



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.211 OF 2013**

**BETWEEN**

**IRENE WAMBUI MUCHAI.....1<sup>ST</sup> PETITIONER**

**GLADYS THITU GAKINYA.....2<sup>ND</sup> PETITIONER**

**JOSEPHAT MBUGUA NJOROGE.....3<sup>RD</sup> PETITIONER**

**FRANCIS NDEGWA NJOROGE.....4<sup>TH</sup> PETITIONER**

**TERESIAH WANJIRU NJUGUNA.....5<sup>TH</sup> PETITIONER**

**MARY WANJIKU NJOROGE.....6<sup>TH</sup> PETITIONER**

**AND**

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

**JUDGMENT**

1. In their Petition dated 18<sup>th</sup> April 2013, the Petitioners, describe themselves as adult females of sound mind and state that their fundamental right to be protected from torture under **Articles 25 (a) and 29(a), (c), (d) and (f) of the Constitution 2010** were contravened and grossly violated by Kenya Police Force and General Service Unit (G.S.U) officers and other Kenyan Government servants, agents, employees and institutions on diverse dates and times from 3<sup>rd</sup> March 1992 up to 19<sup>th</sup> January 1993 following a peaceful demonstration they had held at Uhuru Park's Freedom Corner while agitating for the release of Hon. Koigi Wa Wamwere and 53 other political prisoners.

2. In their Petition aforesaid, the Petitioners specifically pray for the following declarations and orders:

***“a) A declaration that the six (6) Petitioners’ fundamental rights and freedom from torture were each contravened and grossly violated by the Respondent’s Kenya Police Officers and General Service Unit officers (G.S.U) who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and times on 3<sup>rd</sup> March, 1992 up to 19<sup>th</sup> January, 1993.***

***b) A declaration that the six (6) Petitioners are each entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their***

***fundamental rights and freedoms under sections 25 (a) and 29(a), (c), (d) and (f) of the Constitution of Kenya, 2010. (sic)***

- a) General damages, exemplary and moral damages for the torture for each Petitioner. (sic)***
- b) Any further orders, writs, directions as this Honourable Court may consider appropriate***
- c) Costs of the suit and interest.”***

**The Petitioners’ Case**

3. In their Affidavits in support of the Petition sworn on 17<sup>th</sup> April, 2013, the Petitioners’ case is that on 3<sup>rd</sup> March, 1992 while at Uhuru Park’s ‘Freedom Corner’, in a peaceful campaign for the release of Hon. Koigi wa Wamwere and 53 other political prisoners, they were brutally battered with tear gas, boots and batons, slaps, rubber whips, kicks and blows all over their bodies by brutal police officers and General Service Unit officers (G.S.U) which was a violation of their fundamental right and freedom from violence from either the public or private persons under **Article 29(c) and (d)** of the **Constitution 2010** and freedom from being treated or punished in a cruel, inhuman or degrading manner under **Article 29 (f)** of the **Constitution** (formerly **Section 74** of the **Repealed Constitution**.)

4. That on the same day at 9:45 pm, while still at Freedom Corner, in a tent, fasting for the release of the political prisoners aforesaid, they were brutally arrested by over 100 Kenya Police Officers and G.S.U officers and bundled into a police vehicle commonly known as the ‘Black Maria’ and taken to their rural homes which was a violation of their fundamental right and freedom from torture under **Articles 25 (a), and 29 (c) (d) and (f)** of the **2010 Constitution**.

5. Their case is also that the brutality and atrocities they underwent together with fellow women and supporters of the campaign for the release of political prisoners in Kenya was not justified because on 28<sup>th</sup> February 1992, they had visited the then Attorney General, Hon. Amos Wako, and presented him with a petition addressed to the Government of Kenya seeking the release of all political prisoners who had by then been jailed for the political offences of treason, sedition or belonging to an unlawful organization during the dictatorial KANU one party regime because political pluralism had just been re-introduced in the Country.

6. The Petitioners also contend that they, together with other women at the Freedom Corner, on 28<sup>th</sup> February, 1<sup>st</sup> March and 2<sup>nd</sup> March, 1992, the days preceding the attack on them, had no weapons and the only possessions they had were their clothes, blankets, water, Bibles, Hymnbooks and a tent which had been donated to them by well-wishers including the late Prof. Wangari Maathai, who in addition, gave them moral support, food, clothing and water while they waited for the Government, through the Attorney General, to respond to their Petition.

7. The Petitioners have in addition alleged that as peaceful as they were, the sudden and intense brutality that was unleashed on them on 3<sup>rd</sup> March, 1992 by the said officers took them and the other women by surprise as they were attacked by over 100 regular police and GSU officers with tear gas, batons, slaps, rubber whips, kicks blows and gun butts while unarmed which left them badly injured and some of them, like Prof. Maathai, were taken to various hospitals, unconscious. In this regard, it is their further case that the brutal attack was perpetrated between 4.00 pm and 9.45 pm and the same night, using the cover of darkness, 50 police officers, all women, raided the tents where the women and men were hurled, arrested and bundled them into police vans before dispersing them to various police stations in Nairobi and then deported them back to their rural homes.

8. In addition, it is the Petitioners’ case that the brutal breakup of their fasting was an exercise in futility because after one to five days, in their rural homes, they went back to Nairobi and began their peaceful campaign and hunger strike afresh at the All Saints Cathedral Church vowing that the brutal officers

could as well kill them in solidarity rather than give up their crusade. In this regard, they claim that they were hosted and camped in a bunker at the All Saints Cathedral from 4<sup>th</sup> March, 1992 up to 19<sup>th</sup> January, 1993 when all the political prisoners were released. They asserted that during that period, the police and GSU officers continued to attack them while at the Cathedral and inflicted serious injuries on them.

9. Lastly, it is the Petitioners' other claim that their physical, psychological, economic and political lives were destroyed as they were tortured for lawfully campaigning for release of all political prisoners and in that regard they suffered and continue to suffer trauma, pain and damage to-date. They therefore pray for the orders elsewhere set out above.

### **The Respondent's Case**

10. In a Replying Affidavit sworn on his behalf on 22<sup>nd</sup> July, 2014, by Philip Ndolo, Deputy Director of Operations in the Kenya Police Service, the Attorney General has opposed the present Petition.

11. Mr. Ndolo, while denying the allegations by the Petitioners, deponed that the allegations are misconceived, unsubstantiated, and bad in law thereby putting the Petitioners to strict proof thereof.

12. He further deponed that the Constitution does not apply retrogressively and that the Petitioners can only rely on rights under the **Repealed Constitution** and not the **Constitution 2010**. That in any event, the Petitioners were never in police custody and the Kenya Police Service is a stranger to their claims and they (the Petitioner) did not in any event disclose the names and identities of the police officers who allegedly contravened those rights. In addition, that the allegations that they were kicked and beaten by police and GSU officers do not meet the threshold of the definition of torture under **Section 74** of the **Repealed Constitution** as well as under the **1984 Convention Against Torture**.

13. Lastly, Mr. Ndolo deponed that the Respondent is highly prejudiced in defending the Petition given that the alleged cause of action took place more than twenty two years before the Petitioners filed the present Petition and that old newspaper articles are not admissible and neither are they conclusive evidence of any claim in a Court of law. In any event, that the Petition does not disclose any cause of action against the Respondent and it should be dismissed with costs.

### **The Parties' Submissions**

#### **For the Petitioners**

14. The Petitioners in their Written Submissions dated 1<sup>st</sup> July 2016 stated that their fundamental rights and freedoms under **Articles 25(a)** and **29 (c), (d)** and **(f)** of the **Constitution of Kenya, 2010** which were formerly provided for under **Section 74** of the **Repealed Constitution** were contravened and grossly violated by Kenya Police Service and GSU officers and other Kenyan Government servants, agents, employees and institutions on diverse dates and times from 3<sup>rd</sup> March 1992 to 19<sup>th</sup> January 1993. They further contended that whereas the Respondent's officers were entitled to arrest them on suspicion of committing a cognizable offence, they had no lawful, legal or statutory power to unleash violence on them on 3<sup>rd</sup> March 1992, and for days afterwards and neither was there any justification for the torture inflicted on them nor was there any lawful reason to throw tear gas at them, brutalize or batter them with boots, batons, slaps, rubber whips, kicks and blows all over their bodies.

15. Their other submission was that whereas the police and GSU officers had power to arrest and charge them with a criminal offence before a competent Court of law as provided under **Article 49** of the **Constitution** of Kenya, 2010, the Respondents' servants had no lawful, legal or statutory power to deprive and violate their freedom and security of the person arbitrarily or without just cause contrary to **Article 29** of the **Constitution**.

16. Further, according to the Petitioners, torture was and is outlawed under the **Constitution, 2010**, **Article 7** of the **International Covenant on Civil and Political Rights (ICCPR)**, and the **Convention**

**Against Torture** and that while the **Repealed** and the **Constitution 2010** do not give a definition of the term “torture”, a plain meaning of the term must be sought from a dictionary and domesticated Human Rights Statutes, Human Rights Instruments and Human Rights Conventions which have proffered the definition of the term. In this regard, their submission was that they have proved their case on a balance of probabilities and they are entitled to the declaratory orders above and general damages for torture as well as exemplary damages to punish the Respondent for its agents’ unconstitutional conduct and costs of the Petition as prayed. Further, that their evidence clearly shows that their torturers were Police and General Service Unit officers who were all employees and servants of the Kenya Government which fact has not been rebutted or controverted by the Respondent.

17. The Petitioners also submitted that the facts relating to the physical and psychological torture they suffered from are similar to the facts produced in **Petition No.281 of 2011, 282 of 2011, 337 of 2011 and 338 of 2011 Milkah Wanjiku Kinuthia & 2 Others v Attorney General** in which this Court determined that the Petitioners’ fundamental rights and freedom had been violated by the Government of Kenya through the actions of its agents and servants in or around March 1992 and awarded them Kshs.2.25 Million as compensation. That the Court also found that the treatment meted out to the Petitioners by agents of the Government of Kenya was inhuman and degrading noting the circumstances of their case even if no treatment cards or medical reports had been produced by the Petitioners.

18. On the question of transnational justice, their submission was that transnational justice is a judicial process within a period of constitutional transition from a past authoritarian system characterized by bad constitutional structures and systems and by that kind of justice, victims of past human rights abuses are facilitated to get reparation, redress and compensation, through a Court such as this one.

19. They further contended that **Article 20** of the **Constitution** mandates this Court to adopt an open-door policy to human rights litigation and discard the previous gate-keeper policy where human rights litigation was checked by a narrow interpretation of the Bill of Rights that favoured the perpetrators or the State which was the liable party. That **Article 22** of the **Constitution** also makes reference to the need to redress all past human rights violations and violations of fundamental rights and freedoms and that the door for transitional justice and redress of historical injustices actually commenced on 27<sup>th</sup> August, 2010 upon the promulgation of the **Constitution 2010** under the transitional justice clauses of the Constitution and Human Rights Law including the Bill of Rights itself. That transitional justice further ensures that historical injustices and wounds of the victims are healed through legal redress, the public officers in future inevitability avoid repeat of the human rights abuses and that there is hope for a peaceful future respect for human rights and the Rule of Law.

20. The Petitioners in addition expressed the view that the **Constitution, 2010** and even the **Repealed Constitution** do not limit the time for filing constitutional references and human rights cases founded on violation of fundamental rights and freedoms. That this Court in that regard as well as the Court of Appeal has, in over 100 torture related cases, ruled that there is no limitation period envisaged in the Repealed and the current Constitutions and in international human rights law and conventions and all human rights instruments which are the basis of the present Petition. Their argument was further that if there was any strong intention to limit the period for litigation over fundamental rights and freedoms, the drafters of the Constitution 2010 at the Bomas of Kenya as well as Kenyans during the public participation before the 2010 Referendum could have simply and expressly provided for a limitation period and also expressly excluded redress for past violations in the current Constitution.

21. Lastly, the Petitioners submitted that their evidence has not been rebutted and they are entitled to the prayers in their Petition and that the Court should be guided by the decision of the Court of Appeal in **Nairobi, Civil Appeal No.86 of 2013, Koigi wa Wamwere v The Attorney General**, in determining the quantum of damages to award them.

### **For the Respondent**

22. The Attorney General in his Written Submissions dated 2<sup>nd</sup> August, 2016 submitted that the Petitioners assertions are baseless, obnoxious and vexatious and are borne out of malice, opportunism and

herd mentality. That the Petitioners have not proved their case on a balance of probabilities as no medical notes of evidence have been tendered in that regard and that it is hard to comprehend how they survived the aforementioned torture and/or brutality from the police officers from 3<sup>rd</sup> March, 1992 until 19<sup>th</sup> January, 1993.

23. The Respondent's position was further that the lack of the aforesaid evidence is a strong indicator that the Petitioners' testimony must be subjected to strict legal scrutiny and in any event, that the Petitioners were never tortured and if the incidents occurred at all, the police officers only did their duty to the State and the public by dispersing an unruly crowd and the same cannot amount to torture since it is the duty of the police to maintain law and order at all times and demonstrations are dispersed every other day in Kenya and such demonstrators do not go to court alleging that the act of dispersing them amounted to torture.

24. While relying on **Lt Col. Peter Ngari Kagume and Others v Attorney General, Petition No.128 of 2006**, the Attorney General asserted that 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 to prove the said allegation. As such he contended that the Petitioners have a duty under **Sections 107 and 109 of the Evidence Act, Cap 80** to prove their allegations on a balance of probabilities which they have not.

25. The Attorney General further and submitted that the events being complained of took place more than twenty (20) years ago and the Petitioners did not offer any good explanation why they chose to come to Court after such a long period of time. In that regard, he relied on my decision in **Priscilla Mwara Kimani and Others v Attorney General, Petition No.197 of 2014**, where I stated *inter alia* that “... **parties coming to Court ten (10) years after the opening up of the floodgates of justice must explain themselves and it would therefore be very difficult for this Court to accept at face value claims filed after 2012 without clear and justifiable explanations for the delay...the present Petition falls in the latter category ...**” The Respondent thus prays that the same reasoning ought to be adopted in determining the instant Petition and the same must therefore be dismissed with costs.

26. While placing further reliance on **Maharaj v Attorney General of Trinidad and Tobago, (No 2) PC ([1979] AC 385**, the Respondent submitted that damages in constitutional matters are not meant to restore a person to the state that he was in before the incident complained of as is the principle in tortious claims, but to give just satisfaction. Further, that in granting any relief in such cases, the Court ought to apply the principles that: if there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition, if necessary, to afford just satisfaction. That the Court should also not award exemplary or aggravated damages in changed political circumstances and that an award should be of no greater sum than is necessary to achieve just satisfaction. In addition, that the quantum of damages should be moderate and normally on the lower side in comparison to tortious awards.

27. The Respondent concluded his submissions by stating that the doctrines of equity are still alive and he who comes to equity must come with clean hands. That the Petitioners in that regard are not entitled to the prayers sought as they have failed to prove their case on merit and whereas this Court has a constitutional mandate to protect and safeguard the rights and freedoms of the individuals, the Petitioners must demonstrate, to the satisfaction of the Court, that their rights were violated. Lastly, that the Kenyan judicial system is an adversarial one where parties to a suit are judged based on the evidence tendered before a court and the court should not allow itself to be arm twisted by litigants such as the Petitioners who take every opportunity to reap where they did not sow.

### **Determination**

28. The sole issue for determination in this Petition is whether there has been a violation of the Petitioners' fundamental rights as alleged and the remedies available to them, if any. Before I proceed on to the substantive determination of the said issue however, I must address my mind to the preliminary issue raised by the Respondent that the present matter is time barred having been brought more than 20 years after the incident complained of. This is a common defence by the Respondent and I have

previously addressed it.

**The Doctrine of Limitation of Time in Constitutional Petitions alleging violations of fundamental Rights and Freedoms**

29. In previous decisions related to this one, I have stated that over the last twelve years or so in cases such as **Dominic Arony Amolo v Attorney General and Others, Misc Case No.1184 of 2003 (OS)**, our Courts have been confronted with the question of limitation of time in regard to Petitions such as the one before me. I note in that regard that in **Joan Akinyi Kabasellah and 2 Others v Attorney General, Petition No.41 of 2014** the Court stated thus:

*“[24] ... I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as **Dominic Arony Amolo v Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango v Attorney General and Another, Nairobi HCCC NO.845 of 2003 (unreported)**, Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.*

*[25] I note also the sentiments of the court in **James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011** that: ‘Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim.’*

*[26] In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim.”* (Emphasis added)

30. The Court in **High Court Petition No.306 of 2012 Ochieng’ Kenneth K’Ogutu v Kenyatta University and 2 Others**, was however less lenient and expressed itself as follows:

*“[35]... While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even had I found that the facts demonstrated a violation of the petitioner’s rights (which I have not), I would have had difficulty in excusing the 12 years’ delay in this matter.”*

As regards the effect of such delays, the Court noted thus:

*“[36] There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in **Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra)**: “Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.””*

The Court therefore concluded that:

*“In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their*

***subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation periods.”***

31. Further, in **Joseph Migere Onoo v Attorney General, Petition No.424 of 2013** the Court set out certain principles in addressing the issue above and observed thus:

***“[39] The principle that emerges from the cases cited above is 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 defence.***

***[40] In the present case, the acts complained of took place some 29 years ago, and the petition was filed 27 years after the alleged events. No explanation has been proffered for the delay, or to explain or justify the institution of proceedings at this point in time. The petitioner contented himself with maintaining that there is no limitation in petitions such as this.”***

32. From the above decisions and others, I reiterate my previously held position that while the High Court has generally stated that no limitation of time can be imposed in matters where violation of rights has been alleged, many Judges have decried the filing of such Petitions after a considerable length of time had lapsed since the alleged violations occurred and it seems to me that emphasis has now shifted to the fact that each case must be examined and gauged on its own merits and the question whether the delay is inordinate is therefore left to the discretion of each court which is to examine each case on its merits. Of great importance therefore for consideration at all times is the justification for any such delay.

33. It is also now an accepted truth that Kenyan Courts, like the Executive Branch of Government, have accepted that in times past, they have failed to address violations of constitutional rights even in obvious cases and thereby caused injustice to deserving litigants hence the holding in **Gerald Gichohi and 9 Others v Attorney General Petition No.487 of 2012** that:

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

34. I am completely persuaded by the reasoning above and my view is that this Country has now embraced certain measures that must be applied in the proper circumstances of each case to redress historical injustices in the field of human rights. They include criminal prosecutions, the setting up of a truth and justice commission, reparations programs and various kinds of institutional reforms (such as in the police service). But even then, every Petitioner must demonstrate a measure of justification for any delays in instituting their claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I hold so bearing in mind that as early as the year 2003, persons aggrieved by the acts of the Moi Regime where most claims emanated from, have approached the Courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms during that Regime. I have in that regard constantly made reference to the following cases:

- **Stanley Waweru Kariuki v Attorney General, Petition No.1376 of 2003;**
- **Gitari Cyrus Muraguri v Attorney General, Miscellaneous Case No.1185 of 2003 (OS);**
- **Harun Thungu Wakaba v Attorney General, Nairobi, Miscellaneous Application No.1411 of 2004;**
- **Rumba Kinuthia vs Attorney General; Nairobi HCCC No.1408 of 2004, Mugo Theuri v Attorney General, HC Misc. Civil Case No.565 of 2005;**
- **David Njuguna Wanyoike v Attorney General, Petition No.729 of 2006;**
- **Oduor Ong’wen and 20 Others v Attorney General, Petition No.777 of 2008;**
- **Charles Gachathi Mboko v Attorney General, Civil Case No.833 of 2009 (O.S.);**
- **James Omwega Achira v Attorney General, Petition No.242 of 2009;**

- **Mwangi Mathenge v Attorney General, Petition No.240 of 2009; and**
- **Koigi Wamwere v Attorney General, Petition No.737 of 2009** among many others.

35. In furtherance of the above findings, from the evidence and submissions before this Court, no clear justification has been given as to why there was delay in presenting the present Petition which was filed on 17<sup>th</sup> April, 2013 alleging torture that occurred from 3<sup>rd</sup> March 1992 up to 19<sup>th</sup> January 1993. In their oral evidence before this Court, the Petitioners did not allude to the matter at all although it was properly raised by the Respondent who claimed prejudice in defending the claim. I note therefore that in **Mombasa Civil Case No. 128 of 1962, Rawal v Rawal [1990] KLR 275** the Court addressed such prejudice in the following terms:

*“The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”*

36. I further note that, in **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited v Governor Central Bank of Kenya and 2 Others, Misc. Civil Appl. 1759 of 2004** the Court observed thus:

*“In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitations periods...”*

37. The above findings notwithstanding, I reiterate the finding in **Charles Gachathi Mboko v Attorney General, Civil Case No.833 of 2009 (O.S.)**, where I stated thus:

*“It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim.”*

38. The above opinion is not unique and as was stated in **D'Souza v Union of India 1976 A.S.R. 91** the same may not be a Rule of Law issue *per se* but a good practise borne of judicial discretion. In that context, the length of any delay is not the only criteria to be applied *per se* but the circumstances of each case are also important as is the acceptability of the explanation proffered by a party and which may warrant a Court to condone such delay. Whereas therefore, cases in other jurisdictions, as alleged by the Petitioners pertaining to violations of rights by old regimes such as the Nazis among others were admitted after long delays. It must be noted that each case alleging violation of constitutional rights and fundamental freedoms must be determined on its own merits and in its own circumstances taking into account the pleadings before the Court, the evidence tendered and the submissions made because no two cases are ever alike.

39. Further to the above and turning back to the present case, I am aware, and it was so pleaded, that the Petitioners, together with fellow women (mothers of the political prisoners) and their supporters, were agitating for the release of amongst others Koigi wa Wamwere in 1992. It is also common knowledge that many claims arising from alleged injustices arising from that event have long been filed and determined. It is very difficult for me therefore to understand in the circumstances why the Petitioners herein did not institute their claims in good time if the said claims were genuine and founded on a serious claim such as torture.

Despite my sentiments above, nonetheless the wider interests of justice would necessitate that the present claims, like others before them, should ultimately be determined on their merits. The warning expressed

in **Charles Gachathi Mboko (supra)** must be heeded nonetheless in respect of future claims.

40. On the evidence placed before me therefore, save for the evidence contained in their Affidavits, the Petitioners, like all others before them who made claims that they were tortured at Freedom Corner, and at All Saints Cathedral, placed reliance on an article in the “**The Society**” Magazine of 23<sup>rd</sup> March, 1992. In previous similar Petitions, I have asked the question, and I ask it again, are mere assertions and newspaper articles admissible as evidence in Petitions alleging violations of rights and fundamental freedoms? Like in those other Petitions, I must answer the question in the negative because as correctly submitted by the Respondent, the burden of proof expected of any claimant is well set out in **Section 107** of the **Evidence Act** in the following words:

**“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

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

41. In addition, **Section 109** of the **Evidence Act** further provides:

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

42. In accepting the seriousness of the above principle, in **China Wuyi and Co Limited v Samson K Metto [2014] eKLR, Civil Appeal No.181 of 2009**, the Learned Judge stated that:

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

43. Further to the above and specifically on admission of documents including newspapers as evidence, **Section 35** of the **Evidence Act** is to the effect that:

***“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following condition are satisfied, that is to say –***

***(a) If the maker of the statement either –***

***(i) Had personal knowledge of the matters dealt with by the statement; or***

***Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or I might reasonably be supposed to have, personal knowledge of those matters”.***

44. It is in the above context that in **Tesco Corporation Ltd v Bank of Baroda (K) Limited, Civil Case No.182 of 2007** the Court in addressing the admissibility of a report contained in a newspaper stated as follows:

***“The real question for consideration and decision by this court is as to whether on the evidence it has been satisfactorily established that the plaintiff did part with the possession of the premises or any part thereof to any one in a manner to constitute a breach of contract. The only evidence relied upon by the applicant is a newspaper report contained in the Daily Nation of 19<sup>th</sup> November, 2007. The issue here is admissibility of documentary evidence as to the facts in issue.***

*The provisions of Section 35 of the Evidence Act are clear on this issue...*

*Having considered the application in light of the affidavit evidence and submissions by both counsel and the relevant law, I am not persuaded that the newspaper report is covered under the provisions of Section 35 of the Evidence Act.*” (Emphasis added)

45. Further, in **Kituo Cha Sheria and Another v Central Bank of Kenya and 8 Others, Petition No.191 of 2011, Consolidated with Petition No.292 of 2011**, it was noted that:

*“[32] As correctly pointed out by the Attorney General and the 1<sup>st</sup> respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere v The A.G and Randu Nzau Ruwa and 2 Others v Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.*

*[33] The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a “Share Sale and Purchase Agreement”. The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled “De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009”.*

*[34] The petitioners have alleged violation of public procurement laws. On the basis of the documents before me, it is difficult to see how such violation occurred. There is no evidence that the alleged contracts had been entered into, and if they had, whether the process was indeed in violation of the law that regulates procurement.*”

46. The above decision expresses my own views on the subject at hand and I say so well aware that **Rule 10 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules** provides as follows:

*“Subject to Rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.”*

47. Without belabouring the point, **Rules 9 and 10** do not depart from the requirement that only admissible documents should be the basis of any credible evidence. In any event, I do not find that the definition of “informal documentation” in those Rules applies to newspaper cuttings.

48. Having so held, what other evidence in proof of the allegations of torture has been tendered and have the Petitioners otherwise discharged the burden of proof bestowed upon them? It is apparent that by dint of the **Evidence Act**, as I have reproduced herein above, the Petitioners are under an obligation to prove their case on a balance of probability. In that regard, whereas the Petitioners made various assertions that they were tortured, i.e. that they were subjected to **“inhumane and brutal battery with boots, batons, slaps, rubber whips, kicks and blows all over her body; attacks by over 100 Kenya Police Officers and General Service Unit officers”** which they further alleged occurred continuously from 3<sup>rd</sup> March, 1992 to 19<sup>th</sup> January, 1993, no material evidence was placed before this Court to corroborate those averments. Even if I were to accept the view I held in **Milkah Wanjiku Kinuthia (supra)** that medical records are not the only pieces of evidence to prove torture, I maintain the view that a reasonable man ought to appreciate the fact that the length of the alleged torture would certainly have had catastrophic effects on the Petitioner’s physical and mental well-being but this allegation was very casually made. While referring to Prof. Wangari Mathai, for example, who was in fact said to have been rendered unconscious during the incident of 3<sup>rd</sup> March, 1992 and was hospitalised, the Petitioners made no mention of any treatment they received after the serious injuries they claimed to have sustained. In fact they were quick

to point out that they immediately returned to Nairobi after being deported to their rural homes without any evidence of injury. Whatever their resolve and focus, had they been seriously tortured as they claim that they were, they should surely have been treated, healed and returned to Nairobi after sometime but this was not to be. The same finding applies to the alleged torture at all Saints Cathedral.

49. What is the law on torture in any event? It is now trite that the following elements must be present in proof thereof:

i) There must be evidence of severity of pain and suffering – **Article 1** of the **Convention against Torture** is the leading provision on this point.

ii) There must be an intent in reckless indifference to the possibility of causing pain and suffering - in **J. Burgers and H. Danelius, *The United Nations Convention Against Torture*, (Martinus Nijhoff, 1988) page 118**, this point is powerfully made.

iii) Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – in **Sarah Joseph and Melissa Castain, *The International Covenant on Civil and Political Rights, Third Edition*, page 218**, this element is extensively discussed.

iv) The act of torture must involve a public official – in **Article 1** of the **Convention against Torture** expresses this point clearly.

50. I have in the above context noted that while the Petitioners gave no evidence of any pain and suffering on the dates that they alleged that they were tortured, the allegations that they were slapped, kicked and beaten will not amount to torture if the criteria in the Convention on Torture is applied. I maintain also that looking at the Petition and affidavits in support, it is torture that is alleged and all the submissions by Counsel for the Petitioners on other matters are misplaced and irrelevant if the elements of torture are not proved.

51. I should state one more thing; after the hearing of the present Petition, Mativo J. delivered a Judgment in **Irene Wangari Gacheru and 7 Others, H.C Petition No.376 of 2014** in which he found that in similar circumstances as in the present case, the Petitioners were tortured and granted them an award of damages in compensation. The learned Judge's mind seemed to have been swayed by my decision in **Milka Wanjiku Kinuthia (supra)** but I maintain my position that each case must be looked at in its own circumstances particularly as to how the pleadings are drafted and how evidence is presented. In the present case, I have shown that even if the Petitioners had been harassed, physically and mentally, the same cannot amount to torture, the only claim made by them in their Petition.

52. Based on my reasoning above, therefore, it is very difficult for me to reach the conclusion that the Petitioners have made out a case for violations of their right to protection against torture and I so find. Having so held, I see no reason to address the issue of the remedies available to the Petitioners.

### **Disposition**

53. There is little more to do than to dismiss the Petition herein but each Party shall bear its own costs.

54. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE, 2017**

**JOHN M. MATIVO**

**JUDGE**