



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI,

MILIMANI LAW COURTS CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 102 OF 2014

IN THE MATTER OF ARTICLES 19, 20, 21(1), 22(1), 23(1) & (3), 165(3)(A),(B)(D)(I)(II),(6), (7) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER SECTIONS 70(A),71(1),72(3),74(1),77OF THE FORMER CONSTITUTION (CORRESPONDING ARTICLES 26(1),27(1),(2), 28, 29(A), (D),(F), 31(C),(D) & 49(1)(F) OF THE CONSTITUTION OF KENYA, 2010).

AND

IN THE MATTER OF THE ARMED FORCES ACT (CAP 199, LAWS OF KENYA (REPEALED)

BETWEEN

PETER MAUKI KAIJENJA.....1ST PETITIONER

PETER NYAGAH NDWIGA.....2ND PETITIONER

STEPHEN KARANGAU WANJAU.....3RD PETITIONER

CHARLES GITARI KARIONJI.....4TH PETITIONER

GEORGE GATHIACA KEINGATI.....5TH PETITIONER

ELIJAH MASAI KITHUKA.....6TH PETITIONER

PATRICK KIPKURUI CHIRCHIR.....7TH PETITIONER

LAWRENCE NJAU MWAURA.....8TH PETITIONER

CONSTANTINE MASANJA RIGHA.....9TH PETITIONER

CAPT. STEPHEN KARUGA KAMONDE.....10TH PETITIONER

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

The parties.

1. The Petitioners are male adult Kenyan citizens residing in Nairobi. They are all former service officers of the Kenya Air Force.
2. The first Respondent is the Chief of the Kenya Defence Forces in charge of; *inter alia*, the command, operations and discipline of the Kenya Defence Forces under the Kenya Defence Forces Act.
3. The second Respondent is the Honorable Attorney General of the Republic of Kenya. He is the Principal government legal adviser and representative pursuant to Article 156 of the Constitution. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

The factual and legal foundation of the Petition.

4. The Petitioners were all officers of the Kenya Air Force (herein after referred to as the KAF) serving in various fields at the time of the first August 1982 coup attempt. They aver that they were arrested by officers of the armed forces at various bases of the KAF in the country between 1st and 18th August 1982 on suspicion of participating in the coup attempt.
5. They also aver that in the course of and after their arrests in a bid to extort confessions from them, they were subjected to torture, cruel, inhuman and degrading treatment by Kenya Army, police and prison officers, the particulars whereof are detailed in their respective averments summarized below. They contend that the said actions violated their fundamental rights to human dignity, protection of the law, freedom from torture, cruel, inhuman and degrading treatment which were guaranteed under sections 70(a) and 74(1) and various international human rights instruments to which Kenya was a signatory.
6. The Particulars of each Petitioners' complaints are detailed in their separate affidavits in support of the Petition summarized separately below.

Peter Mauki Kaijenja

7. The first Petitioner, **Peter Mauki Kaijenja** averred that he was enlisted in the KAF on 3rd March 1978 under service number 023431. He states that upon completing his training at the Armed Forces Training College, he was posted to the Ground Air Defence Unit (GADU) at Embakasi, where he was trained a gunner, and, he rose to the rank of Senior Private. He deposed that on 31st July 1982, he visited a friend at Dandora where he spent the night, only to wake up on Sunday 1st August 1982 to the news that the armed forces had overthrown the government. He averred that at around 4pm he heard over the radio that the KAF had staged the coup, and that the Kenya Army had crushed it.
8. He averred that due to the ensuing insecurity, he remained at Dandora, but, on 2nd August 1982, he heard a directive over the radio directing all KAF officers to report to their bases or to the nearest military base or police station. He averred that in obedience to the directive, he proceeded Embakasi, but, at or around Embakasi Village, he ran into a squad of army officers and upon introducing himself, they arrested him, brutally beat him up with fists, slaps, kicks and gun butts and stripped him completely naked before bundling him into a land rover. He averred that they escorted him to GADU, and, at the gate, they ordered him to walk on his knees on concrete for a long distance up to the guardroom where they locked him up in a guardroom overcrowded with KAF Officers who were seriously injured, bleeding profusely, groaning and crying for medical attention.
9. He deposed that the same day, with others, they were transported handcuffed to Langata Army Barracks, and, at the gate, naked, in the full view of the public including women and children, they were ordered to walk on their knees on concrete paths up to the guardroom. Further, he averred that the army officers kicked them with boots and hit them with their guns. He states that he was detained at the guardroom at Langata naked, injured and bleeding without any food, water or toilet facilities until the evening of 3rd August 1982 when together with 20 other Kenya Air force Officers, they were escorted laying flat on their bellies in an army truck to Kamiti Maximum Prison. He deposed that they were called educated rubbish, taunted that they would be hanged in less than a month, and, that, on arrival at Kamiti Maximum Prison, they were beaten brutally by prison warders with sticks, slaps, fists and kicks as they were led to the cells.
10. He also averred that he was detained in Kamiti while naked, and, that, the beating continued in the prison cells. He deposed and, that the cell was overcrowded, had a foul smell, poorly ventilated and had no toilet facilities except a filthy bucket used by all the inmates, which was emptied once every 3 days. He averred that they were denied food and drinking water, and, while at Kamiti, he was interrogated on numerous occasions by police officers who coerced him to confess involvement in plotting the coup. He averred that after 4 months of detention at Kamiti, he was transported to Naivasha Maximum Prison in an army truck while being beaten, kicked, stomped and lying on his belly in the truck and upon arrival, they were subjected to brutal beatings by the Prison officers.
11. Additionally, he averred that for the first 4 days at Naivasha, he was locked up in solitary confinement in a black painted filthy waterlogged smelly cell which had no lighting, and that, he, was denied food, water, bathing and toilet facilities. He averred that after the 4 days, he was transferred to a filthy poorly ventilated overcrowded cell without blankets, and, that the cell was lit day and night and he was only allowed one hour a day for basking in the sun and for interrogations.
12. Mr. Kaijenja averred that police officers who demanded a confession on his role in the coup severally interrogated him. He deposed that he refused to confess thrice, but on the fourth time, afraid of being returned to the solitary waterlogged cell and fearing dying from festering wounds on his body, pneumonia, cold, numbness and starvation, he signed a pre-prepared statement without reading the contents. He averred that after signing, he was detained in Naivasha for about two months, until the end of February 1983 when together with about 15 others they

were transferred to Kamiti Prison where he was locked in an filthy, lice infested overcrowded cell which housed insane prisoners on death roll who yelled throughout the day and night. He averred that he was denied blankets and toilet facilities except a single bucket that was emptied once after every 2 days.

13. He averred that on 31st March 1983, together with others, they escorted to Kahawa Army Barracks, where senior army officers informed of his release, and dismissal from the armed forces. He averred that he was given a discharge letter bearing a new service number **102149** for the newly formed 82 Air Force, but, he was not given any benefits for the years he served, and, that he was warned never to be seen near a military installation. Further, he averred that he was given Ksh. 120/= for bus fare to his rural home at Meru District. Lastly, he deposed that throughout the 8 months detention (from 1st August 1982 to 31st March 1983), he was denied medical attention, starved, held incommunicado, and, that, the arrest, detention without trial ended his career, and, he has never secured another job. He contends that the detention without trial violated his rights, and, it was only after the promulgation of the 2010 Constitution that he was able to seek court redress.

Peter Nyagah Ndwiga

14. The second Petitioner, **Peter Nyaga Ndwigah**, averred that he was enlisted in the KAF on 24th April 1980 under service number 024866, and, that after successful completion of the basic military training, he was posted to the Laikipia KAF Base, Nanyuki, where he was trained as a Steward Group "B" Grade 111. He deposed that on Sunday 1st August 1982, at around 5.30am, while at the KAF Base at Nanyuki, he was woken up by the sound of military sirens, shouts and screams by soldiers dressed in full uniform who stormed the barracks and loudly ordered everybody to dress up. He deposed that as per with military regulations, they rushed to the armoury where they met a group of officers who without briefing them on what was going on ordered them to arm themselves, hence, he was issued with a G3 Rifle and rounds of ammunition and they were all deployed to their respective departments to await further orders.

15. Additionally, he deposed that at around 7am while at the mess, he heard news broadcast that the government had been overthrown by the armed forces and not knowing what to do they all remained at the base awaiting orders from their seniors. He averred that at about 3pm Kenya Army Soldiers, who stormed the base, joined their colleagues who were in the base for annual military drills shattered calm in the base. He averred that they turned on the war sirens and ordered all KAF officers under arrest. He deposed that they were disarmed, stripped naked, beaten indiscriminately using fists, slaps, kicks and gun butts and they were frog matched on their knees on concrete paths into a makeshift cell in the supplies block insulting them as educated rubbish.

16. He averred that they were detained in a makeshift poorly ventilated cell without food or drinking water until 2nd August 1982 at 1.00am when while still naked he was transferred to Nyeri G.K Prison, Kingongo. In addition, he states that, army and prison officers subjected him to indiscriminate brutal beatings while still naked, and, that, he was held in a dark, filthy overcrowded cell and was denied food, water or bathing for two days.

17. **Mr. Ndwigah** averred that on 16th August 1982 together with 20 or so KAF Officers, he was escorted to KAF, Nanyuki where he was detained in a makeshift overcrowded cell naked, without beddings or blankets and was coerced to confess participating in plotting the coup. He stated that he was detained in the cell for 10 days until 26th August 1982 when still naked together with 15 other KAF he was escorted to Nanyuki G.K. Prison where he was detained in solitary confinement for 8 days without food or water for 3 days. He averred that on or about 4th September 1982, he was escorted to Eastleigh Air Base, Nairobi where he was severely beaten and forced to walk on his knees on a concrete path to a waterlogged guardroom. He stated that he was locked in the guardroom for four days without food or water or toilet facilities, and, that, he was subjected to interrogations whilst handcuffed and was forced to bite a metal chain as the army officers pulled it almost pulling out his teeth.

18. He also averred that on 8th September 1982 together with about 20 others, they were transferred to Kamiti Maximum Security Prison. Here, he states that he was brutally beaten and for the first three days, he was detained naked in a dark filthy overcrowded foul smelling poorly ventilated cell without toilet facilities except for a filthy bucket used by all inmates, which was emptied once after every two days and that they were denied food or drinking water. He averred that at Kamiti, he was interrogated on numerous occasions by army and police officers who coerced and cajoled him to confess involvement in the attempted coup. He averred that after two weeks of detention in Kamiti, on 23rd September 1982, together with 15 Kenya Air Force inmates, while still naked, they were escorted to Naivasha Maximum Prison while being brutally beaten in the truck as they laid on their stomachs.

19. He averred that at Naivasha, they were severely beaten by the prison warders and army officers and for the first four days, he was locked up in solitary confinement in a black painted waterlogged cell smelling of human waste without light. He deposed that he was denied food, drinking or bathing water, toilet facilities or sunlight. Further, he averred that after 4 days of solitary confinement in the waterlogged cell, he was transferred to a filthy overcrowded poorly ventilated smelly cell without blankets and with lights on day and night, and, he would only be let out for one hour a day to bask in the sun and for interrogations. He averred that he was threatened that he would be returned to the waterlogged cells if he did not confess having been involved in plotting the coup. Further, he averred that afraid of death, he signed the statement, after which he was held for 3 months in an overcrowded cell until 14th December 1982 when he was transferred to Kamiti Prison. At Kamiti, he deposed that he was locked up in an overcrowded filthy and lice infested cell in a block that held insane prisoners without beddings and toilet facilities.

20. **Mr. Ndwigah** averred that on 17th December 1982, he was escorted to the Court Martial at Langata Army Barracks, where he pleaded not guilty to the offence of obeying unlawful orders and failing to suppress a mutiny. He was remanded at the Industrial Area Prison for about one week, then he was escorted to Shimo La Tewa Prison, but he was never returned to the court for trial. He averred that on 23rd March 1983, he was informed that he had been released from prison, and, had been dismissed from the armed forces with effect from 1st August 1982. He states that he was warned never to be seen anywhere near a military installation, and, that, he was given Ksh. 100/= as bus fare to his rural home at Embu District.

21. **Mr. Ndwigah** averred that throughout his 7 months and 23 months detention, he was held in incommunicado, he was denied medical attention, and, that his career was ended leaving him a destitute. That his rights were violated and it was only after the promulgation of the 2010 Constitution that he could seek court redress.

Stephen Karangau Wanjau

22. The third Petitioner, **Stephen Karangau Wanjau** averred that he was enlisted in the KAF on 29th March 1973 under service number 021542. He deposed that upon completing the basic military training at the Armed Forces Training College, Lanet, Nakuru, he was posted to KAF Headquarters, Eastleigh Air Base, Nairobi, where he was trained as an Aircraft Technician (Electrical and Instruments) Group "T" Class One and rose to the rank of Sergeant. He averred that on 1st August 1982, he was in the barrack at KAF Eastleigh when at around 7.am, he heard sirens, shouts and screams by soldiers dressed in full uniform who stormed the barrack and loudly ordered everybody to dress up and rush to the armoury. He deposed that together with his colleagues, they dressed up and rushed to the armoury where they were issued with firearms and ammunition and they were informed that the government had been taken over by the armed forces. He averred that they were deployed to their respective departments to await further orders. He also deposed that he remained at the base and at about 3.00pm, Kenya Army Soldiers stormed the base and ordered all KAF officers to surrender. They disarmed them, stripped them naked and brutally beat them all over their bodies using fists, slaps, kicks and gun butts while insulting them as "cowards and educated rubbish."

23. He averred that they frog matched them on their knees on concrete pavements for long distances and locked them up in an overcrowded guardroom without food or water until the evening when he was bundled into a Kenya Army truck and naked. He averred that he was escorted to Kamiti Maximum Prison, and, at the back of the truck, he was forced to lie on his belly and was brutally beaten. He averred that upon arrival at Kamiti Prison, the army and prison officers subjected him to severe beatings, and, that, they remained stark naked for one week when a senior army officer in the course of the interrogations asked the prison to provide them with uniforms.

24. **Mr. Wanjau** averred that for 3 days at Kamiti, he was detained in a dark, filthy, overcrowded cell with a permanent foul smell, poorly ventilated and with no toilet facilities except a filthy bucket which was used by all inmates and was emptied once every 2 days. Further, he averred that they were denied food or drinking water, and, that, during his detention at Kamiti, he was severally interrogated by army and police officers who coerced and cajoled him to confess involvement in the attempted coup but he declined. He averred that in early November 1982 together with 20 KAF inmates, they were escorted to Naivasha Maximum Security Prison where he was received with more indiscriminate beatings by prison warders using kicks, slaps, fists, buttons and rungs.

25. He further averred that for the first three days in Naivasha, he was locked up incommunicado in solitary confinement in a black painted filthy waterlogged cell with a pungent odour of human waste, without lighting. He deposed that he was denied food, drinking or bathing water, use of toilet facilities. In addition, he stated that he was denied time outside the cell to bask and get fresh air and sunlight. In addition, he stated that after 3 days of solitary confinement in the waterlogged cell, he was transferred to a filthy overcrowded and poorly ventilated smelly cell without beddings, lighting, and, that, he would only be let out for one hour a day to bask in the sun and for interrogation. He averred that Kenya Army and CID officers, threatened to return him to solitary confinement in the waterlogged cells, unless he confessed involvement in plotting and participating in the coup. He averred that afraid of death from the wounds, pneumonia, numbness and starvation if he returned to the solitary waterlogged cell, he agreed to sign the prepared statement whose contents he did not read. He stated that after signing, he was led to an overcrowded, smelly, lice infested cell with lights on day and night and a where he was detained until the beginning of February 1980.

26. He also averred that from February 1983, he was detained in the punishment block incommunicado and in solitary confinement. Here, he averred that he was served with one small meal per day, and was not allowed out of the cell until 13th March 1983 when he was escorted to Kamiti prison where he was detained overnight in Block G together with prisoners sentenced to death who were yelling the whole night. Additionally, He averred that in the morning of 14th March 1983 together with 15 or so KAF inmates, they were escorted to Kahawa Army Barracks where they were presented before senior army officers who informed them that they had been freed and had been dismissed from the armed forces with effect from 1st August 1982. They were warned never to be seen anywhere near a military installation. He averred that he was given Ksh. 350/= as bus fare to his rural home in Karatina, Nyeri District.

27. **Mr. Wanjau** also averred that throughout his detention without trial for 7 months and 14 days, he was denied medical attention and was subjected to degrading treatment. Lastly, he averred that he was unable to secure another job, and, that it was only after the promulgation of the 2010 Constitution that he was able to seek court redress.

Charles Gitari Karionji

28. The fourth Petitioner, **Charles Gitari Karionji** averred that he was enlisted in the Kenya Air force on 24th April 1980 under service number 024830. He averred that after successful completion of his basic military training at the Armed Forces Training College, Lanet, Nakuru, he was posted to KAF Headquarters, Eastleigh Air Base, Nairobi, where he was trained as a Cook Grade Three and attained the rank of Private. He averred that in mid-1981, he was transferred to KAF Nanyuki Air Base where he served until 1st August 1982. He averred that at 6.00am on 1st August 1982, he was in his room in the barracks at KAF, Nanyuki when unusual movements and noise along the corridors wake him up. He stated that he found that his colleagues were already armed, though it was a Sunday, and, on getting out of his room his seniors ordered him to proceed to the armoury and be armed since the government had been overthrown by the armed forces. He averred that he had to obey the orders. He averred that at about 11.am, a group of army soldiers from the neighbouring 1 Kenya Rifles, Laikipia Army Barracks came to their base and joined their colleagues who were already there for their annual military exercises.

29. In addition, he averred that at 4.00pm he heard from the radio that KAF had staged the coup and that loyal Kenya Army had crushed it. He deposed that shortly thereafter, army soldiers, joined their colleagues who were already in the base and ordered them to surrender, stripped then half-naked and detained them in a makeshift cell in one of the aircraft hangers overnight. He averred that on 2nd August 1982, they were forced to walk on their knees to the tarmac runway where they were ordered to write statements on what part they played on 1st August 1982. He deposed that they were forced to lie on their backs facing the sun with their eyes wide open, their arms and legs spread out

as army officers stomped their bodies forcing them to confess. He further averred that after recoding their statements, they were locked up in an overcrowded makeshift cell in the hanger while half-naked, and they were served one meal a day, without drinking water or bathing and without being allowed out of the cell for 4 days until 6th August 1982.

30. He averred that on 6th August 1982 together with about 25 other Kenya Air Force officers, they were transported in a Kenya Army truck lying on their belly at the back of the truck to Kamiti Prison. In addition, he averred that during the journey they were tortured and on arrival, he was subjected to wanton beatings all over his body with slaps, kicks, sticks, batons and gun butts as they were led into the prison cells. **Mr. Karionji** averred that for 3 days at Kamiti prison, he was locked up in a dark, filthy, overcrowded, lice infested cell without any toilet facilities except a single bucket that was emptied once every 2 days. Further, he averred that they were denied food and drinking water for the first 3 days. He averred that he was detained stark naked for one week until interrogations by army officers started when he was provided with torn uniform. He averred that army and CID officers who coerced him to confess involvement in plotting the failed coup interrogated him numerous times.

31. He averred that he was detained at Kamiti Medium Prison for about 3 months up to the end of October 1982 when together with 20 or so other KAF, they were transferred to Naivasha Maximum Security Prison, handcuffed, blindfolded and lying flat on his belly at the back of the truck. He stated that the army and prison officers kicked and stomped him on his back, legs, hands and head, and, upon arrival at Naivasha, he was subjected to brutal beatings by prison warders. Also, for the first four days he was held incommunicado in solitary confinement in a black painted filthy waterlogged cell with a pungent odour of human waste, with lights on 24 hours a day and that he was denied food, drinking or bathing water, use of toilet facilities and time outside the cell to bask and get fresh air. He averred that after 4 days of solitary confinement in the waterlogged cell, he was transferred to a filthy overcrowded cell, without ventilation, without beddings or lighting and would only be let out of the cell for only one hour for interrogation.

32. He further averred that after four days of solitary confinement in the water logged cell, he was transferred to a filthy overcrowded cell with no ventilation, smelly, without beddings and lighting at night and would be let out for one hour for interrogation and basking. He deposed that Kenya Army officers threatened to return him to solitary confinement in the waterlogged cell unless he signed a prepared statement admitting involvement in plotting and participating in the failed coup. He deposed that fearing that he would die due to the harsh conditions and torture; he signed the prepared statement without reading it.

33. He averred that after signing, he was detained in Naivasha for about one month until the end of November 1982 when together with 20 other Kenya Air Force inmates they were escorted to Kamiti Maximum Prison where he was locked in an overcrowded, filthy, lice infested cell in block G that holds insane prisoners. He averred that he was denied beddings, toilet facilities and that in the morning of 21st December 1982 with about 10 other inmates they were escorted to Langata Barracks where he pleaded guilty to the offence of mutiny and was returned back to his cell in Kamiti. He deposed that he was never returned to the Court Martial. However, on 14th March 1983, together with others, he was escorted to Kahawa barracks where they were presented before a senior officer who informed them that they had been released and dismissed from the armed forces, and, that, he was given 52/= as bus fare to his home at Machakos. He averred that throughout his detention without trial for 7 months and 14 days he was denied medical attention, and, that he was not able to secure another job. Lastly, he deposed that it was only after the promulgation of the 2010 Constitution that he could seek court redress.

Elijah Masai Kithuka.

34. The sixth Petitioner, **Elijah Masai Kithuka** deposed that he was enlisted in the Kenya Air Force on 7th February 1979 under service number 023941 and completing the basic military training as supplier class 1. He states that he attained the rank of corporal, and, that, he served at Nanyuki Air Base until 1st August 1982. He averred that on 31st July 1982 he was granted seven days off duty up to 6th August 1982, and, he proceeded to his family residence at Jericho, Nairobi where he spent the night. He averred that in the morning of 1st August 1982, his mother woke him up and informed him that she had heard over the radio that the government had been overthrown by the armed forces. He deposed that at around 4.00pm he learnt from the radio that the coup had been crushed by loyal Kenya Army and on 2nd August 1982, there was a radio announcement directing all KAF officers to report to their bases or to the nearest military base or police station.

35. He averred that on 3rd August 1982 he presented himself to Department of Defence. But, at the gate, the army officers pounced on him, stripped him naked, viciously beat him up and frog matched him on his knees on concrete paths up to the tarmac parade square which was already overcrowded with injured bleeding and groaning KAF Officers. He was locked up in the guardroom without food, water, beddings and toilet facilities. He also averred that on 4th August 1982 together with 25 other KAF officers while half-naked they were transported flat on their bellies in an army truck to Kamiti Maximum Prison and on arrival, he was subject to savage beatings by the army and prison officers. He deposed that at Kamiti, he was locked in an overcrowded filthy, lice infested cell, without toilet facilities, food or water for the first three days. Additionally, he averred that he was detained stark naked for a week, and that, he was interrogated numerous times amid coercion and cajoling to confess.

36. **Mr. Kithuka** averred that he was detained at Kamiti until 15th November 1982 when together with 20 or other inmates, they were transferred to Naivasha Maximum Prison while still handcuffed and lying flat on their belly in a prison truck as prison and army officers brutally beat them. He averred that on arrival at Naivasha, they were subjected to severe beatings and that for the first three days; he was held incommunicado under degrading conditions without food, water and toilet facilities. Further, he deposed that after the three days he was transferred to an overcrowded filthy cell.

37. He also averred that he interrogated several times, and, that he was held in a waterlogged cell. That, fearing death, he signed a prepared statement and on 9th March 1983. He deposed that he was escorted to Kahawa Barracks where a senior army officer informed him that he had been freed and dismissed from the armed forces, and warned him never to be seen near a military installation. He averred that in total, he was detained without trial for 7 months and 7 days under degrading conditions and without medical attention.

Patrick Kipkurui Chirchir

38. The seventh Petitioner **Patrick Kipkurui Chirchir** deposed that he was enlisted in the KAF on 3rd March 1978 under service number 023433 and upon completing the basic military training as a Gunner Grade One and as a technician in Aircraft Engine and Airframes; he was posted to Eastleigh Air base where he attained the rank of Senior Private. He averred that on 30th July 1982, he had just returned to the Eastleigh from transporting soldiers all over the country for the annual military exercise, and, that, he was given 14 days off duty and he left for Kericho. He deposed that in the morning of 1st August 1982, he was startled by news over the radio that the government had been overthrown by the armed forces. Further, he averred that on 2nd August 1982, he heard a radio announcement that all KAF officers were required to report to their base or KAF base, Eastleigh or the nearest military base or police Station. He deposed that in obedience, thereto he proceeded to Eastleigh base where he was immediately arrested, brutally beaten lost two teeth, and he was locked up.

39. Further, he averred that they were to Kamiti prison where he was beaten severely, subjected to torture and he was detained naked under harsh conditions until 13th November 1982 when he was escorted to Naivasha Maximum Prison where he was brutally beaten, and, was held incommunicado for the first three days under inhuman and degrading conditions. He averred that after 5 days of solitary confinement in a waterlogged cell under inhuman and unhygienic conditions he was transferred to an overcrowded cell. In addition, he deposed that after failing to confess, he was returned to the solitary cell, where he succumbed to the torture and threats and signed a confession after which he was transferred to a permanently lit cell. He averred that in December 1982, he was arraigned in court and after pleading not guilty to the offence of failing to suppress a mutiny; he was returned to prison and was held until 16th March 1983 when he was released. He stated that throughout the trial he was denied medical attention.

Lawrence Njau Mwaura.

40. The eighth Petitioner, **Lawrence Njau Mwaura**, states that he was enlisted in the KAF on 1st March 1971 under service number 021364. He deposed that upon completing the basic military training he was posted to Eastleigh Air base where he underwent further training locally and abroad as an instructor in Aircraft Weaponry Systems, Bombs and Missiles, and, later underwent leadership trainings. He states that he rose to the rank of sergeant, and, that, from 1974, he was deployed to KAF, Nanyuki where he was an instructor as at 1st August 1982. He averred that during the said period he was residing outside the base with his family.

41. **Mr. Mwaura** averred that on 1st August 1982 while with his family, he heard over the radio that the armed forces in Nairobi had overthrown the government. He deposed that he proceeded to the base where he found other KAF officers and army officers fully armed but waiting for orders. He also averred that apart from dressing in uniform, he was not issued with a firearm. He averred that, they stayed peacefully until 4.00pm when they learnt that loyal Kenya Army officers had crushed the coup.

42. In addition, he averred that shortly, Kenya Army officers ordered all KAF Officers to Surrender and lay down their arms stormed the barracks. He deposed that they were all arrested, stripped naked and detained, and, the same day they were transported to Meru G.K Prison under inhumane conditions and upon arrival they were brutally tortured and subjected to degrading conditions. Further, he averred that on 6th August 1982, he was transferred to Kamiti Prison naked and under harsh conditions, and upon arrival; he was subjected to brutal beatings. He states that he was held under inhumane conditions for two weeks, and thereafter, he was transferred to Kamiti Prison under harsh conditions where he was brutally tortured and detained under degrading conditions.

43. He averred that twice he was presented before interrogators who demanded that he confesses, but upon refusing, he was forced to walk on his knees to a dark painted filthy waterlogged cell. That on the third day fearing for his life, he signed a pre-prepared statement, after which he was presented before senior officers at Kahawa Barracks who informed him that he had been freed from prison and dismissed from duty and was warned never to be seen anywhere near a military installation, and, that, in total he was detained for 7 months and 4 days.

Constantine Masanja Righa.

44. The ninth Petitioner **Constantine Masanja** deposed that he was enlisted in the KAF in June 1980 under service number 024926 and upon completing the basic military training he was posted to Kenya Armed Forces Technical Training College at Embakasi, Nairobi where he was trained as an Aircraft Technician (Electrical and Instruments) and attained the rank of Senior Private. He deposed that on 31st July 1982, he was given 14 days off, and, that, he left for Mombasa the same evening. He states that on 1st August 1982, his father woke him up and told him that he had heard over the radio that the government had been overthrown by the armed forces. He states that on the same day, at around 4.00pm he learnt that the coup had been crushed. In addition, he deposed that on 2nd August 1982, he heard over the radio that they were required to report at the nearest military base or police station, and, in compliance thereof, he reported at the Navy Headquarters, Mtongwe, Mombasa. He deposed that while at the base they were surrounded by armed forces military police who detained them and later they were interrogated by the then Navy Commander who informed them that he had received orders that they be escorted to Nairobi for further interrogations.

45. **Mr. Righa** deposed that in the evening of 2nd August 1982, together with others while handcuffed, they were escorted by Navy and Military officers in an overcrowded compartment of the train without food, water from Mombasa to Nairobi. He stated that on arrival in Nairobi, they were picked loaded in trucks by army officers and forced them to lie flat on their bellies as the officers stomped all over their bodies and escorted them to KAF Eastleigh. He averred that on arrival at the KAF Eastleigh, they found that the base had been taken over by the Kenya Army, who stripped them naked at the gate. Further, the Kenya Army officers viciously beat him up all over his body with slaps, fists, kicks and gun butts while insulting them as educated rubbish and frog matched them on their knees for long distances on concrete paths and locked them in the guardroom which was overcrowded with injured, bleeding and groaning KAF soldiers and poorly ventilated.

46. He averred that in the evening he was bundled into a Kenya army truck naked and escorted to Kamiti Maximum Prison while being brutally beaten while lying at the back of the truck. Further, he averred that on arrival at Kamiti Prison, he was severely beaten and remained naked in a filthy cell for a whole week without beddings for a whole week.

47. **Mr. Righa** deposed that he was interrogated many times amid coercion and cajoling to confess involvement in plotting the coup, and,

that, he was detained at Kamiti for 3 months until early November 1982 when with others they were escorted to Naivasha Maximum Security prison. He averred that at Naivasha he was brutally beaten and for the first four days he was held incommunicado under inhumane conditions after which he was transferred to a waterlogged cell filthy and poorly ventilated cell. He averred that after four days he was presented before interrogators who threatened to return him to the waterlogged solitary confinement unless he confessed involvement in the coup. He states that fearing the harsh conditions in the said cell, he confessed and signed a prepared statement, after which he was transferred to a common overcrowded cell. He deposed that he remained in the said cell until 6th February 1983 when together with others they were told that they were blameless, and that they would be released. He added that on 7th February 1983, together with others, they were escorted to Kahawa Army Barracks, Nairobi, where a senior Army officer informed them that they had been freed from prison, and, that, they had been dismissed from service, and warned never to be seen anywhere near a military installation. He stated that in total he was detained for 6 months and 6 days, and, that, he has never secured another job.

The Tenth Petitioner

48. Capt. Stephen Karuga Kamonde, the 10th deposed that he was enlisted in the KAF on 18th November 1966. That, after successful training he was posted to KAF Headquarters at Eastleigh Air Base where he trained and qualified as an Air Traffic Control Assistant and Operations. He averred that he rose to the rank of a Sergeant, and, that, he was later considered for commissioning to the rank of a Lieutenant, and, he served as such between 25th July 1978 to 24th July 1982, and, he was promoted to the rank of a Captain and attended an operations course in India.

49. He deposed that while serving at Nanyuki, he was residing with his family outside the base. He averred that in the morning of 1st August 1982, while on annual leave in his house in Nanyuki, armed air men informed him that the government had been overthrown by the armed forces and asked him to dress up and accompany them. He averred that at around 1pm, they learnt that the coup had been neutralized by the Kenya Army. He averred and at around 4pm Kenya Army soldiers surrounded the base and ordered all KAF officers under arrest and disarmed them, stripped them naked and severely beat them up. He deposed that he was detained for three days, while being ordered to train the army on the operations of the air force and use of apparatus. He averred that after three days, together with others, they were transferred under inhumane conditions to Kingongo Prison where they were severely beaten. He stated that he was held for one week and released on 15th August 1982 without charges.

50. He averred that he was later recruited into the newly formed "82 Air force" as an Operations Officer and was issued with a new Service number but on 9th November 1982, but, he was rearrested and escorted to Nairobi where he was locked up for two days, interrogated and beaten. He further stated that on the third day he was escorted to Naivasha Maximum Prison where he was severely beaten and detained in solitary confinement for three days under inhumane conditions. He deposed that after three days, he was transferred to a filthy overcrowded cell and was held incommunicado without charges for one and a half months, after which he was transferred to Kamiti Maximum Prison where he was detained for three months. He averred that on arrival at Kamiti, he was severely beaten, and was locked in a dirty cell without food or water for three days, and, was released on 30th March 1983 after four and a half months of detention.

The Reliefs sought.

51. The Petitioners pray for the following orders/declarations:-

a. A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Petitioners upon being taken into custody in a bid to extort confessions from them, the cruelties, violence, brutalities, extreme, inhuman and degrading conditions that the Petitioners were subjected to in the various military and prisons custody constituted breaches of the fundamental rights and freedoms of the Petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and or degrading treatment or punishment guaranteed by sections 70(a) and 74(1) of the repealed Constitution (now Articles 27(1)(2), 28 and 29(a) (c)(d)(f) of the Constitution.

b. A declaration that the entire period of detention without trial between 4 and a half months to eight months that the Petitioners were unlawfully detained in military and prison's custody incommunicado constituted a period of arbitrary, unlawful, illegal and unconstitutional detention and a violation of the fundamental rights of the Petitioners as to human dignity, the protection of law, personal liberty and freedom from cruel, inhuman and degrading treatment and or punishment guaranteed by sections 70(a), 72(3) and 74(1) of the repealed Constitution (now Articles 27(1)(2), 28, 29(a) and 49(1)(f) & 50(2) of the Constitution.

c. A declaration that the arbitrary and unlawful dismissal of the Petitioners from the Armed Forces and termination of their peculiar technical careers in the Armed Forces without a hearing, without any benefits, was unlawful, inhuman and cruel deprivation of the Petitioners only means of livelihoods in violation of their fundamental right to life, human dignity and freedom from cruel and inhuman treatment and or punishment guaranteed by sections 70(a), 71(1) and 74(1) of the repealed Constitution (now Articles 26(1)(3), 28 and 29(f) of the Constitution.

d. General and exemplary/vindictory, aggravated and or punitive damages consequential upon the declarations of violations of the fundamental rights and freedoms of the Petitioners in prayers (a)to(c) above as may be assessed by this honourable court.

e. Costs of the Petition.

f. Interests on all monetary awards.

Respondent's Replying Affidavit

52. **Major Nicholas Mutuku Mulinge**, the Staff Officer at the Kenya Defence Headquarters swore the Replying Affidavit dated 22nd

February 2015. He averred that the Petitioners were officers and service men in the armed forces, hence, they were subject to the Armed Forces Act [1](Repealed). He deposed that the Petitioners were reasonably suspected of participating in the coup. As a consequence, they were held in lawful custody in accordance with section 70 of the Armed Forces Act, [2] as read with rule 6 of the Armed Forces Rules of Procedure, to facilitate full and thorough investigations into their roles in the attempted coup that resulted in a national crisis.

53. He deposed that all the KAF officers totalling to about 2,300 were placed in lawful arrest and they underwent a screening process and categorized depending on their level of involvement in the mutiny. He averred that owing to the large number of the officers and service men, they were held in civilian prisons since the barracks guardrooms at the Kenya Defence Forces could only accommodate about ten persons.

54. Major Mulinge averred that the screening process was to identify their individual level of involvement. He also averred that it was necessary in light of the state of emergency that was declared soon after the coup, and the ensuing total breakdown of law and order, that the officers and service men identified to have been implicated to be tried by courts martial. He added that the suspects who were not implicated were cleared and allowed to return to their normal duties.

55. Further, he averred that those who confessed to taking unlawful orders and illegally arming themselves without fully engaging in the riotous activities with the mutineers were administratively discharged from service as was the case of the 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Petitioners. In addition, he averred that the suspects who were found culpable were subjected to court martial trial in various courts. He stated that the 2nd Petitioner was charged with the offence of failing to suppress a mutiny.

56. He also averred that in light of the delay in filing this case (33 years), most of the records cannot be traced or have been destroyed, and hence, this claim is prejudicial to the Respondent. He contended that due process was followed in the arrests, investigations as well as the administrative disciplinary processes. Further, he contended that the second Petitioner has not challenged the trial process. He denied that the confessions were obtained under duress and the allegations of torture.

Petitioners' Further Affidavits

57. Each of the Petitioners filed a further Affidavit dated 31st December 2016 in reply to Major Mulinge's Replying Affidavit. The contents of these Affidavits are similar. The substance of the Affidavits is that they all deny interacting with Major Mulinge and that they dispute the contents of his Affidavit.

Oral evidence.

58. All the Petitioners gave oral evidence in court essentially reiterating the contents of their affidavits. I will add no value for me to rehash their oral evidence here. In addition, the eighth Petitioner, Lawrence Njau Mwaura called as a witness Dr. Theophilus Wangata, a Medical Practitioner who examined him and prepared the Medical report dated 20th January 2014. The Doctor concluded that the eighth Petitioner suffers from lumbar spondylosis affecting the lower back, a condition usually caused by trauma. He also noted he has osteoarthritis changes of the lower spine.

The Respondent's failure to call witnesses.

59. The Respondents did not adduce oral evidence.

Issues for determination.

60. Upon analysing the above facts and the submissions tendered by the parties, I find that the following issues distil themselves for determination:-

- a. Whether this suit is barred by the limitation of actions act.*
- b. Whether the Petitioners fundamental Rights and Freedom were violated.*
- c. Whether the Petitioners are entitled to damages and if so, what is the quantum?*

a. Whether this suit is barred by the limitation of actions act.

The Petitioners' counsel conceded that this Petition was filed after 30 years, but argued that courts have held that it is a sound judicial policy for the courts to assert transitional justice by vindicating past violation of fundamental rights in order to secure the country's future. He cited *Jennifer Muthoni Njoroge & 10 Others v The Attorney General*[3] in support of the reasoning that courts must vigorously enforce against the state fundamental rights and freedoms guaranteed in the Constitution, and, that, as a lesson for the future, the State must today pay the price for its failings in the past. Citing *David Gitau Njau & 9 Others v The Hon Attorney General*[4] counsel submitted that courts have held that there is no fixed limitation period for enforcement of fundamental rights and freedoms.

61. The Respondents counsel also admitted that it is settled law that there is no limitation with respect to constitutional Petitions alleging violation of rights, but argued that delay in filing a suit must be explained. In his view, transitional justice cannot operate *ad in finitum*, and that equity does not aid the indolent.

62. It is common ground that this Petition was filed after a period of 32 years since the cause of action arose. It is uncontested that even

though the retired Constitution at Chapter 5 contained a Bill of Rights guaranteeing fundamental rights and freedoms of the citizen, cases of detention without trial, police brutality and massive violation of the Bill of Rights were rampant. Worse still, it was not possible for a citizen to challenge such excesses in court for fear or repercussions. In any event, the judiciary as then constituted lacked the will, courage and independence to protect the citizens' fundamental rights. Simply put, it was a weak judiciary, which failed stand to defend the Constitution. Even when it was presented with opportunities to stand to the occasion and pronounce itself, it failed to do so and simply let such opportunities slip through its fingers. It will go down in history as having left a lasting scar in this country in the manner in which it administered justice. Differently stated, it was a classic case of a country having a Constitution without constitutionalism.

63. On 27th August 2010, Kenyans overwhelmingly voted for a new Constitution. The 2010 Constitution radically altered the hitherto constitutional dispensation. It ushered in a new system of governance. It is highly liberal, transformative and progressive. It ushered in a new set of national values, an expanded Bill of rights and a new system of government. It reset the relationship between the citizen and the State. It reconfigured both the ethos and the architecture of governance.^[5] It gives prominence to national values and principles of governance. These include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law,^[6] Leadership and Integrity,^[7] Values and Principles of Public Service,^[8] entrenchment of exercise of Judicial authority in the Constitution^[9] and Independence of the Judiciary.^[10] It confers sovereignty to the people of Kenya to be exercised on their behalf by State Organs in accordance with the Constitution.^[11]

64. The philosophy, values and the structures of the previous Constitution gave way to those of the new Constitution. This included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.^[12] Every person is accountable to the Constitution. The judiciary is required to apply the law honestly, independently and with integrity.

65. Chapter four of the Constitution introduced an expanded Bill of Rights and expanded not only the democratic space but also guaranteed the right to approach the court citing not only violation of fundamental rights and breach of the Constitution but also a threat to violation of the Bill of Rights or the Constitution. As Baroness Helena Kennedy QC, a woman activist and chair of the British Council^[13] once said that:-

"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline."

66. It is correct to say that law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safeguard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.^[14]

67. The Rule of Law is guaranteed in the Constitution. It is one of the values enshrined in Article 10 of the Constitution. It is upon this instrument that the Petitioners stand before this court seeking redress, 32 years after the cause of action arose. Two questions arise. *One*, whether the delay of 32 years is inordinate, hence, inexcusable. *Two*, whether the delay has sufficiently been explained. Differently stated, are the Petitioners guilty of laches? Addressing a similar objection in *Eliud Wefwafwa Luucho & 3 others vs Attorney General*^[15] this court stated as follows:-

"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^[16] 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^[17] and further the state cannot shut its eyes on its past failings^[18] nor can the court ignore the dictates of transitional justice..."

68. As to whether the delay is prejudicial to the Respondent, it is common ground that the Respondent filed the replying Affidavit of Major Mulinge. He gave a detailed account of the events leading to the Petitioners' arrest and detention and justified the arrest and detention. He also explained how the collected information was sieved leading to prosecution of the second Petitioner and dismissal of the rest. He denied the alleged torture and justified the prolonged detention. Notwithstanding his detailed account, at paragraph 14 he contended that trial records could not be traced due to the long delay. This contention fails on three fronts. *First*, the assault mounted by the Petitioners is premised on torture, inhuman and degrading treatment during arrest and detention. It does not question the reasons for the arrest or the propriety of the trial. *Second*, the Petitioners case is that they were violently tortured to procure confessions in violation of their rights. *Third*, whereas the law may have provided arrest and detention, the rights and freedoms of an arrested person must be respected. Thus, the contention that the records may not be available after 32 years is irrelevant since the records have not been shown to contain material that the alleged violations did not take place. Such records would be viable if this was an appeal or review of the trial.

69. The question whether the Respondent has been prejudiced by the delay is an issue of fact, which requires evidence and prove to the required standard. The Respondent is under a duty to adduce evidence and explain the alleged prejudice. Section 107 (1) of the Evidence Act^[19] provides that "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." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." **Lord Brandon** once remarked:-^[20]

"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."

70. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the decisive 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*^[21] :-

“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”

71. 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. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. In any event, a close look of previous jurisprudence on the subject reveals that courts are reluctant to shut out a litigant because of limitation of time in cases of violation of fundamental rights 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. The 2010 Constitution opened the doors of justice thereby making it possible for aggrieved persons to institute cases of this nature. This petition was filed on 11th March 2014, about 3 years and 7 months after the promulgation of the 2010 constitution. It is common ground that during the period before 27th August 2010, the political climate was un conducive for any citizen to file a challenge of this nature against the government. The question that follows is whether the delay of 3 years and 7 months is unreasonable, and, whether the delay has been accounted for.

72. Regarding the period prior to the promulgation of the 2010 Constitution, I am persuaded that the then prevailing political environment made it impossible for victims to file cases of this nature in court. In so concluding, I am guided by the dictates of transitional justice, the need to uphold and strengthen the Rule of Law, and, the need to hold the perpetrators of violations of human rights accountable. Also relevant is the need to provide victims of such violations with compensation, and the need to effect institutional reform. The conclusion is irresistible that it would be unfair to uphold the defense of limitation in the circumstances of the present case.

73. There is no doubt that the 2010 constitution brought a fundamental change to this country with a strong emphasis on the Rule of Law and national values. It was a major transition from the dark past to a future where constitutionalism would reign supreme. However, was Kenya simply going to transit to the new constitutional dispensation and simply forget such atrocities? Andrea Bonime-Blanc [22] defines "transition" as referring to "a period of reformist change between regimes - not to a change of government within the same constitutional framework nor to a revolutionary transformation."

74. The end goals of transitional justice in general should be to prevent similar recurrence of human rights violations in future; to repair the damage caused through systematic patterns of human rights violations; to uphold the rule of law; to recognize the human dignity and worth of those who have been victimized and to create a stable and governable political environment. The primary objective of a transitional justice is to end the culture of impunity and establish the rule of law in a context of democratic governance. In general, therefore, one can identify the broad objectives that transitional justice aims to serve: - These are; establishing the truth, providing victims a public platform, holding perpetrators accountable, strengthening the rule of law, providing victims with compensation, effecting institutional reform, promoting reconciliation. Transitional justice is not a special form of justice. It is, rather, justice adapted to the often unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs" [23]

75. The next question is whether the delay of 3 years and 7 months after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two stage inquiry: *first*, whether the proceedings were instituted after a reasonable time has passed, and, *second*, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.

76. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an *unreasonable* delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights," and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.

77. To invoke laches the delay by the opposing party in initiating the lawsuit must be **unreasonable** and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favorable to the defendant becoming lost or degraded, witnesses favorable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.

78. As pointed above, there is no serious attempt by the Respondents to demonstrate that the lapse of time has made it impossible to mount evidence to dispute the alleged violations. In fact, the Replying Affidavit states in clear terms that the arrests and detentions were lawful. He cited provisions of the law in support of this contention. Differently stated, the Respondent responded to the allegations.

79. In considering whether delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent. I have already addressed prejudice. The period of 3 years and 7 months after 2010 is in my view not inordinate since the public needed to appreciate the changed constitutional dispensation and at the same time government institutions including the judiciary were subjected to drastic changes to align them to the new constitutional dispensation.

80. In conclusion, I find no difficulty in finding that it would be against the dictates of transitional justice to uphold the defense of limitation in this case considering the difficulties Kenyans experienced at the material time and recognizing that it was not possible for aggrieved parties to seek court redress in cases of this nature at the material time. Additionally, I find and hold that a plea of laches has failed because the Respondent failed to demonstrate prejudice on their part or any of the permissible grounds discussed above to warrant the court to conclude that a plea of laches applies.

b. Whether the Petitioners' fundamental Rights and Freedom were violated.

81. The Petitioners' counsel urged the court to find that the arrest, physical and mental assaults and extreme harsh detention conditions amounted to violation of the Petitioners' rights against torture, cruel inhuman and degrading treatment which were guaranteed under sections 70 (a) and 74(1) of the retired Constitution. He cited *Harun Thungu Wakaba v Attorney General*[24] for the proposition that absence of a medical report is not a bar to compensation since the question is whether the acts complained of violated the Petitioners' rights. Similarly, counsel cited *David Gitau & Others v The Hon Attorney General*[25] and *Denish Gumbé Osire v Cabinet Secretary, Ministry of Defence & Another*[26] where the court found the State liable for similar violations under similar circumstances. In addition, he cited *Peter M. Kariuki v The Attorney General*[27] where the court held *inter alia* that the provisions of the Armed Forces Act[28] could not be construed to take away constitutionally guaranteed rights.

82. The Respondents' counsel cited section 107 of the Evidence Act,[29] which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts, which he asserts, must prove that those facts exist. He argued that the Petitioners case is weak, that the Petitioners never produced medical reports, and that there is no indication in the Dr. Wangata's evidence that the eighth Petitioner's condition was because of the alleged torture. He cited *Lt. Col. Peter Ngari Kagume & Others v Attorney General*[30] for proposition that when a court is faced by a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation. It was counsels' submissions that the Petitioners had a duty to bring tangible evidence of the alleged violation of their rights and freedoms.[31]

83. Each Petitioner narrated the torture and inhuman treatment he was subjected to by the Kenya Army officers, Kenya Navy Officers, Prison Officers and Police Officers. The torture was both physical, mental and psychological. In addition, the Petitioners were detained for long periods without trial, and save for the second Petitioner who was arraigned before the court martial, the rest were released without trial after being held for months under harsh conditions.

84. This court cannot deviate from its own duty of determining acts, which amount to infringement of constitutional rights of the citizens. Every act of the state and its organs must pass through the test of constitutionality, which is, nothing but a formal test of rationality. Thus, when the constitutionality of the manner in which the petitioners were treated is challenged, this court is required to first to determine whether, through the application of all legitimate interpretive aids, the impugned conduct is capable of being read in a manner that is constitutionally compliant.

85. This court, in line with its constitutional mandate to promote and protect the values and ethos that underpin the Constitution, will undoubtedly find and hold that an arrest, torture and detention of a citizen that violates his liberty, dignity, freedom from torture, freedom from degrading treatment or generally violates the Bill of Rights is unconstitutional. The thrust of this conclusion is that, because an arrest, search and detention constitutes an infringement of a person's rights to his or her liberty, dignity and privacy, all of which are enshrined in the Bill of Rights, the actions must be justifiable according to the dictates of the Bill of Rights.

86. The retired Constitution prohibited torture and acts of inhuman and degrading treatment. In cases of violation of fundamental rights, the court examines the case in light of the provisions of the Constitution. The litmus test is simple. Actions that amount to inhuman and degrading treatment are out rightly unconstitutional.[32] Chapter 5 of the Retired Constitution guaranteed Fundamental Rights and Freedoms of the individual. The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable.[33]The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to act against his will or conscience.[34] The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. [35] In this case, we are not essentially dealing with personal injuries but with inhuman treatment, torture, harassment and the mental and physiological effects of such actions to the victims.[36] The actions visited upon the petitioners in my view amount to torture and a gross violation of their constitutional rights.

87. Perhaps I should add that when a citizen is arrested on allegations of committing an offence, his Fundamental Rights are not abrogated in *toto*. [37] The citizens' dignity cannot be allowed to be comatose [38] except, to such limitations as may be provided by the law. The right not to be subjected to inhuman and degrading treatment enshrined in the Constitution includes the right to be treated with human dignity and all that goes along with it. [39] Inhuman treatment has many a facet. It can cover such acts, which have been inflicted with an intention to cause physical suffering or severe mental pain. [40] It would also include a treatment that causes humiliation and compels a person to act against his will or conscience. [41] There is no shadow of doubt that any treatment meted out to a citizen, which causes pain, humiliation, and mental trauma corrodes the concept of human dignity. [42]

88. The majesty of law protects the dignity of a citizen in a society governed by law. The State is governed by rule of law, which must be paramount. Fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity." [43] Simply put, there are certain things a person cannot do to another person simply because he is a human being. The rights of political freedom, right to life, freedom from inhuman and degrading treatment, freedom from torture, the right to due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the U.S. Supreme Court, these rights are "implicit in the concept of ordered liberty." [44]

89. It is the sacrosanct duty of the army, prison officers and the police to remember that citizens while in their hands are not denuded of their fundamental rights under the Constitution. The restrictions imposed on fundamental rights have the sanction of law by which the enjoyment of fundamental right is curtailed. Some rights are absolute. Security officers are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities. The law enjoins them to be scrupulously fair to alleged offenders, to ensure fair investigations and fair trial, and to ensure that the citizens' constitutional and fundamental rights are not violated.

90. It is my finding that the manner in which the Petitioners were arrested, beaten, harassed, tortured, subjected to degrading treatment, held in degrading and inhuman conditions, and denial of food, medical care, access to legal representation or family members cannot be read in manner that is consistent with the retired Constitution. The acts were a blatant violation of the letter and spirit of Chapter five of the retired Constitution.

c. Whether the Petitioners are entitled to damages, and if so, what is the quantum?

91. The Petitioners' counsel urged the court to award damages as follows: -

- a. ***That*** the 1st Petitioner be awarded Ksh. 10,000,000/= for violation of his right and detention for a period of 8 months.
- b. ***That*** the 2nd Petitioner be awarded Ksh. 9,700,000/= for violation of his rights and detention for a period of 7 months and 23 days.
- c. ***That*** the 3rd and 4th Petitioners be awarded each Ksh. 9,500,000/= for violation of their rights and detention for a period of 7 Months and 14 days.
- d. ***That*** the 5th Petitioner be awarded Ksh. 9,500,000/= for violation of his rights and detention for a period of 7 Months and 22 days.
- e. ***That*** the 6th Petitioner be awarded Ksh. 9,500,000/= for violation of his rights and detention for a period of 7 months and 7 days.
- f. ***That*** the 7th and 8th Petitioners be awarded each Ksh. 9,500,000/= for violation of their rights and detention for 7 months and 4 days.
- g. ***That*** the 9th Petitioner be awarded Ksh. 9,000,000/= for violation of his rights and detention for a period of 6 months and 6 days.
- h. ***That*** the 10th Petitioner be awarded Ksh. 8,000,000/= for violation of his rights and detention for a period of 4 months and 15 days.

92. However, the Petitioners' counsel did not explain how he arrived at the above amounts.

93. The Respondents' counsel suggested awards of Ksh. 2,500,000/= for the first Petitioner, Ksh. 2,000,000/= each for the second to eighth Petitioners, and Ksh. 1,500,000/= and Ksh. 1,000,000/= for the ninth and tenth Petitioners respectively. Similarly, he did not justify the said sums.

94. The purpose of public law is not only to civilize public power but also to assure the citizens that they live under a legal system, which aims to protect their interests and preserve their rights. Thus, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the Constitution, or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer, and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.^[45]

95. It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion.^[46] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases:^[47]

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

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of

dignity that some of these violations of rights entailed.^[48]When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.^[49]

98. It is convenient to add that an award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle, it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.

99. Perhaps I should emphasize that an injury suffered because of brutality, torture, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. In addition, the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential.^[50]

100. Even though the Petitioners suffered physical harm caused by the brutal and callous violence visited upon them, they also suffered psychological and severe mental anguish, which is neither physical nor financial. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Differently stated, translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one.^[51] The award must be fair and reasonable, fairness being gauged by earlier decisions. No money can provide true restitution.

101. In other words, although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

102. All the Petitioners were mercilessly tortured. They were detained under extremely inhumane conditions. They were stripped naked and paraded or detained naked, thus subjecting them to degrading treatment. They were transported in police land rovers in a very inhumane manner; they were denied food and water for long periods. The interrogation was so brutal that it reminds me of my earlier observation that there are certain things you cannot do to a human being just because he is a human being. Life in detention was hell. Upon release, the Petitioners could not get employment in the country.

103. I am persuaded that the Petitioners Proved to the required standard that they were physically, mentally and physiologically tortured. I am persuaded that the torture was unconstitutional and that it violated their fundamental rights and freedoms. They suffered both psychological and physical harm. No amount of money can adequately compensate such suffering. However, considering the nature of the violations of their constitutional rights, the psychological and physical suffering visited on each one of them, and considering the applicable legal principles and bearing in mind the fact that it may not be easy to quantify denial of fundamental rights and freedoms, I find that the Petitioners are entitled to compensation. In assessing the damages, I have considered the torture and the period they were each detained.

104. Doing the best I can, and considering the nature gravity of the violations, and the need to hold the State to account for such violations, and taking into account inflationary effects, I award each of the Petitioners the amounts stated below. Accordingly, I enter judgement in favour of the Petitioners against the Respondents jointly and severally as follows:-

a) **A declaration** be and is hereby issued that each of the Petitioner's Fundamental Rights and Freedoms not to be subjected to cruel, inhuman and degrading treatment were violated by the Army Officers, Navy Officers, Prison Officers and the Police during the period of their arrest, interrogation, and detention.

b) **A declaration** be and is hereby made that the Petitioners were detained under extremely harsh, inhumane and degrading conditions in total contravention of their constitutionally guaranteed rights.

c) **A declaration** be and is hereby issued that the manner in which each of the Petitioners was arrested, brutally tortured to extract confessions, and, or, detained in guardrooms in the various military barracks, and/or prisons under inhumane conditions was in total contravention of each and every Petitioners fundamental Rights and Freedoms guaranteed under Chapter five of the Repealed Constitution.

d) **A declaration** be and is hereby issued that each of the petitioners is entitled to damages for violation of their Fundamental Rights and freedoms enshrined in the Repealed constitution.

e) **That judgement** be and is hereby entered in favour of the petitioners against the Respondents jointly and severally by way of general damages as follows:-

a. **Peter Mauki Kaijennja**.....Ksh.5, 500,000/=

b. **Peter Nyaga Ndwiga**Ksh.5,250,000/=

- c. *Stephen Karangau Wanjau*.....Ksh. 5,250,000/=
- d. *Charles Gitari Karionji*.....Ksh. 5,250,000/=
- e. *George Gathiaka Keingati*..... Ksh.5,250,000/=
- f. *Elijah Masai Kithuka*.....Ksh.5,250,00/=
- g. *Patrick Kipkurui Chirchir*.....Ksh.5,250,000/=
- h. *Lawrence Njau Mwaura*.....Ksh. 5,250,000/=
- i. *Constantine Masanja Righa*.....Ksh.4,500,000/=
- j. *Capt. Stephen Karuga Kamonde*.....Ksh. 4,000,000/=
- f) That the above sums shall attract interests at court rates from date of this judgment until payment in full.
- g) The Respondent shall pay the costs of this suit to the petitioners plus interests thereon at court rates.

Orders accordingly.

Signed and Dated at Nairobi this 21st day of May 2019.

John M. Mativo

Judge

[1] Cap 199, Laws of Kenya- Repealed.

[2] Ibid.

[3] Petition No. 340 of 2012, {2013} e KLR.

[4] Petition No. 340 to 350 of 2009

[5] Njeri Githang'a, *Law Reporter*, June 2013, <http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/>. Accessed on 24th November 2017

[6] Article 10 (1) (a)-(e)

[7] Chapter six of the Constitution

[8] Chapter thirteen of the Constitution

[9] Article 159

[10] Article 160

[11] Article 1

[12] Ibid.

[13] Published in *Just Law* {2004}.

[14] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[15] *Supra*.

[16] See *Joan Akinyi Kabasellah and 2 Others vs Attorney General*, Petition No 41 of 2014, *Dominic Arony Amolo vs Attorney General*, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, *Otieno Mak'Onyango vs Attorney General and Another*, Nairobi HCCC NO 845 of 2003

- [17] *Joseph Migere Onoo vs Attorney General*, Petition No. 424 of 2013
- [18] *Gerald Gichohi and 9 Others vs Attorney General* Petition No. 487 of 2012
- [19] Cap 80, Laws of Kenya
- [20] *In Rhesa Shipping Co SA vs Edmunds* {1955} 1 WLR 948 at 955
- [21] {2007} 4 SLR (R) 855 at 59
- [22] Andrea Bonime-Blanc *Spain's Transition to Democracy* (1987) 8-9.
- [23] http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf
- [24] {2010} e KLR.
- [25] {2013} e KLR.
- [26] {2017} e KLR
- [27] {2014} e KLR.
- [28] *Supra-Repealed.*
- [29] Cap 80, Laws of Kenya
- [30] Petition No. 128 of 2006.
- [31] Citing *Col. Peter Ngari Kagume & Others v Attorney General*, Petition No. 128 of 2006.
- [32] *Ibid*
- [33] *Ibid*
- [34] *Greek Case* 1969 Y.B. Eur. Con. on H.R. 186 (Eur. Comm'n on H.R). Also see *Lenaola J. (As he then was) in the case of Milka Wanjiku Kinuthia & Others vs The Attorney General*
- [35] See *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260, paragraph 23.
- [36] *Supra*
- [37] *Ibid*
- [38] *Ibid*
- [39] *Ibid*
- [40] *Ibid*
- [41] *Ibid*
- [42] *Ibid*
- [43] *Supra*
- [44] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).
- [45] See *Kisilu Mutua v Republic* PET No. 91 of 2015.
- [46] *Mbogo & Another vs Shah*{1968} EA 93.
- [47] V.K. Sircar, *Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct from relief of damages in tort*, <http://ijtr.nic.in/articles/art7.pdf>

[48] *Koigi Wamwere v Attorney General* {2015} eKLR

[49] *Attorney General v Ramanooop* [2005] UKPC 15, [2006] 1 AC 338.

[50] This concept was well expressed by Mummery LJ in *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, at 331: -

[51] As Dickson J said in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 475-476.