REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 500 OF 2013

ZIPPORAH SERONEY.....1ST PETITIONER

MARGARET CHEPKOSGEI.....2ND PETITIONER

ROSE JEMUTAI.....3RD PETITITONER

FLORENCE CHEPCHIRCHIR SERONEY.....4TH PETITIONER

DAVID KIPKEMBOI SERONEY.....5TH PETITIONER

CHRISTINE CHEKORIR SERONEY.....6TH PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The 1st Petitioner, Zipporah Seroney, is the widow and administrator of the estate of the deceased Hon. John Marie Seroney. Hon. John Marie Seroney shall henceforth be referred to as the deceased. Margaret Chepkosgei, Rose Jemutai, Florence Chepchirchir Seroney, David Kipkemboi Seroney and Christine Chepkorir Seroney who are the respective 2nd to 6th petitioners are the children of the 1st Petitioner and the deceased.

2. The petitioners' petition filed on 17th October, 2013 which is supported by the affidavit of Zipporah Jebichii Kurui Seroney sworn on 15th August, 2013 was amended on 13th May, 2016. The amended petition was filed on 7th March, 2017 pursuant to the leave granted by Lenaola, J (as he then was) on 7th February, 2017. The petitioners bring the petition on their own behalf as well as on behalf of the estate of the deceased and the estates of Elizabeth Chebet Seroney and Samson Marie Seroney who are the late children of the 1st Petitioner and the deceased.

3. From the pleadings filed in court, the petitioners' case is that the deceased, who was a Member of Parliament (MP) for Tinderet Constituency, while serving as the Deputy Speaker of Parliament was arrested on 11th October, 1975 by the Special Branch Police within the precincts of Parliament. He was held at Spring Valley Police Station overnight and on 12th October, 1975 he was flown to Manyani Maximum Security Prison where he was detained without trial. It is the petitioners' case that the deceased's lawyers and family were not permitted to visit him as he was being held *incommunicado.*

4. The petitioners' case is that after being detained at Manyani Maximum Security Prison for one and a half years, the deceased was transferred to Kamiti Maximum Security Prison where he was detained until his release on 12th December, 1976. I note that in the later part of the petition it is averred that the deceased was released from detention in 1978. This tallies with the petitioners' averment that the deceased was detained for over 3 years and 2 months.

5. The petitioners depose that the deceased's fundamental rights and freedoms were infringed as he was detained without trial amounting to an infringement of his right to liberty protected by Section 70(a) of the repealed Constitution. Further, that the deceased's right to conscience under Section 70(b) of the said Constitution was violated as he was arrested and detained pursuant to a ruling he made while he was serving as the Deputy Speaker of Parliament on 9th October, 1975.

6. It is further the petitioners' case that the deceased freedom from inhuman treatment or punishment under Section 74 of the former Constitution was infringed as he was imprisoned, held for 23½ hours in a tiny cell which was lit throughout, given unhealthy food unfit for human consumption and subjected to mental and physical torture. Additionally, that the deceased's prolonged detention infringed on his right to movement guaranteed under Section 81 of the repealed Constitution.

7. The petitioners further argue that the detention order for the deceased which was issued under the Preservation of Public Security Act was only supposed to last for 28 days under Section 85 of the repealed Constitution.

8. The petitioners additionally allege that after the deceased was released from detention he was politically targeted. He was, they contend, therefore unable to get any gainful employment during the entire duration of his post-detention life until he passed away on 6th December, 1982.

9. It is also the petitioners' case that apart from the violation of the deceased's constitutional rights, their rights were equally infringed as they lacked food, school fees, access to proper medical care and decent clothing as they had been accustomed to. They also missed their father who was the sole breadwinner of the family.

10. The petitioners aver that their troubles did not end upon the demise of the deceased as their rights continued to be violated. They identify the violations as the invasion of their Kiboi farm where they were staying in violation of the right to property under Article 40 of the current Constitution and Section 75 of the repealed Constitution; the brutal gang-raping of the 6th Petitioner amounting to the violation of her right to dignity under Article 28 of the present Constitution; and the constant harassment of the petitioners which caused them to flee their home and country amounting to cruel and degrading treatment in violation of their rights under Article 29 of the 2010 Constitution and Section 74 of the retired Constitution.

11. The petitioners therefore pray for the following reliefs:-

a) THAT a declaration be issued to declare that the arrest of the Late Hon. John Marie Seroney while he was within Parliament precincts and his subsequent detention without trial was a violation of his rights and the Respondent is liable for the violation of the rights and fundamental freedoms enshrined under Sections 70(a), 70(b), 72(1), 74, 81 and 85 of the former Constitution of Kenya.

b) THAT a declaration be issued to declare that the constant harassment of the Petitioners by agents of the state was a violation of their freedom from cruel and degrading treatment enshrined under Section 74 of the former Constitution of Kenya, as well as Article 29 of the Current Constitution of Kenya.

c) THAT a declaration be issued that the brutal gang-raping of the Sixth Petitioner was a violation of her right to human dignity enshrined under Article 28 of the Current Constitution of Kenya, 2010.

d) THAT a declaration be issued to declare that the order that state failure to protect the Petitioners from the constant harassment led to them fleeing from their home located on Kibois farm, and this was a violation of their right to property enshrined under Article 40 of the Constitution of Kenya, 2010 as well as Section 75 of the former Constitution of Kenya.

e) THAT compensation for the violation of the Petitioners' respective rights and fundamental freedoms under Article 27, 28, 41, 47 and 50 of the Current Constitution.

f) THAT the costs of the Petition be borne by the Respondent.

12. By way of her affidavit sworn on 15th August 2013, the 1st Petitioner deposes that she is the administrator of the estate of the deceased, and in that capacity brings the action for her benefit, the benefit of the estate and her two deceased children. She has provided a copy of the Letters of Administration marked ZS1.

13. In further support of the petitioners' case, the 1st Petitioner appeared in court in person and testified as PW1. She told the court that she is the administrator of her late husband's estate and that she obtained a grant of letters of administration in Eldoret Succession Cause No. 144 of 1991.

14. The 1st Petitioner's testimony is that the deceased served in various positions in government until 1975 when he was detained and subsequently released in 1978. PW1 stated that her family relied on her late husband as the breadwinner of the household and therefore his detention caused them suffering.

15. PW1 further attested that in 1991 their house was raided, destroyed, and the 6th Petitioner who was 17 years old at the time gang-raped during the attack. Mrs. Seroney additionally testified that as a result of the attack she lost the property in the farm. She identified a letter dated 13th December, 2012 emanating from the National Assembly directed to the Ministry of State and Provincial Administration calling for an investigation into the matter, and told the court that the letter was not acted upon hence the decision to file this petition.

16. During cross-examination, PW1 stated that she was not permitted to visit her late husband while he was detained at Manyani Prison until one year later. She further attested to the fact that she was arrested and harassed by government officials, and that when she lost her land it was taken over by squatters who are still on the land.

17. She further testified that the people who raped her daughter were arrested but released. Further, that because of the harassment she had

been forced to flee her homeland with her family to go and live in a foreign country. She further stated that she has not been at peace for 43 years and beseeched the court to assist them to find a place to live.

18. Initially the petitioners had sued Daniel Toroitich Arap Moi, the late second President of the Republic of Kenya as the 1st Respondent and the Attorney General as the 2nd Respondent. The 1st Respondent was struck off the proceedings in a ruling delivered on 18th December, 2015 leaving the Attorney General as the sole Respondent.

19. In opposition to the petition, the Respondent filed a replying affidavit dated 14th July, 2014 sworn by Phillip Ndolo, a Senior Assistant Commissioner of Police. The Respondent's first line of attack is that the 1st Petitioner is not the personal representative and or administrator of the estates of her two deceased children and had not obtained their permission to institute this suit and she therefore has no capacity to bring this claim on their behalf.

20. In respect to the substance of the petition, the Respondent denies all allegations of the deceased's detention. Nevertheless, it is the Respondent's contention that according to Section 83(1) of the repealed Constitution, the right to personal liberty, and the freedoms of association and movement would be limited in accordance with the Preservation of Public Security Act. The Respondent avers that since it was admitted in the petition that the deceased was detained under the said Act, the limitation to his rights was therefore lawful. Further, that the alleged violated of rights under Articles 43 and 45 of the Constitution of Kenya, 2010 does not lie as the constitutional provisions do not apply retrospectively and the Petitioner cannot therefore base her claim on the current Constitution.

21. It is also the Respondent's averment that the petitioners have failed to provide the necessary particulars and documents in support of their claim that due to the lack of the deceased's support they suffered illness and were condemned to poor living standards. Additionally, that the socio-economic and family rights were not provided for under the repealed Constitution and the petitioners are therefore not entitled to any compensation for alleged violation of those rights.

22. It is the Respondent's case that the petitioners have failed to provide the necessary particulars of the forceful eviction from their land and the loss of property. The Respondent nevertheless denies any connection with the alleged eviction and assault which have been alleged by the petitioners. Further, that the alleged eviction and assault were not reported to the police. The Respondent also denies any connection with the death of the 1st Petitioner's deceased son and the allegation that the 1st Petitioner's physical and mental health and her exile are attributable to the government or its representatives. For record purposes it is noted that averment on the demise of the deceased's son by the name Samson in India while attending college is found in the original petition but was omitted from the amended petition.

23. It is contended by the Respondent that the petition does not allege any particular violations of the petitioners' rights or the rights of the deceased. Additionally, it is averred that the violations that allegedly occurred after the death of the deceased are not attributable to the Respondent.

24. It is averred that the Respondent is non-suited in reference to the allegations concerning the petition filed in the National Assembly as the National Assembly is an independent arm of government.

25. The Respondent states that the petitioners have deliberately avoided the procedure and remedy available to them under Section 83(2)(c) of the repealed Constitution without any explanation as to why no complaint was made as required by that provision.

26. Finally, the Respondent avers that this petition has been brought over 35 years after the release of the deceased and the petitioners have not offered any explanation for the delay in instituting these proceedings.

27. The Respondent also opposed the petition grounds of opposition dated 15th November, 2018 as follows:-

(i) The instant Petition has been instituted after an unreasonable and unexplained delay from the time the alleged cause of action arose.

(ii) The Petitioners have not proved with concrete evidence that the late John Marie Seroney (the late Seroney) was arrested by the alleged Special Branch and/or detained *incommunicado* at any of the Prisons in Kenya.

(iii) The Petitioners have not discharged the evidentiary burden required of them to prove that together with their lawyers, they attempted to visit the late Seroney at any prison and that their alleged access to him was denied, if at all.

(iv) The evidentiary burden required of the Petitioners to prove that the late Seroney was treated in an inhumane or degrading manner has not been discharged at all. Such allegations are based on conjecture and hearsay.

(v) The Petitioners have not proved the illegality of detention without trial under the repealed Constitution of Kenya, if at all.

(vi) The instant Petition [is] based on a cause of action that happened in the 1970s and 1980s can only be hinged on the repealed Constitution and not the current one.

(vii) The Petitioners' allegations that the late Seroney's rights alleged to have been violated by the Respondent were absolute rights under the former Constitution.

(viii) Fundamental rights and freedoms of any individual under any Constitution are personal in nature and allegations of violations of the same cannot be claimed on behalf of another person.

(ix) The Petitioners' allegations that the threats they allegedly received was from the agents of the State and that the 6th Petitioner was gang-raped have not been proved. This is so because no evidence of a report of any criminal offence being meted against any one of them has been availed to this court, not even an OB entry has been availed.

(x) The role of the State to provide security to its citizens applies to all equally and that no particular individual should be given preferential treatment over the rest, in any event, there is no evidence to the effect that the Petitioners petitioned the State for any special security to be accorded to them.

(xi) The 1st Petitioner's decision to seek refuge in the USA as alleged is her personal decision since she can afford to live and stay there. There is no evidence adduced to the effect that the USA government is catering for her stay there or that her bills are footed by the government of the United States of America.

(xii) The instant Petition lacks merit and the same is otherwise an abuse of the due process of this honourable court.

28. The petitioners filed their submissions dated 17th December, 2018 and identified various issues for determination by this court. On the alleged violation of the right to liberty of the deceased as guaranteed under sections 70(a) and 72(1) of the former Constitution, the petitioners state that the deceased was detained for a cumulative period of over three years and two months without trial or charge in any court and was held in Mayani Maximum Security Prison and later transferred to Kamiti Maximum Security Prison. The petitioners submitted that the State's actions violated the rights of the deceased. Reliance was placed on the decision in the case of **Albanus Mwasia Mutua v Republic, Criminal Appeal No. 120 of 2004; [2006] eKLR** where the Court found that the Appellant's right under Section 72(3)(b) and 77(1) of the repealed Constitution were infringed as he was kept in police custody for 8 months before being taken to court. The petitioners aver that on the basis of the breach of the deceased's fundamental right to liberty, the petitioners are entitled to compensation as was provided by Section 72(6) of the former Constitution.

29. The petitioners further contend that the petition presented to the National Assembly on 12th May, 2011 by Hon. John Mututho seeking compensation and apologies for the families of the deceased and the late Hon. Martin Shikuku is clear indication that the unlawful arrest and detention of the deceased is in the public domain. It is the petitioners' submission that in the petition before the National Assembly it was stated that the deceased was arrested in his chambers in Parliament, which violated the immunity granted for words uttered in Parliament. Additionally, that Hon. John Mututho's petition had indicated that the deceased was detained pursuant to the Preservation of Public Security Act and according to the petitioners such detention ceased to have effect upon the lapse of 28 days by virtue of Section 85(2) of the repealed Constitution.

30. On the question of the claimed violation of the right to conscience of the deceased as guaranteed under sections 70(b) and 72(1) of the former Constitution, the petitioners once again relied on the petition presented to the National Assembly by Hon. John Mututho in which it was alleged that the arrest was a reaction to a landmark ruling made by the deceased which was not favourable to the Executive. The petitioners assert that the ruling was an expression of the deceased's opinion and was made in line with his mandate as the Deputy Speaker of Parliament, and his arrest therefore violated his freedom of conscience.

31. The petitioners contend that the treatment afforded to the deceased while he was in detention amounted to inhuman treatment and this violated his right and fundamental freedom under Section 74 of the former Constitution. According to the petitioners, the particulars of torture are that the deceased was held for 23½ hours in a tiny cell which was lit throughout the day, given unhealthy food unfit for human consumption and subjected to mental and physical torture. The petitioners relied on the definition of torture as pronounced in the cases of **Greek Case 1969 Y.B. Eur. Cov. On H.R. 186 (Eur. Comm'n on H.R)** and **Samwel Rukenya Mburu v Castle Breweries, Nairobi HCC 1119 of 2003**. Further reliance was paced on the cases of **Robert Njeru Nyaga v Attorney General [2014] eKLR** and **Republic v Minister for Home Affairs and others ex-parte Sitamze [2008] 2 E.A. 323** where the courts elaborated on the prohibition against torture or cruel or inhuman or degrading treatment or punishment.

32. The petitioners submit that the continued detention of the deceased for a period of three years and two months limited his right to movement guaranteed under Section 81 of the former Constitution. Their case is that the deceased's right to freedom of movement was infringed as he was unlawfully detained without committing any offence and for a period of more than the 28 days stipulated by the repealed Constitution.

33. The petitioners further urge that the invasion of their Kiboi farm where they were staying amounted to violation of their right to property guaranteed under Section 75 of the former Constitution. They rely on the cases of **Multiple Hauliers East Africa Limited v Attorney General & 10 others, Petition No. 88 of 2010; Patrick Chege Kinuthia & 2 others v Attorney General [2015] eKLR;** and **Charles Murithii & 2 others v Attorney General Petition No. 113 of 2009** where the courts adjudicated on the importance of the constitutional protection of the right to private property.

34. The petitioners assert that their right to property was infringed as they were harassed at their farm in Kiboi by the agents of the State including regular and administrative police. They urge that the sustained harassment escalated to a point where the 6th Petitioner was brutally gang-raped on the property which led the family to flee for fear over their safety. The petitioners submit that after the family fled, their farm was invaded by squatters and agents of the deceased's political enemies. They state that the farm was compulsorily acquired and divided into several pieces. They contend that to date the land has not been returned to them nor have they been compensated for the deprivation of their land.

35. The petitioners also submit that the brutal gang-raping of the 6th Petitioner amounted to a violation of her right to dignity enshrined under Article 28 of the current Constitution. The petitioners argue that the right of the 6th Petitioner to dignity was infringed by virtue of the brutal gang rape by the political enemies of the deceased and agents of the State.

36. The petitioners submit that in the Preamble of the Universal Declaration of Human Rights, the right to human dignity is recognised as a

basis of fundamental rights. The inherent nature of this right is further highlighted by referring to the cases of **S v Makwanyane & another 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC)** and **JWI v Standards Group Limited & another [2013] eKLR**.

37. On their assertion that their fleeing their home due to constant harassment amounted to cruel and degrading treatment and thus violated their rights under Section 74 of the former Constitution, the petitioners once again rely on the definition of torture and inhuman treatment in the **Greek case** and **Minister of Home Affairs ex parte Sitamze** (supra). It is the petitioners' case that the treatment of the family of the deceased amounted to an infringement of the said rights. Further, that the inhuman treatment caused a deterioration of the 1st Petitioner's physical and mental health causing her to seek refuge in the United States of America.

38. The petitioners rely on the petition of Hon. Mututho to the National Assembly in which he claims that the persecution and harassment of the petitioners caused some of the properties of the deceased to be sold, and one of his children to suffer from mental complications. It is the petitioners' case that they were forced to flee their home and this can only be termed as inhumane and therefore a violation of Section 74(1) of the repealed Constitution.

39. On his part the Respondent through his submissions dated 12th March, 2019 identifies two issues for the determination of this court. On the first issue as to whether the petitioners have discharged the burden of proof, the Respondent refers to sections 107(1) and 109 of the Evidence Act as establishing the law on the burden of proof. It is submitted that the petitioners have not produced substantive evidence in support of their allegations. According to the Respondent, the petitioners were required to prove their allegations on a balance of probabilities since he had controverted their case. This argument is supported by the holding in **Constitutional Petition No. 128 of 2006, Lt Col. Peter Ngari Kagume & others v Attorney General.**

40. Turning to the specific allegations of violation of rights, the Respondent submits that the deceased's right to liberty was not violated as he was arrested in accordance with the law as provided by the Preservation of Public Security Act. Further, that the right to liberty can be limited and such limitation was justified under the stated Act.

41. The Respondent urges the court not to rely on the petition presented to the National Assembly by Hon. Mututho stating that parliamentary proceedings are privileged and no person was called as a witness to collaborate the document. Further, that there is no evidence that the issue was discussed and what the decision of the National Assembly was, if any.

42. On the right to property, the Respondent retorts that there is no evidence to prove that State agents were the ones harassing the petitioners. The Respondent also submits that the petitioners have failed to provide evidence of ownership of the Kiboi farm or that the ownership of the land has changed. On this point the Respondent refers to the decision in **Lt Col. Peter Ngari Kagume** (supra) where the Court held that where there is an alleged violation, the petitioners must avail tangible evidence of the violation of their rights such as medical records. The Respondent also relies on the dictum in the case of **Fredrick Gitau v AG [2012] eKLR** that he who alleges must prove.

43. On the alleged ill treatment of the deceased, it is submitted that he was subjected to the standard treatment that was applicable to all prisoners regardless of the reasons for their imprisonment. The cases of **Koigi Wamwere v AG [2012] eKLR** and **Hon. Gitobu Imanyara & 2 others v AG, Petition No. 78 of 2010** are relied on for the proposition that the deplorable conditions that all prisoners were subjected to cannot be termed as torture.

44. The Respondent further contend that the petitioners have failed to tender evidence to prove that because of the incarceration of the deceased, he was unable to gain employment in government or elsewhere. Additionally, it is urged that the petitioners failed to produce evidence to show that the deceased made a specific contribution towards their needs. The Respondent also submits that the 6th Petitioner did not prove that she was raped by providing medical records or a record of the incident in the police occurrence book.

45. It is finally submitted on the first issue that there is no evidence to prove that the deceased was arrested within the precincts of Parliament, held incommunicado and his lawyers were not allowed to see him.

46. The second issue identified by Respondent is whether the petition was brought in good time. The Respondent urged the court to be guided by the case of **Eluid Wefwafwa Luucho & 3 others v Attorney General [2017] eKLR** where it was held that although there is no time limitation for filing a constitutional petition alleging violation of fundamental rights and freedoms, the delay in filing the claim should not be unreasonable and prejudicial to the respondent's defence. It is the Respondent's position that the petitioners herein have failed to establish a plausible reason for the delay in filing the suit.

47. On the issue of costs, the Respondent urges that costs should not be awarded to the petitioners as no infringement of rights has been established. Reliance is placed on the case of **Party Independent Candidate of Kenya v Mutula Kilonzo & 2 others [2013] eKLR** for the holding that costs are awarded at the court's discretion and to the successful party.

48. The Respondent concludes his submissions by stating that the petitioners are not entitled to the orders sought as they have not discharged the burden of proof.

49. Having carefully considered the pleadings and submissions before me, I identify the issues for the determination of this court as:-

a) Whether the constitutional rights and fundamental freedoms of the deceased were infringed on the basis of his arrest and detention;

b) Whether the constitutional rights and fundamental freedoms of the petitioners were infringed as a result of the arrest and detention of the deceased;

c) Whether the 6th Petitioner was gang-raped, and if so, whether such action amounted to a violation of her right to dignity; and

d) Who should get the costs for the petition?

50. The question as to whether this petition is bad for inordinate delay needs to be settled at the outset. It is the Respondent's view that the petition has been overtaken by events and the petitioners have failed to provide a plausible reason for the delay in filing their suit.

51. On the issue of timelines in filing constitutional petitions, the Court stated in the case of **Eluid Wefwafwa Luucho & 3 others v Attorney General [2017] eKLR** that:-

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

52. The Court went ahead and held that:-

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

53. The Court in **James Kanyitta Nderitu v Attorney General & another, Nairobi Petition No. 180 of 2011**, as cited in **Joan Akinyi Kabasellah and 2 others v Attorney General, Petition No 41 of 2014,** considered the issue of delay in filing of constitutional petitions and concluded that:-

> **"Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim."**

54. In **Gerald Juma Gichohi & 9 others v Attorney General [2015] eKLR**, it was observed that:-

> **"[T]he history of this Country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breathe, it was also the Petitioners' claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the Country's future….**
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> **[It] is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay, the price for its historical faults and I must also agree with the Petitioners submission that the instant Petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the Courts for doing justice, albeit belatedly because delayed justice is indeed justice denied."**

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

> **"In *Wellington Nzioka Kioko vs. Attorney General [2018] eKLR*, this Court, in an appeal arising from a decision of the High Court on a petition for a declaration that the fundamental rights and freedoms of the petitioner therein had been violated, upheld the High Court that institution of a claim over 30 years after the cause of action had arisen constituted inordinate delay. The Court expressed that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay.**
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> **In *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* (above), this Court also addressed the question of limitation in the context of constitutional petitions. After reviewing past decisions on the subject, the Court concluded that there is no time limit for filing of a constitutional petition and that the period of limitation in the Limitation of Actions Act does not apply to violation of rights and freedoms guaranteed under the Constitution. The Court stated:**
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> ***"Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State***

or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).

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

56. The Court of Appeal went ahead and summarised the law thus:-

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

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

58. The petitioners have explained through their pleadings, evidence and submissions why they filed this petition after the enactment of the 2010 Constitution. It is also observed that the Respondent has not stated that he has not been able to proffer his defence because of the time lapse. Indeed this petition relates to events that occurred during the presidency of Mzee Jomo Kenyatta. The petition has been brought about forty five years after the deceased was allegedly arrested and detained. It is, however, appreciated that the window for redressing violation of rights was provided when the 2010 Constitution came into force. The petition was filed in 2013 about three years after the promulgation of the Constitution of Kenya, 2010. There was therefore no inordinate delay in the filing of the petition. In the circumstances of this case, it is not too late to peer into the past and correct the injustices that may have occurred in our history. I therefore reject the Respondent's assertion that this petition is time-barred. I will therefore proceed to consider the petition on its merit.

59. The petitioners assert that the deceased's right to liberty was infringed as he was detained for a cumulative period of over three years and two months without trial in any court. Further, that since the deceased was detained under the Preservation of Public Security Act, Section 85(2) of the repealed Constitution envisaged that the detention order would cease to have effect upon the lapse of twenty eight days.

60. The Respondent's response is that the deceased's right to liberty was not violated as he was arrested in accordance with the law under the Preservation of Public Security Act. Further, that the right to liberty could be limited and such limitation was justified under the Act.

61. Section 70 of the repealed Constitution provided as follows:-

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

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

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

62. Section 72 further stated that:-

"72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –

(a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the fulfilment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;

(f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease; Protection of right to personal liberty. 20 of 1987. 4 of 1988, s.5. *Constitution of Kenya* 57 Rev. 2009]

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

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

(3) A person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with. *Constitution of Kenya* 58 [Rev. 2009

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person."

63. As indicated by the Respondent, the right to liberty and personal security is not an absolute right, and its limitations were provided for under Section 72(1) of the repealed Constitution. In respect of the arrest and detention of the deceased, the Respondent relies on Section 72(1)(j). The parties agree that the deceased was arrested and detained under the Preservation of Public Security Act, Cap. 57. Counsel for the petitioners submit that the detention of the deceased beyond 28 days from the date of his arrest violated Section 85(2) of the repealed Constitution which provided that an order under the Act would cease to have effect on the expiration of twenty eight days unless it received parliamentary approval. Counsel for the Respondent did not make any response to this important submission.

64. In order to make a determination on the petitioners' submission, Section 85 of the repealed Constitution needs to be interpreted. The Section provided as follows:-

"85. (1) Subject to this section, the President may at any time, by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any of the provisions of that Part of that Act.

(2) An order made under this section shall cease to have effect on the expiration of the period of twenty-eight days commencing with the day on which the order is made, unless before the expiration of that period it has been approved by a resolution of the National Assembly; but in reckoning any period of twenty-eight days for the purposes of this subsection no account shall be taken of any time during which Preservation of public security. Cap. 57. *Constitution of Kenya* 74 [Rev. 2009 Parliament is dissolved.

(3) An order made under this section may at any time be revoked by the President by an order published in the Kenya Gazette.

(4) An order made under this section and approved by a resolution of the National Assembly in accordance with subsection (2) may at any time be revoked by a resolution of the Assembly supported by a majority of all the members of the Assembly (excluding the *ex officio* members).

(5) Whenever the election of the President results in a change in the holder of that office an order made under this section and in force immediately before the day on which the President assumes office shall cease to have effect on the expiration of seven days commencing with that day. (6) The expiry or revocation of an order made under this section shall be without prejudice to the validity of anything previously done under the order or to the making of a new order."

65. Section 85(2) cannot be read in isolation because it refers to Section 85(1). Section 85(1) gave powers to the President of the Republic of Kenya to by order published in the Kenya Gazette, bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any of the provisions of that Part of the Act. The order referred to in Section 85(2), and which required the approval of Parliament before the expiry of twenty days is the one in Section 85(1). That is the order that operationalised the detention law and it was not the same with a detention order for an individual issued under the Preservation of Public Security Act. The law that governed the detention of individuals was not Section 85 of the retired Constitution but the Preservation of Public Security Act, Cap. 57. It is not therefore correct for the petitioners to submit that the detention of the deceased violated Section 85(2) of the former Constitution. The restriction of the deceased's liberty cannot therefore be faulted on that ground.

66. The petitioners' evidence that the deceased was held in detention for three years and two months did not receive much opposition from the Respondent. The historically documented fact that the deceased was detained while executing his parliamentary duties as a Member of Parliament and Deputy Speaker cannot indeed be wished away. The detention of the deceased was thus proved by the petitioners.

67. The question is whether the taking away of the liberty of the deceased through detention was lawful. There is agreement by the parties that the detention of the deceased was executed under the Preservation of Public Security Act. The petitioners have not urged the court to find that the detention violated the provisions of the said Act. It therefore follows that the detention of the deceased was lawful. I find support for my finding in the decision in **Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR** where Lenaola, J (as he then was) held that:-

"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…

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."

68. Lawful limitation of the right to liberty is recognised the world over. The Indian Supreme Court in **Neeru Yadav v State of U.P & Another, Criminal Appeal No. 2587 of 2014,** as cited in **Michael Rotich v Republic [2016] eKLR,** held that:-

"…we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order."

69. There is nothing on record to support the petitioners' contention that the deceased's right to liberty was taken away in contravention of the Constitution, as it then was. The petitioners' claim that the detention of the deceased violated his constitutional right to liberty therefore fails.

70. The petitioners also claimed that the deceased's right to freedom from torture or inhuman treatment was infringed by the actions of the Respondent. They claim that during his detention for 1½ years in Manyani Maximum Security Prison his lawyers and family were not permitted to visit him as he was being held *incommunicado.* They further allege that during his detention he was held for 23½ hours in a tiny cell which was lit throughout the day, given unhealthy food unfit for human consumption and subjected to mental and physical torture.

71. The Respondent denies all the allegations of the deceased's detention and assert that his treatment while in detention was the status quo for all prisoners regardless of the reasons for their imprisonment.

72. It has been held that the fact that a person is lawfully confined in conditions in common with other prisoners cannot be said to amount to

torture or inhuman treatment. This position was stated by Mumbi Ngugi, J in **Koigi Wamwere v Attorney General [2012] eKLR** where she 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."**

73. On appeal in **Koigi Wamwere v Attorney General [2015] eKLR,** the Court of Appeal upheld the decision on that issue 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."**

74. The question then is whether the treatment of the deceased during incarceration qualified to be torture legally speaking. *The petitioners claim that the treatment of the deceased* amounted to torture, specifically in relation to being fed unhealthy food and being kept in a tiny cell which was lit for 23½ hours. It is difficult to ascertain whether this treatment, particularly the cell which was lit for 23½ hours was meted out to the deceased alone or to all prisoners within the Kenyan prisons. It would indeed be unjust to compensate *an individual prisoner for the treatment that he was subjected while in prison, whilst ordinary prisoners were subjected to the same treatment.*

75. *However, certain treatment of prisoners can be termed as torture and inhuman treatment. According to Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR),* ***"persons*** **deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."**

76. According Jim Murdoch and Vaclav Jiricka in their book titled **Combating Ill-Treatment in Prison: A Handbook for Prison Staff with Focus on the Prevention of Ill-Treatment in Prison', Council of Europe, 2016** at page 23, it has been recognised by the European Court of Human Rights (ECHR) that:-

> **"Prolonged exposure to poor material conditions of detention may be such in themselves to amount to ill-treatment, or alternatively, may exacerbate other forms of treatment or punishment such as to give rise to an issue under Article 3."**

77. The authors at page 24 cite the ECHR case of **Mamedova v Russia (1 June, 2006)** for the proposition that the detention conditions may amount to ill-treatment. In the said case **"the Court found a violation of Article 3 in light of the two-year detention of a pre-trial detainee confined to cells with less than 2 sq m of space per prisoner for 23 hours per day in circumstances where the prisoner was required to use a toilet in the presence of other prisoners."**

78. Additionally, according to Rule 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules):-

> **"1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:**
>
> **(a) Indefinite solitary confinement;**
>
> **(b) Prolonged solitary confinement;**
>
> **(c) <u>Placement of a prisoner in a dark or constantly lit cell</u>;**
>
> **(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;**
>
> **(e) Collective punishment."**
>
> [Emphasis supplied]

79. In the instant case, it is claimed that the deceased was held in a tiny cell which was lit continuously for over 23 hours. This is a practice which is prohibited under international law.

80. Furthermore, Amnesty International in **'Prisons within Prisons: Torture and Ill-Treatment of Prisoners of Conscience in Vietnam," (2016) at page 7** has stated that:-

> **"An incommunicado detention is when a detainee is held without access to the outside world, particularly to family, friends, lawyers and independent doctors. The practice encourages torture and ill-treatment, and prolonged periods of incommunicado detention themselves violate the prohibition on torture."[1]**

81. In line with the above opinion, the Human Rights Committee made a similar decision in the case of **Polay Campos v Peru, Communication No 577/1994** where it held that:-

> **"8.6 As to the detention of Victor Polay Campos at Callao, it transpires from the file that he was denied visits by family and relatives for one year following his conviction, i.e. until 3 April 1994. Furthermore, he was unable to receive and to send correspondence…In the Committee's opinion, this total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant."**

82. The Committee ultimately found that:-

> **"8.7 ….the conditions of Mr. Polay Campos' detention, especially his isolation for 23 hours a day in a small cell and the fact that he cannot have more than 10 minutes' sunlight a day, constitute treatment contrary to article 7 and article 10, paragraph 1, of the Covenant."**

83. From the cited case, I draw similarities with the circumstances under which the deceased was confined. He was detained for a year and a half without access to a lawyer or communication from his family. I am persuaded by the decisions of the ECHR that this is a form of inhuman treatment which is prohibited under international and domestic laws.

84. I also refer to the paper written by Amnesty International and CODESRIA titled **'Monitoring and Investigating Torture, Cruel, Inhuman or Degrading Treatment, and Prison Conditions,' (2000)** where at page 13 they state that:-

> **"For instance, poor prison conditions, a lack of sanitation, lack of access to medicine, or a poor diet imposed on prisoners will constitute, in the majority of the cases, CID treatment. Prison officials are neglecting to provide prisoners with the minimum adequate conditions; they might not be deliberately imposing acute suffering on the prisoners."**

85. It is my finding based on the cited cases, books and articles that although individuals in prisons are subjected to the limitation of certain rights and freedoms, they are still to be treated with the respect and dignity afforded to all human beings. When persons are imprisoned, even when the imprisonment is within the bounds of the law, they should not be treated in any way which can be construed to amount to torture or cruel, or inhuman, or degrading treatment or punishment. In the most extreme cases this would include corporal punishment and other severe forms of torture. Even what appears to be mild forms of cruel treatment such as sensory deprivation and being held incommunicado are prohibited forms of punishment.

86. Just because all prisoners may be subject to these cruel forms of treatment does not extinguish the State's liability when one prisoner wishes to hold them accountable for his own mental or physiological anguish. As such, it is evident that the actions of the State in the case before me were contrary to international human rights norms and to the repealed Constitution. The deceased was held incommunicado for 1 ½ years, and was later subjected to poor prison conditions including being kept in a tiny cell which was lit for 23 hours, which is a form of sensory deprivation, all of which have been establish to be forms of cruel, inhuman or degrading treatment.

87. Indeed in **Kenneth Stanley Njindo Matiba** (supra), the Court while agreeing with the holding in the **Koigi Wamwere** case by both this Court (Mumbi Ngugi, J) and the Court of Appeal that the treatment afforded to a prisoner in common with other prisoners cannot be said to amount to torture and inhuman treatment, nevertheless went ahead and found that the conditions under which the petitioner was held actually violated his rights. This is what the Court said:-

> **"[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."**

88. I therefore find, that the Respondent violated the deceased's rights to freedom from torture and cruel or inhuman treatment as provided

under Section 74 of the repealed Constitution.

89. On the infringement of the right to conscience, the petitioners in relying on the petition presented to the National Assembly by Hon. John Mututho, claim that the arrest and detention of the deceased was a reaction to a landmark ruling that he made which was not favourable to the Executive and promoted the abuse of power exercised in his arrest.

90. The Respondent's reply was to the effect that this court cannot rely on the petition presented to the National Assembly by Hon. Mututho as the proceedings are privileged and no one was called as a witness to collaborate the evidence. Further, that there is no evidence of the discussion of the issue by the National Assembly and the decision made thereon, if any.

91. According to Section 35 of the Evidence Act Cap 80:-

> **"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—**
>
> **(a) if the maker of the statement either—**
>
> **(i) had personal knowledge of the matters dealt with by the statement; or**
>
> **(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**
>
> **(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.**
>
> **(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—**
>
> **(a) notwithstanding that the maker of the statement is available but is not called as a witness;**
>
> **(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be."**

92. The Respondent's claim that the petitioners have not provided the requisite evidence is incorrect as attached to the original petition dated 17th October 2013 and supporting affidavit dated 15th August, 2013 are the Official Report of the Petition by the National Assembly dated Thursday 12th May, 2011 and marked exhibit ZS3, as well as the letter dated 13th December, 2012 addressed to the Minister of State for Provincial Administration by the National Assembly and marked exhibit ZS4. Therefore, even without the oral evidence of the maker of the document or the original documents themselves, it suffices that the court has been furnished with copies of the same. It was not necessary for the petitioners to call somebody from the National Assembly to come and verify the authenticity of the documents. Parliamentary proceedings form public records and in this particular case the Respondent did not dispute the correctness of the documents placed before the court by the petitioners. The annexed documents confirm that a petition seeking an apology by the State and compensation for the unlawful arrest and detention of the deceased and the late Hon. Joseph Martin Shikuku was indeed brought before the National Assembly. Furthermore, the letter dated 13th December, 2012 proves that the Ministry failed to respond to the allegations raised in the petition.

93. In the case of **Shaneebal Limited v County Government of Machakos [2018] eKLR** the Court referred to the decision in **Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001** where the learned Judge stated that:-

> **"….it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."**

94. The Respondent failed to refute through its pleadings or by way of evidence the fact that the contents in the petition before the National Assembly were correct. The said facts, including the fact that the arrest and detention of the deceased in the Chambers of Parliament when he made a landmark ruling that **"you do not have to substantiate the obvious",** therefore stands uncontroverted and unchallenged.

95. It is indeed evident from the facts placed before the court that the deceased was arrested for doing his work and for exercising his freedom of speech. In the circumstances I agree with the petitioners that the deceased's right to freedom of expression was infringed by his unlawful arrest and detention.

96. Another issue for the consideration of the court is whether the fundamental rights and freedoms of the petitioners were infringed due to the imprisonment of the deceased, as well as the harassment faced after his death. The petitioners claim that their right to property was infringed as they were incessantly harassed at their farm in Kiboi by the agents of the State including the regular and administration police. They allege that as a result of this harassment they were forced to flee the farm which is now overrun by squatters.

97. The Respondent retorts that there is no evidence to prove that the State or its agents were the ones harassing the petitioners. Further, that the petitioners have failed to provide evidence of ownership of the said land or that the ownership of the land has changed.

98. According to Section 107 of the Evidence Act:-

> **"(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."**

99. Section 108 of the Evidence Act legislates on the effect of failure to adduce evidence as follows:-

> **"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."**

100. Section 109 of the Evidence Act proceeds to state that:-

> **"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."**

101. The petitioners' claim that the persons who harassed them at the farm were agents of the State is a mere allegation with no proof by way of evidence. The petitioners have not provided any evidence to link the Respondent with their ill-treatment whether by establishing that the abusers were wearing government uniforms, drove government cars, or that the persons verbally stated that they were agents of the government. These allegations are pure speculations based on the family's fears following arrest and detention of the deceased and his subsequent death.

102. In the case of **Christopher Maina Kimaru v Josephine Wairimu Ngari & another [2016] eKLR** the Court held that:-

> **I have in several decisions among them *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri Reginah Nyambura Waithatu vs Tarcisio Kagunda Waithatu & 3 others* citing authorities held that:-**
>
> > ***"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds remarked:-***
>
> ***"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."***
>
> ***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"***
>
> ***With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. 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. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."***

103. It was further stated that:-

> **"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist."**

104. The petitioners have failed to prove the identity of their harassers and attackers, even by way of eye witness testimony. I find the statement in the case of **Daniel Kiptegon Ng'eno v Republic [2018] eKLR,** though made in a criminal case, apt in the circumstances of this case. In the case, the Court stated as follows:-

"35. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution."

105. The Court in the case above at paragraph 47 cited with approval the decision in the case of **Anil Phukan v State of Assan [1993] AIR 1462** where the Court held that:-

"*A convictio*n can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"

106. I have made reference to the decision above to illustrate the importance of positively identifying perpetrators in circumstances where an allegation against an individual, or in this case the government, has been made. The petitioners have failed to establish through any form of evidence that the mistreatment meted against them was done by agents of the State.

107. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR**, the Court of Appeal while stressing that the burden of proof has to be discharged 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."

108. On the stated grounds I find that Respondent did not violate the petitioners' right to property.

109. The petitioners additionally contended that their alleged ill-treatment at the hands of the State and its agents caused them to flee their home and caused the deterioration of the 1st Petitioner's physical and mental health, which amounts to a violation of their freedom from torture and inhuman treatment.

110. On this issue I rely on my determination above on the alleged violation of the right to property. Once again the petitioners have failed to properly discharge their burden of proof. They have not provided the court with any form of evidence to show that the persons who harassed and attacked them were indeed the agents of the State. Furthermore, they have failed to demonstrate the health complications the 1st Petitioner suffered and how her ailments are connected with the alleged harassment.

111. It is also noted that the petitioners accused the State as well as the deceased's alleged political enemies of forcing them to flee their land and later taking over the land. As correctly stated by the Respondent, the petitioners have not adduced any documentary evidence to confirm that they indeed owned land at Kiboi and that the land has indeed changed hands. The petitioners talked of the deceased's political adversaries without naming them. They did not even linked the unnamed political opponents to the State. The petitioners' case on this particular issue is totally wanting and their word of mouth that their land was grabbed cannot form the basis for the entry of a judgement in their favour.

112. I therefore concur with the Respondent, and find that there was no violation of the petitioners' individual right to freedom from torture or inhuman treatment.

113. The final issue is whether the 6th Petitioner's right to dignity was infringed on account of the alleged brutal gang rape on 11th December 1991. The petitioners submit that the right of the 6th Petitioner to dignity was infringed when she was brutally gang-raped by those who invaded their farm. PW1 attested to the fact that the 6th Petitioner was 17 years old when she was allegedly attacked and brutally gang-raped by the political enemies of the deceased and agents of the State.

114. In response, the Respondent contend that the petitioners did not prove by way of medical records and any recording in the police occurrence book that the 6th Petitioner was indeed raped.

115. Section 62 of the Evidence Act legislates that **"[a]ll facts, except the contents of documents, may be proved by oral evidence."**

116. Section 63 of the Evidence Act provides as follows:-

"63. Oral evidence must be direct

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means—

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection."

117. Once again the court is faced with the issue of the lack of proper evidence to prove the allegation of the petitioners. Even if the 6th Petitioner did not find it appropriate to come and express her ordeal before the court, it was necessary for her to swear a supporting affidavit of her own. It is the 1st Petitioner in her supporting affidavit, and on oath in court who testified to the brutal gang-rape suffered by her daughter. However, she did not provide any details of the incident. She did not tell the court that she witnessed the alleged gang rape. The evidence of the petitioners on this particular incident does not meet the standard required by the Evidence Act.

118. As was stated in the already cited case of **Daniel Toritich Arap Moi,** the failure by the Respondent to rebut the petitioners' case did not in any way take away the duty imposed by the law on the petitioners to provide evidence in support of their allegation. This being a matter that is civil in nature, the bar set for the petitioners in establishing the alleged gang-rape was indeed a low one. In my view, the petitioners have failed to pass the test. The petitioners have failed to supply any form of evidence as to the alleged rape, either through an affidavit sworn by the victim, medical evidence, circumstantial evidence or oral evidence by the victim. Therefore they have failed to meet the required standard of proof and failed to discharge the burden of proof.

119. Additionally, as already decided concerning the other allegations, the petitioners failed to provide any evidence, whether it be circumstantial or eye witness testimony, to prove that the 6th Petitioner's attackers were agents of the State. In the circumstances I have no other choice than to find that the Respondent cannot be held liable for the alleged violation of the 6th Petitioner's right to dignity.

120. Before I move to the next issue, it is important to observe that the delay by the petitioners in filing their claim has greatly contributed to their inability to prove some of the allegations. It can be seen from the proceedings that the petitioners struggled to prove facts in respect of the happenings that took place several years ago. Had they approached the court earlier, there is a high chance that they could have easily established those facts. It is therefore advisable for any person who desires to right constitutional wrongs to do so as soon as they occur. However, the circumstances surrounding the petitioners' case are unique and understandable hence the decision by this court to proceed to hear the matter on merit.

121. I have found that some of the deceased's rights guaranteed by the repealed Constitution were violated by the State. What automatically follows is the question of the appropriate remedies for those violations. The Court of Appeal discussed at length the principles governing the award of damages in claims for violation of rights in the case of **Peter M. Kariuki v Attorney General [2014] eKLR**. I shall be guided by those principles in determining the appropriate general damages to award the estate of the deceased in this case.

122. The principles that guide a trial court in assessing damages were stated in **Peter M. Kariuki** (supra) as follows:-

"Turning to the ground of appeal relating to damages, 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….

The challenge, in our view is not limited to assessment of damages in personal injuries claims alone; it extends to all assessment of general damages that are essentially at large. In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive."

123. The Court of Appeal went ahead and observed that:-

"On the purpose of awards of damages, the Supreme Court of Uganda in *CUOSSENS V ATTORNEY GENERAL, (1999)1 EA 40,* noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances."

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

125. In the **Peter M. Kariuki** case, where the appellant who was the Commander of Kenya Air Force was court-martialled and sentenced to concurrent imprisonment of four years on two counts, the Court of Appeal awarded the appellant a **"global sum of KShs.15,000,000/= as general damages for violation of his constitutional rights, including in particular the violation of his right to a fair trial by an independent and impartial court."**

126. In **Koigi Wamwere v Attorney General [2015] eKLR,** the Court of Appeal having found that **"the violation of rights suffered by the appellant fell under two distinct instances namely the torture at the macabre Nyayo House cells and while held in Kamiti's Block G",** enhanced the global award of general damages from Kshs. 2.5 million to Kshs. 12 million.

127. In **Kenneth Stanley Njindo Matiba** (supra), the petitioner was awarded Kshs. 15 million as general damages for violation of the freedom against torture, and degrading and inhuman treatment.

128. It is noted that the arrest of the deceased cut short his parliamentary term. He was also the Deputy Speaker of Parliament at the time of the violation of his rights. As already stated, the deceased's various rights were violated by the State. The deceased was incarcerated for more than three years. Appropriate compensation is called for in the circumstances. In my view, a global award of Kshs. 17 million is sufficient recompense for the violation of the stated rights. That is the amount I award as general damages in this case.

129. According to 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 court to determine their rights and fundamental freedoms. In this case, I find no reason why the petitioners' success in the matter should not be accompanied by an award of costs. As such, the Respondent shall meet the petitioners' costs for these proceedings.

130. In summary, judgement is entered in favour of the petitioners and against the Respondent as follows:-

(a) A declaration is hereby issued that the treatment the Hon. John Marie Seroney (deceased) was subjected to while in prison was a violation of his right to freedom from torture and cruel, inhuman or degrading treatment or punishment as enshrined under Section 74 of the repealed Constitution;

(b) A declaration is hereby issued that the arrest and detention of the Hon. John Marie Seroney (deceased) was a violation of his rights to freedom of expression and conscience as enshrined under Section 79 of the repealed Constitution;

(c) The petitioners are awarded Kshs. 17,000,000/- as general damages for the violation of the constitutional rights and fundamental freedoms of the Hon. John Marie Seroney (deceased);

(d) The Respondent shall meet the petitioners' costs for the proceedings; and

(e) The petitioners are awarded interest on the general damages and costs from the date of the delivery of this judgement until payment in full.

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

W. Korir,

Judge of the High Court