



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**PETITION NO. 5 OF 2017.**

**CONSOLIDATED WITH PETITIONS NO. 6/17 – 21/17.**

**IN THE MATTER OF ARTICLES 22, 23, 25(a), AND ARTICLES 29 OF THE CONSTITUTION OF KENYA, 2010.**

**AND.**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLES 25(a), AND 29(a), 29(c), 29(d) and 29(f) & 49(c) & 49(f) OF THE CONSTITUTION OF KENYA, 2010.**

**BETWEEN.**

**TAIGA JOB WANYANJA & 16 OTHERS.....PETITIONERS**

**AND.**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT.**

The Petition Taiga Job Wanyanja and 16 others filed Petitions in this Court against the Respondent seeking several prayers. By order of this Court all the 17 Petition No. 6 - 21 of 2017 were consolidated and Petition No. 5/20 made the operational file; as all the Petitions were premised on same grounds and seeking similar orders. The Petitioners were seeking orders that;

1. A **DECLARATION** that the Petitioner's Fundamental Rights and Freedom from Torture were contravened and grossly violated by the Respondent's Special Branch Police Officers who were Kenyan Government servants, agents, employees in its institutions at Naivasha G.K. Prison, Bungoma and Kakamega Police Station and lastly in Kakamega and Police Station and lastly in Kakamega and Kodiaga Remand Prisons in Kenya from 25<sup>th</sup> February 1995 to October 1995.
2. A **DECLARATION** that the Petitioner is entitled to the payment of damages and Compensation for the violations and contraventions of his Fundamental Rights and Freedom from Torture Under Article 29(a), 29(c), 29(d) and 29(f) of The Constitution of Kenya 2010.
3. General damages, exemplary damages and moral damages on an aggravated scale Under Article 23(3) of the Constitution of Kenya of 2010 for the unconstitutional conduct by the Kenyan government servants and agents be awarded.

February Eighteen, refers to the date when Kenya's Foremost Freedom Fighter Dedan Kimathi was hanged by the British Colonialist on 18<sup>th</sup> February 1957 at Kamiti Maximum Prison. The name was adopted in the mid 1990s to denote an underground political grouping referred to as the February Eighteen Movement (FEM) which later allegedly formed a military Wing namely; February Eighteenth Revolutionary Army (FERA). The Kenyan Government claimed the leaders of the outfit were the late Brigadier John Odongo who reportedly died in exile in the Democratic Republic of Congo and Mr. Joseph Wangamati who is a prominent businessman in Bungoma in the former Western Province.

In their respective Petitions, the 17 Petitioners have averred that due to the publicity of the FERA Torture Victims, the Kenya – Government did three of the torture things to cover-up the evidence of FERA Human Rights violations; **One**, all Official records at various Police Stations were destroyed at the behest of the Special Branch Officers. **Two**, all Court records in various Courts Registries were destroyed at the behest of the Special Branch Officers to cover-up the FERA Torture Victims Court Cases. Three, the torture victims were ordered not to talk to the press or to tell anybody about the degrading torture or else the Special Branch officers would come for them again for more torture.

### **1<sup>ST</sup> PETITIONER – TAIGA JOB WANYANJA:**

The 1<sup>st</sup> Petitioner filed his Petition dated 30<sup>th</sup> June 2014 in NRB HC. PETITION NO. 338 of 2014 TAIGA JOB WANYANJA - VS – THE ATTORNEY GENERAL now under BUNGOMA HC. PET. NO. 5 OF 2017 TAIGA JOB WANYANJA -VS – THE ATTORNEY GENERAL. He also filed his Supporting Affidavit Sworn on 30<sup>th</sup> June, 2014.

The Petitioner has sworn that **25<sup>th</sup> February 1995** he was arrested at his home in Bungoma Town, taken to Bungoma Police Station for a short while and later was blindfolded, bundled in the waiting Police Land Rover and driven to Kakamega Police Station where he was kept in undergrounds police cells for 3 days without food and was not allowed to contact his family.

The Petitioner has sworn that while at Kakamega Police Station, he was told to say what he knew about a movement known as **February Eighteen Revolutionary Army (FERA)** which was formed by the Late **Brigadier JOHN ODONGO** and Mr. **JOSEPH WANGAMATI** who was a prominent Businessman in Bungoma District and then he was locked up in a solitary cell at the said Kakamega Police Station where he was held incommunicado and tortured.

### **2<sup>ND</sup> PETITIONER – SAMUEL NGETI JORAM:**

The 2<sup>nd</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 339 OF 2014 SAMUEL NGETI JORAM - Vs- ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 6 OF 2017 SAMUEL NGETI JORAM -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit sworn on 30<sup>th</sup> June, 2014.

The Petitioner has sworn that on 12<sup>th</sup> January 1995, he was arrested at his home by Kenya Police Officers at Chepkube, taken to Chepkube Police Patrol base for a short while and later transferred to Kapsokwony Police Station and then Kimilili Police cells where he was kept in undergrounds police cells for 6 days without food and he was not allowed to contact his family.

The petitioner has sworn that while at Kimilili Police Station, he was told to say what he knew about a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier JOHN ODONGO and Mr. JOSEPH WANGAMATI who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at the same police station where he was held incommunicado and tortured.

### **3<sup>RD</sup> PETITIONER – GEOFFREY WILSON WEKALAO:**

The 3<sup>rd</sup> Petitioner filed his Petition dated **30<sup>th</sup> June 2014** in **NRB H.C.**

**PETITION NO. 340 OF 2014 GEOFFREY WILDOS WAKELAO – VS – THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 7 OF 2017 GEOFFREY WILSON WEKALAO -VS- THE ATTORNEY GENERAL.** He also filed a Supporting Affidavit sworn on 3<sup>th</sup> June, 2014.

The Petitioner has sworn that on **2<sup>nd</sup> February 1995** he who was a civic leader of Lwandanyi Ward on Ford Kenya Ticket was arrested at his home in Webuye, taken to Webuye Police Station where he was locked and not allowed to contact his family and released after 2 weeks of Torture.

The Petitioner has sworn that on 18<sup>th</sup> May 1995, he was re-arrested while he was coming home from Sirisia Land Control Board representing Bungoma County Council, he was blindfolded, bundled in a waiting Police Land Rover and driven to take to Nzoia Police Station where he was locked in a police cells.

### **4<sup>TH</sup> PETITIONER - VINCENT SIMIYU MATUMBAYI:**

The 4<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June 2014 in **NRB H.C. PETITION NO. 341 OF 2014 VINCENT SIMIYU MATUMBAYI**

**-VS - THE ATTORNEY GENERAL under BUNGOMA H.C. PETITION NO. 8 OF 2017 VINCENT SIMIYU MATUMBAYI -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit sworn on 30<sup>th</sup> June, 2014.

The Petitioner has sworn that on 12<sup>th</sup> February 1995 around 7.00p.m., he was arrested at his home at Chepkube with his friends Samuel Ngeti and Moses Mandu by Kenya Police Officers and taken to Chepkube Police Station where he was kept in undergrounds police cells for one day without food and he was not allowed to contact his family.

The Petitioner has sworn that later during the day, he was bundled into a waiting Police Land Rover and driven to Kimilili Police Station where he stayed for a while and later he was taken to Webuye Police Station, where he was told to say that he knew about a movement know as February Eighteen Revolutionary Army (FERA) WHICH WAS FORMED BY Late Brigadier JOHN ODONG and Mr. JOSEPH WANGAMATI who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at the same Police Station where he was held incommunicado and tortured.

### **5<sup>TH</sup> PETITIONER - BONIFACR ODEKE PAPA:**

The 5<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 342 OF 2014 BONIFACE ODEKE PAPA -VS- THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 9 OF 2017 BONIFACE OKEKE PAPA -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit Sworn on 30<sup>th</sup> June 2014. The Petitioner has sworn that on 18<sup>th</sup> May 1995 he was arrested at his home at Korosiandet while he was weeding Tobacco with his family by Police Officer Namely Corporal Peter Komora and others, blindfolded, bundled in the waiting Police Land Rover and driven to Lwakhakha Police Station where he met his friend Lazarus Wekesa already arrested and he was kept in undergrounds police cells and locked for a while and later taken to Bungoma Police Station.

The Petitioner has sworn that on 19<sup>th</sup> May, 1995, while at Bungoma Police Station, he met Luka Wafula and was later at 3.00 a.m. joined by other likes of Jacob Amoit, Joseph Pepela, Josephat Pepela, Gaian Manywe, George Makokha, Jonathan Barasa, Wilson Wakalao, Joseph Kunikina and Livingston Wanyonyi.

#### **6<sup>TH</sup> PETITIONER - GEORGE MAKOKHA:**

The 6<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June 2014 in **NRB H.C. PETITION NO. 343 OF 2014 GEORGE MAKOKHA -VS- THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION 10 OF 2017 GEORGE MAKOKHA -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit sworn on 30<sup>th</sup> June 2014.

The Petitioner has sworn that on 19<sup>th</sup> May 1995 he was arrested at his home in Lwakhakha, taken to Bungoma Police Station where he was locked, Tortured for one day and was not allowed to contact his family.

The Petitioner has sworn that while at Lwakhakha Police Station, he was told to say what he knew about a movement known as **February Eighteen Revolutionary Army (FERA)** which was formed by the Late **Brigadier JOHN ODONGO** and Mr. **JOSEPH WANGAMATI** who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at Police Stations where he was held incommunicado and tortured.

#### **7<sup>TH</sup> PETITIONER - VINCENT WEKESA LAZARO:**

The 7<sup>th</sup> Petitioner filed his Petition dated **30<sup>th</sup> June 2014 in NRB H.C. PETITION NO. 345 OF 2014 VINCENT WEKESA LAZARO - VS- THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 11 OF 2017 VINCENT WEKESA LAZARO -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit sworn on **30<sup>th</sup> June 2014.**

The Petitioner has sworn that on 18<sup>th</sup> May 1995 he was arrested by Special Branch Officers Peter Komara and Mr. Kosgei at his home at Lwakhakha at 7.30 a.m., driven in a Special Branch Land-rover to Bungoma Police Station which was under the D.C.I.O. Mr. Langat where he was locked and Tortured and was not given food and could not be allowed to contact his family.

The Petitioner has sworn that on 19<sup>th</sup> May 1995, while still in Bungoma Police Station, Policemen went back to the Petitioner's house and arrested his two wives namely Roselyne Nasimiyu Wekesa and Fanice Nanyama Wekesa together with his Son Lugard Wafula Wekesa and his Lorry Driver Hassan Hammed and driven his Lorry KXJ 237 to Bungoma Police Station where it was later vandalized and all spares stolen.

#### **8<sup>TH</sup> PETITIONER - JAMES WANGALWA MABONGA:**

The 8<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June 2014 in **NRB H.C. PETITION NO. 346 OF 2014 JAMES WANGALWA MABONGA -VS- THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 12 OF 2017 JAMES WANGALWA MABONGA -VS- THE ATTORNEY GENERAL.** He also filed his Supporting Affidavit sworn on **30<sup>th</sup> June 2014.**

The Petitioner has sworn that on **19<sup>th</sup> May 1995** he was arrested at his home at Chepkuyi while he was with his family by two Police Officers, blindfolded, bundled in the waiting Police Land Rover which was hidden in a nearby bush and driven to Lwakhakha Police Station where he was kept in police cells and locked for a while and later taken to Bungoma Police Station.

The Petitioner has sworn that on 20<sup>th</sup> May 1995, he was blindfolded, bundled in the waiting Police Land Rover and driven to Kapsabet Police Station where he was tortured in Police cells by electrocuting him using electricity live wires and beating him with whips and forcing him to admit that he was in the group that killed 2 Police Officers.

#### **9<sup>TH</sup> PETITIONER - GAUIS JOHN MANYWE:**

The 9<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 347 OF 2014 GAUIS JOHN MANYWE -VS- THE ATTORNEY GENERAL now under BUNGOMA H.C. PETITION NO. 13 OF 2017 GAUIS JOHN MANYWE -VS- THE ATTORNEY GENERAL.** He also filed his Supporting affidavit sworn on **30<sup>th</sup> June 2014.**

The Petitioner has sworn that on 19<sup>th</sup> 1995 while he was awaiting on the road for a matatu to attend an Agricultural meeting, he was informed to report at DO's office at Lwakhakha where upon arrival he was arrested by heavily armed Administration Police Officers and ordered to board a waiting Police Land Rover and driven to Bungoma Police Station where he could not be allowed to seek/talk with his Family members nor his Advocate or friends.

The Petitioner has sworn that at 2 p.m. while still in Bungoma Police Station, he was bundled into a waiting Police Land Rover and driven to

Nzoia Police Station where he stayed for a short while and later he was driven to Kapsabet Police Station, where he was told to say what he knew about a movement known as February Eighteen Revolutionary Army (FERA) which was formed by the Late Brigadier JOHN ODONGO and Mr. JOSEPH WANGAMATI who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at Police Stations where he was held incommunicado and tortured.

**10<sup>TH</sup> PETITIONER - MARY NEKESA MURAKWA:**

The 10<sup>th</sup> Petitioner filed her Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 348 OF 2014 MARY NEKESA MURAKWA - VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 14 OF 2017 MARY NEKESA MURAKWA -VS- THE ATTORNEY GENERAL.** She also filed her Supporting affidavit sworn on 30<sup>th</sup> June 2014.

The Petitioner has sworn that in his 1992, some unknown people who the Petitioner believe were Police Officers threw a grenade in her compound which left 3 of her children dead.

The Petitioner has sworn that on 27<sup>th</sup> March 1995 at around 2.00p.m. while she was standing at home's gate, 7 Police Land Rovers which were driven by heavily armed Administration Police Officers came at her home compound and asked her to say whereabouts of her husband. When she refused to tell them where her Husband was, she was beaten using the gun bat until her arm was broken and ordered to board a waiting Police Land Rover together with one month old baby and driven to Bungoma Police Station where she underwent further torture.

**11<sup>TH</sup> PETITIONER - JOSEPH VENATIUS KUNIKINA:**

The 11<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 349 OF 2014 JOSEPH VENATIUS KUNIKINA -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 15 OF 2017 JOSEPH VENATIUS KUNIKINA -VS- THE ATTORNEY GENERAL.** He also filed his Supporting affidavit sworn on 30<sup>th</sup> June 2014.

The Petitioner has sworn that on 2<sup>nd</sup> February 1995 he was a Nominated Councilor of Sirisia Urban Council and was arrested at Sirisia Market, taken to WEBUYE Police Station where he was locked together with his friend GEOFFREY WILSON WEKALAO and not allowed to contact his family and released after 2 weeks to Torture.

The Petitioner has sworn that on 19<sup>th</sup> May 1995, he was re-arrested at Sirisia Market, blindfolded, bundled in the waiting Police Land Rover and driven to Nzoia Police Station where he also met his friend GEOFFREY WILSON WAKALAO and was locked in a police cells.

**12<sup>TH</sup> PETITIONER - FRANCIS NAMAYENGO:**

The 12<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 350 OF 2014 FRANCIS NAMAYENGO -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 16 OF 2017 FRANCIS NAMAYENGO -VS- THE ATTORNEY GENERAL.** He also filed his Supporting affidavit sworn on 30<sup>th</sup> June 2014.

The Petitioner has sworn that on 2<sup>nd</sup> February 1995, he was arrested at Lwakhakha Market by Kenya Police Officers and taken to Webuye Police Station where he was kept in police cells for 14 days of torture for being suspected to be a member of February Eighteen Revolutionary Army (FERA) without food and he was not allowed to contact his family.

The Petitioner has sworn that on 17<sup>th</sup> February 1995, the Petitioner was released without being taken to court but later re-arrested on 21<sup>st</sup> May 1995, bundled into a waiting Police Land Rover and driven to Lwakhakha Police Station where he stayed for a short while and later taken to Bungoma Police Station, where he was locked-up for 4 hours while being tortured and forced to say what he knew about the movement known as **February Eighteen Revolutionary Army** (FERA) which was formed by the Late **Brigadier JOHN ODONGO** and Mr. **JOSEPH WANGAMATI** who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at the same Police Station where was held incommunicado and tortured.

**13<sup>TH</sup> PETITIONER - JOSEPH PEPELA WABUGE:**

The 13<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 351 OF 2014 JOSEPH PEPELA WABUGE - VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 17 OF 2017 JOSEPH PEPELA WABUGA -VS- THE ATTORNEY GENERAL.** He also filed his Supporting affidavit sworn on 30<sup>th</sup> June 2014.

The Petitioner has sworn that on 19<sup>th</sup> May, he was arrested at Lwakhakha Market by Kenya Police Officers and taken to Bungoma Police Station where he was kept in police cells for one day without food and he was not allowed to contact his family.

The Petitioner has sworn that on the following day, he was bundled into a waiting Police Land Rover and driven to Kapsabet Police Station, where he was told to say what he knew about movement known as **February Eighteen Revolutionary Army** (FERA) which was formed by the Late **Brigadier JOHN ODONGO** and Mr. **JOSEPH WANGAMATI** who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at the same Police Station where was held incommunicado and tortured.

**14<sup>TH</sup> PETITIONER - GEORGE KIARA WALUNGUNYA:**

The 14<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 352 OF 2014 GEORGE KIARA WALUNGUNYA -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 18 OF 2017 GEORGE KIARA WALUNGUNYA -VS- THE ATTORNEY GENERAL**. He also filed his Supporting affidavit sworn on **30<sup>th</sup> June 2014**.

The Petitioner has sworn that on 25<sup>th</sup> November 1994, he was arrested at Lumboka Memorial Hospital Ward by Police Officers, bundled in the waiting Police Land Rover and driven to Bungoma Police Station where he was kept in police cells.

The Petitioner has sworn that while at Bungoma Police Station, he was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows and asked how he had been training officers of unlawful movement known as **February Eighteen Revolutionary Army (FERA)** and was locked up in Police cells.

**15<sup>TH</sup> PETITIONER - PETER WAMUKOTA TAMBINI:**

The 15<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 353 OF 2014 PETER WAMUKOTA TAMBINI -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 19 OF 2017 PETER WAMUKOTA TAMBINI -VS- THE ATTORNEY GENERAL**. He also filed his Supporting affidavit sworn on **30<sup>th</sup> June 2014**.

The Petitioner has sworn that on 27<sup>th</sup> July 1995 at around 3.00 p.m. he was arrested at his shop at Mayeku Market by Six Police Officers, bundled in the waiting Police Land Rover and driven to Nzoia Police Station where he was locked in police cells for seven days.

The Petitioner has sworn that on 2<sup>nd</sup> August 1995, he was blindfolded, bundled in the waiting Police Land Rover and driven to Webuye Police Station where he was kept for a while and later at 8.00p.m. he was driven for more than 7 hours and taken to Naivasha Police Station where he was asked how he had been training officers of unlawful movement known as February Eighteen Revolutionary Army (FERA) and was locked in a Police cells.

**16<sup>TH</sup> PETITIONER - JAMES NEKHWE CHETEKA:**

The 16<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 354 OF 2014 JAMES NEKHWE CHETEKA -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 20 OF 2017 JAMES NEKHWE CHETEKA -VS- THE ATTORNEY GENERAL**. He also filed his Supporting affidavit sworn on **30<sup>th</sup> June 2014**.

The Petitioner has sworn that on 21<sup>st</sup> May 1995, he was arrested at his home at Sirisia by 7 Administration Police Officers, blindfolded, bundled in the waiting Police Land Rover and driven to Sirisia Police Station where he was kept in police cells and locked for a while and later taken to Bungoma Police Station.

The Petitioner has sworn that while at Bungoma Police Station, he was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows and asked how he had been training officers of unlawful movement known as February Eighteen Revolutionary Army (FERA) and was locked in a police cells.

**17<sup>TH</sup> PETITIONER - EZEKIEL BARASA:**

The 17<sup>th</sup> Petitioner filed his Petition dated 30<sup>th</sup> June, 2014 in **NRB H.C. PETITION NO. 355 OF 2014 EZEKIEL BARASA -VS- THE ATTORNEY GENERAL** now under **BUNGOMA H.C. PETITION NO. 21 OF 2017 EZEKIEL BARASA -VS- THE ATTORNEY GENERAL**. He also filed his Supporting affidavit sworn on **30<sup>th</sup> June 2014**.

The Petitioner has sworn that on 19<sup>th</sup> May 1995 while he was standing at his home's gate, 2 Policemen approached him and ordered him to identify himself whereby they had a list of those to be arrested where his name appeared and was immediately arrested by heavily armed Administration Police Officers and ordered to board a waiting Police Land Rover and driven to Lwakhakha Police Station and later driven to Malakisi where he stayed for a short while and later taken to Bungoma Police Station where he met other likes of Ex-Chief Luka Wafula and Francis Namayengo and he was not allowed to seek/talk with his Family members nor his Advocate or friends.

The Petitioner has sworn that the following day, he was bundled into a waiting Police Land Rover and driven to Webuye Police Station where he was told to say what he knew about he movement known as **February Eighteen Revolutionary Army (FERA)** which was formed by the Late **Brigadier JOHN ODONGO** and Mr. **JOSEPH WANGAMATI** who was a prominent Businessman in Bungoma County and then he was locked up in a solitary cell at the same Police Station where was held incommunicado and tortured.

On the basis of these treatment one Petitioners allege that their fundamental rights were violated in particular; ***violation of their freedom from any form of violence from either the public or private Under Article 29I, freedom from Torture in any manner whether physical or psychological under Article 29(d) and freedom from being Treated or punished in a cruel, inhuman or degrading manner Under Article 29(f) of The Constitution of Kenya 2010 [formerly Section 74 of the Repealed Constitution.]***

The Respondent the Attorney General on behalf of the State filed grounds of opposition dated 15.1.2016 stating;

- i). *That the petition has been brought after inordinate delay of over nineteen years after the alleged violation was committed.*
- ii). *That no reasons have whatsoever have been advanced to explain the long and inordinate delay.*

- iii). That the Petitioner has not shown by way of evidence that the alleged acts were committed by officers of the government.
- iv). That the Respondents herein shall be gravely prejudiced if the Petition is allowed to proceed as the would be witness have either retired, left service or passed on.
- v). That the petition is otherwise an abuse of the process of this Honourable Court.

By Consent this Petitions were to be canvassed by way of written submissions. The Counsel for the parties filed their respective submissions.

Mr. Gitau for the Petitioners submitted that the Petitioners were/are Citizens of Kenya and persons entitled to the enjoyment of the Fundamental Rights and Freedoms of individuals under Section 74 of the former Constitution. These rights transited to The Constitution of Kenya 2010, and particularly Article 22, 23, 25(a) and 29(a), 29(c) 29(d) and 29(f) of The Constitution of Kenya 2010. At the material times, these were formerly Section 70 to 83 and particularly Article 72 & 74 of the Repealed Constitution.

Article 25(a) now provides that,

***“despite any other provision of this Constitution, the rights and fundamental freedom from torture and cruel, inhuman or degrading treatment or punishment shall not be limited.”***

Article 29 now provides that;

***“every person has the right to freedom and security of the person, which includes the right to be;***

- a) Deprived of Freedom arbitrarily or without just cause;***
- b) Detained without trial, except during the state of emergency, in which case the detention is subjected to Article 58;***
- c) Subjected to any form of violence from wither public or private sources;***
- d) Subjected to torture in any manner, whether physical or psychological;***
- e) Subjected to corporal punishment; or***
- f) Treated or punished in a cruel, inhuman or degrading manner.”***

Article 29 is formerly Section 74 of the Repealed Constitution which provided that ***“No person shall be subjected to torture inhuman or degrading punishment or any other treatment”***. It did not provide for any derogation, qualification or exception by the Government or its public officers.

Article 49(c) provides:-

***“An arrested person has the right to communicate with an Advocate and other persons whose assistance is necessary.”***

Article 49(f) provides:-

***“An arrested person has the right to be brought before a Court as soon as reasonably possible but not later than;***

- i). Twenty-four hours after being arrested; or
- ii). If the Twenty-four hours ends outside ordinary court hours. Or on a day that is not ordinary court day, the end of the next court day.

Counsel submitted that whereas the Respondent’s Special Branch Police Officers were entitled to arrest the Petitioners on suspicion of committing a cognizable offence, they had no lawful, legal or statutory power to keep them in their custody for more that 24 hours in different Police Stations hence the incarceration of the Petitioners in illegal Police custody was contrary to the protection of the Petitioners’ right to personal liberty **as provided under Article 49(f) of The Constitution of Kenya 2010**.

Finally counsel for petitioners submitted that whereas the Respondent’s Special Branch Police Officers had power to arrest Petitioners, they had no lawful, legal or statutory power to deny them communication with members of his family, friends or Advocate to organize their Defence or to threaten him with being returned to the Torture Chambers of further Torture if they dare disclosed his deal. **This was violation of their Rights and freedom from any form of violence and Torture as provided under Article 49(c) of The Constitution of Kenya 2010.**

The Respondent, Attorney General did not file any response to the 17 Petitioners’ Petition and Supporting Affidavits despite being afforded the opportunity before the Hearing date.

Mr. Tarus learned State Counsel for the Respondent submitted on 4 issues;

**Whether the Petitioners fundamental rights and freedoms were violated by the Respondent**

1. *It is the Respondents Submissions that the 17 Petitioners herein have failed to prove that their fundamental rights and freedoms under the Constitution were violated by the Respondents nor its agents and that it is upon the Petitioners to prove the alleged violations of the fundamental rights and freedoms.*

2. *That the Burden of proof expected of any claimant including the Petitioners herein is well set out in the Evidence Act under which Section 107 of the Evidence Act provided as follows;*

*i) “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.*

*ii) Where a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

3. That Section 109 of the Evidence Act, Cap 80 also provides as follows;

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

4. The provisions of the Evidence Act as to the burden of proof was also highlighted in the case of CHINA WUYI CO. LTD. -VS- SAMSON K METTO [2014] eKLR, Civil Appeal No. 181 of 2009 in which the court stated;

*“The cardinal principles of law that he who alleges must prove is also well captured in Section 107 to 109 of the Evidence Act.”*

5. That the Petitioners have not adduced any concrete evidence to demonstrate to this Honourable Court that there were indeed tortured by the agents of the respondents. The medical report exhibited in the Petitioners supplementary affidavit sworn on 30<sup>th</sup> January, 2016 and filed on 7<sup>th</sup> April, 2016 is merely meant to rubber stamp the allegations of torture in the main petition and in any case it does not show any physical evidence of torture on the face of the medical report, under the heat CURRENT MEDICAL HISTORY and which according to the respondents is not sufficient proof that the petitioners were tortured.

6. That in PETER NGARI KAGUME & OTHERS -Vs- ATTORNEY GENERAL, Constitutional application No. 128 of 2006 the court stated;

*“when a court is faced with a scenario where one side alleges and the rival side disputes any assertions, the one alleging any fact assumes the burden of prove the said allegation”*

From the Petitions and submissions by counsel the issues for determination in these petitions are;

*a) Whether the Petitioners fundamental rights and freedoms were violated by the Respondents.*

*b) Whether the Petitioners are entitled to the damages sought.*

The first issue raised by the Respondents in their grounds of opposition and submission is that the Petition was brought after inordinate delay and that no reasons have been advanced to explain the long and inordinate delay of 25 years before filing this petition. Counsel for Respondents submits that the long delay will prejudice their case as their would have been witnesses may have either retired, left Government Service or died. On this issue Counsel for the Petitioner submitted that contravention of fundamental rights by state or any organ of state has no time limitation within which a Petition is filed.

On this issue it is my finding and hold that where there is allegations of violation or fundamental rights by the state or its organs, a petition filed premised on the said violation cannot be limited by time unless it is demonstrated that the Petitioner slept on his rights for such a long time that the institutions of the Petition is an afterthought or amounts to an abuse of the court process. The court will be guided by the nature of the violations, circumstances but always bear in mind that state machinery can be used to intimidate or obstruct the petitioners to cover its misdeeds during that regime.

The Petitioners in their petition allege the alleged violation were done during the period 1992 – 1993 and during the period when the President of the Republic of Kenya was H.E. Daniel Arap Moi. They filed these Petition in 2007 about 25 year later. No doubt a quarter century is a long time to wait. The Respondent submit that this was a long time and therefore an afterthought and that the court should consider that the Petitions are time barred by the Limitation of Actions Act.

Violation of fundamental rights committed by State Agencies are usually done with approval of the sitting Government. There is always a scheme to conceal the same and conspiracy to intimidate any aggrieved party to seek redress by instilling fear, intimidation and coverup. Addressing this issue Lenaola – J *In Eliud Wefwafwa Luucho Vs. The Attorney General* stated;

*“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 are no limitation with respect to constitutional petitions alleging violation of fundamental rights with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent’s defense and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice discussed below.*

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

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

I concur with the learned Judge that limitation cannot be used to shut out the Respondent from seeking justice from the courts of Justice. Where violation of Constitution rights have been claimed by Counsel for the Respondent, Mr. Tarus submitted that Petitioners have not established that;

***(a) That they were arrested and;***

***(b) That the person who arrested them were agents of the Government and;***

***(c) That they were tortured as alleged in their petitions.***

The Petitioners have adduced their evidence through the affidavit sworn and filed. In their affidavit they deponed how they were arrested by Police officer, taken to various police stations, detained and tortured while in custody for various periods and later released. The Respondent though served with these affidavit did not rebut the averments by way of affidavit or statement filed. The averments in the Petitioners affidavits are therefore not challenged by any evidence or affidavit by the Respondents. Upon perusal of the affidavit evidence, I am satisfied that the Petitioners have established their case that each of the Petitioners was arrested by agents of the Respondent, held in custody, for longer periods than provided by law, tortured and later released without charge. I am satisfied that their constitutional rights to freedom from any form of violence, and freedom from torture and freedom from cruel and inhuman treatment was violated.

I therefore find and hold that though this petition were filed after 25 years since violations, the petitions have adequately explained the delay to the satisfaction of this Court.

The courts are often called upon by Petitioners to redress Constitutional violation by state organs. It is not contested that the violation complained of in these petitions were committed under the old Repealed Constitution. However, in the repealed Constitution;

*Chapter 4 of the Repealed constitution contained the Bill of Rights, that is Protection of fundamental rights and freedoms of the individual. The notion of inhuman treatment covers at least such treatment that deliberately causes suffering, mental or physical, which in the particular situation is unjustifiable. The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.*

If they were violated, and the court so finds, then the Petitioners would be entitled to an award of damages. The assessment of quantum of damages is a matter of discretion of the court. The award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principles and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the public law remedy evolved by the court. The following principles clearly emerged from decided cases;

*(i) Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection 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 to 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.*

In the assessment of quantum of damages this court takes into account the nature of treatment met out, duration of incarceration, injuries

sustained as per the Medical reports and awards made by courts in similar violations. This court will therefore proceed to make awards as follows;

**1. 1<sup>st</sup> Petitioner Taiga Job Wanyanja.**

He was arrested and held at Bungoma, Kakamega Police stations, Nyayo House, Naivasha and Kodiaga Prisons for 40 days. I award him Kshs.1.5million.

**2. Samuel Joram Ngeti.**

*Held for 49 days in Naivasha Prison tortured and released. I award Kshs.1.5million.*

**3. Godfrey Wilson Wekalao.**

*Was held for weeks in Kitale, Webuye, Bungoma and Kakamega for 2 months. Awarded Kshs.1.5million.*

**4. Vincent Simiyu Matumbayi.**

*Was held at Kimilili, Webuye, Eldoret and Naivasha Police Station and Naivasha Prison for 3 months. I award Kshs.2million.*

**5. Boniface Odeke Papa.**

*He was held at Bungoma, Kapsabet, Lwakhakha, Naivasha G.K prison for 2 months. I award Kshs.1.5million.*

**6. George Makokha.**

*Was held at Lwakhakha, Naivasha G.K. Prison for 40 days. I award Kshs.1.5million.*

**7. Vincent Wekesa Lazaro.**

*Was held in Bungoma, Kapsabet, Nandi Hills for 3 days and later to Naivasha G.K. Prison for 40 days. I award Kshs.1.5million.*

**8. James Wangalwa Mabonga.**

*Was held at Lwakhakha, Bungoma, Kapsabet and Naivasha G.K. Prison for 30 days. I award him Kshs.1million.*

**9. Gaius John Manywe.**

*Was arrested and held at Bungoma, Nzoia and Kapsabet police stations and later at Naivasha G.K. Prison for 37 days. I award him Kshs.1.5million.*

**10. Mary Nekesa Murakwa.**

*Was held at Bungoma, Kimilili, Kakamega Police station for 8 months. I award her Kshs.2million.*

**11. Joseph Venatius Kunikina.**

*Was held at Webuye, Nzoia Nandi Hills Police station and Naivasha G.K. Prison for 2 months and Kakamega G.K. Prison. I award him Kshs.1.5million.*

**12. Francis Namayengo.**

*Was held at Lwakhakha, Bungoma, Kakamega and Naivasha G.K. Prison for 65 days. I award the Petitioner Kshs.2million.*

**13. Joseph Pepela Wabuge.**

*Was held at Bungoma, Lwakhakha, Kapsabet Police stations and Naivasha G.K. Prison for 42 days. I award him Kshs.1.5million.*

**14. George Kiara Walungunya**

*Was held at Bungoma, Malaba Busia, Nzoia, Kakamega Police Stations for 29 days, and then at Naivasha G.K. Prison for 40 days. I award the Petitioner Kshs.2million.*

**15. Peter Wamukota Tambini.**

Was arrested and held at Nzoia, Webuye, Naivasha Police Station and Naivasha G.K. Prison for 4 months. I award the Petitioner Kshs.2million.

**16. James Nekhwe Cheteka.**

Was arrested and held at Sirisia, Bungoma, Nand Hills Police stations and Naivasha G.K. Prison and Kodiaga for 2 months. I award the Petitioner Kshs.1.5million.

**17. Ezekiel Barasa.**

Was arrested and held at Lwakhakha, Bungoma, Webuye, Kakamega Police station for 3 months. I award the Petitioner Kshs.2million.

Accordingly, I enter Judgment in favour of the Petitioners against the Respondent as follows:-

i) A declaration be and is hereby issued that each of the Petitioners Fundamental Rights and Freedom from torture, degrading and inhuman treatment was violated by the police and/or state agents.

ii) A declaration be and is hereby issued that the petitioners are entitled to damages for violation of their Fundamental Rights enshrined in the Repealed Constitution.

iii) That Judgment be and is hereby entered in favour of the Petitioners against the Respondent by way of general damages for a global sum as follows;

- a) 1<sup>st</sup> Petitioner - Taiga Job Wanyanja.....Kshs.1.500,000/=
- b) 2<sup>nd</sup> Petitioner - Samuel Joram Ngeti.....Kshs.1,500,000/=
- c) 3<sup>rd</sup> Petitioner - Godfrey Wilson Wekalao.....Kshs.1,500,000/=
- d) 4<sup>th</sup> Petitioner - Vincent Simiyu Matumbayi.....Kshs.2,000,000/=
- e) 5<sup>th</sup> Petitioner - Boniface Odeke Papa.....Kshs.1,500,000/=
- f) 6<sup>th</sup> Petitioner - George Makokha.....Kshs.1.500,000/=
- g) 7<sup>th</sup> Petitioner - Vincent Wekesa Lazaro.....Kshs.1,500,000/=
- h) 8<sup>th</sup> Petitioner - James Wangalwa Mabonga.....Kshs.1,000,000/=
- i) 9<sup>th</sup> Petitioner - Gaius John Manywe.....Kshs.1,500,000/=
- j) 10<sup>th</sup> Petitioner - Mary Nekesa Murakwa.....Kshs.2,000,000/=
- k) 11<sup>th</sup> Petitioner - Joseph Venatius Kunikina.....Kshs.1,500,000/=
- l) 12<sup>th</sup> Petitioner - Francis Namayengo.....Kshs.2,000,000/=
- m) 13<sup>th</sup> Petitioner - Joseph Pepela Wabuge.....Kshs.1,500,000/=
- n) 14<sup>th</sup> Petitioner - George Kiara Walungunya.....Kshs.2,000,000/=
- o) 15<sup>th</sup> Petitioner - Peter Wamukota Tambini.....Kshs.2,000,000/=
- p) 16<sup>th</sup> Petitioner - James Nekhwe Cheteka.....Kshs.1,500,000/=
- q) 17<sup>th</sup> Petitioner - Ezekiel Barasa.....Kshs.1.500,000/=

iv) That the above sums shall attract interest at Court rates from the date of filing the Petitions until payment in full.

v) That Respondent do pay the costs of these proceedings to the petitioners plus interests thereon at court rates.

Orders accordingly.

**Dated and Signed at Bungoma this 14<sup>th</sup> day of May 2019.**

**S.N. RIECHI**

**JUDGE.**