REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 91 OF 2015

and

IN THE MATTER OF THE CONSTITUTION OF KENYA 1969 (REPEALED) SECTION 72 (1), (2), (3), 73, 74 (1), 77, 88, 84 (6)

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLE 19 (2), (3) (A), (B), (C), 22 (1), (3), (C), 23 (1), 165, (B), 27 (1), (2), 28, 29 (A), (F), 3 (1), 43 (1), (2) & (3), 47 (1), 50 (B), (A) & (B), 165 (3) (1)-6 (1)- (IV), (E)

AND

IN THE MATTER OF THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI CRIMINAL APPEAL NO. 25 OF 1965

KISILU MUTUA...APPLICANT

VERSUS

REPUBLIC.......................................……………………..........RESPONDENT

BETWEEN

KISILU MUTUA...PETITIONER

VERSUS

THE ATTORNEY GENERAL...RESPONDENT

JUDGEMENT

Introduction

On 5th July 1965, the petitioner herein with a one Chege Thuo were arraigned in the high court of Kenya at Nairobi in criminal case number 58 of 1965 jointly charged with the offence of murdering a one Pio Gama Pinto. The petitioner herein was convicted of the said offence and sentenced to death. His appeal to the then East African Court of Appeal for Easter Africa[1] was dismissed on 12th November 1965. The

petitioner was held in various prisons for a period f 36 years until 4th July 2001 when he was released by the orders of the then president His Excellency President Daniel Toroitich Arap Moi.

The petitioner withdrew the prayer seeking a declaration that his fundamental rights were violated and that the trial was a fundamental miscarriage of justice, leaving only the claim for damages for the alleged torture.

Respondents case

In a Replying affidavit filed on 31st August 2015, sworn by a one Henry Barmao, a commissioner of Police, it is averred that the law cannot be applied retrospectively, hence, the petitioner cannot rely on the provisions of the 2010 constitution, that the allegations of torture were denied, that no medical reports were tendered in support of the alleged injuries, and that the trial was in accordance with the law.

Petitioners evidence

The petitioner testified that he was tortured at the police station. In particular, he claimed that his testicles were squeezed until he lost consciousness, that he was taken to Westland's where someone had been killed and after he refused to answer questions put to him he was taken back to the police station where he was forced to sign a pre-prepared statement. He was tried and sentenced to death, but the sentence was later commuted to life imprisonment. He remained in jail for 36 years until 1st July 2001 when he was released pursuant to a presidential order.

Having, abandoned the prayer challenging the trial, his claim is only based on the alleged torture and mistreatment subjected to him by the police.

The petitioner also claimed that upon his release, former president Daniel Arap Moi promised him a parcel of land. I do not think that this court is in position to enforce such a promise.

The Respondents counsel cross-examined him particularly citing the absence of medical records to support the alleged injuries. However, the Respondent did not call any witnesses.

Petitioners counsels submissions

Counsel for the petitioner submitted that the petitioner suffered physical and psychological injuries as a result of the tortuous acts visited upon him. Counsel cited section 74 of the repealed constitution which outlawed torture. Counsel also cited article 1 of the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment and cited decisions of this court rendered in *Rumba Kinuthia vs A.G*.[2], *Harun Thungu Wakaba & Others vs A.G*.[3] and *Gitari Cyrus Muraguri vs A.G.*[4] In the said cases, the court found such treatment to be illegal, inhuman and a violation of constitutional rights and awarded damages to the petitioners.

Also cited is the case of *Obongo vs Kisumu Municipal Counci*l[5]where it was held *inter alia* that exemplary damages for tort may be awarded where there is oppressive, arbitrary or unconstitutional action by servants of the government.[6] Counsel urged the court to award Ksh. 3,500,000/= for exemplary aggravated and punitive damages and general damages of Ksh. 3,500,000/=.

Respondents counsels submissions

Counsel for the Respondent submitted that the petitioner did not discharge the burden of proof,[7]that the petitioner did not make out a case for torture,[8] that no medical reports were availed, that the petitioner is guilty of inordinate delay and that an applicant must satisfactorily explain the delay as was held by Nyamu J. in *Abraham Kaisha Kanzika alias Moses Savala Keya t/a KAPCO Machinery Services & Milano Investments Limited v Governor Central Bank of Kenya & 2 others*.[9]Counsel also submitted that a person whose constitutional rights have been violated should have some zeal in enforcing hi rights[10]and also cited *Wamahihu Kihoro Wambugu vs A.G*[11] where a delay of 24 years was held to be

inordinate and that the court should consider whether or not justice will be served[12]that there must be a justification for the delay[13] and that the petitioner is not entitled to the reliefs sought.

On the issue of Limitation

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[14] 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[15] and further the state cannot shut its eyes on its past failings[16] 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.

This petition was filed on 11thMarch 2015, almost 5 years after the promulgation of the 2010 constitution. Considering the prevailing political situation which made it impossible for victims to file cases of this nature 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 reform, I find that it would be unfair to uphold the defense of limitation in the circumstances of the present case.

Transitional justice

As Dr. Willy Mutunga, former Chief Justice of the Republic of Kenya observed:-[17]

> *"In 2010 Kenya adopted a new modern transformative constitution that replaced both the I969 Constitution and the post Colonial Constitution of 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country.*
>
> *...................There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence.*
>
> *In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: reconstitution or reconfiguration of a Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the vision of the Constitution; a vision of nationhood premised on national unity and political integration, while respecting diversity; provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state and society in Kenya. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution."*

The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

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. But the key question that boldly requires to be addressed is what would happen to all those Kenyans whose rights were grossly violated by state agents. Was Kenya simply going to transit to the new constitutional dispensation and simply forget such atrocities. Andrea Bonime-Blanc[18] 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."

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, effectuating 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.[19]

It is important to mention that owing to the political climate of the day, it was not possible for victims of human rights abuses to seek court redress and this door was opened by the promulgation of the 2010 constitution.

In the abstract at least, the transition of transitional justice connotes unspecified change. Yet, for **Ruti Teitel**, who arguably coined the term ‘transitional justice’ in 1991,[20] the transition at issue is essentially a political one involving ‘the move from less to more democratic regimes.’[21] This conceptualization of transition is hardly unique to Teitel, and indeed it can be said that liberal democratic transitions constitute the paradigmatic transition of transitional justice.[22] Implicit in this understanding of transition is a sort of teleological or ‘stage theory’ view of history.[23] If barbarism, communism and authoritarianism lie at one end of the narrative, then western liberal democracy sits at the other ‘end of history.’[24] With law as the master discipline and lawyers as the high priests, the mechanisms of transitional justice become a sort of secular rite of passage symbolizing political evolution.[25]

Dustin N. Sharp observes that the label ‘transitional justice’ has for some time been applied to contexts that do not involve a liberal political transition (Rwanda, Chad, Uganda, Ethiopia), if they involve a political transition at all (Kenya, Colombia), or contexts that involve transition from one nominally liberal ethno-regime to another (Côte d’Ivoire). Beyond illiberal transitions, the term has also been invoked to describe the use of truth commissions and other commissions of inquiry in consolidated liberal western democracies (Australia, Canada).[26]

Whether or not the petitioner proved his case to the required standard

I note that counsel for the Respondent opted not to call witness but cross-examined the petitioner. Thus, the only evidence on record is the evidence tendered by the petitioner. In the case of *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited*[27] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. It is trite that where

a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defense is uncontroverted and therefore unchallenged.[28] In short, the petitioners evidence remained unchallenged.

Counsel for the Respondent cross-examined the petitioner. The purpose of cross-examination is three-fold; **(a)** *To elicit evidence in support of a party's case;* **(b)** *To cast doubts on, or undermine the witness's evidence so as to weaken the opponent's case, and to undermine the witness's credibility;* **(c)** *To lay out a party's case and challenge disputed evidence*. But once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Hence, failure to call witness leaves the petitioners evidence unchallenged.

Regarding the constitutional issues raised in the petition, it must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.[29]

The spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.[30] The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case before the court.[31]The privy council in the case of *Minister for Home Affairs and Another vs Fischer*[32] stated that:-

> *"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation… It is important to give full recognition and effect to those fundamental rights and freedoms.….."*

Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

> *"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms….."*

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

The Petitioner narrated the torture and inhuman treatment subjected to him by the police. This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. In my view, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The former constitution just like the 2010 constitution prohibited torture and acts of inhuman and degrading treatment. How can the callous act of a police officer squeezing the testicles of a person in their custody be justified. Such inhumane acts should only be consigned in the dustbin of our history never to resurface again.

In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the

case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the *"direct and inevitable effect"* of such actions. In my view, actions that amount to inhuman and degrading treatment are out rightly unconstitutional.

Chapter 5 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 as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word torture is often used to describe in human treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be de-grading if it grossly humiliates him before others, or drives him to an act against his will or conscience.[33]

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.[34] 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. The actions visited upon the petitioner in my view amount to torture.

When a citizen is arrested on allegations of committing an offence as in the present case, his/her Fundamental Rights are not abrogated in *toto*. His dignity cannot be allowed to be comatose. The right not to be subjected to inhuman treatment enshrined in the Constitution, includes the right to be treated with human dignity and all that goes along with it. Inhuman treatment has many a facet. It fundamentally can cover such acts which have been inflicted with an intention to cause physical suffering or severe mental pain. It would also include a treatment that is inflicted that causes humiliation and compels a person to act against his will or conscience. There is no shadow of doubt that any treatment meted out to a citizen which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the State is governed by rule of law which must be paramount. The Constitution as the organic law of the land has unfolded itself in manifold manner like a living organism in the various decisions of the court about the rights of a person under the bill of rights. When citizenry rights are sometimes dashed against and pushed back by the members of the police force, there has to be a rebound and the Constitution springs up to action as a protector.

It is the sacrosanct duty of 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 but the citizens basic human rights are not crippled so that the police officers can treat citizens in an inhuman manner. On the contrary, they are under obligation to protect fundamental rights of the citizens and prevent all forms of atrocities.

The law enjoins the police to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. I find that the police subjected the petitioner to inhuman and degrading treatment which was not justifiable at all under the former constitution.

Whether the petitioner is entitled to damages

The petitioners claims damages as a result of breach of his fundamental rights. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, 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.

It is thus now well settled that 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. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent 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.

On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[35]The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases;[36]

> *1. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
>
> *2. Such claim is distinct from, and in addition to remedy in private law for damages for tort;*
>
> *3. This remedy would be available when it is the only practicable mode of redress available;*
>
> *4. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

I note that arriving at the award of damages is not an exact science, and also I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed.[37] 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. But 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.[38]

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 right 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.

An injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential.[39]

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. 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. [40] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less 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.

I am persuaded that the petitioner proved to the required standard that his rights were violated by the police. Considering the nature of the violations of the constitutional rights, the above 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 petitioner is entitled to an award of damages. Doing the best I can, I find that an award of Ksh. 2,500,000/= would be reasonable in the circumstances. I must clarify that this award is for the torture subjected to the petitioner while in the hands of the police, **but not for trial and conviction**. It is also important to mention that possibly aware of the fact that the petitioner was arrested, charged, tried and convicted by a court of law, the petitioner dropped his prayer challenging the conviction which in my view was well advised.

Accordingly, I enter judgement in favour of the petitioner as follows:-

> i. ***A declaration*** *be and is hereby issued that the right of the petitioner not to be subjected to torture and degrading treatment by the police were violated.*
>
> ii. ***That*** *judgement be and is hereby entered in favour of the petitioner against the Respondent in the sum of* ***Ksh. 2,500,000/=*** *by way of general damages.*
>
> iii. ***That*** *the above sum shall attract interests at court rates from date of filing suit until payment in full.*
>
> iv. *The Respondent do pay the costs of this Petition to the petitioner plus interests thereon at court rates.*

Orders accordingly.

Signed, Dated, Delivered at Nairobi this 12th day of May 2017

John M. Mativo

Judge

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[1] Criminal Appeal No. 125 of 1965

[2] Misc Civ Case No 1184 of 2003

[3] Misc Civ App No 1411 of 2004

[4]Misc. Case No. 1185 of 2003

[5] {1971} E.A 91

[6] The court of appeal referred to the English case of Rookies vs Barnard & Others{1964}A.C. 1129

[7] Counsel cited Evans Otieno Nyakwana vs Cleophas Bwana Ongaro {2015}eKLR, Jenniffer Nyambura Kamau vs Humphrey Mbaka Nandi {2013}eKLR, Zakayo W. Makomere vs West Knya Sugar Co. Ltd {2013}eKLR

[8] Counsel relied on Peter Ngari Kagume & Others vs A.G. Cont App No. 128 of 2006

[9] {2006} eKLR

[10] A.G of Uganda & Another vs Omar Awadh {EACJ} No. 2 of 2012

[11] Pet. No. 468 o 2014

[12] James Kanyiita vs A.G & Ano. Pet No. 180 of 2011

[13] Ochieng Kennet Ongutu vs Kenyatta University & 2 Others Pet No. 306 of 2012

[14]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

[15] Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013

[16] Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012

[17]Willy Mutunga, The 2010 Constitution of Kenya and its Interpretation: *Reflections from the Supreme Court Decisions*, University of Fort Hare Inaugural Distinguished Lecture Series, October 16, 2014

[18] Andrea Bonime-Blanc *Spain's Transition to Democracy* (1987) 8-9.

[19]http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf

[20] Ruti G. Teitel, 'Transitional Justice Globalized,' *International Journal of Transitional Justice* 2(1) (2008): 1–4.

[21] Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 5.

[22] Padraig McAuliffe, 'Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transition,' *Journal of Conflictology* 2(2) (2011): 32–44.

[23] See, Alexander Hinton, 'Introduction,' in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, ed. Alexander Hinton (New Brunswick, NJ: Rutgers University Press, 2010).

[24] See generally, Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992).

[25]See, Michael Rothberg, 'Progress, Progression, Procession: William Kentridge and the Narratology of Transitional Justice,' *Narrative* 20(1) (2012): 1–24.

[26]Dustin N. Sharp, Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition; https://academic.oup.com/ijtj/article/9/1/150/678021/Emancipating-Transitional-Justice-from-the-Bonds

[27]{Milimani} Hccc no. 165b of 2000

[28] Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS

[29] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[30] State vs Acheson {1991} 20 SA 805

[31] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[32] {1979} 3 ALL ER 21

[33] 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 Gneral

[34]See Joginder Kumar v. State of U.P. (1994) 4 SCC 260, paragraph 23

[35]*Mbogo & Another vs Shah{1968} EA 93*

[36] 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

[37] Koigi Wamwere v Attorney General{2015} eKLR

[38]Attorney General v Ramanoop [2005] UKPC 15, [2006] 1 AC 338

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

[40] As Dickson J said in Andrews v Grand & Toy Alberta Ltd(1978) 83 DLR (3d) 452, 475-476, (cited by this court in Heil v Rankin [2001] QB 272, 292, para 16)