REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

PETITION NO. 9 OF 2016

ABEL ONG'AI OKAKA.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL....RESPONDENT

JUDGMENT

1. The petition, dated 4th May 2016, was brought at the instance of Abel Ong'ai Okaka, to be known hereafter as the petitioner, citing several constitutional violations of his rights. He has brought the suit against the Attorney General, as the legal advisor to the national government, sued on behalf of the Kenya Police Service.

2. His case is that he was a student at the University of Nairobi, to be hereafter referred to as the university, in 1982, and an official of the Students Organization of Nairobi University (SONU). Following the closure of the university in 1982, he and other students were required to report to their area chiefs, and he routinely made his reports at the Chief's camp at Lurambi. On 7th August 1982, while at the Chief's camp, reporting as usual, he was arrested by Special Branch Police officers and taken to Kakamega Police Station, from where he was later removed to Nairobi. He avers that at the time of his arrest, he was never informed of his rights, nor was it explained to him why he was being arrested. At Nairobi he was stripped naked and thrown into a cell at Turkomen Carpet House, and subjected to interrogation. He was later transferred to a cell at General Service Unit (GSU) camp at Embakasi. At the GSU cells he was beaten by police officers using crude objects, such as broken chair parts and whips, and he was compelled to comb his hair using his nails. He was thereafter held at various police stations and other government security institutions within Nairobi, ending up finally at the Nairobi Industrial Area Remand Home, where he was locked up with madmen. At the time he was held in the police cells, he would be denied food and water for days, forced to clean corridors, sleep on wet floors without clothes, and he grew very weak in the process. He was arraigned in court on 9th September 1982, together with other students, charged with the offence of rioting, which was later substituted with sedition. He denied the charges, and was denied bail, and remanded at the Nairobi Remand Home, Industrial Area, in a block meant for madmen. He was subsequently released on 22nd February 1983, after the charges against him were withdrawn. He subsequently resumed his studies at the university, and graduated in 1984.

3. After graduation, the petitioner was employed at the university as an administrator, and his services were later transferred to the Mombasa Polytechnic. He was arrested at his house at Mombasa on 16th April 1986, and taken to Nairobi. He, and Maurice Odongo, were detained at the Muthangari Police Station, from where they were blindfolded, put inside a vehicle and driven around for a long time, before they found themselves at a room within Nyayo House, where they were questioned about being connected to the Mwakenya Movement. When the petitioner denied association with the movement, he was assaulted with rubber whips, wooden sticks and pieces of broken chairs. He was also made to do military drills after being stripped naked. He avers that he was held in a cell whose floor was covered with cold water which had floating human waste, and from which cell he could not tell whether it was day or night. He avers that he could not sit naked in the cold water because the cold froze his private parts, which caused him unbearable pain. He states that he was denied food and water, and the door to the cell was opened only once every twenty-four hours for him to be hosed with water from a pipe directed at his face, every morning, after which he would be left in the water-logged cell and forced to drink that same water that he used to relieve himself in. He would be removed from the cell after every five days to a dry cell, by which time he would be weak, his body smelling and aching, with fungus growing all over his feet. He was held in that cell at the basement of Nyayo House for twenty-one days, before he was released without any charges being preferred against him. He avers that he was never charged before a court of law. When he went back to Mombasa, he found that he had been relieved of his employment, but he was subsequently reinstated. He avers that on account of that mistreatment by the Kenyan state officials he suffers from post-traumatic disorders, resulting in high blood pressure, depression, amnesia and several other life threatening health complications.

4. He has attached to his affidavit, three documents to support his case. The first is copy of the *Daily Nation* of Wednesday, 15th September 1982, which identifies him among twenty-two university students, who had been charged before a Nairobi court with the offence of engaging in a riot on 1st August 1982. The second document is a copy of the *Daily Nation* of Friday, 18th April 1986, which identifies him as a 1984 graduate of the university, working as an administrator with Mombasa Polytechnic, who had been arrested and taken away. The third document is a letter dated 30th April 1985, from the Teachers Service Commission, employing the petitioner as a graduate teacher, and posting him to Mombasa Polytechnic as an administrative assistant.

5. The petitioner finally contends that as a result of the state officials conduct his fundamental rights and freedoms were infringed and or contravened, specifically the rights to privacy, freedom of expression, freedom of assembly and demonstration, and access to justice, provided for in Articles 28, 29, 31, 33 and 37 of the Constitution of Kenya, 2010, which I shall hereafter refer to as the new Constitution, and sections 72, 74, 75, 76 and 77 of the repealed Constitution, which I shall refer hereto as the old Constitution.

6. The petitioner seeks the following reliefs:

1. a declaration that his fundamental rights and freedoms were contravened and grossly violated by the police, and or other Kenyan Government officials, servants and or employees, on various dates between 1982 and 1986;

2. general damages for violation of his fundamental rights and freedoms by agents of the government of Kenya; and

3. Costs.

7. The Attorney General responded to the petition, by way of grounds of opposition, dated 1st February 2017. The grounds state as follows:

a. That the petition was speculative, odious, bad in law, vexatious, an abuse of the court process and brought in bad faith and against public interest;

b. That the petitioner had not demonstrated the violation or threatened violation of their fundamental rights and the manner in which his rights have been violated by the respondent;

c. That the petition did not disclose any cause of action as against the respondent and lacked merit in its entirety and was an afterthought;

d. That the claim for unlawful imprisonment offends the express provision of section 3 of the Public Authorities Limitations Act, Cap 39, Laws of Kenya, and the court lacks jurisdiction to hear and determine the petition for having been filed out of time; and

e. That the orders that the petitioner seeks are not tenable as against the respondent.

8. Directions were given on 8th February 2017, that the petition be disposed of by way of oral evidence, which directions were reiterated on 9th May 2017.

9. The hearing happened on 11th July 2018. The petitioner testified, and breathed life to the averments made in his affidavit sworn on 4th May 2016. He produced a number of documents to support his case. There is a medical report by Dr. Charles M. Andai, dated 1st February 2018, which identified scars on his back and left upper arm as evidence of the injuries that were sustained during torture at Nyayo House, which he attributed to acid poured on him. The doctor assessed the burns to be 3rd degree of approximately 9%. There are also two letters from the Teachers Service Commission employing the petitioner and deploying him to Mombasa Polytechnic, as an administrator. Finally, there are documents as evidence that the petitioner did serve notice on the Attorney General, of intention to commence the suit.

10. The petitioner testified that his troubles began after the attempted coup of 1st August 1982. The university was closed on 3rd August 1982, and students were directed to be reporting to their local Chiefs. It was while he was making such a report, on 7th August 1982, that he was arrested and moved to Nairobi, where he was held in custody without being informed reasons for his detention. He mentioned some of the other students that he was being held together with, as including Maurice Justice Odongo, Philip Murgor, Ongwen, among others, and the place of his detention as GSU Camp Embakasi. He also mentioned the names of the special branch police officers who subjected him to torture, such as David Shipira, Billy Owino and James Opiyo. He also detailed his torture and ill-treatment as taking the form of beatings, being given bad food and acid poured on his back. He described the effect of the torture to be that his feet went bad, his teeth were damaged and began to fall off. He stated that he remained in custody until 7th September 1982, when he was presented in court. After arraignment he was not freed on bond, and he remained in remand at the Industrial Area Remand Home until the charges were dropped on 22nd February 1983, and he was set free. He stated that he was on remand for nine months. He resumed his studies thereafter, graduated and got employment, first with the university, and later with the Teachers Service Commission, who posted him to work at Mombasa Polytechnic, where he worked between 1985 and 1989, both dates inclusive.

11. He testified that while at Mombasa he was arrested, sometime in April 1986, accused of being a member of Mwakenya, his house and office were searched, before he was detained at the Central Police Station at Mombasa, where he found Maurice Odongo. The two of them were taken to Nairobi, where they were held at Muthangari Police Station and later at the basement at Nyayo House. He stated that he was questioned by David Shipira, a special branch officer, and arap Too, the then head of Criminal Investigations Department (CID), about the events around the attempted coup in 1982, and he was pressed to confess to his wrongs. During his days at Nyayo House, he would be blindfolded as he was moved from one room to another, stripped naked, and held in a waterlogged cell, would routinely be sprayed with jets of cold water, was denied food, among others. He stayed at Nyayo House for twenty-one days, before he was set free without any charges being preferred, whereupon he went back to Mombasa and resumed duty at Mombasa Polytechnic. He stated that he left his employment in 1989, when another wave of reprisals began, relating to what was then known as *Pambana*. He feared arrest, and so he fled to Uganda through Tororo, where he was accommodated by a former high school student friend of his at Lenana School. He explained that he did not sue the state immediately after the causes of action accrued because it was very risky to sue the government of President Moi then. He also explained that he was in exile in Uganda for ten (10) years. He stated that he was scared and feared arrest, adding that he was generally traumatized. He did not trust anyone after that. He stated that he was aged fifty eight years at the time of his testimony, and was bitter emotionally, that his colleagues at university, such Isaac Ruto and Mudavadi, were way ahead of him in life as a result of the disruption of his life by the state. He asserted that he was not anti-government. He asked for compensation and for costs of the suit.

12. During cross-examination, he stated that the delay in bringing the matter to court was because he was in exile, even though he had no documents to support that assertion. He conceded that some of those who had been detained with him at Nyayo House had filed suits before him, and but he said that they never informed him that they had filed suits. He said that the only evidence he had of his arrest was the newspaper cuttings attached to his affidavit. He conceded that he did not further file suit for malicious prosecution. He conceded further that after his release from custody, he did not visit a doctor, and that he only saw a doctor in 2018. He explained that he feared for his life and did not trust any person or institution and preferred to stay with his wounds. He said that he feared treatment for his own security. He said that he was not going to call Maurice Odongo as a witness, but insisted that he was with him during that period of distress.

13. The petitioner called one witness, Dr. Charles M. Andai, who produced the medico-legal report that I have referred to above. After that he closed his case.

14. The Attorney General did not call any witnesses, and also closed his case.

15. After both sides closed their respective cases, the parties were directed to file written submissions. They complied and have filed their respective written submissions. The petitioner's written submissions were filed on 5th November 2019, while those by the Attorney General were filed on 21st January 2020.

16. The petitioner addressed three issues in his submissions – whether a case had been made out of the violation of his rights, whether he was entitled to the remedies sought, and whether his claim was time barred.

17. On the first issue, he submits that he had provided evidence relating to his first and second arrests, and the fact that, in respect of the first arrest, he was not produced in court until after thirty days, while for the second arrest he was released after twenty one days without any charges. He cited section 72(3) of the old Constitution, which required arrested persons to be produced in court within twenty four hours for lesser offences, and within fourteen days where arrested on suspicion of having committed an offence punishable by death, otherwise referred to as capital offences. Regarding the first arrest, the charge preferred against him was that of rioting, which was a misdemeanor then, as now, and which was later substituted with sedition, a felony not punishable by death, which was later withdrawn. The second arrest had something to do with his association with individuals who were members of an alleged outlawed organization, which would have meant commission of a mere misdemeanor or a non-capital felony. He submits that he was tortured and mistreated on both occasions, which he argues amounted to a violation of both sections 74 of the old Constitution and Article 29 of the new Constitution. He emphasizes that the mistreatment was by a public official directed at an ordinary citizen.

18. On the second issue, he submits that he proved his case to the required standard, that he was arrested and tortured, but not subjected to a trial before a court of law in both instances. He submits further that there was no defence to his case, as the Attorney General did not adduce any evidence to counter his testimony. He cites sections 107 and 109 of the Evidence Act, Cap 80, Laws of Kenya.

19. On the third issue, that there was delay in the bringing of the petition, the petitioner submits that because of his constant harassment and mistreatment, he had to seek refuge abroad, as testified at the trial, hence he could not prosecute his case because of that. He also submits that he could not file his petition earlier because of the repressive climate prevailing then, and further that the transitional government had since acknowledged the ills of the past. With regard to that he cites *Gitau Njau & 9 others vs. Attorney General* [2013] eKLR, *Maurice Justice Adongo vs. Hon. Attorney General* [2014] eKLR and *Njuguna Githiru vs. Attorney General* [2016] eKLR.

20. He submits that Article 26 of the Constitution, on violation of human dignity, was violated to the extent that he was incarcerated, beaten, denied food and his body sprayed with acid that occasioned serious bodily injuries to him. He submitted further that Article 29, on the right to privacy, was violated, when he was detained in the cells in the company of madmen, which exposed him to serious harm. He also submits that his freedom of assembly was violated when he was arrested on suspicion of associating with Mwakenya adherents, yet that accusation was never proved. It is also argued that his freedom of assembly and right to access justice were violated, when he was detained without trial and denied the right to legal representation. On assessment of damages, he cites the decisions in *Maurice Justice Adongo vs. Hon. Attorney General* (supra) and *Njuguna Githiru vs. Attorney General* (supra), and prays that he be awarded Kshs. 6, 000, 000.00 as compensation.

21. The petitioner has attached copies of the decisions in *Maurice Justice Adongo vs. Hon. Attorney General* (supra) and *Njuguna Githiru vs. Attorney General* (supra), to assist the court in assessment of damages. In *Maurice Justice Adongo vs. Hon. Attorney General* (supra), the court took into account the number of days that the petitioner was in unlawful custody, the ill-treatment he was subjected to and the suffering that he continued to undergo as a result. It also took into account the principle, stated in other cases, that exemplary damages ought not to be awarded on grounds that the political circumstances had changed. In *Njuguna Githiru vs. Attorney General* (supra), the trial court considered the number of days that the petitioner was held in illegal custody before he was released without charge, and the fact that the reason raised for his incarceration was suspicion concerning commission of a misdemeanor and the fact that he was tortured during that period.

22. On his part, the Attorney General addresses two issues – whether there was unexplained delay in filing the petition and whether the petitioner's fundamental rights and freedoms were violated.

23. On the first issue, it is submitted that the delay in bringing the petition, which was filed thirty four years from the time of the alleged violations, had not been adequately explained. It is submitted that the delay, and the failure to explain it, had prejudiced the Attorney General in defending the cause. He cites *Priscilla Mwara Kimani & 2 others vs. Attorney General* [2019] eKLR, to support his case. It is submitted that the argument that the climate was not conducive politically for the petitioner to seek redress, was not tenable, as the regime in question ended in 2002, and the petitioner ought to have filed his petition shortly after that.

24. On the second issue, the respondent submits that the petitioner had not proved that his fundamental rights and freedoms had been violated by the state or its agents. It is argued that the petitioner had not adduced any concrete evidence to demonstrate that he was indeed tortured by the agents of the state. The medical report placed on record is dismissed as an afterthought, as it is alleged to have been prepared for the sole purpose of rubberstamping the allegations of torture made by the petitioner. It is submitted that at cross-examination the petitioner had conceded that he did not visit any hospital after his arrests in 1982 and 1986, and, therefore, his visit to the doctor in 2018 could not hold any

water. It is further submitted that the newspaper cuttings that the petitioner was relying on to prove allegations of torture were not admissible under section 35 of the Evidence Act. The decision in *Tesco Corporation Ltd vs. Bank of Baroda (K) Ltd* [2009] eKLR, which turns on section 35 of the Evidence Act, is cited to buttress that point. It is also submitted that section 107 of the Evidence Act, requires that the person who comes to court with certain allegations, must prove them, and, therefore, it was up to the petitioner to prove his claims of torture and mistreatment on a balance of probability, adding that the evidence of the persons that he was arrested with would have gone some way in lending credence to his testimony. In the end, it is submitted that the petition was misplaced, unmerited and an afterthought, as there was no justification for the inordinate delay in its filing and there was failure to prove it to the required standard.

25. In *Priscilla Mwara Kimani & 2 others vs. Attorney General* (supra), the appellants claimed to have been party to the events in 1992, when a group of women, protesting at a corner of Uhuru Park in Nairobi, were dispersed by the police. They filed a claim for compensation on grounds that their fundamental rights were violated by state agents over a period of time between 1992 and 1993. The matter was dismissed at the High Court on two grounds. First, on account of delay, and secondly, on account of lack of proof of the allegations of torture. At the Court of Appeal, the appellate court agreed with the trial court, that whereas there was no limitation for filing proceedings to enforce fundamental rights, any considerable delay in filing such claims should be justified and must not be prejudicial to the respondent. The appellate court also agreed with the trial court that the delay, in that case of twenty one years, was not justified, and it prejudiced the respondent. On proof of the violation, the appellant further agreed with the trial court that violation of constitutional rights cannot be proven based on mere allegations, and that there was a burden to prove that they were indeed tortured, as a result of which they suffered mentally or physically. It was noted that they had presented no medical evidence and called no witnesses to support their claims. The appellate court also agreed with the trial court that newspaper articles were not admissible as evidence. In *Tesco Corporation Ltd vs. Bank of Baroda (K) Ltd* (supra), the court held that a newspaper report was not admissible evidence under section 35 of the Evidence Act.

26. There are three issues that fall for me to determine in this petition. Firstly, is the validity of the petition itself, which is a roundabout question about jurisdiction. Secondly, is the question as to whether the petitioner has made out a case for violation of his rights. Finally, is, in the event that I find that his rights were violated, the matter as to whether he is entitled to the remedies that he has sought in the petition.

27. The first issue is not novel. There has been a plethora of suits, filed after the late President Moi left office, by persons alleging to have had been tortured during the so-called the Nyayo Era. The Attorney General has, in most of those suits, challenged their validity on grounds that they were statute-barred on account of either having been filed way out of limitation time or, where there was no limitation time, on account of inordinate delay. The High Court has, in a series of decisions, addressed itself to the issue, and, in a number of them, appeared to make a special case for them.

28. It was stated in such decisions as *David Gitau Njau & 9 others vs. Attorney General* (supra), *Dominic Arony Amolo vs. Attorney General* [2003] eKLR, *Joan Akinyi Kabasellah & 2 others vs. Attorney General* [2014] eKLR, *Joseph Migere Onoo vs. Attorney General* [2015] eKLR, *Otieno Mak'Onyango vs. Attorney General & another* [2003] eKLR, among others, that there was no limitation for filing of proceedings to enforce fundamental rights, on grounds that a claim made under the Constitution is neither founded on contract or tort as to necessitate application of the Limitation of Actions Act, Cap 22, Laws of Kenya, or, for that matter, the Public Authorities Limitation Act, and that the rules of procedure governing the filing of constitutional proceedings, that is to say the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual)(Practice and Procedure) Rules 2001 and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)(Practice and Procedure) Rules, 2013, do not place any limitations on the right to institute a suit for redress of violation of fundamental rights and freedoms under both the old and the new Constitutions.

29. The courts in *Joan Akinyi Kabasellah and 2 others vs. Attorney General* (supra), *Charles Gachathi Mboko vs. Attorney General* [2014] eKLR, *James Kanyiita vs. Attorney General and another* Nairobi Petition No. 180 of 2011, *Ochieng Kenneth K'Ogutu vs. Kenyatta University and 2 others* Petition No. 306 of 2012, *Abraham Kaisha Kanzika alias Moses Savala Keya t/a KAPCO Machinery Services & Milano Investments Limited vs. Governor Central Bank of Kenya & others* [2006] eKLR, among others, have stated that although there is no statutory limitation to the filing of constitutional causes for enforcement of fundamental rights, the courts seized of such matters are still bound to consider whether there had been inordinate delay in the filing of the claims, and whether justice would be served by permitting a respondent to be vexed by an otherwise stale claim.

30. The jurisprudence, therefore, that emerges, is that the lack of statutory limitation to the filing of actions, of the nature of the one before me, does not grant a petitioner an absolute right to be heard in such cause, he still has an obstacle to surmount, and that is to justify or explain any delay in the bringing of the constitutional cause. The test of delay, of course, is that of a reasonable person. A delay of a few years would be considered reasonable, but one that extends beyond a decade would be unreasonable, and meriting an explanation or justification. The justification for a timeous filing of any suit is so as not to prejudice the respondent or defendant, for a lengthy delay would present a challenge where witnesses are not available, either because they have died, or changed addresses or lost soundness of their minds, or it could also be the case that the documents upon which the respondent proposes to rely on in his defence got lost or misplaced or destroyed, making it impossible for the respondent to defend or explain themselves. See *Rawal vs. Rawal* [1990] KLR 275.

31. The twin causes of action, in the instant petition, accrued in 1983 and 1986. The petition, that I am tasked with determining, was filed herein in 2016. Applying the general rule, the petitioner was justified to file his petition at any time as there is no time limitation which would have barred him from doing so. However, the petition should be subjected to the test of reasonable time, as it was lodged in court some thirty odd years after the cause of action accrued. So, the question is, was it filed within reasonable time? I do not think so. Thirty years is a long time. I do not think that a delay of thirty years should be overlooked without some explanation. The second question is, has the petitioner explained or justified that delay, so as to warrant the court to consider his claims? The petitioner sought to explain that away in his oral evidence. He stated that after his ordeal in the hands of state agents, he lost trust in everyone and every institution, and that bred fear in him, for the sake of his life and security. He stated, in particular, that he it was very risky during the days of President Moi, for one to sue the state for compensation. His other explanation was that he went into exile after the 1986 ordeal, and remained away for ten years or so, and, therefore, he was not available in the country to initiate the process.

32. Are the justifications or explanations that the petitioner placed before me plausible? On the first explanation, that it was a risky affair to bring such action during the incumbency of President Moi, the Attorney General has argued that if that was the cause of the delay, then the

petitioner ought to have moved the court shortly after President Moi left power in 2002. That would mean that the petitioner was still bound to explain why he took no action shortly after 2002, and that a delay from 2002 to 2016 was still unreasonable, and warranted explanation or justification. I agree with the Attorney General, if the problem was with the government of President Moi, then after that government transferred power to another in 2002, the petitioner ought to have taken advantage of that to bring his claim. I take judicial notice of the fact that some of his compatriots in such cases as *Dominic Arony Amolo vs. Attorney General* (supra), *Otieno Mak'Onyango vs. Attorney General & another* (supra), *Charles Gachathi Mboko vs. Attorney General* (supra), *Wachira Waheire vs. Attorney General* [2010] eKLR, *Kariuki Gathitu vs. Attorney General* [2013] eKLR, *Stanley Waweru Kariuki vs. Attorney General* [2013] eKLR, *Rumba Kinuthia & others vs. the Attorney General* Nairobi HC Misc Appl. No. 1408 of 2004, *Mugo Theuri vs. Attorney General* [2013] eKLR, *Cornelius Akelo Onyango & others vs. The Attorney General* Nairobi HC Misc 233 of 2009, *Harun Thungu Wakaba & 14 others vs. Attorney General* [2009] eKLR, among others, did so and brought their suits shortly or within reasonable time after President Moi handed over power. One would wonder why the petitioner, in the instant cause, did not move to court at the same time with them.

33. With respect to his claim that he was away in exile for ten years, I have noted from his oral evidence he was not specific with the exact dates as to when he went into exile. He merely said that in 1988-89 there was another crisis looming, relating to *Pambana*. He feared that the state agents might come after him, and he chose to go into exile in Uganda, where he remained for ten years. He did not say when he went into Uganda, nor when he came back to Kenya. In any event, whatever the case, President Moi left office in 2002, and it would be reasonable to expect that he came back to Kenya shortly thereafter. That would mean that the exile story would not be a reasonable explanation for his failure to initiate the constitutional cause within reasonable time.

34. From the above, it will be seen that there is a sense in which the inordinate delay in the initiation of this constitutional cause has not been adequately explained. My inclination is to dismiss the cause herein for having been filed after an inordinate delay, which has not been explained adequately. However, a precedent has been set in other Nyayo House torture cases, filed at about the same time as the instant one. It was noted in *Ochieng Kenneth K'Ogutu vs. Kenyatta University and 2 others* (supra), as follows:

> "While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressed climate then prevailing …"

35. Then the court in *Gerald Gichohi and 9 others vs. Attorney General* [2015] eKLR said, *obiter* :

> "It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the petitioner's submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past."

36. The court in *Njuguna Githuru vs. Attorney General* [2016] eKLR, whose facts are not much different from those in the instant case, picked it up from there, saying:

> "…I am inclined to follow the dicta in Ochieng Kenneth K'Ogutu vs. Kenyatta University and 2 others (supra) that Nyayo House Torture Chamber cases are in a special category because the fact that in its final Report, the Truth Justice and Reconciliation Commission found as a matter of fact that the chambers existed and are now a museum to remind Kenyans never to return to those days, a foundational base for the present petition was created. Further, where the present regime has publicly, through the President, acknowledged the ills of the past regimes and specifically the painful ordeals that some Kenyans underwent *at Nyayo House adds to the need for this court to accept that evidence …"*

37. The Attorney General has cited *Priscilla Mwara Kimani & 2 others vs. Attorney General* (supra), and urged me to dismiss the petition on grounds of inordinate delay. In that case delay was for twenty one years. I believe that *Priscilla Mwara Kimani & 2 others vs. Attorney General* (supra) is distinguishable. It was not one of the Nyayo House torture cases, that, as demonstrated by *Ochieng Kenneth K'Ogutu vs. Kenyatta University and 2 others* (supra), *Gerald Gichohi and 9 others vs. Attorney General* and *Njuguna Githuru vs. Attorney General* (supra), are in a class of their own. The appellants, in *Priscilla Mwara Kimani & 2 others vs. Attorney General* (supra), were never arrested, held in custody for prolonged periods of time and tortured as was the case with the Nyayo House cases.

38. I agree with the court in *Njuguna Githuru vs. Attorney General* (supra), that the Nyao Torture Case was in a special category each case must be looked at in light of its own peculiar circumstances. I am persuaded that the petition herein should be considered favourably, and I shall accordingly proceed to assess its merits.

39. The second issue is as to whether the petitioner has made out a case for violation of his rights. He asserts that he has. The respondent argues that he has not, since he did not place on record concrete evidence of his torture. The petitioner's case is founded on his petition and the facts set out in his affidavit, which he swore on 4th May 2016, with some annexures. The respondent's response to the petition is by way of grounds of opposition, dated 1st February 2017. It is not lost to me that the said grounds, which are quite general, respond to the allegations made in the petition. The respondent did not respond to the averments made on oath by the petitioner in his affidavit sworn on 4th May 2016, by having an affidavit sworn to counter those averments. The averments made on oath in that affidavit are, therefore, not controverted or opposed or challenged. Similarly, at the oral hearing, the petitioner gave a sworn statement and was cross-examined by the advocate for the Attorney General. The Attorney General did not call any witness, and, therefore, no evidence was adduced on his behalf. That then left me with only the case of the petitioner. That is to say that the petitioner's case, as presented through oral evidence, is again unchallenged, uncontroverted. That being the case, it would follow that the petitioner's allegations are true.

40. I feel fortified in the conclusion that I have made above by the remarks made by the court, in *Kariuki Gathitu vs. Attorney General* (supra), that:

> "It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the court can only but take it that those facts are actually uncontested. In the cross-examinations of the plaintiff nothing substantial came out that would sway the court's mind to disbelieve the plaintiff and I therefore accept all the facts as set out above to be true."

41. I fully embrace those remarks for the purpose of this case. It was foolhardy of the Attorney General to content himself with filing generalised grounds of opposition, and fail to respond to the specific allegations of fact made in the affidavit of the petitioner, in a case such as this, built around a petition, which is explained by a detailed affidavit, supported by documents, and hope that the petitioner's case would somehow flounder. The argument that the petitioner's case is not founded on any evidence is, therefore, hollow.

42. Having disposed of that issue, I shall proceed to consider whether the petitioner's constitutional rights were violated. He presented a two-pronged case. The first prong relates to his arrest and detention on two occasions. The first arrest and detention was in 1982, where he was held for thirty days before he was presented in court. The second came in 1986, when he has held for twenty one days, and was subsequently released without any charges being preferred against him. The second prong is that during the two occasions that he was in state custody, he was subjected to torture and inhuman treatment, which he has detailed in the petition, the affidavit and the oral testimony. It is from these acts complained of that he argues that his rights, as detailed in sections 72, 74, 75, 76 and 77 of the old Constitution and Articles 28, 29, 31, 33 and 37 of the new Constitution, relating to right to human dignity, the right to privacy, freedom of expression, freedom of assembly and access to justice were violated.

43. The petitioner has not specifically alleged violation of his right to liberty, but he has alleged violation of his rights as enshrined in section 72 of the old Constitution, which dealt with the right to liberty. Under that provision, the right to personal liberty was not be interfered with except as might have been authorized by law. According to that provision, a person who had been arrested or detained should have been informed as soon as possible of the reasons for his arrest or detention. The provision also detailed the reasons for which a person could be arrested. They included arrest or detention for the purpose of being taken to court, or in execution of a court order, or for reasonable suspicion of having committed an offence or being about to commit an offence. The provision required that where a person was arrested and was not released, he was to be presented in court as soon as was practicable, and, in any event, within twenty four hours of the arrest or within fourteen days where the offence he was suspected of committing or being about to commit was punishable by death.

44. The first arrest of the petitioner happened on 7th August 1982, and the petitioner was not presented in court until thirty days later, on 7th September 1982, charged with a misdemeanour, rioting, which was later substituted with the felony of sedition. No doubt there was violation of the petitioner's rights as stated in section 72 of the old Constitution. The second arrest was on 16th April 1986. He was taken to Mombasa Central Police, before being removed to Nairobi, where he was held at the Muthangari Police Station, and later at the basement cells of Nyayo House. He has not stated the exact date of his release, but he says that he was in custody or detention for twenty one days. He was released without any charge being preferred against him. Again, looked at against the provisions of section 72 of the old Constitution, I find that the constitutional rights of the petitioner, stated in that provision, were violated. The provisions in section 72 of the old Constitution are mirrored in Article 49 of the new Constitution.

45. The second violation alleged is of section 74 of the old Constitution, with respect right to human dignity. The section provided that a person was not to be subjected to torture or inhuman or degrading punishment or other treatment. It was the petitioner's case that during the two occasions when he was in state detention, he was beaten, denied food, acid poured on him, stripped naked, blindfolded, sprayed with water, locked up in waterlogged cells incommunicado for long periods of time, among others. All these amounted to cruel inhuman treatment that violated the rights enshrined in section 74 of the old Constitution. The provisions in section 74 of the old Constitution are reproduced in Article 28 of the new Constitution.

46. The third alleged violation relates to right to privacy. It is alleged that that happened when he was locked up in the same cells with mad persons, or persons of unsound mind. I do not think that this violation was well articulated. I wonder whether it would have not amounted to loss of privacy to be held in a cell with sane persons. If cells are meant to hold more than one person, and a person is put in such a cell with other persons, I do not see how the issue of privacy would arise even if his co-inmates were not of sound mind. Being locked up with insane persons, in a cell meant to accommodate many, does not, in itself, amount to invasion of privacy, although it suggested that the petitioner was being mishandled. I note that the other violations were not articulated in the written submissions of the petitioner, I shall, therefore, not venture to address them.

47. The respondent submitted that the reliance by the petitioner on copies of newspaper articles or reports to establish his case was not tenable as such newspaper articles are not admissible, and he cited *Tesco Corporation Ltd vs. Bank of Baroda (K) Ltd* (supra) to support his case. Firstly, the decision cited was in respect of a commercial or civil matter, and not a constitutional matter, whose background or foundation is political. Whereas newspaper articles or reports may not be useful evidence in a pure commercial matter, the same cannot be said with respect to other cases. In libel cases, for example, were the slanderous material is carried in a newspaper article or report, the case cannot be proven without reliance on the offending newspaper article, which has to be produced as evidence. Similarly, in cases of a political nature, such as the present one, where there was political agitation against a regime, the only material that is often available would be shreds of newspaper reports or articles. Such evidence would be good evidence given the circumstances. I would like to underscore the decisions in *Ochieng Kenneth K'Ogutu vs. Kenyatta University and 2 others* (supra) and *Njuguna Githuru vs. Attorney General* (supra), which stated that these Nyayo House torture cases were a special category, and I would hold that that was not only with respect to delay in the filing of the cause, but also in terms of the evidence presented to establish the claims. Indeed, the court took into account, in *Njuguna Githuru vs. Attorney General* (supra), newspaper reports, to find that the petitioner, in that case, had been arrested. In any event, absence of such evidence, if indeed it was inadmissible, would not be fatal to the petitioner's case given what I have stated earlier, that his case has not been controverted by the respondent.

48. In this case, I have seen the newspaper accounts attached to the affidavit in support of the petition, which establishes that the petitioner was indeed arrested on the two occasions that he alleges to have been arrested. He had mentioned that he had been arrested with a Maurice Odongo in 1986. I have noted that the petitioner is mentioned in the judgment in *Maurice Justice Adongo vs. Hon. Attorney General* (supra), as having been transported together with him after their arrest in Mombasa, which again confirms that he was indeed arrested in 1986

49. With respect to violation of the petitioner's constitutional rights, it is my finding that his rights were indeed violated for the reasons that I have detailed in the foregoing paragraphs.

50. Having disposed of the second issue, the final issue is with respect to the remedies available to the petitioner. He seeks only two remedies, a declaration that his rights were violated and compensation therefor. I believe I have already declared that the petitioner's rights were violated, and, therefore, the only remaining remedy is with respect to damages.

51. The evidence adduced demonstrated that the petitioner was held in pre-trial detention for thirty days after the first arrest, and for twenty one days after the second arrest. That was an aggregate of fifty one days. In addition, he was tortured or ill-treated on both occasions. He made an attempt to adduce medical evidence to establish the impact, healthwise, that the ordeals had on him. I am not persuaded that that evidence was useful, for the petitioner presented himself to the doctor thirty years after the events, and the doctor did not confirm whether or not he was presented with any medical treatment notes dating back to the relevant period. I shall, therefore, assess or compute compensation founded only on the period that he spent in custody and the fact that he was subjected to torture at the time.

52. In *Maurice Justice Adongo vs. Hon. Attorney General* (supra), whose facts were similar to those of the instant case, and curiously, where the petitioner was held at the same time with the petitioner herein, the detention was for seventy eight days, and there was evidence that the petitioner suffered posttraumatic disorder. The court awarded Kshs. 4, 000, 000.00. In *Njuguna Githuru vs. Attorney General* (supra), the petitioner had been detained for eight days before he was presented in court. The court believed that he was beaten and denied food during the incarceration. An award of Kshs 1, 000, 000.00 was made. The petitioner herein was in detention for fifty one days and was subjected to torture. *Maurice Justice Adongo vs. Hon. Attorney General* (supra) was decided in 2014, while *Njuguna Githuru vs. Attorney General* (supra) was in 2016. Taking all these factors into account, I hereby award compensation to the petitioner at Kshs. 5, 000, 000.00.

53. The final orders, that I shall make in the circumstances, are as follows:

> **a. A declaration is hereby made that the petitioner's fundamental rights and freedoms were violated by the police and other government agents on various dates in 1982 and 1986;**
>
> **b. An award of Kshs. 5, 000, 000.00 is hereby made to the petitioner, to be paid by the respondent, as compensation for violation of the petitioner's fundamental rights and freedoms by agents of the government of Kenya; and**
>
> **c. The petitioner shall have the costs of the petition, together with interest on the damages awarded in (b), above, from the date of the judgement herein until payment in full.**

54. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W MUSYOKA

JUDGE