August, 1982. It is the petitioners' case that upon their arrest, they were subjected to brutal, cruel, inhuman and degrading treatment by soldiers of the Kenya Army. They aver that the inhumane treatment involved being stripped naked in public, being frog-marched on their knees on concrete floors, being whipped, kicked and bludgeoned all over their bodies, taunted with insults and transported to custody in open trucks whilst still naked in full view of the public.

5. The petitioners depose that they were detained *incommunicado* in various military and prison facilities where the cruel unfathomable horrors continued. It is their case that during their detention they were assaulted with buttons, whips, rungus, gun butts, fists, hands, legs and locked up naked in overcrowded, filthy, waterlogged cells that housed mentally challenged prisoners. They additionally aver that they were subjected to solitary confinement in uninhabitable waterlogged conditions, deprived of sleep, medical attention for the pain and wounds, food, clean drinking water and toilet facilities for days on end. They aver that they were constantly interrogated and coerced to confess to their involvement in the botched coup d'état.

6. The petitioners further aver that apart from the mistreatment, they were unlawfully held in custody for periods ranging between 74 to 376 days from 1st August, 1982 to 13th August, 1983. The petitioners' case is that the 1st Petitioner was released without any charge and the other petitioners were presented before courts-martial and coerced to plead guilty. They aver that as a result the 2nd to 10th petitioners were convicted and sentenced to imprisonment where the cruel treatment persisted. Their case is that they were also dismissed from the Armed Forces on the ground of redundancy.

7. Through their petition dated 22nd May, 2014, the petitioners therefore seek the following reliefs:

i) **A declaration that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted on the petitioners upon being taken into custody; the cruelties, violence, brutalities, deprivation of basic necessities of life and the extreme, inhuman and degrading prison conditions that the petitioners were subjected to in *incommunicado* pre-arraignment detention and in prisons [while] serving sentences constituted violations of the fundamental rights and freedoms of the petitioners as to inherent human dignity, equal protection and benefit of the law and prohibition against torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 74(1) and 77 of the former Constitution (now Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).**

ii) **A declaration that the period between 74 and 376 days that the respective Petitioners were detained in pre-arraignment *incommunicado* detention between 1st August 1982 and 13th August 1983 when they were either released without charge or arraigned before the Court Martial constituted periods of arbitrary, unlawful and illegal detention in violation of the Petitioners' fundamental rights to inherent human dignity, equal protection and benefit of the law, personal liberty and fundamental freedom from servitude and from torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the former Constitution (now Articles 27(1), 28, 29(c)&(d) and 30(1) of the Constitution of Kenya, 2010) and Articles 7 & 9(3) of the International Covenant on Civil and Political Rights (ICCPR).**

iii) A declaration that the period of 8 months to 1 year and 4 months that the 2nd to 5th Petitioners continued to be imprisoned in deprivation of their respective periods of remission of sentence constituted periods of arbitrary, unlawful and illegal detention in violation of the Petitioners' fundamental rights to equal protection and benefit of the law, personal liberty and fundamental freedom from servitude contrary to sections 70(a), 73(1) and 77 of the former Constitution (now Articles 27(1), 29(a) and 30(1) of the Constitution of Kenya, 2010) and Articles 8(3) & 9(1) of the International Covenant on Civil and Political Rights (ICCPR).

iv) A declaration that the dismissal of the 1st Petitioner from the service of the Armed Forces was arbitrary and unlawful and the dismissal from service of the 2nd to 10th Petitioners was vitiated by the unlawful pleas of guilty exhorted at the Court Martial pursuant to severe torture inflicted on the petitioners in the cause of the inordinate unlawful pre-trial detention and the dismissals were unlawful, inhuman and cruel deprivation of the petitioners' means to a meaningful livelihood in violation of their fundamental right to life, human dignity and freedom from cruel and inhuman treatment and/or punishment guaranteed by sections 70(a), 71(1) and 74(1) of the former Constitution (now Articles 26(1)&(3), 28 and 29 of the Constitution of Kenya, 2010) and Article 6(1) of the ICCPR and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

v) General, exemplary, aggravated and/or punitive damages consequential to the declarations of violations of fundamental rights and freedoms of the Petitioners in prayers (i) to (iv) above as may be assessed by this Honourable Court.

vi) Costs of the Petition.

vii) Interest on all monetary awards.

8. The petition is supported by affidavits sworn by all the petitioners on the date of the petition. It is prudent to note that the facts of the individual cases of the petitioners are similar to those of the 1st Petitioner. Specific details that are unique to the individual petitioners will be outlined under each Petitioner's case.

9. The 1st Petitioner avers that he was enlisted on 7th February, 1979 under Service No. 023808 and following successful completion of the basic military training at the Armed Forces Training College at Lanet, Nakuru he was posted to the Kenya Air Force (herein referred to as KAF) headquarters at Eastleigh Air base, Nairobi. He was sponsored for further training in Israel as an Aircraft Technician in Airframe and Engine and qualified as a Grade One Tradesman rising to the rank of Senior Private.

10. It is the 1st Petitioner's averment that he used to live in the KAF barracks during the week and visit his parents' home at Kangemi every weekend. On 31st July, 1982, a Saturday, he went to his parents' home as usual. He avers that on 1st August, 1982 he was woken up by members of his family who informed him that there was an announcement by the Voice of Kenya (VoK) radio, that the Government of Kenya had been overthrown by the Armed Forces. This shocked him as he had left the barracks the previous day with no clue of such plans.

11. The 1st Petitioner deposes that upon further deliberations with his family they deemed it fit to remain calm until further information was issued by VoK radio. He goes ahead to aver that following the announcement of a coup, there was tension in Kangemi as gunshots could be heard coming from the Nairobi City Centre. It is his averment that at around 4.00 pm on the same day, VoK radio announced that the *coup d'état* staged by KAF had been defeated by the Kenya Army and the Government restored under the leadership of then President Daniel Arap Moi.

12. The 1st Petitioner states that on 2nd August, 1982 there was a radio announcement directing all KAF officers to report to their bases or the nearest military base or police station. The 1st Petitioner avers that on 3rd August, 1982 in obedience to the directive he reported to the Department of Defence Headquarters at Ulinzi House in Hurlingham (hereinafter "DoD"). He states that once he introduced himself at the gate, the army officers pounced on him stripping him naked, beating him up with slaps, kicks and gun butts, while insulting him as a *'coward and educated rubbish'*. He was then frog-marched on his knees on concrete paths to the parade square where he met other injured, bleeding and groaning KAF soldiers. He was later locked up for about four hours in an overcrowded guardroom which was flooded with cold water, urine and blood of the injured KAF soldiers.

13. The 1st Petitioner's testimony is that later in the day, together with 20 or so KAF officers they were escorted to an army truck while handcuffed and transported naked to Lang'ata Army Barracks. Inside the truck the soldiers escorting them abused them as they beat them up, stomping on their backs, legs, hands and heads as they lay flat on their bellies. On arrival at Lang'ata Army Barracks and in full view of all those present including women and children, they were ordered to walk on their knees on the concrete paths up to the guardroom while being kicked and hit with gun muzzles on their backs and legs. It is averred that while at the guardroom, they remained naked without any food, water or toilet facilities. It is additionally stated that on the same day in the evening they were yet again and in a similar manner transported from Lang'ata Army Barracks in an army truck to KAF Headquarters at Eastleigh, Nairobi.

14. The 1st Petitioner avers that upon arrival at the KAF Headquarters he realized the Air base had been taken over by the Kenya Army. They were escorted to the guardroom at which point they were totally exhausted, starving, injured from the torture and bleeding at their knees. He deposes that they stayed at the KAF Air base for a week where they were interrogated and coerced to confess being involved in the coup. The 1st Petitioner avers that he refused to falsely incriminate himself.

15. The 1st Petitioner further avers that on 9th August, 1982 while still naked he was escorted to an army truck and transported to Kamiti Maximum Security Prison while being beaten and threaten that he would be hanged in less than a month. It is the 1st Petitioner's case that at Kamiti Maximum Security Prison he was forced to endure wanton torture and continued interrogation. He avers that he was locked up in a dark overcrowded, filthy, lice infested cell without any toilet facilities, and denied food and water for the first three days. He was interrogated numerous times and when he refused to confess to participating in the coup he was transferred to the block holding mentally challenged persons and was at other times subjected to solitary confinement in waterlogged cells.

16. The 1st Petitioner avers that he was detained for 376 until 13th August, 1983 when he was removed from the cells with 15 others, given civilian clothes and escorted to Kahawa Army Barracks where they were presented before senior army officers. The 1st Petitioner was told that he was being released from prison and informed that he was already dismissed from the Armed Forces.

17. The 1st Petitioner supported his case with a copy of the Certificate of Service in Kenya Armed Forces dated 7th February, 1979; a copy of a document detailing his educational attainments, trade qualifications and medals dated 12th October, 1983; a copy of a document showing the period of service from 7th February, 1979 to 13th August, 1983; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 12th October,1983; and a copy of a Certificate of Discharge dated 12th October, 1983.

18. The petitioners aver that the delay in accessing justice was as a result of the untold torture and unlawful detention that left them completely traumatized by the Government's power under the reign of President Daniel Arap Moi and they could not even contemplate filing a suit for the constitutional violations during his tenure. Further, that even with the change of government in 2002, they did not have confidence that courts were independent so as to dispense justice on their claims. The petitioners aver that it was only upon the promulgation of the current Constitution in 2010 that they were assured that Kenya had changed and they would be able to access justice. It is additionally their case that due to irregular income for lack of employment it took them time to raise money to meet the costs of filing the suit.

19. The 2nd Petitioner avers that he was enlisted in the KAF on 3rd March, 1978 under Service No. 023505 and upon successful training posted to KAF Eastleigh Air base, Nairobi where he received further training as an Air Force Police Officer. He attained Grade III and was posted to KAF, Embakasi where he worked but resided at their KAF Eastleigh Air base.

20. The 2nd Petitioner avers that on 1st August, 1982 at about 2.00am he was woken by the sound of gunshots and screams by excited soldiers. He was informed that the government had been overthrown and ordered by his seniors to arm himself and await instructions. At around 4.00pm on the same day their Air base was surrounded by Kenya Army officers who informed them that all KAF officers were under arrest before beating, torturing and detaining them.

21. The 2nd Petitioner states that he was detained at Kamiti Maximum Security Prison for three weeks before being escorted to Nyeri G. K. Prison, King'ong'o. In late September 1982 he was transferred to Naivasha Security Prison. All this while he had not been charged. The 2nd Petitioner deposes that on 16th November, 1982 after two and a half months of *incommunicado* detention, he was escorted to the Court Martial at Lang'ata Army Barracks, Nairobi. He states that the counsel assigned to him advised him to plead guilty in exchange for a light sentence in military confinement and return to service. He was charged with the offence of munity and imprisoned for 16 years. He served 2 years at Kamiti Maximum Security Prison before being transferred to Naivasha Security Prison.

22. The 2nd Petitioner deposes that sometime in late 1984 he was informed that the Military Review Board had reviewed and reduced his

sentence to 5 years. Despite this and without notice he was deprived of his statutory right to remission of 1 year, 3 months and 22 days being one third of his sentence. He was therefore released on 7th July, 1987 instead of 15th March, 1986. The 2nd Petitioner's evidence is that he was in pre-trial detention for 108 days.

23. The 2nd Petitioner supported his case with a copy of the Certificate of Service in Kenya Armed Forces dated 3rd March, 1978; a copy of final assessment of conduct and character on leaving service dated 29th October, 1985; and a copy of the Certificate of Discharge dated 29th October, 1985.

24. On his part, the 3rd Petitioner deposes that he was enlisted in the Kenya Army on 1st September, 1978 under Service No. 9958 and attained the rank of Private. He was posted to Kahawa Garrison, Nairobi, Transport Battalion as a driver. He avers that on 9th February, 1982 following an ambush by Shifta rebels in Wajir while on duty he was shot in the leg and thereafter given a long leave to nurse his injuries and was still on leave when the attempted coup took place on 1st August, 1982.

25. The 3rd Petitioner avers that following the coup he went to 50 Air Calvary Battalion which was the nearest Air base to his home where he found total confusion. He proceeded to his station at Kahawa Garrison where he met his commander Major Gitema who ordered him to join them and head to Embakasi Garrison. They took over the Ground Air Defence Unit (GADU) and 50 Air Calvary Battalion from the rebel KAF soldiers. He avers that on 4th August, 1982 he was summoned to the office of the commanding officer where, without explanation, he stripped naked and escorted to Kiambu G. K. Prison where he was tortured and detained for 2 weeks before being escorted to Naivasha Security Prison. At Naivasha he continued to receive beatings and insults as he was being forced to confess of his involvement in the coup. Afraid for his life and the threat of continued stay in solitary confinement he eventually agreed to sign statements whose contents were unknown to him.

26. The 3rd Petitioner avers he was eventually taken to Kamiti Maximum Security Prison where he stayed until 17th November, 1982 when he was presented to the Court Martial and charged with the offense of failure to suppress a mutiny, convicted and sentenced. His testimony is that the Military Review Committee reduced his sentence from 5 years to 2½ years but he was deprived of remission of the sentence and was eventually released on 18th May, 1985. It is therefore the 3rd Petitioner's case that he was unlawfully held in pre-trial detention for 105 days and deprived of remission of sentence of 10 months.

27. The 3rd Petitioner's case is supported by both the original and copy of the Certificate of Service in Kenya Armed Forces dated 1st September, 1978; a copy of a document showing his educational attainments, trade qualifications and medals dated 5th January, 1983; a copy of a document detailing his days of service tabulated from 1st September, 1978 to 11th November, 1978; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 21st March, 1983; a copy of the Certificate of Discharge dated 21st March, 1983; and a copy of the Certificate of Rehabilitation from Kenya Prisons Service dated 5th May, 2014.

28. The 4th Petitioner avers that he was enlisted in the KAF on 24th April, 1980 under Service No. 024674 and posted to Laikipia KAF Air base in Nanyuki where he was trained as a Fighter Control Operator and attained Grade II. He avers that on 1st August, 1982 at around 5.30am he was woken up by military sirens and shouts followed by orders that every soldier should dress up in uniform which he did. They were then ordered by the senior officers to arm themselves without any briefing and deployed to their respective departments awaiting further orders. His averment is that further instructions were not issued until around 5.00pm when Kenya Army soldiers stormed the Air base, arrested all of them and started beating them.

29. The 4th Petitioner deposes that he was detained in a makeshift cell at the Air base until early October 1982 when he and his fellow KAF officers were escorted to Naivasha Security Prison in the manner described by the 1st Petitioner. The 4th Petitioner avers that he was held at Naivasha until 26th October, 1982 when he was transferred to Kamiti Maximum Security Prison and arraigned before the Court Martial on 27th October, 1982 for failure to suppress mutiny. The 2nd Petitioner states that he was coerced to confess his involvement in the coup after which he was convicted and sentenced to serve 2 years at Kisumu G.K. Prison, Kodiaga.

30. The 4th Petitioner further avers that his right to 8 months' remission of sentence granted to him by the Military Review Board was denied. He was therefore released from prison on 26th October, 1984 instead of 26th February, 1984. According to the 4th Petitioner, he was unlawfully detained for 88 days before being court-martialed.

31. The 4th Petitioner's case is supported by a copy of the Certificate of Service in Kenya Armed Forces dated 24th April, 1980; a copy of his educational attainments, trade qualifications and medals dated 23rd March, 1984; a copy of the days in service tabulated from 24th April, 1980 to 1st August, 1982; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 23rd March, 1984; a copy of the Certificate of Discharge dated 23rd March, 1984; a copy of Certificate of Imprisonment; and a travel warrant with the Kenya Railway from Kisumu to Nairobi dated 26th October, 1984.

32. The 5th Petitioner avers that he was enlisted in KAF on 12th September, 1979 under Service No. 024425 and attained the rank of Senior Private I. He was posted to KAF Headquarters, Eastleigh Air base in Nairobi for 2 months before being transferred to KAF Nanyuki Air base where he was trained as an Air Field Police Officer and attained Grade II.

33. The 5th Petitioner avers that on 1st August, 1982 at around 3.00am he was startled by screams of excited KAF soldiers who ordered them to dress up in uniform and be armed as they awaited instructions. At around 4.00pm the Air base was overtaken by 1st Kenya Rifles (1KR) a unit of Kenya Army who issued commands similar to those issued in other air bases and likewise brutalized them. The 5th Petitioner avers that he managed to escape and hid in nearby bushes.

34. The 5th Petitioner states that following a VoK radio announcement instructing all KAF officers to report to their stations, he obeyed and presented himself at the Air base. He avers that he was met by the brutalities of the previous day. His testimony is that he was detained in the hangar for 2 days before being escorted to Meru G. K. Prison. They stayed in the prison until 10th August, 1982 when they were escorted back to KAF, Nanyuki Air base before being transferred again to KAF Headquarters at Eastleigh. He stayed there until 17th August, 1982 when he was transferred to Naivasha Security Prison, all the while enduring beatings, torture and insults.

35. According to the 5th Petitioner, he was arraigned before Court Martial on 14th October, 1982 where he pleaded guilty as advised by counsel so as to get a light sentence. He was convicted and served 4 years at Shimo La Tewa G. K. Prison, Mombasa. He further avers although his sentence was reduced by the Military Review Board his right to remission was denied and he was forced to serve his entire sentence. He was released on 12th October, 1984 instead of 13th February, 1984. His case is that he was therefore held unlawfully in pre-trial custody for 74 days and deprived 8 months' remission of sentence.

36. The 5th Petitioner's case is supported by a copy of the Certificate of Service in Kenya Armed Forces dated 12th September, 1979; a copy of his educational attainments, trade qualifications and medals dated 23rd March, 1983; a copy of the days in service tabulated from 12th September, 1979 to 1st August, 1982; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 23rd March, 1984; and a copy of the Certificate of Discharge dated 23rd March, 1984.

37. As for the 6th Petitioner, his case is that he was enlisted in KAF on 3rd March, 1978 under Service No. 023184 and rose to the rank of Senior Private. He was posted to KAF Headquarters, Eastleigh Air base in Nairobi where he was further trained in driving trade and attained Driver Group "A" Grade I. He avers that on 1st August, 1982 while asleep at his house at Dandora Phase II he was woken up by neighbours and informed of a coup. He immediately went to the Air base where he was commanded to dress up in uniform and await further instructions. At 3.00pm Kenya Army officers stormed the Air base and later escorted them to Kamiti Maximum Security Prison.

38. It is the 6th Petitioner's averment that on or about 15th October, 1982 he was transferred to Naivasha Security Prison with other KAF officers. His evidence is that due to torture and threats, he signed statements issued by the interrogating officers from Kenya Army and Criminal Investigation Department. On 31st December, 1982, he was charged before the Court Martial where he was convicted and imprisoned for 3 years. He avers that he served his sentence, which was reduced to 1 year by the Military Review Board, at Shimo La Tewa Prison, Mombasa and was released on 31st December, 1983. The 6th Petitioner's testimony is that he was unlawfully detained for 153 days before being charged.

39. The 6th Petitioner supported his case with a copy of a Certificate of Service in Kenya Armed Forces dated 3rd March, 1978; a copy of his educational attainments, trade qualifications and medals dated 6th January, 1984; a copy of a document tabulating the days in service; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 6th January, 1984; and a copy of a Certificate of Discharge dated 6th January, 1984.

40. On his part, the 7th Petitioner avers that he was enlisted in KAF on 12th September, 1979 under Service No. 024366 and was posted to Laikipia KAF Air base, Nanyuki where he was trained as a Driver Grade II and subsequently attained the rank of Private. He avers on 17th July, 1982 he applied for compassionate leave to go home to Mombasa to bury his daughter. He returned to Air base on 31st July, 1982 and on 1st August, 1982 at around 6.00 am he was startled by unusual movements and noise. He left the room to find out what was happening only to be ordered to dress up in uniform, be armed and await instructions as the Government had already been overthrown by the armed forces.

41. According to the 7th Petitioner at around 4.00 pm Kenya Army officers stormed the Air base and ordered them to surrender, disarmed them, stripped them half-naked, and detained them in one of the aircraft hangers overnight. The next day they were directed to crawl on concrete to a hot tarmac runway where they were ordered to record statements. On 6th August, 1982 he was escorted to Kamiti Maximum Security Prison where he stayed until the end August 1982 before being transferred to Naivasha Security Prison.

42. The 7th Petitioner testified that he was charged before the Court Martial on 23rd December, 1982 where he pleaded guilty on the understanding that he would receive a lesser sentence. He was thereafter convicted and imprisoned for 3 years. He served his term at Nyeri G. K. Prison and although he appealed to the High Court he never got to know of the outcome of the appeal. He was finally released on 23rd December, 1984. His case is that he was detained for 145 days in pre-trial custody.

43. The 7th Petitioner supported his case with a copy of final assessment of conduct and character on leaving service dated 11th June, 1984.

44. The 8th Petitioner's case is that he was enlisted in KAF on 2nd September, 1977 under Service No. 022807 and posted to Nanyuki Air base, where he was trained as an Air Field Police Officer and attained Grade I. Thereafter he to the rank of Senior Private. He avers that on 1st August, 1982 at around 6.30 am he woke up to the starling news of a coup. He dressed and proceeded to the Mess. He stayed in the Air base waiting for further instructions until 4.00 pm when 1KR officers stormed the Air base. In the midst of the confusion he managed to escape and he went and took cover outside the Air base. He went back to the Air base the following day after they were asked to report to their stations through a VoK radio announcement. Upon arrival at the gate, army soldiers pounced on him, viciously assaulted him, stripped him naked and frog-marched on his knees on concrete paths to a holding hall which was overcrowded with injured, bleeding and groaning KAF officers crying for medical attention.

45. It is the 8th Petitioner's averment that on 3rd August, 1982 he was escorted to Nyeri G. K. Prison where he stayed for 14 days before being transferred to Kamiti Medium Prison. His testimony is that he was denied food and drinking water for the first two days as prison wardens claimed that the prison did not have any ration for the soldiers. Further, that they were detained in a filthy, lice infested,

overcrowded cell with a pungent smell with no lighting and beddings.

46. The 8th Petitioner avers that after about 3 months he was transferred to Naivasha Security Prison where he was forced to endure beatings, torture and inhuman treatment. Afraid for his life he agreed to sign the statements issued by his interrogators and he was presented before Court Martial on 16th December, 1982 where he pleaded guilty and was imprisoned for 2 years. He served this term at Shimo La Tewa, Mombasa. The sentence was reduced to 1 year by the Military Review Board and he was released on 16th December, 1983. According to the 8th Petitioner he was unlawfully detained for 138 days prior to his trial.

47. The 8th Petitioner's case is supported by a copy of the Certificate of Service in Kenya Armed Forces dated 2nd September, 1977; a copy of his educational attainments, trade qualifications and medals dated 17th February, 1984; a copy of the days in service tabulated from 2nd September, 1977 to 1st August, 1982; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 17th February, 1984; and a copy of the Certificate of Discharge dated 17th February, 1984.

48. The 9th Petitioner avers that he was enlisted in KAF on 24th April, 1980 under Service No. 024842. After training he was posted to KAF Headquarters at Eastleigh Air base, Nairobi where he was further trained as a Cook Grade II and rose to the rank of Senior Private. He avers that on 1st August, 1982 at around 7. 00 am he woke up to commotion in the Air base. They were ordered to dress up in uniform and issued with firearms and ammunition. They were ordered into a KAF truck and dropped at the City Centre along Uhuru Highway. While in the City Centre they were ordered to patrol as they wait for further orders. At around 12.00 pm while still on patrol around Nyayo Stadium, Kenya Army soldiers arrived, arrested them and escorted them to Lang'ata Army Barracks.

49. The 9th Petitioner deposes that they were detained in the guardroom until the evening of 2nd August, 1982 when they were escorted to Kamiti Maximum Security Prison where he stayed until early October from where he was transferred to Naivasha Security Prison alongside other officers. His averment is that due to coercion and threats he was forced to sign a statement before the interrogators and arraigned in the Court Martial on 6th December, 1982. He pleaded guilty and was convicted and sentenced to 8 years in prison. While serving sentence at Shimo La Tewa, Mombasa, he appealed against his conviction to the High Court and the appeal was partially successful as his sentence was reduced to 5 years. He was released on 5th December, 1985. His case is that he was unlawfully held in pre-trial custody for 122 days.

50. The 9th Petitioner supported his case with a copy of the Certificate of Service in Kenya Armed Forces dated 24th April, 1980; a copy of his educational attainments, trade qualifications and medals dated 5th August, 1985; a copy of the days in service tabulated from 24th April, 1980 to 1st August, 1982; a copy of a cancelled certificate of transfer to the reserve; a copy of final assessment of conduct and character on leaving service dated 5th August, 1985; and a copy of the Certificate of Discharge dated 5th August, 1985.

51. The 10th Petitioner avers that he was enlisted in KAF on 2nd July, 1979 under Service No. 021908 and posted to Nanyuki Air base where he was further trained as an Air Field Police Officer and rose to the rank of a Senior Private. He avers on that on 1st August, 1982 at around 3.00 am was woken up by the sound of excited shouts by soldiers in the base. They dressed in uniform and were directed by their seniors to arm themselves and await further instructions. The station was taken over by 1KR soldiers at around 4.00 pm and they were arrested and brutalized. Later in the day he was escorted with others to Nyeri G. K. Prison where he remained for 3 days before being transferred to Kamiti Medium Prison. At the end of September 1982 he was transferred to Naivasha Security Prison where he was detained for 2 months before being presented to the Court Martial on 6th December, 1982. He pleaded guilty as advised by counsel and was convicted and sentenced to imprisonment for 1 year at Shimo Law Tewa, Mombasa. His sentence was reduced by the Military Review Board to 6 months and he was subsequently released on 1st June, 1983. He says that he was in unlawful pre-trial detention for 127 days.

52. The 10th Petitioner's case is supported by a copy of a Police Abstract form dated 20th September, 2011 confirming the loss of his Certificate of Service in Kenya Armed Forces.

53. The respondents opposed the petition through a replying affidavit sworn by L. T. Colonel Joseph Karbuali Kosen on 5th December, 2014. The respondents denied the averments of the petitioners stating that the 1st and 3rd petitioners did not serve in the Kenya Armed Forces; that the arrest of the petitioners was not premised on their service in the armed forces; that the petitioners' allegation of violation of fundamental rights is not true; that the claims on brutal arrest, beatings, torture, inhuman treatment, unlawful detention, conviction and sentencing is not true; that the petitioners' alleged constant transfer from one prison to another is not true; and that the petitioners' allegation of violation of fundamental rights and freedoms under sections 70(a), 71(1), 72(3), 73(1), 74(1) and 77 of the repealed Constitution is not true.

54. It is the respondents' averment that if at all the petitioners were arrested then the arrest was done lawfully by the State security organs for their involvement in the 1st August, 1982 coup. Additionally, they aver that the military had nothing to do with the alleged tribulations, mistreatment and suffering of the petitioners while in civil prisons. It is also their averment that the repealed Constitution limited the rights of members of the armed forces under Section 86(4) meaning that the rights of the petitioners were not absolute. It is averred that the respondents had no knowledge that the 2nd to 5th petitioners were not granted remission of their sentences and are thus not responsible as the petitioners were not held in military custody.

55. It is further deposed that the 2nd Petitioner's action of arming himself with a self-loading rifle, firing four rounds of ammunition, looting and patrolling the streets was an indication of his participation in the coup. According to the respondents, the 2nd, 4th, 5th, 6th, 7th, 8th, 9th and 10th petitioners' actions of arming themselves with self-loading rifles indicated their participation in the coup. The respondents deny coercing confessions from the petitioners and aver that they voluntarily pleaded guilty to mutiny under Section 25(2) of the repealed Armed Forces Act, Cap. 199 and were accordingly convicted and sentenced.

56. As for the dismissal of the petitioners from service, the respondents depose that this was done lawfully in line with sections 102, 103 and 176 of the repealed Kenya Defence Forces Act, Cap. 199. The respondents state that they were not responsible for the alleged economic

tribulations afflicting the petitioners due to their dismissal.

57. The respondents aver that the petitioners' 30-year delay in filing the suit prejudices their defence. They state that the petitioners' claim that they feared filing the suit earlier due to perceived lack of independence of the Judiciary is not believable.

58. The respondents annexed to the replying affidavit copies of records showing the petitioners' service numbers, charges, sentences and remission of sentences.

59. The petitioners, with the exception of the 5th Petitioner, filed further affidavits sworn on 29th May, 2015 in response to the respondents' replying affidavit. They aver that L.T. Colonel Joseph Karbuali Kosen was not present when the events which are the subject of these proceedings occurred. The respondents' averment that the 3rd Petitioner was not a member of the armed forces was rejected and photographs exhibited showing the 3rd Petitioner in armed forces service. Also exhibited is the 7th Petitioner's passport copy showing that he is a resident of Vienna, Austria.

60. Further documents adduced in contradiction of the respondents' averments are the 1st Petitioner's copy of Aircraft Technician Oath dated 12th May, 1980, a copy of the Advanced Course for Aircraft Technicians list of the class at Israel and Certificate of Technology as a qualified Air Force Technician from 4th July, 1979 to 12th May, 1980, and an examination transcript from the training school signed by the School Commander dated 9th May, 1980.

61. The petitioners filed submissions dated 3rd February, 2020. In response to the respondents' defence that the petition was time-barred, they argued that although their petition was filed over 30 years after the event they had good reasons for the delayed litigation. According to them, the reasons for the delay in instituting the proceedings were their genuine fear of President Daniel Moi's regime, lack of confidence in an emasculated Judiciary prior to the promulgation of the 2010 Constitution, and lack of income to meet the advocates' legal fees and court fees.

62. The petitioners additionally submitted that there is no limitation of time when it comes to filing suits on enforcement of fundamental freedom and constitutional rights. Further, that the respondents did not demonstrate any prejudice suffered as a result of the delayed filing of the petition. In support of these arguments they relied on the cases of **David Gitau Njau & 9 others v Attorney General [2013] eKLR; Jennifer Muthoni Njoroge & 10 others v Attorney General [2012] eKLR;** and **Peter Mauki Kaijenja & 9 others v Chief of the Kenya Defence Forces & another [2019] eKLR.**

63. As regards the substance of their claims, the petitioners submitted that their brutal arrest, cruel, inhuman, degrading and extreme ill-treatment while in custody, deprivation of basic necessities of life and the extreme, inhuman and degrading conditions in prison, being held *incommunicado* prior to prosecution and in prison violated their fundamental rights and freedoms as provided in sections 70(a), 74(1) and 77 of the repealed Constitution (Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

64. The petitioners' case is that the absence of medical evidence to corroborate the incidents of ill-treatment and torture does not defeat their claims in light of their sworn evidence of the brutalities which was not factually rebutted by the respondents. They add that Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment notes that *'…the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…'* They therefore stress that the absence of medical reports exhibiting injuries does not detract from the fact that torture or ill-treatment occurred.

65. The petitioners further asserted that none of them knew LT. Joseph Karbuali Kosen as he admitted during cross-examination that he joined the armed forces on 3rd August, 1990. It is therefore their case that the respondents' affidavit as sworn by LT. Joseph Karbuali Kosen is not an adequate answer to their positive and detailed assertions of unlawful detention without trial, ill-treatment and torture. This assertion was supported by reference to Articles 4 and 7 of the ICCPR and the cases of **Jennifer Muthoni Njoroge (supra); David Gitau Njau (supra);** and **Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another [2017] eKLR.**

66. The petitioners submit that the act of being detained *incommunicado* prior to being released or tried for periods ranging from 74 to 376 days was unlawful, illegal and in violation of their rights under sections 70(a), 73(1), 74(1) and 77 of the repealed Constitution (Articles 27(1), 28, 29(c)&(d) and 30(1) of the current Constitution) and Articles 7 and 9(3) of the ICCPR.

67. It is submitted that even during the State of Emergency during the colonial days, failure to act lawfully and uphold the Constitution while detaining persons was frowned upon as seen in the Court of Appeal case of **Njuguna s/o Kimani & 3 others v R [1954] 21 EACA 316.** They contend that the need to act lawfully and in compliance with the Constitution also applies to the armed forces. It is the petitioners' case that the respondents in their replying affidavit did not offer any explanation for their long and unlawful pre-trial detention but rather justified the actions by referring to Section 86(4) of the repealed Constitution. According to the petitioners, the issue of unexplained long pre-trial detention was addressed in the cases of **David Gitau Njau (supra); Peter M. Kariuki v Attorney General [2014] eKLR; Peter Tonny Wambua & 17 others v Attorney General [2017] eKLR.** The petitioners therefore urged that by keeping them in detention *incommunicado* without trial, the respondents had violated their rights to personal liberty, human dignity and this amounted to cruel, inhuman and/or degrading treatment and failure to accord them the due protection of the law as required by Articles 7 and 9 of the ICCPR.

68. The petitioners assert that the denial of sentence remission, as provided in Section 46 of the Prisons Act, Cap. 90, to the 2nd to 5th petitioners for periods ranging between 8 and 16 months amounted to unlawful and illegal detention hence a violation of their rights as was enshrined in sections 70(a), 73(1) and 77 of the repealed Constitution (Articles 27(1), 29(a) and 30(1) of the Constitution of Kenya, 2010) and Articles 8(3) and 9(1) of the ICCPR.

69. On the 1st Respondent's claim that it was not aware that the petitioners were denied sentence remission by the civilian authorities, the

petitioners pointed out that the 2nd Respondent did not make any response to this issue on behalf of the prison authorities. The petitioners stressed that deprivation of remission of sentence constituted a violation of the right to personal freedom or liberty under Section 72 of the former Constitution thereby necessitating compensation as a remedy. It is further submitted that rules 95(1), 96 and 97 of the Prison Rules provides that a prisoner entitled to remission of sentence is entitled to be released after completing his sentence less any remission earned and if forfeited be duly informed by the officer in charge of such a forfeiture. On the right to remission, the petitioners relied on the decisions in the cases of **David Oloo Onyango v Attorney General [1987] eKLR;** and **Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR.**

70. In regard to their dismissal from service, the petitioners submit that the dismissal of the 1st Petitioner from the service of the armed forces was unlawful. Further, that the dismissal from service of the 2nd to 10th petitioners was vitiated by the unlawful pleas of guilty exhorted at the courts-martial due to the severe torture inflicted in the course of their unlawful detention and violation of their rights as guaranteed under sections 70(a), 71(1) and 74(1) of the repealed Constitution (Articles 26(1)&(3), 28 and 29(f) of the Constitution of Kenya, 2010), Article 6(1) of the ICCPR and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

71. The petitioners submit that from the evidence adduced, the 1st Petitioner was never charged with any offence in a court martial or any court but was nevertheless after release dismissed from service without any lawful cause. Further, that he was never paid any terminal or redundancy dues. As for the 2nd to 10th petitioners, it is submitted that although Section 102(6) of the Armed Forces Act provides that the conviction of an officer can lead to discharge from service, the conviction was a result of coerced pleas induced by the severe torture. It is the petitioners' case that as a result of their dismissal their professional careers came to an end and they were not able to secure other jobs thereby relying on help from their families and well-wishers.

72. It is asserted by the petitioners that the right to life not only encompasses the prohibition against unlawful taking of life but also deprivation of rights that facilitate the means through which a person's life is sustained in dignity. They supported this argument by citing the South African case of **Takawira Biggie v Minister of Police, Case No. A3039/2011.**

73. In regard to their prayer for compensation, the petitioners point out that they seek general, exemplary, and aggravated or punitive damages consequential to the violations of their fundamental rights and freedoms. They submit that they are entitled to a lump sum award of damages for the interrelated violations of their rights against torture, cruel, inhuman and degrading treatment, and unlawful deprivation of liberty, and the rights to human dignity, the protection of law and to livelihood. Reliance was placed on the case of **Jennifer Muthoni Njoroge (supra)** as adopted in the case of **Peter Tonny Wambua (supra).**

74. On the issue of quantum, the petitioners asked the Court to be guided by the cases of **Peter M. Kariuki (supra); David Gitau Njau (supra); Captain (RTD) Frank Mbugua Munuku v Kenya Defence Forces & another [2013] eKLR; Denish Gumbe Osire (supra); Peter Tonny Wambua (supra); Peter Mauki Kaijenja (supra)**; and **Johnson Gacheru Ngigi v Inspector General of the National Police Service & Another [2019] eKLR,** and award them lump sum damages ranging between Kshs. 9.5 million and 15 million. In addition, they pray for interest on the monetary awards and costs of the petition.

75. Through their submissions are dated 5th January, 2021 the respondents argue that the petitioners' case is an excellent example of indolence and negligence as they sat on their rights for 32 years from the occurrence of the cause of action in 1982 until 2014 when they filed their petition. They urge that the petition is an afterthought and is only brought as an abuse of the court process as the petitioners' explanations cannot excuse the delay in the institution of the proceedings.

76. Although the respondents concede that there is no limitation of time set for filing constitutional petitions, they contend that in order to protect the right to a fair trial as provided under Article 50 of the Constitution, one should not advertently delay commencement of a suit, such that the other party is compromised in putting forth a plausible defence. Further, that any delay must be explained for the purpose of establishing whether it can be excused. According to the respondents, the burden of establishing that the delay is excusable lies on the party approaching the court after inordinate delay.

77. The respondents consequently submit that there are no perceptible reasons offered by the petitioners to merit a delay of 32 years. The petitioners relied on the Court of Appeal decisions in the cases of **Daniel Kibet Mutai & 9 Others v Attorney General, [2019] eKLR;** and **Wellington Nzioka Kioko v Attorney General [2018] eKLR** in support of their assertion that courts will dismiss any case brought after unexplained inordinate delay even if it seeks to remedy violation of constitutional rights and fundamental freedoms.

78. The respondents further submit that the unfathomable advertent delay disadvantaged them in putting up a more plausible defence. According to the respondents, their case was prejudiced by the fact that the courts-martial proceedings were destroyed pursuant to Section 114 of the repealed Armed Forces Act and Rule 97 of the Armed Forces Rules of Procedure. Further, that members of the Kenya Armed Forces who could have been witnesses of the events of the 1982 attempted coup are either retired or deceased.

79. The respondents urged that in the spirit of Article 50 of the Constitution, no party should be subjected to hardships, especially from the opposite party, when litigating on a matter. The respondents contend that delayed institution of claims beats the principle of fair trial and defeats the ends of justice. The respondents state that the position they have adopted is affirmed by numerous decisions including **Hezron Ndarera Onchiri v Attorney General [2020] eKLR; Stanley Waweru Kariuki v Attorney General, Petition No. 1376 of 2003; Harun Thungu Wakaba v Attorney General, Nairobi Miscellaneous Application No. 1411 of 2004; Odour Ongwen & 20 others v Attorney General, Petition No. 777 of 2008; Gilbert Guantai Mukindia v Attorney General [2019] eKLR; Rawal v Rawal [1990) KLR 275; Abraham Kaisha Kanzika alias Moses Savala Keya T/A Kapco Machinery Services and Milano Investments Limited v Governor Central Bank of Kenya and 2 others [2006) eKLR; James Kanyiita v Attorney General & another [2013] eKLR; Alphonse Kipkemoi Somongi v Attorney General [2019] eKLR;** and **Monica Wangu Wamwere v Attorney General [2019] eKLR.**

80. Turning to the substantive issues raised in the petition, the respondents contend that the petitioners have totally failed to prove the allegations of violation of their fundamental rights and freedoms. The respondents contend that the allegations of torture, inhuman and

degrading treatment are merely enumerated. According to the respondents, the petitioners have failed through their petition, supporting affidavits and oral testimony to demonstrate when, how and who allegedly violated their fundamental rights and freedoms.

81. The respondents state that allegation of torture and the resultant harm, was never corroborated by medical evidence. They further contend that the petitioners failed to tender adequate evidence to prove that they were tortured and treated inhumanely and degradingly. The respondents submit that the petitioners did not point out the specific members of the armed forces who allegedly violated their fundamental rights and freedoms.

82. Turning to the specific cases of the petitioners, the respondents point to the 3rd Petitioner as testifying that he was beaten by prison warders and not military personnel. It is stated that the 6th Petitioner testified that he was tortured at a police station while the 10th Petitioner claimed he did not know who arrested him. It is said that the 5th Petitioner testified that he did not know who tortured him. It is the respondents' case therefore that the petitioners have not proved any wrongdoing on their part. This argument is supported by reference to the decisions in **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** and **Susan Mumbi v Kefala Grebedhin, Nairobi HCCC No. 332 of 1993.**

83. The respondents contend that the petitioners failed to discharge the burden of proof on their claims of being subjected to torture by being held in extreme harsh and inhuman conditions during confinement at various prisons and military custody for periods ranging between 74 and 376 days. In support of the submission, reliance is placed on the cases of **Monica Wangu Wamwere v Attorney General [2016] eKLR; Robert Njeru v Attorney General [2014] eKLR;** and **John Cheruiyot Rono v Attorney General, Petition No. 536 of 2015.**

84. The respondents submitted that the petitioners were rightly arrested on reasonable suspicion of having participated in the attempted 1982 coup and that being members of the Kenya Armed Forces they were subjected to the repealed Armed Forces Act and tried by lawfully constituted courts-martial as was provided for in Part VIII of the Act. The respondents submit that the petitioners' allegation of coercion to plead guilty and being misled by advocates assigned to them to plead guilty in exchange of reduced sentences cannot stand as the said attorneys were not identified and called to testify in this matter. Further, that from the petitioners' pleadings and oral testimony, they admitted that they were tried, entered pleas of guilty and were thereafter sentenced to imprisonment.

85. The respondents further submit that the petitioners were informed of their right to appeal but chose not to exercise the said right. It is noted that although the 4th and 7th petitioners in their testimonies claimed to have appealed their sentences they did not provide evidence of such appeals. They pointed out that the 9th Petitioner appealed and although his sentence was reduced from 8 years to 5 years, the conviction was not set aside. According to the respondents, the rest of the petitioners saw it right to serve their full terms in prison and thus acquiesced to the whole process of their detention through to their trials, convictions and sentencing. It is additionally the respondents' submission that the committee appointed to review the findings of the courts-martial did not quash the convictions of the concerned petitioners but only reduced their sentences. It is submitted that this only goes to prove the petitioners' arrests, detentions, trials, convictions and sentences were lawful.

86. On the issue of the dismissal of the petitioners from service, the respondents submit that their discharge was lawful as per Section 103 of the repealed Armed Forces Act which provided for various sentences and punishments for service personnel including dismissal from service. Further, that Section l76(g) of the repealed law empowered the competent service authority to discharge service members if for any reason the member's services were no longer required. It is therefore the respondents' position that the petitioners were discharged procedurally, fairly and in strict adherence to the law.

87. It is additionally the respondents' contention that the issue of unlawful dismissal as raised by the petitioners fall in the jurisdiction of the Employment and Labour Relations Court and the best forum to address it is the said Court. The respondents assert that the petitioners knew very well that their claim could not have been entertained by the Employment and Labour Relations Court because of the doctrine of limitation of actions and therefore decided to bring the matter as a constitutional petition.

88. The respondents submit that the petitioners failed to discharge the onus to prove the allegations that they were unlawfully detained as they did not adduce any evidence or supporting documents particularizing the details of their alleged unlawful detention. It is therefore urged that the as was held in the cases of **Lt. Col. Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR; Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154;** and **Koigi Wamwere v Attorney General [2012] eKLR,** the petitioners' case should fail as it is unsupported, unverified and uncorroborated.

89. The petitioners responded to the respondents' submissions through supplementary submissions dated 4th March, 2021. The petitioners reiterated their position on the question of limitation of actions, adding that courts have on several occasions held that demands of transitional injustice require vindication of past injustices occasioned by violation of fundamental rights. This statement was supported by reference to the case of **Ziporah Seroney & 5 others v Attorney General [2020] eKLR**.

90. The petitioners reject the respondents' assertion that this is an appeal from the courts-martial and submit that all they seek is the enforcement of their fundamental rights through declaratory orders and damages.

91. On the claim that they had failed to prove illegal detention and inhuman treatment in prison, the petitioners reiterate their contention that their averments were not denied by the respondents in their replying affidavit and the burden of proof rested on them to show the detention was constitutionally justifiable. In support they cited the cases of **Salim Awadh Salim & 10 others v Commissioner of Police & 3 others [2013] eKLR** and **Khanyile v Minister of Police, South Guanteng High Court, Case No.3 3478/11**.

92. Lastly, the petitioners, relying on the decision in **Peter Tonney Wambua & 17 others v Attorney General [2017] eKLR** reject the respondents' claim that this is a labour dispute and submit that the petition does not seek any employment relief but is premised on violation of fundamental rights and freedoms.

93. I have perused the pleadings and submissions of the parties and in my view that the issues for determination are:

a) Whether there was inordinate delay in filing the petition;

b) Whether the constitutional rights and fundamental freedoms of the petitioners were violated; and

c) Whether the petitioners are entitled to reliefs sought.

94. An issue has arisen as to whether the filing of this petition over 30 years after the cause of action arose is excusable. The Court of Appeal in **James Kanyiita v Attorney General & another [2019] eKLR** defined inordinate delay as follows:

> **"28…Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time."**

95. The respondents in cases of this nature usually raise the defence of delayed litigation. The law on the limitation of time in petitions alleging violation of constitutional rights and fundamental freedoms is now settled. The law is as was stated by the Court of Appeal in **James Kanyiita v Attorney General & another [2019] eKLR** as follows:

> **"31. In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi –v- The National Police Service [2017] eKLR, where the learned judge correctly expressed:**
>
> **"While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution.""**

96. In **David Gitau Njau & 9 others v Attorney General [2013] eKLR** the law was captured thus:

> **"43. To my mind, I do not know any law or a particular provision of the Repealed Constitution that provided that a claim based on fundamental rights and freedoms has a limitation period within the claims ought to be filed. A claim made under the Constitution is neither a claim in tort nor contract that would necessitate the application of the Limitation of Actions Act, Cap 22 Laws of Kenya. Further, a casual reading of the rules contained under the Legal Notice No. 133 of 2001 (Constitution of Kenya (Protection of Fundamental rights and Freedoms of the individual) Practice and Procedure Rules, 2001 would show that they do not place any limitations on the citizens rights to institute a suit for the redress of violation of fundamental rights and freedoms under Section 84 of the Repealed Constitution. I therefore agree with the reasoning of Hayanga J while determining a preliminary issue in *Dominic Arony Amolo(supra)* that;**
>
> ***"I therefore, think and I so hold that section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act, Cap 22."***
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> **Despite my position on this issue as can be seen above, I strongly believe that I must hereby state that I am not persuaded by the authority of *Peter Ngari Kagume & Others v Attorney General (supra)* cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply in my view did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breaches occurs but for obvious reasons, I am clear in my mind that there is no limitation period imposed by the Repealed Constitution and the rules made thereunder under Section 84 for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case."**

97. The respondents argue that the petitioners' case is an excellent example of indolence and negligence as they sat on their rights for 32 years before filing the petition in 2014. They add that the petitioners' explanations for the delay in filing their claim cannot excuse the delay. According to the respondents, the petition is an afterthought and is therefore an abuse of the court process. Moreover, the respondents submitted that the unfathomable advertent delay disadvantaged them in putting up a more plausible defence.

98. The respondents argue that their defence is prejudiced by the fact that the courts-martial proceedings were destroyed pursuant to Section 114 of the repealed Armed Forces Act and Rule 97 of the Armed Forces Rules of Procedure. It is additionally their case that members of the defunct Kenya Armed Forces who could have been witnesses of the events of the 1982 attempted coup are either retired or deceased.

99. The petitioners aver that the reasons for the delayed litigation are that their torture and unlawful detention left them completely traumatized by the government's power under the reign of President Daniel Arap Moi to even contemplate filing any suit for the

constitutional violations during the President's tenure; that even with change of government in 2002 they did not have confidence that the courts were sufficiently independent to dispense justice; that it was only upon the promulgation of the current Constitution that they were assured Kenya had changed and they would be able to access justice; and that they had no income and it took them long to raise the costs of filing the suit.

100. The question is whether the reasons advanced by the petitioners are sufficient excuse for the delay in filing the petition. In answering this question, I find guidance from a wealth of cases that have set out the principles and factors to be considered in determining whether the delay was justified.

101. In the case of **James Kanyiita Nderitu v Attorney General & another [2019] eKLR,** the Court of Appeal opined that the promulgation of the 2010 Constitution was not sufficient to explain away delayed filing of a constitutional claim. In that regard the Court stated that:

> **"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.**
>
> **35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay. In Josephat Ndirangu vs. Henkel Chemicals (EA) Ltd [2013] eKLR, the trial court correctly held that litigants should not avoid the provisions of an Act by going behind statute and seeking to rely directly on constitutional provisions. The primary legislation should not be circumvented."**

102. In the case of **Wellington Nzioka Kioko v Attorney General [2018] eKLR,** the Court of Appeal once again addressed the issue of delayed prosecution of constitutional claims as follows:

> **"On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, She considered several persuasive decisions of the High Court for instance Wamahiu Kihoro Wambugu vs A.G .Petition No. 468 of 2014; Mugo Theuri vs. A.G, Ochieng' Kenneth Kogutu vs Kenyatta University and 2 others, High Court Petition No. 306 of 2012, and several others. 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 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."**

103. The High Court has in various decisions laid down the factors to be taken into account in determining whether the delay in instituting a constitutional claim is excusable. In the case of **Joseph Migere Onoo v Attorney General [2015] eKLR** the Court noted as follows:

> **"39. The principle that emerges from the cases cited above is that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence.**
>
> **40. In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this."**

104. In the case **Hezron Ndarera Onchiri v Attorney General [2020] eKLR**, I observed as follows:

> **"13. It should be observed from the outset that the Petitioner has not offered any explanation in his pleadings for the delay in filing the petition. His attempt to do so through submissions adds no value because submissions are not pleadings. See – Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.**
>
> **14. Even assuming that the explanation offered in the submissions was to be accepted by the court, I would still find the explanation unconvincing. As correctly submitted by the Respondent, the late President Moi left power in 2003 and this petition was filed thirteen years later. The democratic space was greatly expanded after the promulgation of the 2010 Constitution. The Petitioner did not explain why it took him over five years from 2010 to file his petition.**

15…

16. An unexplained delay in filing a constitutional petition can be a ground for the dismissal of the petition. A plethora of authorities speak to that point. Apart from the authorities cited by the Respondent, other decisions on the issue are Lt. Col. Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR; Kanyitta Nderitu v Attorney General & another [2013] eKLR; Joseph Migere Onoo v Attorney General [2015] eKLR; and Nairobi High Court Petition No. 16 of 2018 Alphonse Kipkemoi Somongi v The Hon. Attorney General.

17. In the circumstances of this case, I find myself in agreement with the Respondent that there has been unexplained inordinate delay in this matter thereby denying the Respondent an opportunity to put up a plausible defence."

105. It is important to further note that in determining whether the delay in instituting the constitutional petition is excusable, the courts have to take into account the facts and circumstances of each case. It is thus necessary for the courts to appreciate the delicate balance that is required in considering inordinate delay and the very real violation of the rights of the petitioners. The importance of providing justice to those whose rights have been violated by the State was stressed in **Eluid Wefwafwa Luucho & 3 others v Attorney General [2017] eKLR** as follows:

"28. The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defense and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice discussed below.

29. My understanding of the jurisprudence on the issue of limitation is that courts will be reluctant to shut out a litigant on account of limitation of time unless there are obvious reasons to do so. In considering such delays, the court cannot avoid taking judicial notice of the immense difficulties which prevailed at the period of the alleged violations making it impossible for aggrieved persons to file cases of this nature against the government. In fact it is the promulgation of the constitution of Kenya 2010 that opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature.

30. These petitions were filed on 7th April 2016, almost 7 years after the promulgation of the 2010 constitution. I appreciate that 7 years is a long period of time and the delay has not been explained, but considering the prevailing political situation prior to the promulgation of the 2010 constitution which made it impossible for victims to file cases of this nature in court and bearing in mind the dictates of transitional justice, and in particular the need to uphold and strengthen the rule of law, and to hold the perpetrators of violations of human rights accountable, and the need to provide victims with compensation, and the need to effectuate institutional reform, I find that it would be unfair to uphold the defense of limitation in the circumstances of the present case."

[Citations omitted]

106. A similar position was taken in the case of **Gerald Juma Gichohi & 9 others v Attorney General [2015] eKLR** where the Court observed that:

"[T]he history of this Country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breathe, it was also the Petitioners' claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the Country's future….

[It] is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay, the price for its historical faults and I must also agree with the Petitioners submission that the instant Petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the Courts for doing justice, albeit belatedly because delayed justice is indeed justice denied."

107. In **Safepak Limited v Henry Wambega & 11 others [2019] eKLR** the Court of Appeal considered the question of time limits in seeking redress for violation of constitutional rights and fundamental freedoms and held that:

"In *Wellington Nzioka Kioko vs. Attorney General [2018] eKLR*, this Court, in an appeal arising from a decision of the High Court on a petition for a declaration that the fundamental rights and freedoms of the petitioner therein had been violated, upheld the High Court that institution of a claim over 30 years after the cause of action had arisen constituted inordinate delay. The Court expressed that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay.

In *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* (above), this Court also addressed the question of limitation in the context of constitutional petitions. After reviewing past decisions on the subject, the Court concluded that there is no time limit for filing of a constitutional petition and that the period of limitation in the Limitation of Actions Act does not apply to violation of rights and freedoms guaranteed under the Constitution. The Court stated:

"Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).

In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits…."

108. The Court of Appeal proceeded to summarize the factors to be taken into account thus:

"Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done."

109. In **Zipporah Seroney & 5 others v Attorney General [2020] eKLR,** I stated my understanding of the law on the issue of delayed prosecution of constitutional claims in the Kenyan context as follows:

"57. My understanding of the law as stated in the cited cases is that there is no time limit for the institution of claims touching on violation of constitutional rights and fundamental freedoms. However, where no plausible reason is offered for the delay and if the delay is inordinate that it is likely to prejudice the trial of the claim due to for instance unavailability of witnesses, then the court will be inclined to reject the suit for being time barred. Additionally, it is the solemn duty of the courts in the post-2010 constitutional epoch to address historical injustices visited upon the people of Kenya by those in power when the democratic space was constrained.

58. …The petition has been brought about forty-five years after the deceased was allegedly arrested and detained. It is, however, appreciated that the window for redressing violation of rights was provided when the 2010 Constitution came into force. The petition was filed in 2013 about three years after the promulgation of the Constitution of Kenya, 2010. There was therefore no inordinate delay in the filing of the petition. In the circumstances of this case, it is not too late to peer into the past and correct the injustices that may have occurred in our history. I therefore reject the Respondent's assertion that this petition is time-barred."

110. From the pleadings on record, this Court is able to discern that other than the issue of fear of the President Moi's government and the lack of confidence in the judicial system pre-2010, the petitioners state that they did not have the financial resources to mount a claim in respect of the violated rights.

111. Two of the reasons given by the petitioners for the delayed prosecution of their claims have not received favour with the Court of Appeal in some of the cases already cited in this judgement. In **Wellington Nzioka Kioko v Attorney General [2018] eKLR,** the petitioner's claim that the lack of financial wherewithal led to the delay in the institution of the petition was rejected as follows:

"The reasons given for not filing the petition with promptitude were that he was poor, he did not have parents, and that his family depended on him. Those in our view are not plausible reasons. The appellant could have gone to court and applied to file the claim as a pauper. There is no evidence that he tried to pursue that route."

112. The fear factor was dismissed in **Monica Wangu Wamwere v Attorney General [2019] eKLR** thus:

"We also note that the Petition was filed 20 years from when the last alleged violation took place. The appellant stated that the reason for the delay was that she did not have faith in the Judiciary under the old constitutional disposition and especially under the Moi regime. The learned Judge took issue with the explanation given for the delay by the appellant. He noted that since 2003 after end of the Moi era, many aggrieved persons approached the courts seeking redress for their constitutional violations. We dare say, that the appellant's famous son Koigi Wamwere filed his case in 2008, before the promulgation of the current Constitution. In any case, the said promulgation took place in 2010 yet the appellant filed her Petition in 2013 and that delay has not and indeed cannot be sufficiently explained. We have no difficulty agreeing with the learned Judge that the delay was inordinate and cannot be cured. It is apparent that the petition was no more than a speculative afterthought."

113. With utmost respect to the Court of Appeal, I am of the humble view that the lack of confidence in the Kenyan Judiciary pre-2010 is a good enough reason for entertaining constitutional petitions that were filed immediately after the promulgation of the 2010 Constitution. When the petitioners claim that they had no confidence on the impartiality of the courts and there is no rebuttal of that averment then there is no reason why they should not be believed. The fact that the Kenyan people had lost confidence in the Kenyan Judiciary was affirmed when they included in the 2010 Constitution the requirement for judges and judicial officers to be vetted before they could serve under the new constitutional dispensation. It was the duty of the respondents, which they failed to discharge, to dismantle the petitioners' case by demonstrating that the pre-2010 Judiciary was indeed capable of adjudicating matters like those of the petitioners. I therefore find the assertion by the petitioners that they had no confidence that they would receive justice from the courts to be a plausible reason for the delayed institution of their litigation.

114. Other than the reasons provided for the delay, the Court is required to determine whether the respondents have been prejudiced by the

delayed prosecution of the claim. A perusal of the respondents' replying affidavit and the oral testimony does not disclose any averment that the respondents would suffer any prejudice as a result of the institution of the petition late in the day. The records attached to the replying affidavit shows the existence of material evidence that would enable the respondents to defend the petitioners' claim. The documents disclose the petitioners' service numbers, the charges, the sentences and the remission on the sentences by the Military Review Board.

115. It is also observed that the respondents only brought up the issue of prejudice in their submissions by claiming that the courts-martial records had been destroyed as required by the law. It is a well-established principle of law that submissions are not pleadings. The question whether the respondents were going to be prejudiced by the delayed filing of the claim is one of fact that ought to have been pleaded and proved. Persuasive argument to support prejudice includes loss of crucial evidence or witnesses as a result of the delay. Averments by the respondents' witness as to the prejudice suffered as a result of the delayed institution of the proceedings would have granted the petitioners a chance to contest the respondents' evidence by way of cross-examination thus allowing the Court to make the final determination.

116. In light of what I have stated above, I am persuaded by the petitioners that they had good reason for filing their petition over thirty years after their constitutional rights and fundamental freedoms were allegedly violated by the State. In the circumstances of this case, I reject the respondents' argument that the delay in the institution of the proceedings was inordinate and had impaired their ability to mount a defence. I will therefore proceed to consider the merits of the petition.

117. The petitioners claim that their rights to life and security of person were violated by the petitioners. They also contend that the right not to be tortured or subjected to degrading treatment or punishment was also infringed. The petitioners submit that following their arrest between 1st and 4th August, 1982 they were subjected to cruel, inhuman, degrading and extreme ill–treatment while in custody, deprived of basic necessities of life and detained incommunicado for periods ranging between 74 to 376 days before being released or presented before courts-martial. These facts are explicitly detailed in their affidavits.

118. The petitioners submit the actions of the respondents violated their rights to protection from torture and right to security of the person as was guaranteed under sections 70(a), 74 and 77 of the repealed Constitution and Article 7 of the ICCPR. It is additionally their case that these rights are also protected by Articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); Articles 6 and 9 of the ICCPR; and Articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights (Banjul Charter).

119. The respondents on the other hand contend that the petitioners failed to prove the allegations of violation of their fundamental rights as they did not demonstrate when, how and who allegedly violated their rights and fundamental freedoms. Further, that the petitioners' have not provided any documentary evidence such as medical records in support of their averments.

120. It is important to appreciate from the outset that the State cannot escape from its obligation to ensure that the rights enshrined in the Constitution are fully protected. The State has a duty to safeguard against the prevention of enjoyment of such rights. It is the inherent duty of the State to ensure that in conducting arrest, detention, prosecution, sentencing and imprisonment, the rights and fundamental freedoms of the persons involved are secured. Denial of existence of violation of rights is not the best line of defence especially when the facts speak for themselves.

121. In the case of **Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae) [2020] eKLR,** I observed that the State has a duty to protect the rights of its citizens by stating as follows:

> **"110. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8:**
>
> **"The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."**
>
> **111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-State actors. In other words, the State must protect citizens from threats to their rights. I therefore find myself in agreement with the holding in Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR that:**
>
> **"60… the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order..."**
>
> **112. The Human Rights Committee has expounded on the right to life in its General Comment No. 36 on Article 6 of the ICCPR. In paragraph 6 the Committee states that the deprivation of the right to life includes the *"intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission."* Therefore, the State must respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right, and as determined above it must also protect the citizens from the deprivation of the rights by non-State actors."**

122. Section 70(a) of the repealed Constitution provided as follows:

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

(a) life, liberty, security of the person and the protection of the law.

123. Section 74(1) provided that:

No person shall be subject to torture or to inhuman or degrading punishment or other treatment.

124. Section 77(1) stated as follows:

If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

125. The stated rights are the rights which the petitioners were entitled to in 1982. Those rights were also protected by international law. In that regard Article 7 of the ICCPR provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

126. The terms inhuman treatment and degrading punishment were defined in **Samwel Rukenya Mbura & others v Castle Brewing Kenya Limited & another [2006] eKLR** as follows:

"Inhuman treatment is an "action that is barbarous, brutal or cruel" while degrading punishment is "that which brings a person in dishonour or contempt.""

127. The Court in **Silla Muhia Kinyanjui & 2 others v Attorney General [2020] eKLR** observed as follows:

"59. I agree with Petitioners contention, that though the Police were entitled in the course of investigation to arrest, the Petitioners as murder suspects, they had no statutory authority, to torture them while under their custody. The petitioners were arrested nearly 5 years after the alleged murder in 1992, when the police had statutory authority to discharge the Petitioners; but the torture of the Petitioners by the Flying Squad Officers, and denial of their right to communicate with their relatives, friends and advocates after their arrest and their subsequent incarceration pending trial was an infringement of the Petitioners' rights as protected under Section 72(1), 72(3), and 77(1) of the Repealed Constitution, 1969 and Article 29 of the Constitution of Kenya 2010."

128. The Court proceeded to state:

"63. The treatment meted upon the Petitioners herein, qualifies to be a torture as each of them was treated in a cruel or inhuman and degrading manner, while in the hands of the Flying Squad officers. I find that their action to say the least, was not only unjustified but was barbaric, brutal, cruel and degrading.

64. From the contents of the Petitioners affidavits and oral evidence, which was not contested at all by the Respondent, through filing of an affidavit, I am satisfied, the Petitioners have demonstrated through the affidavits and oral evidence, that they were subjected to torture, cruel and degrading treatment contrary to Section 74(1) of the (Repealed) Constitution, which is not permissible nor excusable under any circumstances. I further find that regardless of whatever crimes the Petitioners were suspected of or had purportedly committed, the Petitioners should not have been subjected to torture or inhuman and degrading treatment by Police Officers, as the Petitioners were under the protection of the Constitution not to be subjected to torture or to inhuman or degrading punishment or any other treatment."

129. In the case of **David Gitau Njau & 9 others v Attorney General [2013] eKLR**, the Court while addressing circumstances mirroring those of the instant case held that:

"The Petitioners claimed that immediately upon their arrests, they were stripped naked in public, were made to walk on their knees on concrete floors, whipped with a whip, kicked around, bludgeoned all over their bodies as they were being taunted that they were 'educated rubbish'. They were also moved into custody in military trucks whilst naked and in full view of the public. In the circumstances I find and hold that the Petitioners were subjected to torture, cruel and degrading treatment contrary to Section 74(1) of the former constitution. In doing so, I will quickly dismiss the Respondent's submission that the Petitioners may have been involved in a mutiny; torture is not permissible or excusable under any circumstance."

130. A perusal of the pleadings before this Court reveals the extreme brutalities the petitioners were subjected to. Even though the violations were not supported by medical records, the unrebutted averments of each of the petitioners paint a vivid and believable picture of torture and inhuman and degrading treatment. Medical records would have indeed aided the Court in assessing the appropriate damages. However, the Court cannot close its eyes to the fact that the petitioners could not have accessed treatment having been held *incommunicado* for long periods of time. I am therefore satisfied that the petitioners suffered inhuman treatment as detailed in their affidavits and oral testimonies.

131. The respondents claim that the petitioners were involved in criminal offences during the attempted in 1982. Apart from the 1st Petitioner who was released without charge, the other petitioners were indeed court-martialed, convicted and sentenced upon pleading guilty to various charges. The fact that the petitioners had committed crimes did not throw the Bill of Rights out of the window. I therefore agree with the petitioners that they were subjected to torture and degrading inhuman treatment.

132. The petitioners contend that their right to be charged within a reasonable time by an independent and impartial court established by law was violated by the respondents. The petitioners testified that they were held in pre-trial custody for periods ranging between 74 to 376 days. Except the 1st Petitioner, the other petitioners were court-martialed. The 2nd to 10th petitioners were not presented before the courts-martial within the stipulated constitutional period. They thus claim that their detention was illegal and violated their fundamental rights to life, liberty, security of the person and to have a fair trial within a reasonable time as enshrined in sections 70(a) and 77 of the repealed Constitution.

133. The respondents denied the claims and additionally asserted that the rights of the petitioners were not absolute as the repealed Constitution under Section 86(4) limited the rights of members of the armed forces.

134. A similar defence was raised in **David Gitau Njau & 9 others v Attorney General [2013] eKLR** and the Court addressed the issue as follows:

> **"The Respondent in what appears to be his defence and explanation for not arraigning the Petitioners in court within the stipulated time, claimed that the Petitioners had confessed their participation in the failed 1982 coup attempt and as such the measures and force used upon them was reasonably justifiable as the Petitioners participated in a mutiny…**
>
> **To my mind, this explanation cannot hold water and flies right out of the window for simple reasons that even if Section 86(2) and (3) is with regard to members of the disciplined forces as were the Petitioners, that provision applies only in instances where such persons are being disciplined in accordance with the disciplinary law of the force as established under the Armed Forces Act, (Cap 199) (now repealed) and in effect means that a person could not allege a violation of Chapter 5 of the Bill of Rights save for Section 71, 73 and 74 which a court martial cannot derogate from; while being disciplined in accordance with Cap 199 aforesaid."**

135. The Court proceeded to cite the provisions of the Armed Forces Act dealing with arrests and concluded that:

> **"As it can be seen, this Section provides that a person arrested for suspicion of having committed an offence under the Act shall be investigated without unnecessary delay. The Respondent thus cannot have any valid answer as to why the Petitioners were not arraigned in any Court within the time stipulated by law."**

136. The Court of Appeal on the issue of reasonable time in the case of **Albanus Mwasia Mutua v Republic [2006] eKLR** held as follows:

> **"At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place… In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time."**

137. What can be understood from the cited decisions is that it is quite clear that holding the petitioners for long periods of time before release or trial fell short of the *'reasonable time'* stipulation in the repealed Constitution. This action was unlawful and a clear violation of sections 70(a) and 77 of the repealed Constitution.

138. As would be reasonably expected, the burden of proving that the person arrested has been brought before a court as soon as is reasonably practicable, rests upon the person alleging that the constitutional provisions were adhered to. The respondents have failed to discharge that duty. In a nutshell, I find that the petitioners' right to life, liberty, security of the person and the protection of the law, right to freedom from torture or inhuman or degrading punishment or other treatment and right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law was infringed by the respondents in contravention of the national, regional and international law.

139. Some of the petitioners also contend that their right to remission of sentence was violated by the respondents. The 2nd to 5th petitioners submit that they served unwarranted imprisonment for periods ranging between 8 and 16 months as these are the periods for which their sentences should have been reduced as provided by Section 46 of the Prisons Act, Cap. 90. Further, that the failure to remit their sentences amounted to illegal detention and thus violated their rights under sections 70(a), 73(1) and 77 of the repealed Constitution and Articles 8(3) and 9(1) of the ICCPR.

140. The 1st Respondent denied knowledge of the deprivation of the 2nd to 5th petitioners' right to remission of sentence. However, the 2nd Respondent did not make any response on this issue.

141. Section 46 of the Prisons Act provides as follows:

> **46. (1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a**

period exceeding one month, may by industry and good conduct earn a remission of one third of their sentence or sentences:

Provided that in no case shall—

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) or 297(1) of the Penal Code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1) of this section, each prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period—

(a) spent in hospital through his own fault or while malingering; or

(b) while undergoing confinement as a punishment in a separate cell.

(3A) A prisoner may be deprived of remission—

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Minister for the time being responsible for internal security considers that it is in the interests of public security or public order.

142. On the issue of remission of prison sentence, rules 95(1), 96 and 97 of the Prisons Rules provides as follows:

95. (1) A prisoner shall be entitled to release on the day after he has completed the period of his sentence less any remission which he has earned.

96. The officer in charge shall ensure that the remission system is explained to all prisoners on admission, and, when for any reason remission is forfeited, the officer in charge shall ensure that a prisoner is made fully aware of such forfeiture.

97. A record shall be kept for each prisoner earning remission showing the sentence, the remission allowed and any forfeiture of remission. The earliest possible date of release shall be recorded as well as the latest possible date of discharge.

143. The Court of Appeal in the case of **David Oloo Onyango v Attorney General [1987] eKLR** affirmed that arbitrary deprivation of remission of sentence is a deprivation of personal liberty. The Court opined as follows:

"To summarise and answer the principal substantive point of this appeal I would say the Commissioner erred in law in that he decided to deprive the appellant of his rights without affording him an opportunity to be heard. The Commissioner is required to act fairly towards the appellant. At the very least, the Commissioner ought to do the following acts:

1. To inform the appellant in writing in a language the appellant understands the disciplinary offence he is alleged to have committed and the particulars of the offence.

2. To afford the appellant an opportunity to be heard in person and to fix reasonable time within which the appellant (or an inmate) must submit his written answer to the officer-in-charge of the particular prison for onward transmission to the Commissioner.

3. Thereafter within reasonable time, the Commissioner should inform the appellant (or the inmate concerned) that pursuant to Section 46 (3A) (a) he has directed his mind at the allegation made against the appellant that he requires further reformation and rehabilitation, has considered the grounds for the allegation and the defence of the appellant (or inmate) and has decided to deprive the appellant of all remission granted to him under Section 46 (1) of the Prisons Act, but that he the appellant (or inmate) may petition the Minister in writing, through the Commissioner, to restore the forfeited remission in whole or in part under Sub-section 5 of Section 46."

144. In the case of **Stephen Nderu Njuguna v The Hon. Commissioner of Prisons & another [2011] eKLR,** the Court found the denial of remission of sentence to the plaintiff actionable and held that:

"In this case which the court considered as based on the tort of unlawful extended detention in prison, reference was made to Rule 95 of the Prison Rules on calculation of remission, particularly sub-rule 5.

"95. (1) ……...

(5) Whenever a capital sentence is commuted to a sentence of imprisonment for a term of years, the sentence so commuted shall, for the purpose of remission be deemed to have commenced at the date the sentence of death was passed."

The date of commutation form the death to the prison term of 6½ years was wef. 15.12.99. That is the date that the 1st defendant ought to have considered remission and date of release of the plaintiff. The release probably could even be earlier than 14.6.06. The date the plaintiff held on. Probably it may as well not have been necessary to bring up the sentence regarding the handling charge. But be that as it may.

Having considered the circumstances of this case, the time of the unlawful continued confinement in prison, the plaintiff is awarded a global sum of sh. 2 million plus costs and interest."

145. From the cited authorities, it is apparent that the denial of remission of sentence without lawful justification violates the right to liberty and a person who brings an action is entitled to compensation. As evidenced by the annexures to the respondents' replying affidavit, the sentences of some of the petitioners were reviewed and reduced. The 2nd Respondent did not offer an explanation why the petitioners were forced to serve the original sentences. The 2nd to 5th petitioners ended up serving their full terms resulting in the violation of their rights. I therefore agree with the named petitioners and find that the respondents violated their fundamental rights to liberty, security of the person and protection from being held in slavery.

146. On the issue of discharge from service, the petitioners submit that the discharge of the 1st Petitioner from the service of the armed forces was unlawful and that that of the 2nd to 10th petitioners was vitiated by the unlawful pleas of guilty exhorted at the courts-martial due to the severe torture inflicted in the cause of their unlawful detention. It is their case therefore that their dismissal from service violated their rights as guaranteed in the Constitution and international conventions.

147. The respondents retort that the discharge of the petitioners from service was lawful as per Section 103 of the repealed Armed Forces Act which provided for various sentences and punishments for service personnel including dismissal from service. Further, that Section 176(g) of the Armed Forces Act empowered the competent service authority to discharge service members if for any reason their services were no longer required. The respondents also claimed that this Court has no jurisdiction to handle this particular aspect of the petitioners' claim which arise from a labour dispute hence falling within the jurisdiction of the Employment and Labour Relations Court.

148. The petitioners in their supplementary submissions asserted that the respondents' claim that this is a labour claim is unfounded as they do not seek any prayer in the nature of employment relief since they only claim violation of fundamental rights and freedoms.

149. The respondents' claim that this Court lacks jurisdiction to handle the petitioners' complaint about unlawful dismissal from service would strictly speaking be correct. However, this is a mixed-grill matter and this Court cannot ask the petitioners to go and file a claim in the Employment and Labour Relations Court over this particular issue. The predominant claim before this Court is that of violation of constitutional rights and fundamental freedoms and this Court is therefore entitled to address all the issues arising from the incident that has given rise to these proceedings. Courts usually discourage the splitting of claims and filing of several suits over the same cause of action.

150. I will therefore proceed to consider the petitioners' contention that they were unlawfully dismissed from military service. The petitioners submit that their right to life was violated by violated by termination of their employment which was the means through which they sustained their dignity.

151. Section 176(g) of the repealed Armed Forces Act, Cap. 199 spoke to the discharge of a soldier as follows:

A serviceman may be discharged by the competent service authority at any time during his period of colour service –

(a) if, within two years after the date of his attestation, his commanding officer considers that he is unlikely to be an efficient member of the armed forces; or

(b) for activities or behaviour likely to be prejudicial to the preservation of public security; or

(c) if he is convicted of a civil offence; or

(d) if he is pronounced by a medical officer to be mentally or physically unfit for further service; or

(e) on reduction of establishment; or

(f) at his own request on compassionate grounds; or

(g) if for any reason his services are no longer required; or

(h) if he is granted a commission; or

(i) if he is sentenced by court martial to be dismissed from the armed forces.

152. I have perused the certificates of discharge as produced by the petitioners and the reason for the discharge of each one of them is *'services no longer required.'* A reading of the cited provision reveals that some of the grounds for discharging a soldier from service was if

his/her services were no longer required or for activities or behaviour likely to be prejudicial to the preservation of public security. It is a matter of public notoriety that lives and property were lost as result of the failed coup which was an attempt to take over the Kenyan government through unconstitutional means. It is therefore difficult to agree with the petitioners that their rights as guaranteed under sections 70(a), 71(1) and 74(1) of the repealed Constitution, Article 6(1) of the ICCPR, and Article 11(1) of the ICESCR were violated by their lawful discharge from service.

153. In any case, the 2nd to 10th petitioners did not provide the courts-martial proceedings to justify their allegation that they were forced to confess to offences that they did not commit. Their convictions therefore remain valid as the respondents' averment that the proceedings were destroyed in accordance with the law remains unchallenged. I would therefore reach the same conclusion as the Court of Appeal in **Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR** where it was stated that:

> **"[63] Finally, on the issue whether the appellants were accorded a fair and impartial trial during their arraignment before the court martial, we find that without copies of proceedings of the court martial the evidence placed before us is insufficient to come to the conclusion that the appellants were denied a right to fair trial. We would therefore uphold the dismissal of the appellants' claim in this regard."**

154. From the forgoing analysis, I have found that some fundamental freedoms and rights of the petitioners were violated by the respondents. It therefore follows that I must now determine the amount of damages awardable to them. The petitioners submit that they are entitled to general, exemplary, and aggravated or punitive damages as a result of the violations. They propose that this Court makes the following awards:

a) Kshs. 15,000,000 for each of the 1st and 2nd petitioners;

b) Kshs. 14,5000,000 for the 3rd Petitioner;

c) Kshs. 13,500,000 for each of the 4th and 5th petitioners; and

d) Kshs. 9,500,000 for each of the 6th to 10th petitioners.

155. The proposed quantum is premised on torture and inhuman and degrading treatment, unlawful pre-trial detention, deprivation of remission of sentence, and dismissal from service. It is, however, noted that the petitioners' counsel did not explain how he arrived at the proposed figures.

156. The respondents on their part urged this Court while making a determination on this point to be guided by the principles laid down in the cases of **Lt. Col. Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR** and **Charles Gachathi Mboko v Attorney General [2014) eKLR** and find that courts should be lenient on the respondents where the petitioners after inordinate delay seek redress for violation of fundamental rights by past political regimes.

157. The principles to be taken into account in claims for violation of constitutional rights and fundamental freedoms were laid down in the case of **Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR** as follows:

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

158. In the case of **Zipporah Seroney (supra)** it was held that:

> **"124. Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case."**

159. In **Jennifer Muthoni Njoroge (supra)** the factors that were taken into account in determining the award for each petitioner were identified as follows:

> **"20. In awarding damages therefore, I shall use the following criteria;**
>
> **(i) The torture inflicted on each Petitioner.**
>
> **(ii) The length of time the Petitioners were held in unlawful custody**

(iii) The decided cases on the subject or matter.

(iv) what is fair and reasonable in the circumstances of each case, and I have chosen to give a lumpsum in each case."

160. While explaining why the award of global compensation is recommended in cases of this nature, the Court in **Dominic Arony Amolo v Attorney General [2010] eKLR** stated that:

> **"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.2,500,000.00 would be a fair and reasonable award in damages in the novel situation arising from this case."**

161. It is important to state that the award of Kshs. 15,000,000 to the appellant for violation of his constitutional rights by the Court of Appeal in **Peter M. Kariuki v Attorney General [2014] eKLR** is not a proper yardstick for determining the kind of general damages to award in cases of this nature. This is because in that case, the Court made a finding that the appellant had been subjected to a sham trial before the Court-Martial.

162. A review of various decisions will show that the general trend in cases of this nature is to award between Kshs. 1,000,000 and Kshs. 5,000,000 as general damages. I will cite a few cases to illustrate this point. In **Jacob Ntubiri Japhet & 8 others v Attorney General [2016] eKLR** the petitioners were awarded between Kshs. 1,000,000 and Kshs. 3,000,000. The general damages in **Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR** was between Kshs. 4,000,000 and Kshs.5000000. In **Jennifer Muthoni Njoroge (supra)** the petitioners were awarded between Kshs. 1,000,000 and Kshs. 3,000,000 whereas in **Joel Benard Lekukuton & 4 others v Attorney General [2017] eKLR** each petitioner was awarded Kshs. 2,500,000. The awards are recent and would provide a good guide as to the kind of general damages to be awarded to the petitioners.

163. As for the claim for exemplary, aggravated and/or punitive damages I find that such damages cannot be awarded for the reasons I stated in **Michael Rubia v Attorney-General [2020] eKLR** that:

> **"170. I need not cite any other authority to show that the general trend in this jurisdiction is to avoid award of exemplary or punitive damages in public law claims. This principle is grounded on two reasons namely that the State has improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. I therefore decline to award the estate of the deceased exemplary or aggravated damages. In my view, general damages and special damages shall suffice to right the wrongs suffered by the deceased."**

164. I believe that the award of general damages in this matter will be sufficient to vindicate the petitioners and compensate them for the injuries suffered. In making this determination I am guided by the principles and criteria for awarding damages as stated in the authorities cited in this judgment. In arriving at the lump sum award to be made as general damages for each petitioner, I will take into consideration the torture inflicted on each petitioner, the length of time each petitioner was unlawfully held pre-trial, the deprivation of remission of sentence for the 2nd to 5th petitioners, the relevant decided cases, and what this Court in its discretion finds to be a fair and reasonable award.

165. In light of what I have stated in this judgement, I find the following reliefs to be appropriate:

a) A declaratory order is issued that the brutal, cruel, inhuman, degrading and extreme ill-treatment inflicted upon the petitioners during their arrest, pre-trial detention and imprisonment by the respondents violated the petitioners' fundamental rights and freedoms to inherent human dignity, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 74(1) and 77 of the repealed Constitution;

b) A declaratory order is issued that the pre-trial *incommunicado* detention of the petitioners by the respondents for periods ranging between 74 and 376 days was unlawful and in violation of the petitioners' fundamental rights to inherent human dignity, personal liberty, freedom from servitude and freedom from torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the repealed Constitution;

c) A declaratory order is issued that the period of 8 and 16 months that the 2nd to 5th petitioners continued to be imprisoned in deprivation of their remission of sentence was illegal detention and in violation of their fundamental right to personal liberty and fundamental freedom from servitude contrary to sections 70(a), 73(1) and 77 of the repealed Constitution;

d) General damages are awarded to the petitioners as follows:

i) The 1st Petitioner's case is unique in that he was detained for 376 days and later released without being tried. He is therefore awarded Kshs. 3,000,000;

ii) The 2nd Petitioner was held in pre-trial custody for 108 days and denied remission of sentence of 1 year, 3 months and 22

days. He is awarded Kshs. 2,800,000;

iii) The 3rd Petitioner is awarded Kshs. 2,600,000 as he was held in pre-trial custody for 105 days and denied the right to 10 months' remission of sentence;

iv) The 4th Petitioner was held in pre-trial custody for 88 days and denied the right to 8 months' remission of sentence. He is awarded Kshs. 2,400,000;

v) The 5th Petitioner who was held in pre-trial custody for 74 days and denied the right to 8 months' remission of sentence will get Kshs. 2,350,000; and

vi) The 6th to 10th petitioners who were in pre-trial custody for periods ranging between 122 and 153 days will each get an award of Kshs. 1,800,000.

e) The petitioners are awarded the costs of the proceedings against the respondents; and

f) The general damages shall attract interest from the date of judgement until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021.

W. Korir,

Judge of the High Court