REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 10 OF 2013

MICHAEL RUBIA (Suing as the Legal Representative of the

Estate of Charles Wanyoike Rubia (Deceased))...PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The Petitioner, Michael Rubia is the son and administrator of the estate of the late Charles Wanyoike Rubia (hereinafter simply referred to as the deceased). The deceased passed away on 23rd December, 2019 when this petition was pending hearing and the Petitioner was allowed to substitute the deceased on 23rd January, 2020. The petition was filed on 15th January, 2013 by the deceased. It was later amended with the leave of the court and the amended petition dated 28th November, 2018 was filed on 4th December, 2018. Through his pleadings, the deceased alleged violation of his constitutional rights and fundamental freedoms as protected in sections 74, 72, 78 and 79 of the repealed Constitution.

2. The Attorney General is the Respondent.

3. The petition is premised on the facts and events revolving around the deceased's arrest and subsequent detention by the Government of Kenya on two separate occasions. The deceased averred that his arrests and detentions were unlawful and that he was subjected to inhuman and cruel treatment and torture which caused the drastic decline in his health as well and irreversible damage to his political career and business empire.

4. In the amended petition dated 28th November, 2018 prayed for the following reliefs:-

a. A declaration that the Petitioner's rights and freedoms were contravened and grossly violated by the Respondent's Police Officers who were Kenyan Government servants, agents and or employees.

b. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution.

c. General damages, exemplary damages and moral damages on an aggravated scale under the Constitution of Kenya and compensation for all medical and related costs incurred for the unconstitutional conduct by the Kenyan Government and its agents made out as hereunder:-

c1) Special damages of Kshs 40,674,544/= with interest thereon at court rates from May 1991 to date of payment.

c2) Kshs. 150,000,000 for loss of businesses with interest thereon at court rates from May 1991 to the date of payment.

d. Any further order, writs, directions as this Honourable Court may consider appropriate.

e. Costs of the Petition and interest.

5. The deceased's case is encompassed within the further amended petition dated 20th January, 2020. It is supported by the affidavits sworn by the deceased on 15th January, 2012 and 29th October 2018, the statement of the deceased dated 25th July, 2016 and further statement by the deceased dated 27th February, 2018. Other documents relied on are a detention order marked CW2, medical reports marked CW3, medical invoices marked CW4, and the witness statement of the Petitioner (Michael Rubia) dated 29th June, 2017. The deceased also gave oral evidence and called two witnesses in support of his case.

6. The deceased claimed that as he was serving as a Member of Parliament for Starehe Constituency in February 1987 he was arrested on the false allegation that he was sponsoring and financing *Mwakenya* in an effort to overthrow the government. He was kept in detention at Nyayo House for five days and subsequently released without being arraigned in court or any charges being preferred against him.

7. It was the deceased's averment that during this first instance of arrest he was bundled into a car by the Special Branch Police and driven around in circles while blindfolded. He was not informed of the reason of his arrest nor the offence he was suspected of having committed.

8. The second instance of his arrest followed a press conference called by the deceased and one Stanley Njindo Matiba on 3rd March, 1990 where they urged the government to repeal Section 2A of the repealed Constitution, dissolve Parliament and hold fresh elections devoid of rigging, end the mismanagement of public affairs, and institute better socio-economic policies in Kenya. The deceased averred that on 4th July, 1990 he was arrested by Special Branch Police officers pursuant to a detention order issued by the Minister for Internal Security and held in a solitary cell which he later ascertained was the Naivasha Maximum Prison.

9. The deceased asserted in his statement dated 25th July, 2016 that on both occasions of his detention he was subjected to torture and a hostile environment by the police and was not informed of the reason for his arrest; and as a result he suffered injuries, loss and damage. He particularised the inhuman treatment and violations to his right to dignity and freedom and security of person as follows: he was blindfolded and driven around in circles for hours; kept in long and dark underground cells in solitary confinement; stripped half-naked and made to lie on cold ground; kept in dark and very cold cells; denied good nutrition, food and water for many days; forcefully made to lie on a pest-infested mattress and cold ground without sufficient cover; denied good medical treatment; and subjected to poor and unhygienic sanitary conditions.

10. The deceased stated that during the second instance, which lasted nine months, he was not allowed to see friends and members of his family on a regular and scheduled basis. Instead he was ferried to an unknown destination to meet family members. The deceased averred that he was finally released after nine months on health grounds.

11. The deceased stated that his right to freedom from inhuman treatment and torture contrary to Section 74 of the repealed Constitution and his right to human dignity and freedom and security of person as provided by Article 28 and 29 of the Constitution of Kenya 2010 were seriously violated by virtue of the above treatment by government officials including police officers.

12. The deceased further stated that his right to liberty, conscience and expression protected under sections 72, 78 and 79 of the repealed Constitution and Articles 32 and 33 of the current Constitution were breached when he was: detained for petitioning peacefully for the introduction of multiparty democracy and for no good reason; denied his personal liberty without justification; and, arrested in connection to harmless statements made in public thus breaching his right to free expression.

13. It was further alleged by the deceased that due to the torture, and the inhuman and degrading treatment that he was subjected to, his health deteriorated and upon his release he was forced to seek medical treatment both in Kenya and in the United Kingdom which seriously strained his finances. The deceased averred that not only was he tackling the expenses of his medical treatment, but was also confronted with the expenses of travelling to and within London, and the accommodation, food and medication required, all of which totalled Kshs. 40, 674,544/-. He asked the court to award this amount as special damages.

14. The deceased also claimed in his further statement dated 27th February, 2018 that as a result of his incarceration by the Government he suffered financial loss due to the collapse of his business and financial ventures, which included Mwamba Distributors Ltd, Giant Printers, Peponi School, Rweru General Stores and directorship in Provincial Insurance (now UAP Insurance), Co-operative Bank and ICDC Investments Co. Ltd.

15. The deceased further deposed that due to his incarceration his family suffered great loss. His wife and daughter passed away. His other children were devastated and were unable to recover from the experience. Additionally, that his children were unable to gain employment despite having the proper academic qualifications, all because of the infamy of their surnames. He opined that the compensation of Kshs. 325,000,000/- as general damages was just and reasonable in the circumstances.

16. In furtherance of his case and upon the court's direction the deceased appeared in court to testify in person as PW1. He called his doctor, Daniel Kibuka Gikonyo who testified as PW2 and the Petitioner who testified as PW3 as his witnesses.

17. The deceased testified that he was arrested in February 1987 and held in Nyayo House for five days on the allegation that he was a financier of *Mwakenya*. He was arrested again on 4th July 1990 and was detained for nine months. He testified that on both occasions he was tortured and mistreated by the police and was denied the right to see his family.

18. The deceased further testified that he was treated by PW2 at Nairobi Hospital as he had developed health complications while in prison and was subsequently released due to his poor health. It was then that PW2 made arrangements for him to be hospitalised in a London hospital. During his hospitalisation he underwent several surgeries, and suffered damages and losses as particularised in his statement dated 25th July, 2016.

19. The deceased further testified as to negative impacts of his detention which caused loss in his family and business. In reference to his

further statement dated 27th February, 2018, PW1 testified to the fact that some of his businesses wound up due to his detention, and he was forced to sell his shares at Provincial Insurance (now UAP Insurance) in order to pay off his debts.

20. In respect of his ownership of a primary school in Juja, he stated that he had to sell the school as his political problems were affecting the school. The deceased further testified that he was forced by the State to give up his directorship of Co-operative Bank Limited. Additionally, that due to political problems he was forced to close down Rweru General Stores which he owned.

21. According to the deceased, he was one of the founders of ICDC Investment Co. Ltd and was the chair of the company's Board of Directors for 20 years. He stated that in 1989 the government used its influence, particularly through the Minister of Finance, to kick him out of the Board of Directors and the company's subsidiaries. He was also forced to leave many other boards of various companies he was sitting in including Kisumu/Kicomi/Thika Cotton Mills.

22. It was the testimony of the deceased that due to the death of his wife, who could not recover from the impact of his detention, and the young age of his children, his family could not run his businesses. On top of that loss, his children were unable to get jobs despite holding the relevant qualification such an MBA held by one of his sons.

23. The deceased reiterated that he suffered torture at the hand of the government and that he was yet to recover from the effects of the torture. He testified that his torture included being driven in a Land Rover vehicle facedown and being mistreated at Nyayo House by one Jeremiah Opiyo who made him strip and sit for some time. He testified that he could not even take his claim to court as the courts were fearful.

24. In cross-examination in respect of the medical report dated 22nd April, 1991, the deceased testified that PW2 was his family doctor, and that his visit with him in 1987 was a normal visit and he did not make an observation linking the visit or weight loss to his incarceration.

25. It was the testimony of the deceased that he had proof for some expenses incurred but for other expenses such as his claim for future medical expenses of Kshs 30 million, he did not have any documents to support the claim. When shown his statement on the alleged business loss, the deceased admitted that he did not have any evidence that he had connections with Mwamba Distributors Ltd, or that he was a distributor of Kenya Breweries Limited and Coca Cola Company.

26. The deceased also admitted that he had no proof of the fact that his children could not get jobs. He also admitted that although the special damages at Kshs 12,412,289/- included sterling pounds, he could not recall what the exchange rate was between 1991 and 1999.

27. In re-examination, the deceased confirmed that the medical report dated 22nd April, 1991 by PW2 which was prepared a few days after his release from his second detention. He stated that he was diagnosed with a mass in his upper right chest which was not there in 1987. He further testified that he was advised by PW2 to travel to London for surgery as the surgery could not be done locally.

28. The deceased told the court that one Jeremiah Opiyo was in charge of interrogation of detainees and interrogated him twice daily during his detention.

29. In support of his claim that his children could not get employment due to his detention, the deceased stated that one of his sons who had returned from the U.S.A. with a master's degree in business administration was unable to get a job at the Central Bank of Kenya and another child could not secure employment with H.F.C.K.

30. In his testimony, PW2 told the court that he had known the deceased as a client since 30th October, 1987. He stated that he visited the deceased on 9 November, 1990 at about midnight at Wilson Airport after his second arrest. Dr. Gikonyo testified that he was allowed to examine the deceased and during the examination that the deceased raised several health complaints. He also complained about his treatment in prison which included sleeping on the floor in a dusty room without adequate blankets. Additionally, the deceased informed him that he was locked in a room without being allowed to exercise and that he was not receiving proper nutrition specifically fruits. The deceased also complained that he was experiencing headaches, difficulty in breathing, joint aches, and that the cold was affecting his chest. The final complaint by the deceased was that his vision was impaired and he requested to see an eye doctor. PW2 observed that the deceased had lost about six kilogrammes within four months of his detention.

31. PW2 testified to having recommended that the deceased be given fruits once in a while, be allowed to exercise, and that be given a bed and beddings. PW2 stated that he also recommended for a CT scan of the brain of the deceased.

32. According to PW2, the next time he visited the deceased was on 14th March, 1991. PW2 stated that during this visit the deceased was weak in appearance. Further, that the deceased had not had a CT scan, seen an eye doctor or had fruits as earlier recommended. The deceased was wheezing due to the dust in the room. Once again he recommended that the deceased gets a CT scan of his chest and he be given fruits.

33. PW2 averred that on 5th April, 1991 the deceased was brought for the CT scan of his chest which revealed that he had a tumour in his chest. The mass was compressing his windpipe and pushing his trachea to the left. PW2 recommended that a biopsy be taken of the mass and followed it in writing on 8th April, 1991. The deceased was released two weeks thereafter and hospitalised in Nairobi Hospital from 19th April, 1991 to 24th April, 1991.

34. PW2 further testified on the complexity of the deceased's health condition and the urgency that they faced to remove the mass in his chest in order to release the pressure it was causing to his windpipe. Upon realising that the deceased required further tests which were not available in Africa, PW2 arranged for him to be sent to London where he received the necessary medical treatment and underwent surgery.

35. PW2 testified that the deceased remained in London for a number of weeks and returned to Kenya on 6th June, 1991 with a number of recommendations from his doctor in London. The deceased returned to London in 1992 for a review of his voice. He later prepared a medical report dated 15th March, 1993 on the condition of the deceased. The medical report was produced in court as an exhibit with PW2 stating that a correction had to be made to paragraph 2. He clarified that the deceased's voice had not returned to normal and still remained hoarse.

36. PW2 further testified that the deceased continued with medical attention and used his own money for the treatment. He told the court that the deceased thereafter remained under constant medication.

37. Upon cross-examination by counsel for the Respondent, PW2 testified that it is possible for the stress caused by detention, which is a traumatic event, to cause damage to an individual's hormones. That the damage to the hormones can cause ailments such as thyroid disease. PW2 confirmed that the deceased's thyroid disease was stress-related.

38. PW2 also confirmed that he did not write a medical report after seeing the deceased at Wilson Airport. However, he did make a recommendation that the deceased does minimal exercise. The witness further confirmed that the deceased had a history of allergic rhinitis and sinusitis. Additionally, that the deceased had no distress and a CT scan of his brain came back normal.

39. The Petitioner who testified as PW3 told the court that their father's detention traumatized the family as they lost many friends and businesses. PW3 stated that the financial losses sustained by the deceased included the loss of shares in Peponi School and ICDC.

40. PW3 confirmed the deceased's testimony that the deceased had been arrested on two occasions. He, however, only recalled the arrest of 4th July, 1990 when he was held for nine months. He also stated that the deceased was subjected to torture.

41. PW3 testified to the fact that their mother, was unable to cope with the detention of their father and fell ill with depression and unfortunately did not recover even after the release of the deceased and subsequently died.

42. PW3 told the court that the children in the family were affected by their loss including the loss of a sister although her death was not associated with the deceased's situation. Additionally, they were unable to get jobs due to their relationship to the deceased. PW3 personally confirmed that he has a master's degree in business and public administration from Howard University but was still unable to get a job after attending a number of job interviews.

43. PW3 affirmed that he accompanied his father to London for treatment together with PW2. He stated that they deposited sterling pounds 10,000/- before the deceased's admission, and that the medical fees amounted to about 12,000/- sterling pounds in total.

44. On cross-examination PW3 testified that he has never been employed as he was unable to successfully get a job, and therefore he had settled in the private sector.

45. When shown the medical report prepared by Dr. Gikonyo, PW3 confirmed that the deceased was not found to have chest pain and that his heart beat was normal. Further, that the doctor's report did not reveal any aspects of torture, and that he could not tell whether the deceased's illness was a result of old age.

46. PW3 further attested to loss of friends due to their father's detention, as well as the flight of a Spanish business partner of the deceased. He, however, stated that he had no proof of his evidence. He also admitted that there was no evidence to the effect of the deceased was a shareholder in the mentioned companies.

47. In response to the petition, the Respondent filed a replying affidavit sworn on 22nd December, 2015 by Ambassador Monica Juma who was, at the time of the deposition, the Principal Secretary in the Ministry of Interior and Co-ordination of National Government.

48. It was averred for the Respondent that the deceased was lawfully detained under the Preservation of Public Security Act, Cap 57, and that in fact he was informed of the reason for his arrest as he was served with a statement informing him of the same which statement he had annexed to his petition as CW2.

49. The Respondent's witness swore that she was not aware of the allegations of torture, harassment, inhuman and degrading treatment as alleged in the petition and that the deceased had failed to prove the same by way of empirical evidence and therefore the allegation should not be entertained by the court. Ambassador Juma further stated that the Kenya Police Service as a professional organ does not perform torture or harassment as part of its mandate and therefore denied the allegation of such violations.

50. It was further averred for the Respondent that the court should disregard the allegations surrounding the deceased's ill-health as there was evidence by way of a medical report marked MJ1 proving that he had recovered from his alleged ailments and was undergoing the normal ageing process.

51. The Respondent did not call any witnesses and the replying affidavit of Ambassador Monica Juma was adopted as a defence to the deceased's claim.

52. Counsel for the estate of the deceased relied on the submissions dated 19th July 2019, in which he identified the issues for the determination of the court as follows:-

a. What is the import of the failure of the Respondent's witness to give evidence in court?

b. Was the detention of the deceased both in 1987 and 1990 a breach of the Constitution and or law?

c. What remedies lie in favour of the deceased?

53. On the first issue, counsel for the estate of the deceased submitted that the Respondent's case had collapsed due to the failure or refusal by his witness to attend court to give oral testimony. This position was fortified by reference to Section 107 of the Evidence Act, Cap. 80, as well as the cases of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited) v City Council of Nairobi [2019] eKLR; Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR**; and **Shaneebal Limited v County Government of Machakos [2018] eKLR.**

54. In light of the case law relied on, counsel for the estate of the deceased submitted that the averments in the deceased's pleadings and the testimony in support thereof ought to be upheld as they are unchallenged by the Respondent.

55. On the issue of the unconstitutionality of the deceased's detention both in 1987 and 1990, counsel challenged the assertion by the Respondent that the detentions were lawful under the Preservation of Public Security Act, Cap 57. He urged the court to distinguish the finding in **Nairobi High Court Petition 94 of 2014, Kenneth Stanley Njindo Matiba v Honourable Attorney General** (hereinafter the Matiba case) that detention was within the law. Counsel for the estate of the deceased submitted that in order to determine if a detention is legal, the court should take into consideration three elements: detention without reasonable justification and or cause; detention in breach of detention rules and or laws; and detention under torturous conditions.

56. It was submitted for the deceased that on the first element, there was no detention order issued for his arrest in 1987. Further, as to the grounds contained in the detention order issued during the 1990 arrest, the claim that the deceased was allegedly involved in *Mwakenya*, was never backed by evidence. Furthermore, on the cited reason that the deceased was organizing the Kamukunji rally, counsel submitted that he was exercising his right to freedom of assembly provided for under Section 80(1) of the repealed Constitution. On the cited reason that the deceased was promoting the formation of another party, counsel maintained that the deceased was exercising his right to freedom of expression as per Section 70(b) of the repealed Constitution. Finally, on the cited ground of organizing touts, matatu operators and musicians to record, produce and distribute seditious material, it was submitted that there was no evidence on the same, and what the deceased was calling for was multiparty democracy. The submissions were supported by reference to sections 70(b), 72, 78(1), 79(1), 80(1) of the repealed Constitution, and Article 1 of the Universal Declaration of Human Rights (UDHR).

57. On the second element, counsel submitted although the requirements of Section 83(2) and (3) of the repealed Constitution were indeed complied with in regard to the second detention of 1990 as the detention order was issued in writing and in a language understood by the deceased, nevertheless, the other constitutional requirements of gazettement, a review by an independent and impartial tribunal, and provision of reasonable facilities to consult a legal representative of one's choice were breached. Further, that all the constitutional requirements were indeed violated in respect to deceased's arrest in 1987.

58. Counsel further contended that calling for multi-party democracy did not constitute a danger to public security as envisioned by Regulation 6(1) of the Public Security (Detained and Restricted Persons) Regulations. Additionally, that the deceased and Hon. Matiba called for multi-party democracy in the open and in utmost good faith without using any words that disclosed any criminal motive.

59. Counsel posited that the arrest and detention of the deceased was actuated by malice as he was never arraigned in court or formally charged, and the government eventually repealed the former Constitution and re-introduced multi-party democracy which proves that the call by the deceased for the amendment of the law was not illegal. Counsel further claimed that even before the deceased and his comrades called for multi-party democracy, the government had impounded his passport without a just cause and the same was only returned once he was due to travel to London for treatment after his release. According to counsel, the actions of the government were therefore a form of harassment which violated the deceased's fundamental rights and freedoms.

60. It was also submitted by counsel that the arrest and detention of the deceased violated his right to personal liberty guaranteed in Section 72(1) of the repealed Constitution and Articles 1 and 9 of the UDHR; and his freedom of movement guaranteed under Section 81(1) of the repealed Constitution. Additionally, counsel asserted that the deceased was subjected to incidents of torture, cruel, inhuman or degrading treatment or punishment in violation of Article 5 of the UDHR and Section 74 (1) of the former Constitution.

61. The counsel of the estate of the deceased argued that even if the deceased's detentions in 1987 and 1990 were legal, the deceased should have been held under humane conditions and treated well whilst in detention. In support of the argument, counsel relied on the case of **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR**; General Assembly Resolution 2858 (XXVI) of 20th December, 1971; The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1975); Code of Conduct for Law Enforcement Officials (1979); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); General Assembly Resolution 43/173 of 9th December, 1988; and Article 9 of the International Covenant on Civil and Political Rights of (1976).

62. Counsel submitted that inhuman treatment has been outlawed by international instruments and the right to protection from inhuman treatment cannot be limited. This statement was supported by reference to Articles 3 and 15 of the European Convention on Human Rights (1953) and the European Court of Human Rights decision in **Application Nos. 3321, 3322, 3323, and 3344, the Governments of Denmark, Norway, Sweden and Netherlands against Greece ("the Greek case").**

63. It was contended by counsel for the estate of the deceased that the treatment of the deceased in the hands of the government fits the definition of ill-treatment as provided in the **Greek case**. Counsel further buttressed his contention that the deceased was tortured and harassed by referring to the decisions in the cases of **Koigi Wamwere v Attorney General [2015] eKLR; Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi [2011] eKLR;** and **Johnson Gacheru Ngigi v Inspector General of Police Service & another [2019] eKLR.**

64. The court was urged to find that the replying affidavit of the Respondent does not constitute a sufficient response to the claim as it contains general averments.

65. Counsel for the estate of the deceased referred to the decisions in the cases of **Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi [2011] eKLR; Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR;** and the **Matiba case,** and told the court that those cases were in respect of claims involving torture and the courts had granted large awards.

66. Counsel specifically urged the court to follow the decision in the **Matiba case** as that would be the only way of arriving at a fair determination in this matter. Counsel submitted that the deceased served as a Member of Parliament for nineteen years which was longer than the nine years served by Matiba. Further, that the deceased served in the local authority as the Mayor of Nairobi whereas Matiba did not. Additionally, that although the two served as cabinet ministers, the deceased unlike Matiba served in the governments of both Presidents Kenyatta and Moi. According to counsel, the deceased was detained twice whereas Matiba was only detained once. Finally, that although both men lost businesses, the deceased was ejected from more businesses and also lost his political support whereas Matiba partially succeeded in politics post-detention. That the number of detentions is significant in the determination of the damages to be awarded was supported by reference to the decision in the case of **Koigi Wamwere v Attorney General [2015] eKLR.**

67. Counsel stressed that the government is liable to pay damages by virtue of the violating the deceased's fundamental rights and freedoms as protected by the repealed Constitution and principles of international law. He relied on the maxim of equity that "**equity shall not suffer a wrong without a remedy"** and asserted that the estate of the deceased is entitled to damages as that is the only way it can be compensated for the damage to the deceased's health, political career, businesses and other spheres of his life. This proposition was supported by the decision in **Otieno Mak' Onyango v Attorney General & another, H.C.C.C. No. 845 of 2003.**

68. Counsel backed the claim for exemplary or punitive damages by citing, among other cases and materials, the decisions in **Donselaar v Donselaar [1982] 1 NZLR 97; Rookes v Barnard [1964] 1 All ER 367; Radul Sah v State of Bihar (1983) 4 SCC 141; Nilabati Behara v State of Orissa (1993) 2 SCC 746; Bank of Baroda (Kenya) Ltd. v Timwood Products Ltd [2008] eKLR**; **Kenya Revenue Authority v Menginya Salim Murgani [2101] eKLR; Obongo v Municipal Council of Kisumu [1971] EA 91; Dr. Odhiambo Olel v The Attorney General, H.C.C.C. No. 360 of 1995**; **AK 011 and Fats (U) Limited v Bidco Uganda Limited [2010] 3 EALR;** and **Biwott v Clays Ltd [2002] 2 EALR.** According to counsel, the cited cases confirm that exemplary damages are suitable in this suit as they are awarded where a defendant carries out outrageous conduct to the detriment of the plaintiff. It was further submitted that exemplary damages may well exceed compensatory damages in an appropriate case such as this one.

69. On the prayer for aggravated damages, it was the contention of counsel for the estate of the deceased that because of the nature of the injury to be compensated, the amount awarded should be very high. This averment was supported by reference to the case of **Ken Odondi & 2 others v James Okoth Omburah t/a Okoth Ombura & Company Advocates [2013] eKLR.**

70. Counsel for the estate of the deceased acknowledged the decisions in **Hon. Gitobu Imanyara v The Attorney General, H.C. Petition No. 78 of 2010** and **Obongo v Municipal Council of Kisumu [1971] EA 91** that exemplary and aggravated damages are not recoverable in cases involving violation of the fundamental rights and freedoms guaranteed by the Constitution. He however submitted that this position cannot stand where individuals cannot seek justice for the suffering they experience at the hand of despotic governance. Further, that the arguments posed by the cited cases that such damages cannot be awarded at the taxpayers' expense does not make sense since taxpayers have an interest in the due and proper dispensation of justice to all, and that the taxes payed are meant to achieve the very purpose of securing the ends of justice since they are used to pay judicial officers to dispense justice.

71. According to counsel, the Court of Appeal, has, in various cases including **Obongo v Municipal Council of Kisumu [1971] EA 91** held that exemplary damages are awardable in Kenya. Additionally, counsel posited that the Court of Appeal has enunciated that exemplary or punitive damages apply where there has been oppressive or unconstitutional damages and where the action is calculated to make a profit. Counsel therefore urged this court to uphold the judicial precedent that exists by virtue of the cited case and the doctrine of *stare decisis*. The importance of complying with the principles of judicial precedent and *stare decisis* was supported by reference to the following cases: **Dodhia v National Grindlays Bank [1970] EALR 195; Rift Valley Sports Club v Patrick James Ocholla [2005] eKLR; Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR; National Bank of Kenya Limited v Wilson Ndolo Ayah [2009] KLR 762; Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others, Civil Appeal No. 238 of 2003;** and **Broome v Cassell [1971] 2 DB 354.**

72. Counsel cited the case of **Victoria Laundry v Newman [1949] 2 All ER 997** as enunciating the principles that guide the award of damages as compensation for damage, loss or injury suffered, and the case of **Livingstone v Rawyards Coal Company [1880] 5 AC** as establishing the principles for determining the measure of such damages. Counsel urged that the damages to be awarded should put the deceased in the same position he would have been if he had not been unlawfully detained by the government. Counsel submitted that the damages should be in respect of the unconstitutional arrest and detention of the deceased, his treatment in detention and the damage that resulted from the same, specifically to his health, political career and finances.

73. It was counsel's proposition that the deceased's political career was damaged due to the hoarseness of his voice which occurred due to the conditions he was exposed to during his detention. It was opined that a politician's voice is integral to his career as it is used to communicate ideas persuasively, and once its quality is diminished due to the actions of another, the culprit shall be liable for the loss and damage which accrues as a result. Counsel therefore called for the government to be held liable for the loss of the deceased's career.

74. Counsel further submitted that the measure of damages should be appropriate, and assessed liberally especially in respect of violation of fundamental rights and freedoms. Such damages should suffice as full and adequate compensation for the wronged party. The court was urged to be persuaded by the decisions in **Pacificio Lucio Garofalo S.P.A. v Debenham Ltd, HCCC No. 823 of 2010** and ***Arnacherry Limited* v *Attorney General* [2014] eKLR.**

75. The court was told to disregard the decision in **Robert Njeru Nyagah v The Attorney General, HC Petition No. 261 of 2014,** which

relied heavily on the opinion of Lord Wolf in his paper: **The Human Rights Act 1998 and Remedies in M. Andenes and D. Fairgriere (eds) Judicial Review in International Perspective 11 (2000) pp 429-436,** for the holding that in cases of infringement of fundamental rights and freedoms, the damages should be generally low, and should only be in addition to another remedy where necessary.

76. On the matter of special damages, specifically medical expenses, counsel proffered that the Respondent has failed to deny the claim, and has omitted to submit any material to challenge or disprove it. Counsel therefore insisted that the claim for medical expenses has been admitted and the proved. The court was directed to the decision made in the **Matiba case** in respect of the claim for medical expenses by the petitioner therein.

77. Concerning the claim for compensation for financial loss or loss of earnings, counsel submitted that due to the deceased's poor health, he was unable to maintain and continue to earn through his involvement in his businesses as he used to. According to counsel, the detention and subsequent health complications led to the loss of the deceased's business acumen and entrepreneurial skills as well as his ability to engage in business and earn a living generally resulting in immense financial loss. The **Matiba case** was cited for the proposition that a shareholder of a company is entitled to compensation for losses suffered due to poor health caused by detention which affected his ability to run his businesses.

78. Counsel placed heavy reliance on American jurisprudence, where punitive damages are a settled principle of common law and are generally determined based on statute, on the issue of the propriety of the amount sought. I will briefly highlight the submissions on this point. Counsel stated that punitive damages are available in most states except Louisiana, Nebraska, Puerto Rico and Washington. He opined that in tort cases, punitive damages are usually allowed only when the defendant has displayed actual intent to cause harm. Further, that there is no maximum dollar amount of punitive damages that a defendant can be ordered to pay and the same can be disproportionate where the conduct was especially egregious. The decision in **TXO Production Corp. v Alliance Resources Corp**, **509 U. S. 443 (1993)** was cited as upholding that proposition.

79. Relying on the cited cases, counsel for the estate of the deceased asked for damages to be awarded as follows:-

> **"i. General damages on an aggravated scale of Kshs. 5,000,000,000/- (5 billion);**
>
> **ii. Exemplary damages and moral damages of Kshs. 5,000,000,000/- (5 billion);**
>
> **iii. Compensation for all medical and related costs, and future financial losses of Kshs. 20,000,000,000/- (20 billion);**
>
> **iv. Special damages of Kshs. 40,674,544/- with interest thereon at court rates from May, 1991 to date of payment;**
>
> **v. Kshs. 150,000,000/- (150 million) for loss of businesses with interest thereon at court rates from May, 1991 to the date of payment;**
>
> **vi. Any other relief of Kshs. 10,000,000,000/- (10 billion); and**
>
> **vii. Interest on the decretal amount from the date of harm.**
>
> **The court was therefore urged to award a total of Ksh 40,190,674,544/- plus interest at 12% per annum compounded from the date of harm and costs of suit."**

80. The Respondent filed written submissions dated 16th August, 2019 and identified the issues for determination as follows:-

> i. Whether the deceased's fundamental rights and freedoms were infringed on account of his arrest and subsequent detention;
>
> ii. Whether, as a result of the deceased's arrest and detention and his alleged failing health, his business portfolio deteriorated and that the Respondent should thereby be held liable; and
>
> iii. Whether the deceased was entitled to the reliefs sought in terms of the declarations, special damages for medical expenses, financial loss, general damages, loss of business, and aggravated and exemplary damages?

81. On the first issue, the Respondent contended that the deceased was lawfully detained and his detention was done through the proper legal mechanisms under Section 83 of the repealed Constitution as well as the Preservation of Public Security Act, Cap. 57. It was asserted that a detention order was issued by the Minister of State in the Office of the President in line with the Preservation of Public Security Act and the Public Security (Detained and Restricted Persons) Regulations. Reliance was placed on the Court of Appeal decision in **Koigi Wamwere v Attorney General [2015] eKLR** in support of the assertion that the detention of the deceased was not only constitutional but also lawful. The Respondent further submitted that the rights and freedoms claimed to have been infringed were not absolute as was provided in Section 70 of the repealed Constitution.

82. On the allegation of inhuman treatment, torture and or harassment the Respondent submitted that the deceased had failed to provide credible evidence on those allegations. The Respondent contended that the burden of proving allegations of violation of fundamental rights and freedoms is on the party who asserts such violation. The Respondent supported this argument by citing the decisions in the cases of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR; Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR;** and **Macharia Wa Kamau & 2 others v Attorney General [2015] eKLR.**

83. According to the Respondent, the fact that the deceased was required to sleep on the floor did not amount to punishment as the same was the standard for all detained persons. The Respondent submitted that the deceased could not have been given special treatment.

84. In furtherance of his defence, the Respondent referred to the medical report dated 22nd April, 1991 as confirming that when the deceased was released from detention he was in good health save for his allergic rhinitis which he had suffered from before being detained. Moreover, it was the Respondent's position that the health complications of the deceased were as a result of the normal ageing process and his ailments could not therefore be linked to the Respondent.

85. The Respondent opposed the allegation that the deceased was not allowed to contact his family by stating that according to the law all prisoners were allowed to meet with their families. Further, that the deceased was indeed able to meet with his family members while in detention as confirmed in the petition.

86. The Respondent therefore proposed that the deceased' rights were never violated while he was under lawful detention and the prayers in the petition should not be granted.

87. On the second issue, the Respondent asserted that the deceased admitted to disposing of some of his alleged businesses on account of his own personal interests for example the sale of his shares at UAP to pay off his debts. The Respondent therefore submitted that the misfortunes alleged by the deceased had no connection to his detention or the Respondent.

88. It was further submitted that the deceased failed to produce a share certificate for any of the companies he allegedly owned, and neither did he produce transfer of share documents for the shares he was allegedly forced to sell. The Respondent also contended that the deceased failed to show in his statements and during cross-examination, who the shares and assets of the companies were sold to by producing transfer documents or payment receipts as proof. Additionally, that no financial analyst or expert was called or financial report tendered as proof that the deceased owned the alleged assets, as well as how the assets have grown to be worth billions. The Respondent prayed for this particular claim to be struck out or dismissed for lack of evidence.

89. On the final issue, the Respondent submitted that the claim for special damages of Kshs. 40, 674, 544/-as medical expenses was not specifically proved as required. The Respondent relied on the Court of Appeal decision in **Provincial Insurance Co East Africa Ltd v Nandwa [1995-1998] 2 EA** in support of the legal principle that a claim for special damages should be specifically pleaded and proved.

90. On the prayers for damages resulting from medical expenses stated in paragraphs 8A and 8B of the amended petition dated 29th October, 2018, the Respondent rejected the figure of Kshs. 10, 674,544/- on the ground that some of the expenses included could not be attributed to the deceased's detention. The Respondent further asserted that the sum of Kshs. 30,000,000/- claimed under the same head was a figure which could not be proven by evidence or during cross-examination of both the deceased (PW1) and PW2. The Respondent therefore urged that since the figure was not supported by evidence it must be dismissed.

91. The Respondent further submitted that the deceased was unable to justify the demanded compensation and therefore the same, including the special damages are contested. It was further posited that exemplary and general damages are not to be sought in order to compensate a victim of an unconstitutional action, but rather to punish the perpetrator and act as a deterrent. This proposition was supported by reference to the High Court's decisions in **Dick Joel Omondi v Honourable Attorney General (2013) eKLR** and the **Matiba case,** and the Court of Appeal's decision in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.** The Respondent urged that in any case the award of damages is upon the court's discretion and therefore it is not for a petitioner to specify the amount that the court should award.

92. The Respondent submitted that counsel for the estate of the deceased had through the submissions dated 19th July, 2019 introduced and escalated the claim beyond what had been stated in the pleadings. The Respondent stated that anything not found in the pleadings should be discarded. This statement was supported by reference to the cases of **Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR** and **Tarbaj Constituency (Wajir County) v Ahmed Bashane & 2 others [2018] eKLR.**

93. The Respondent stressed that the deceased did not attach documentary evidence to prove the existence of the alleged ownership of businesses and companies. Further, that the deceased cannot compare himself to Matiba in terms of the award of damages, since in the **Matiba case**, Matiba had produced documentary evidence and even called a financial analyst to support his case, particularly the claim for loss of business and future earnings.

94. In reply to the argument by counsel for the estate of the deceased that the deceased's case is uncontested because of the failure to call Ambassador Monica Juma to give evidence in court, the Respondent took refuge in Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Mutunga Rules") and submitted that a party in a constitutional petition needs not call a witness in order to succeed, and can even rely on written submissions. The Respondent further relied on the case of **Benjamin K. Kipkulei v County Government of Mombasa & another [2015] eKLR** in support of the same argument. The Respondent further urged that the replying affidavit filed in support of his case was enough to oppose the petition without the calling of witnesses for examination before the court. In support of the proposition, reliance was placed on the decision in **R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281.**

95. Finally, the Respondent asserted that the affidavit sworn by the deceased in support of the petition as initially filed failed to disclose any evidence to support the allegations of torture and therefore the deceased's statements dated 25th July, 2016 and 27th February, 2018 cannot carry any evidential value and should be dismissed. The Respondent relies on the case of **Tana River Pastoralists Development Organisation & 4 others v National Environment Management Authority & 6 others [2009] eKLR** to support this claim.

96. The Respondent consequently urged the court to dismiss the petition with costs.

97. In my view, the issues for the determination of this court are:-

a. Whether the arrest and subsequent detention of the deceased in 1987 and 1990 resulted in a violation of his constitutional rights and fundamental freedoms;

b. Whether as a result of his arrest, detention, and alleged failed health the deceased suffered irreversible damage to his business portfolio;

c. Whether the estate of the deceased is entitled to all or any of the reliefs sought; and

d. The issue of costs.

98. It is important to settle at the outset the issue of the effect of the failure by the Respondent to avail the deponent of the replying affidavit for cross-examination. According to the counsel for the estate of the deceased, the non-appearance of Ambassador Monica Juma in court meant that the Respondent's case had collapsed and the Petitioner's case therefore remains uncontested and the petition should be allowed. The Respondent rejected this proposition and cited case law to support his argument that this court has a duty to consider the evidence disclosed in the affidavit filed in opposition to the petition.

99. In my humble view, counsel for the estate of the deceased cannot be allowed to raise this issue in submissions having indicated to the court on 3rd July, 2019 that the advocates for the parties had agreed that the Attorney General would adopt the replying affidavit of Ambassador Monica Juma as a defence to the claim. He cannot now turn around and ask the court to reject the evidence contained in the Respondent's replying affidavit.

100. In any case counsel for the estate of the deceased did not ask to cross-examine the deponent of the replying affidavit. In my view, there was no legal requirement for the Respondent to adduce *viva voce* evidence. As correctly stated by counsel for the Respondent, Rule 20 of the Mutunga Rules provides the procedure for the hearing of constitutional petitions as follows:-

"Hearing of the petition.

20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—

(a) affidavits;

(b) written submissions; or

(c) oral evidence.

(2) The Court may limit the time for oral submissions by the parties.

(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.

(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.

(5) A person summoned as a witness by the court may be cross examined by the parties to the petition."

101. A reading of Rule 20 of the Mutunga Rules clearly shows that the primary procedure for hearing constitutional petitions is by way of affidavits and written submissions. The use of oral evidence is an alternative to the main procedure and can only be activated at the discretion of the court either of its own motion or upon application by a party. In the instant case, although the court had earlier issued a directive that the petition proceeds through oral hearing, the parties had by consent changed that guideline by agreeing that the Respondent should not call his witness. It would therefore be unjust and unfair to the Respondent to reject his defence during the writing of the judgement on the strength of the contrary argument by counsel for the estate of the deceased. I therefore find no merit in the argument and I reject and dismiss the same. I shall proceed to consider the evidence of the Respondent and weigh it against the evidence placed before the court by the other side.

102. I now turn to the substance of the petition. The deceased alleged that his arrest and detention in both 1987 and 1990 were unlawful, and that while in detention he was subjected to inhuman and cruel treatment and torture which caused the drastic decline in his health as well and irreversible damage to his political career and business portfolio.

103. The deceased's case was that as a result of his treatment by the Respondent, his right to freedom from inhuman treatment and torture contrary to Section 74 of the repealed Constitution and his right to human dignity and freedom and security of person as provided by Articles 28 and 29 of the Constitution of Kenya 2010 were seriously violated. Additionally, that his right to liberty, conscience and expression protected under sections 72, 78 and 79 of the repealed Constitution and Articles 32 and 33 of the current Constitution were breached when he was detained for peacefully petitioning for the introduction of multi-party democracy and for no good reason; denied his personal liberty without justification; and arrested in connection to harmless statements made in public thus breaching his right for expression.

104. The Respondent did not contest that the deceased was arrested and detained on both occasions, but maintains that he was lawfully detained under the Preservation of Public Security Act, Cap 57, and that he was informed of the reasons for his arrest as he was served with a statement to that effect. The Respondent further asserted that the detention of the deceased was justified in order to preserve public security.

105. The Respondent also contended that the deceased failed to provide credible evidence to support his allegations of inhuman treatment, torture and or harassment and submitted that the deceased's rights were never violated while he was under lawful detention and therefore his prayers should not be granted.

106. I will begin by reviewing the deceased's first arrest and detention for five days in February 1987. The deceased averred that he was arrested and detained on the false allegation that he was sponsoring and financing *Mwakenya.* He substantiated his claim by way of *viva voce* evidence on 13th November, 2017.

107. The Respondent urged by way of a replying affidavit and submissions that the reasons for the deceased's arrest are contained in the detention order which the deceased exhibited as CW2. However, as correctly submitted by counsel for the estate of the deceased, the said detention order was issued on 4th July, 1990 in respect of the second detention and does not apply to this particular incident.

108. In the absence of oral or documentary evidence to counter the deceased's assertion that his detention was unlawful, or to prove that the deceased was indeed detained pursuant to a detention order, I find that in regard to the first detention, the deceased was actually arrested and detained contrary to the law in place at the time, and that his arrest and detention breached his right to liberty contrary to Section 72 of the repealed Constitution.

109. As for the second detention which commenced on 4th of July, 1990 and lasted for nine months, the deceased was served with a detention order stating that he had been involved in activities aimed at undermining and overthrowing the government. However, the deceased's testimony was that he was merely expressing his political opinion and agitating for Kenya to become a multi-party State.

110. Section 83(1) of the retired Constitution provided that:-

> **"Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 85."**

111. Additionally, Section 6 of the Public Security (Detained and Restricted Persons) Regulations provided that:-

> **"(1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, over any person, he may order that that person shall be detained.**
>
> **(2) Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.**
>
> **(3) The Minister may at any time revoke a detention order".**

112 . Based on the cited provisions, it can be concluded that the detention order was issued in accordance with the law. The Court was confronted with a similar situation in the **Matiba case** and the Court held that:-

> **"53. It was the law then, as I understand, it that the right and freedom of movement as well as the right to personal liberty under Section 72 above are not absolute and would have been limited in circumstances such as when a person is held in lawful detention. Indeed, the Respondent has correctly argued that detention without trial was sanctioned under the repealed Constitution as was the holding in the Court of Appeal's decision in the case of Koigi Wamwere v Attorney General, Nairobi Civil Appeal No. 86 of 2013; [2015] eKLR. In that case, the Petitioner was detained under the then existing legal regime and by virtue of the said detention, some of his rights and freedoms such as liberty and freedom of movement were automatically limited, a fact the Court of Appeal found to be lawful. I take the same view."**

113. It was further declared in the above decision that:-

> **"54. ….I note that Regulation 6(1) of the Public Security (Detained and Restricted Persons) Regulations, 1978, gave the relevant Minister power to order the detention of a person, if the Minister was satisfied that such action is in the interest of preservation of public security. It is in the exercise of those powers, that the impugned detention order was issued."**

114. I agree that where a detention was executed in compliance with the laws that were in force at the material time, such a detention cannot be termed unconstitutional or unlawful. Indeed the Court of Appeal confirmed the constitutionality of detentions in the past when it **Koigi Wamwere v Attorney General [2015] eKLR** that:-

> **"We thus need to first decide whether the appellant's two stints in detention had constitutional sanction at the material time. The retired Constitution at Section 83 provided for the constitutionality of detention without trial in so far as it legitimized Part III of the Preservation of Public Security Act as follows;**
>
> **"83(1) Nothing contained in or done under the authority of Parliament shall be held to be inconsistent with or in contravention of Section 72, 76, 77, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority**

of any provision of part III of the preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of the Constitution when and in so far as the provision is in operation by virtue of an order made under Section 85.

(2) Where a person is detained by virtue of a law referred to in sub-section (1) the following provisions shall apply-

(a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;

(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained *and giving particulars of the provision of law under which his detention is authorized.*"

Given that clear provision of the Constitution, we respectfully are unable to agree with the appellant's submission on the learned judge's reliance on some authorities to buttress her view that the Constitution then in place did countenance detention without trial."

115. The provisions of Section 6(2) of the Public Security (Detained and Restricted Persons) Regulations clearly stated that where a person is arrested and detained with the authority of a detention order, that person can be detained for as long as the detention order is in force and the detention will at all times be deemed lawful. Furthermore, the repealed Constitution was clear that the rights envisaged under sections 72, 76, 77, 80, 81 or 82 were not absolute and could be limited in exercise of the powers contained in the Part III of the Preservation of Public Security Act, Cap. 57.

116. Counsel for the estate of the deceased went ahead and submitted that even though there was a detention order, the reasons for the detention violated the repealed Constitution and the constitutional requirements for a legal detention were not met. On the claim that the reasons given for the detention were insufficient, counsel contended that calling for a system of multi-party democracy did not constitute a danger to public security as envisioned by Regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulations. Further, that the arrest and detention of the deceased was actuated by malice as he was never arraigned in court or formally charged, and that the government eventually re-introduced multi-party democracy proves that the call by the deceased for the amendment of the Constitution was not illegal. In counsel's view the actions of the government were therefore a form of harassment which violated the deceased's fundamental rights and freedoms.

117. Counsel additionally submitted that although the requirements of Section 83(2) and (3) of the repealed Constitution were indeed complied with as the detention order was issued in writing and in a language understood by the deceased, the other constitutional requirements of gazettement, review by an independent and impartial tribunal, and being afforded reasonable facilities to consult a legal representative of one's choice were breached.

118. Some of these arguments were advanced in the **Matiba case** and the Court addressed them as follows:-

"54. The Petitioner also questions the legality of his arrest and submits that it was unjustified, since according to him, the sole reason for his arrest was due to the firm political stand that he had taken, which was a mere exercise of his freedom of expression, assembly and association as well as his freedom of conscience which were guaranteed under the repealed Constitution. The Respondent on his part urges that the arrest and subsequent detention were justified in the interest of preservation of public security. In addressing that issue, it is difficult for the Court, to try and deduce the true motive of the arrest without engaging in speculation and I shall therefore be guided by the law and the materials that have been placed before me in doing so. I also note that the detention order, partly quoted earlier in this judgment, particularizes the official reasons that necessitated the arrest of the Petitioner. Whereas the Petitioner has denied those accusations and states that they are false and malicious, I note that Regulation 6(1) of the Public Security (Detained and Restricted Persons) Regulations, 1978, gave the relevant Minister power to order the detention of a person, if the Minister was satisfied that such action is in the interest of preservation of public security. It is in the exercise of those powers, that the impugned detention order was issued.

55. In particular, Regulation 6 provided:

"(1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, over any person, he may order that that person shall be detained.

2. Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.

3. The Minister may at any time revoke a detention order."

56. Until its repeal by Parliament the preservation of Public Security Act and its regulations was the operative as regards the detention of a person. I cannot by this Judgment declare it to be unlawful because I have not been asked to do so. The Koigi Wamwere decision also settled that question."

119. In my view, more was required from the deceased in support of his claim that he was not involved in subversive activities as alleged in

the detention order. In order for him to establish that the detention was unreasonable or irrational, there was need to subject the order to deeper interrogation. Mr Angaine, the Minister of State in the Office of the President who signed the order passed away sometimes back. He is the only person who could have been questioned on the truthfulness or otherwise of the contents of the detention order. The delay by the deceased, though understandable, in filing the petition has denied him an opportunity of demonstrating that his detention was malicious and unreasonable.

120. The submission that the detention of the deceased was not gazetted; that the detention was not reviewed by an independent tribunal; and that the deceased was not afforded an opportunity to instruct counsel of his choice are issues that popped up in the submissions. These are the kind of allegations that needed to be particularized in the pleadings in order to provide an opportunity to the Respondent to specifically answer the allegations. The deceased failed to plead these matters and this court finds it difficult to make findings on the allegations without thrashing the right of the Respondent to a fair hearing. In short, these particular allegations by the deceased cannot be addressed in this judgement and the submissions are therefore rejected and dismissed.

121. In summary, I therefore concur with the Respondent that the detention of the deceased was lawful, and therefore his rights under sections 72, 78, and 79 of the repealed Constitution in so far as they related to his confinement were not infringed by the actions of the government in respect of the second detention.

122. There is the allegation that while under detention the deceased was subjected to torture, cruel, inhuman or degrading treatment or punishment. The specifics of the violation are as follows: the deceased was blindfolded and driven around in circles for hours; kept in long and dark underground cells in solitary confinement; stripped half-naked and made to lie on cold ground; kept in dark and very cold cells; denied good nutrition and food; forcefully made to lie on a pest-infested mattress and cold ground without sufficient cover; denied good medical treatment; and subjected to poor and unhygienic sanitary conditions. Additionally, that the deceased was not allowed to see friends and members of his family on a regular and scheduled basis. Instead he was ferried to an unknown destination to meet family members for disguising purposes.

123. In his pleadings and his oral testimony, the deceased recounted that he would at random be taken away from the facility in which he was detained to Wilson Airport where he was permitted to meet his family in the presence of security officers and prison wardens after which he was returned to prison. His evidence was that the environment and uncertainty of the visits caused severe trauma. Additionally, that his visitations with his family ceased until he was hospitalised after falling ill. The deceased alleged that the manner in which these visitations were conducted amounted to psychological torture stemming from severe loneliness. The deceased claimed that when initially detained in Naivasha he was kept in solitary confinement for one month during which period he was not permitted visitations from his family or lawyers. Further, that psychological torture was perpetuated by being denied the opportunity to talk to anyone while under detention which propagated his loneliness and the damage to his physical and mental well-being.

124. The Respondent retorted that the allegations of torture and harassment have not been proven by way of empirical evidence, and that the fact that the deceased slept on the floor did not amount to punishment as that was the norm for all detained persons. The Respondent also rejected the allegation that the deceased was not allowed to contact his family by stating that the deceased was able to meet with his family members while in detention as confirmed in his petition.

125. Section 74 of the repealed Constitution prohibited torture or inhuman or degrading punishment or other treatment. The provision was in line with the general position under international and regional human rights laws on the prohibition of torture and cruel, inhuman and degrading treatment and punishment. Specifically, the prohibition is found in Article 7 of the International Covenant on Civil and Political Rights, 1996 and Article 5 of the African Charter on Human and People's Rights, 1986.

126. The term "torture" is defined in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 as follows:-

> **"… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."**

127. In the **Matiba case,** the Court relied on the decision and definition of torture and inhuman treatment provided in the **Greek case** as follows:-

> **"The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience."**

128. Applying the cited definition to the uncontroverted evidence of the deceased, which was substantially confirmed by PW2, it becomes apparent that the deceased was tortured and subjected to inhuman treatment. The said ill-treatment of the deceased was meted out by police officers and prison wardens. Additionally, his alleged ill-treatment was as a form of punishment and included actions such as stripping him naked, keeping him in solitary confinement and extreme isolation for a month, not providing him with proper nutrition and not allowing him to exercise despite the same being recommended by a medical doctor. Lastly, as a result of his treatment the deceased suffered psychological anguish caused by his severe loneliness, and physical pain due to the poor conditions and neglectful treatment of the early signs of his ailment while in detention which caused him to develop health complications. The deceased complained that he was forced to lie on the cold floor with only a pest infested mattress, and was not provided with enough blankets in the cold cells.

129. It is important to note that not all the complaints raised by the deceased amounted to torture or inhuman or degrading punishment of treatment. The Respondent contended that the deceased received the same treatment with other prisoners and the deceased could not have been given special treatment. The decision of Mumbi Ngugi, J in **Koigi Wamwere v Attorney General [2012] eKLR** as upheld by the Court of Appeal in **Koigi Wamwere v Attorney General [2015] eKLR** was cited in support of the submission that the poor prison conditions under which the deceased was held cannot be said to amount to torture. Mumbi Ngugi, J held that:-

> **"I have set out in detail some of the averments of the petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change. To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the petitioner's rights under section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention."**

130. The Court of Appeal upheld her by stating that:-

> **"We take the view, as did the learned judge, that whereas prison conditions as picturesquely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined. We do not understand the learned judge to have been speaking as an apologist for, or gatekeeper for the State in stating, obiter, that to hold that the appellant had been tortured would be opening floodgates of litigation on the same basis by all persons who passed through the Kenya prisons system at the time. Such an avalanche of litigation would, of course, have grave and deleterious effects which the judge, as a responsible judicial officer, could not afford to be oblivious to."**

131. However, in the **Matiba case,** the Court opined that:-

> **"[W]hereas I recognize that the act of detaining a person necessarily limits some of privileges and 'rights', which a free person would as a matter of course enjoy, the conditions within which the confinement occurs should not be so gross as to remove any 'human' element from them. I harbor no doubts whatsoever that Section 74(1) of the repealed Constitution was intended to protect all persons, and principally those that are in custody who are particularly vulnerable and are therefore mostly in need of such protection. That notwithstanding, I respectfully agree with the sentiments of the learned Judge in the Koigi Wamwere case (Supra) wherein she proclaimed that, not every prison condition amounts to torture and inhuman treatment more so where that same treatment is meted equally on other prisoners. However, in the present case, there is peculiarity in the way in which the Petitioner was treated at the time of his detention. For example, uncontroverted evidence on record suggests that the Petitioner was for a period of over five months held in solitary confinement and was also at some point, held in a block next to where condemned prisoners resided and which prisoners screamed and shouted at each other from dusk to dawn. Such conditions would in no doubt inflict deep psychological wounds at the heart of any ordinary human being. Indeed the Respondent admits that when the Petitioner complained of his confinement, he was moved away from his cell which was next to the block where condemned prisoners stayed. This is an admission on the part of the Respondent that indeed, the Petitioner was at some point held near such condemned prisoners and subjected to continuous high level of noise all day long."**

132. I agree with the statement by the learned Judge that in certain cases, like the one before me, the conditions under which the person is held amounts to torture hence a violation of the right that prohibits torture or inhuman or degrading treatment. It is quite clear from these proceedings that the treatment of the deceased during his confinement was not the standard manner of treating prisoners. He was held in dark, cold underground cells in solitary confinement. He was blindfolded and driven round in circles for hours. This amounted to both physical and mental torture. It is therefore my finding that the actions of the Respondent during the detention of the deceased in 1987 and 1990 amounted to torture, cruel or inhuman treatment or punishment. The State therefore breached Section 74 of the repealed Constitution which prohibited torture or cruel or degrading punishment or treatment.

133. The next question that I must answer is whether the poor conditions that the deceased was subjected to while in detention, and his mistreatment and neglect caused him to develop health complications which eventually developed into a chronic disease. The deceased's doctor testified that he had been the personal doctor of the deceased since 30th October, 1987. He confirmed that when examining the deceased on 9th November, 1990 at Wilson Airport, the deceased made several health complaints as well as complaints about the condition of his treatment in the prison which included sleeping on the floor in a dusty room and without adequate blankets which was causing him problems with his chest. PW2 testified to having recommended that the deceased be given fruits once in a while, he be allowed to exercise, and he be given a bed and beddings in order to alleviate his symptoms. PW2 affirmed that he also recommended for a CT scan for the deceased and that he be seen by an eye doctor.

134. The second time Dr. Gikonyo visited the deceased was in a room at the Traffic Headquarters. He observed that the deceased was weak in appearance, and he confirmed that the CT scan had not been done, he had not seen an eye doctor and had not been given fruits. The deceased was wheezing due to the dust in the room. Once again he recommended that the deceased gets a CT scan of the chest and be given fruits.

135. PW2 averred that on 5th April, 1991 the deceased was brought for the CT scan of his chest which revealed that he had a mass in his chest which was compressing the trachea and had pushed it to the left. The deceased was released two weeks later. He was hospitalised in

Nairobi Hospital and from there he was sent to London for surgery and further treatment.

136. The Respondent in response interpreted the medical report dated 22nd April, 1991 as showing that the deceased was in good health when he was released from detention, save for his allergic rhinitis which he had suffered from before being detained. Moreover, it is the Respondent's position that the deceased's health complications was a result of the normal ageing process and his ailments could not therefore be linked to the Respondent.

137. I have reviewed the medical report prepared by Dr. Gikonyo on 22nd April, 1991 and agree that indeed upon the doctor's physical examination of the deceased, it was observed that he was not under any distress and had no observable health problems besides his usual rhinitis and sinusitis. However, on the second page of the report it is revealed that the chest x-ray, lumbar spine x-ray, and CT scan of the thoracic inlet in axial plane all came back with abnormal results indicating that there were complications that the deceased was dealing with that could not be observed with the naked eye.

138. From the medical report it therefore follows that the contention of the Respondent that the deceased was undergoing the normal ageing process cannot be believed. The testimony of PW2 was clear that the health problems that the deceased was facing arose as a result of the conditions in which he was held or was exacerbated by those conditions. This may explain why the deceased was hurriedly released after the tests carried out by Dr. Gikonyo. It is therefore evident that the deceased started experiencing the complications upon being detained in 1990. Furthermore, PW2 testified to having ordered for a chest x-ray to be conducted upon examining the deceased in November 1990, and the same was only conducted in April 1991, about three months later, and upon sustained complaints by the deceased about his health. This in my view confirms the fact that the deceased's wellbeing was not taken seriously by those who had incarcerated him.

139. I have determined that the deceased was exposed to cruel or inhuman treatment which caused him physiological and psychological distress. PW2 confirmed that the deceased's thyroid disease was stress-related. This evidence was unchallenged and it follows therefore that the stress caused by the inhumane nature of the deceased's detention was the catalyst for his thyroid disease.

140. Having considered the medical evidence, medical reports, and the oral evidence of the deceased and his doctor, I find that the deceased's health complications were directly caused by and aggravated by the acts and omissions of the State during his detention. Consequently the Respondent is liable for the same. In saying so, I have not lost sight of the report prepared by the Medical Board following the examination of the deceased on 8th May, 2014 as a result of a consent entered by the parties in this petition on 28th March, 2014. In the report the Board concluded that the deceased had no medical complaint and after examination he was found to have no medical condition. That was the condition of the deceased at the time of the examination in 2014. It is however noted that the Board also tellingly concluded that the deceased fell sick when in prison in 1991 and was treated appropriately.

141. Did the arrest, detention and failed health of the deceased cause irreversible damage to his business portfolio? The deceased filed pleadings, submissions, and testified in court to having owned shares and served on the boards of an impressive number of companies including Provincial Insurance Ltd (now UAP); ICDC Investment Company Ltd; Co-operative Bank of Kenya Ltd; Kenya Mystery Tours Limited; Rubia Enterprises Africa Limited; Eveready Ltd; Unga Ltd; Rweru General Agencies; Universal Garments Ltd; Francis Thuo Stock Brokers (the first African owned stock brokerage firm that collapsed after his detention); Ceramics Industries Ltd; East Africa Industries (makers of many household items); East African Packaging Industries; International Computers Ltd; Inter Products Ltd (now the multibillion Haco Ltd); and Sera Coating Ltd.

142. The deceased testified to the negative impact his detention had on his businesses and other financial investments. He stated that some of his businesses wound up due to his detention. For others he was forced to give up his directorships and to sell his shares in others including Provincial Insurance (now UAP) in order to pay off his debts.

143. The Respondent's reply was that the deceased admitted to disposing of some of his alleged businesses on account of his own personal interests for example the sale of his shares at UAP to pay off his debts. It was therefore submitted that the misfortunes alleged by the deceased had no connection to his detention or the Respondent.

144. The Respondent further submitted that the deceased failed to produce a share certificate for any of the companies he allegedly owned, neither did he produce transfer documents for the shares he was allegedly forced to sell.

145. Section 107 of the Evidence Act legislates on the burden of proof as follows:-

> **"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

146. Section 108 on the incidence of burden states:-

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

147. Section 109 legislates on the proof of a particular fact thus:-

> **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

148. The cited provisions require a person who desires judgement to be entered in his or her favour to produce evidence in support of his or her pleadings and to adduce facts in support of averments. The provisions are summarised by the oft cited legal principle that 'he who alleges must prove'. In **Yunes Maniafu Mukowle v Moses Makokha & 3 others [2016] eKLR,** the Judge in dismissing an application for lack of the necessary information to support the claim, relied on the case of **Stephen Wasike Wakho & another v Security Express Limited [2006] eKLR,** where the Court stated as follows:-

> **"13. A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove."**

149. This burden of proof was further elaborated on in the case of **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** where the learned Judge posited that:-

> **"Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any)."**

150. The Judge further stated that:-

> **"Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd:-***
>
> **"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.""**

151. It is immaterial whether the opposing side has placed any material before the court to rebut the proponent's case. This was stated by the Court of Appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** when it held that:-

> **"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."**

152. The law as stated in the cited legal provisions and the decided cases is what will guide the court in arriving at its decision. It is clear from the stated law that even in constitutional cases the standard and burden of proof remains the same. It is for the party alleging the existence of certain facts to prove the same by presenting to the court the evidence in support of the allegations in order to aid the court in arriving at a just and fair decision.

153. The deceased alleged that he was the owner of certain businesses, and was a shareholder and director in a number of companies. Further, that he was forced to sell those businesses and step down as director in the companies on account of his tarnished political and personal reputation as a result of his detentions. He stated that one of his foreign business partners left the country upon his arrest and detention. He also testified that many of these companies later became extremely successful some of which are now worth billions of shillings.

154. In the case of **Vivo Energy Limited (Initial Party Kenya Shell Limited) v George Karunji [2014] eKLR** the Court held that:-

> **"[20] Pleadings and documents on record are all allegations until they are proved. Oral and documentary evidence should be adduced in a hearing to prove the issue."**

155.155. In the case of **Christian Juma Wabwire v Attorney General [2019] eKLR**, the Judge relied on the decision in **Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006 where it was held that:-**

> **"23. ….[I]t is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses…… the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation… However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened….."**

156. The learned Judge proceeded to hold as follows:-

"24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought."

157. The deceased and his son who testified as PW3 and is now the Petitioner in this case completely failed to provide this court with any form of evidence that the deceased was the owner of any of the said companies, or held shares in those companies. No originals or even copies of the certificates of business registration, memoranda of association for the various businesses, the notices of appointment of directors, share certificates, share transfer forms or any other form of documentation was produced to prove ownership of the businesses or shareholding in the companies. The deceased arrived in court empty-handed and urged the court to rely on his word of mouth. That is not how things are done in courts of law.

158. In the already cited case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** the petitioner therein took a similar strategy and the Court of Appeal answered him thus:-

"In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1st respondent, the three provisions reproduced above require that the 1st respondent who laid the claim that certain facts existed had the burden to prove existence of those facts. It is no matter that the appellant did not refute the claim by way of a replying affidavit. The 1st respondent was still bound to lay evidence on a balance of probability of the alleged facts before the learned judge. The 1st respondent claimed that there were three companies in which he, the appellant and others held shares. Each of those companies owned the properties stated in the petition. That the appellant sold off those properties and had them accordingly transferred and as a result the 1st respondent suffered loss and damage.

In our view we think that the facts to be proved required documentary evidence. The 1st respondent ought to have produced the certificates of incorporation of the three companies together with their respective Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who, at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1st respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it.

On perusing the judgment and hearing *Mr. Mwangi,* what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1st respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

> **"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."**

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed."

159. It was not enough that the deceased submitted that he was the owner of certain businesses or shares, or that he was the director in certain companies. Such claims needed to be corroborated, and in this case it was necessary that the same be proven by way of documentary evidence. Without the required documentation it is impossible for me to find in favour of the estate of the deceased.

160. Again in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR,** the Court of Appeal stressed that submissions cannot be equated to pleadings and cannot therefore form the basis for the determination of a case. This is what the Court said:-

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

161. Even if the deceased had adduced evidence to confirm ownership of certain businesses and shareholding in certain companies, his claim on this head may still have disintegrated due to the failure to establish a nexus between his failed health and the alleged collapse of the businesses and the companies. In respect of the alleged collapse of companies in which he was a shareholder or director, the deceased was required to demonstrate that he was actively involved in the day to day running of the companies and due to his absence the companies were negatively affected- see the **Matiba case**. He did not discharge this burden.

162. The deceased asked this court to treat him like Hon. Matiba and find that his business empire surpassed that of Hon. Matiba. In the **Matiba case** the petitioner brought to court an expert who detailed **"the financial loss suffered by the Petitioner as a result of his inability to manage his vast business portfolio."** The deceased herein did not provide any evidence at all at all to support his case on this issue and the court cannot award him damages which have not been proved or quantified in order to put him in the same position with Hon. Matiba. Whenever a party approaches the court for a remedy, he does so as an individual and his case will succeed or fail depending on the evidence he places before the court.

163. I therefore agree with the Respondent that the deceased failed to discharge the burden of proof. His claim for compensation on this head therefore fails.

164. The final issue is whether the estate of the deceased is entitled to any relief and the appropriate remedy, if any. The issue of costs will also be determined at this stage.

165. I have found in my analysis above that the petition has succeeded on some aspects. The Respondent is liable for the wrongful detention of the deceased in 1987 and for the torture, inhuman and cruel treatment or punishment that he was subjected to while in detention for the nine months following his arrest in 1990.

166. Counsel for the estate of the deceased submitted at length and urged this court to award exemplary or aggravated damages. In the **Matiba case** which was heavily relied upon by counsel, the Court held on the claim for exemplary damages as follows:-

> **"97. The Petitioner also seeks exemplary and aggravated damages for the violation of his rights by the Respondent. However, the High Court has been reluctant in awarding exemplary damages for reasons that they are not awardable in changed political circumstances. In *Benedict Munene Kariuki and 14 Others v the Attorney General High Court Petition No. 722 of 2009* it was for example determined that no exemplary damages should be awarded in addition to general damages in respect of violation of constitutional rights. Similarly, in *Standard Newspapers Limited & another v Attorney General & 4 others Petition no. 113 of 2006 [2013] eKLR* Mumbi Ngugi J held:**
>
> > **"It is worth noting that exemplary damages are sought not to compensate the victim for the impugned action but to punish and serve as an example to the perpetrator and act as a deterrent for any such future conduct. The High Court has held that exemplary and aggravated damages are inappropriate remedies where unconstitutional action is the subject of challenge."**
>
> **98. In the circumstances, I do not find it necessary to award exemplary and aggravated damages."**

167. Additionally, in **Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR** it was held that:-

> **"61. For similar reasons, it is my finding that the order of exemplary damages is not an appropriate relief to grant in the circumstances. I note that considerable progress has been made towards the protection of fundamental rights and freedoms, including protection of the media, beginning with the promulgation of the Constitution of Kenya 2010 and the guarantees to the media contained therein. The situation has changed considerably for the better over the last seven years, and I see no need to 'punish' the State or unduly burden the tax payer by way of high awards in damages…"**

168. In the case of **Gitobu Imanyara & 2 others v Attorney General [2013] eKLR** Lenaola, J (as he then was) discussed the issue of award of exemplary damages and held that:-

> **"54. Regarding the prayer for exemplary damages by each Petitioner, in the case of Obongo vs. Kisumu Municipal Council (1971) EA 91, the Court of Appeal referred to the English case of Rookes vs. Barnard & Others (1964) AC 1129 where it was held that exemplary damages in tort may be awarded in two classes of cases i.e.**
>
> > **i) Where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and**
> >
> > **ii) Where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff**
>
> **On that issue, I share the same thoughts as Majanja, J. in Benedict Munene Kariuki & 14 Others vs. The Attorney General Petition Number 722 of 2009 (2011) eKLR, where he stated as follows;**
>
> **"I am constrained to depart, from the position taken by my learned brother. In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages."Further, in the case of Wachira Waihere vs. the Attorney General HC Misc. App.No.1184/2003 (O.S.) the Court did not find it appropriate to award aggravated and exemplary damages and stated that;**
>
> **"In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages."**

169. When the matter went on appeal as **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR,** the Court of Appeal upheld him and stated that:-

> **"Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations. We find support in the recent decision of the Supreme Court of Canada in Vancouver (City) *v.* Ward, 2010 SCC 27, [2010] 2 S.C.R. 28 where the Court while considering a colossal award for a Constitutional violation and Sec 24 of the Canadian Charter, held that:**
>
> > **"…** ***In the end, s. 24(1) damages must be fair to both the*** **claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests…**
>
> **Similarly, in the case of Dandy *(supra)* the court held that:**
>
> > **"...The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiffs interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."**
>
> **In the end, we have considered the comparative jurisprudence in this area and the recent decisions of this Court and find no justification to interfere with the learned Judge's exercise of discretion in assessing the damages awarded to the appellants based on the evidence placed before him. We would however point out that even though the learned Judge did not distinguish between public law remedies and private law remedies, he however proceeded correctly and applied the general principles for award of monetary damages in arriving at his decision."**

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.

171. What should be awarded as special damages? It is a firm principle of law that special damages must be specifically pleaded and proved. The principle was reiterated by the Court of Appeal in **Sande v Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK),** as cited by the same Court in **Moses Tengeya Omweno v Commissioner of Police & another [2018] eKLR** thus:-

> **"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."**

172. On the matter of medical expenses, the deceased in his statement dated 25th July, 2016, calculated his medical expenses as 203, 200 Kenyan shillings and 77, 248 sterling pounds which he totalled at Kshs12, 412, 289/-. The estimation was based on the evidence marked CW4 from pages 31-55 and 58-62. The deceased claimed that the amount included his travels to and within London and accommodation in London. He also asked for a further award of Kshs. 30 million which he termed as additional medical and other expenses.

173. A perusal of the exhibits shows that the deceased omitted to submit evidence of his travel expenses and the additional medical and other expenses. He also failed to submit the exchange rate he used to convert the sterling pounds to Kenyan shillings.

174. I will however base the award of special damages on his medical expenses and accommodation as supported by the bundle of documents marked CW4. I have studied the evidence submitted by the deceased and find that the claim for Kshs 226,200/- and £68,474.29 for his medical expenses; and £506.55/- for his hotel stay in Rubens Hotel, London has been proved and his estate is awarded that amount. This is the only amount proved by the deceased. Although a claim for future medical expenses, which falls in the category of special damages, is indeed awardable once proved, it is clear that the deceased failed to support the claim for Kshs. 30 million. This claim therefore fails for want of evidence in support of the claim.

175. On the exchange rate to apply to money in sterling pounds, I rely on the case of **Ingra v National Construction Corporation [1987] eKLR** where the Court was guided by the decision of Lord Wilberforce in **Miliangos v Frank (Textiles) Ltd [1976] AC 443** in which he elaborated that:-

> **"As regards the conversion date to be inserted in the claim or in the judgment of the court, the choice, as pointed out in the Havana Railways case (1961) AC 1007 is between (i) the date of action brought (ii) the date of judgment (iii) the date of payment. Each has its advantages, and it is to be noticed that the Court of Appeal in Scharasch Meier and in the present case chose the date of payment meaning, as I understand it, the date when the court authorises enforcement of the judgment in terms of sterling. The date of payment is taken in the convention annexed to the Carriage of Goods by Roads Act 1965 (article 27(2)). This date gets nearest to securing to the creditor exactly what he bargained for. The date of action brought,**

though favoured by Lord Reid and Lord Radcliffe in the Havana Railways case, seems to me to place the creditor too severely at the mercy of the debtor's obstructive defences (cf. this case) or the law's delay ..."

176. A.M. Cockar, J went ahead and held that:-

"The plaintiffs are entitled to their US dollars at the value they held in the world market on December 31, 1978. The only way to assure that they get that value of the judgement sum which is rightfully due to them is by ordering a conversion at the rate of exchange that applies on the day of payment."

177. The decision in the **Miliangos** case was approved by the Court of Appeal in **Beluf Establishment v Attorney General [1993] eKLR**. I will therefore apply the principle so that the exchange rate applicable will be the one prevailing at the time of payment of the decretal amount by the Respondent.

178. Turning to the claim for general damages, I note that counsel for the estate of the deceased in the submissions asked for an award of Kshs. 5 billion on what was termed as an aggravated scale. This claim was not backed by support of any local jurisprudence. Only awards that can be sustained by the economy should be made. Claimants in similar circumstances should receive similar awards and any divergence in awards ought to be accompanied by reasons. In **Peter M. Kariuki v Attorney General [2012] eKLR,** the Court of Appeal restated the principles governing the award of damages as follows:-

"….it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions."

179. In the **Matiba case** the petitioner who was detained at the same time with the deceased was awarded a global sum of Kshs. 15 million for violation of his constitutional rights and fundamental freedoms. Even in the case of **Koigi Wamwere v Attorney General [2015] eKLR** the petitioner's award of Kshs. 2.5 million as general damages by the High Court was enhanced to Kshs. 12 million notwithstanding the fact that the Court of Appeal noted that his rights had been violated in two different instances. In **Peter M. Kariuki v Attorney General [2012] eKLR** the petitioner was awarded Kshs. 15 million as damages for the violation of his rights despite the Court of Appeal finding that the violation of his rights vitiated his trial before the court martial to the extent that it amounted to no trial.

180. A few years have passed since the awards were made in the cited cases. Even taking inflation into account, the award cannot be ramped up to the Kshs. 5 billion prayed for by counsel for the estate of the deceased. In respect of that figure the words of the Court of Appeal in **Koigi Wamwere v Attorney General [2015] eKLR** come to mind. The Court stated that:-

"….as far as this appeal is concerned, we are of the respectful view that the Kshs. 200 million urged both before the High Court and in the submissions before us has no foundation in authority or reality. The sum is literally plucked from the air and placed in counsel's submissions."

181. It is obvious that what is sought in this petition is mindboggling and I do not think that even the world's best economies can meet or sustain such awards. Counsel urged that those who fought for the second liberation of this country should be adequately compensated. He pointed out that over Kshs. 600 billion is lost to corruption annually. All that notwithstanding, I find the proposed figures beyond comprehension. After factoring inflation, and considering that the deceased was detained twice unlike Matiba, I award the estate of the deceased a global sum of Kshs. 17 million as general damages for his unlawful detention, in the first instance, and violation of his constitutional rights and fundamental freedoms in the second instance.

182. The principles applicable to the award of costs in constitutional petitions are found in Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The award of costs is purely at the discretion of the court. However, the court in exercising the discretion is required to take appropriate measures to ensure that every person has access to the courts to determine their rights and fundamental freedoms. In this case, the claim has largely succeeded and the Respondent will meet the Petitioner's costs and it is so ordered.

183. For record purposes, it is stated that apart from the awards made hereinabove, all the others claims for compensation by the estate of the deceased have failed.

184. Before I issue the final orders in this petition, it is important that my interaction with this petition be recorded in this judgement for posterity. This file first landed on my docket on 25th March, 2019 slightly over three weeks after I reported to the Constitutional and Human Rights Division of the High Court on 1st March, 2019. This was over six years after the petition was filed on 15th January, 2013. On the first day, counsel for the deceased was not in court. I noted that the matter was old, directed that the proceedings be typed and fixed a mention date for four days later being 29th March, 2019. Again on that date, counsel for the deceased did not attend court. I fixed the matter for mention on 5th June, 2019 which turned out to be a public holiday. On 6th June, 2019 the matter was mentioned before the Deputy Registrar who fixed a mention date for 3rd July, 2019. All the advocates for the parties appeared before me on that day and that is when counsel for the Respondent indicated that he was not going to call the deponent of the replying affidavit to testify. He proceeded to close the Respondent's case. The advocates agreed to file and exchange submissions and come back on 24th September, 2019 for highlighting of the same. On 24th September, 2019 the matter did not take off as I was hearing Petitions No. 56, 58 and 59 all of 2019 (commonly known as the Huduma Namba case) with two other judges. The Deputy Registrar mentioned the matter on that day and listed it for mention before me on 30th September, 2019. Although counsel for the deceased was present when the mention date was taken, he did not attend court on the mention date. Nevertheless, on 30th September, 2019 I fixed the matter for hearing on 20th January, 2020 and directed counsel for the Respondent to serve a hearing notice on counsel for the Petitioner. Submissions were indeed highlighted on 20th January, 2020 and judgement reserved for 19th March, 2020. This judgement was actually ready for delivery on 19th March, 2019 which was slightly less than one year from 25th

March, 2019 when the matter first came to my attention. However, due to the emergency measures taken by the National Council on the Administration of Justice (NCAJ) on 15th March, 2019 in respect of COVID-19 disease, which resulted in the suspension of all civil matters except those filed under certificate of urgency, the earliest date the judgement could be delivered is today.

185. In conclusion, I enter judgment in favour of the Petitioner as follows:-

a. A declaration is hereby issued that the deceased's detention in 1987 was unlawful and thus contravened his right to liberty under Section 72 of the repealed Constitution;

b. A declaration is hereby issued that the deceased's right to freedom from torture, cruel or inhuman treatment under Section 74(1) of the repealed Constitution was contravened by his detention for nine months from 1990 to 1991;

c. A global sum of Kshs. 17, 000, 000/- is awarded to the estate of the deceased as general damages for the said violation of his constitutional rights and fundamental freedoms;

d. The estate of the deceased is awarded Kshs 226,200.00 and £68,980.84 being costs of medical expenses and accommodation in London. The sterling pounds to be paid at the exchange rate prevailing at the time of the satisfaction of the decree;

e. The costs of the proceedings are awarded against the Respondent in favour of the estate of the deceased;

f. The general damages and costs shall attract interest at court rates from the date of judgement until payment in full; and

g. The special damages will attract interest at court rates from the date of the filing of the petition until payment in full.

Dated, signed and delivered at Nairobi this 3rd of April, 2020.

W. Korir,

Judge of the High Court