



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.27 OF 2015**

**BETWEEN**

**LEWIS WILKINSON KIMANI WAIYAKI.....PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The Promulgation of the **Constitution 2010** has opened an unimaginable avalanche of claims particularly on the Bill of Rights. Like caged birds, the freedom heralded by a robust, barely inhibitive Constitution has given litigants who had long despaired, an opportunity to test the judicial system with both recent and very old claims. One such old claim is the present one as the alleged violation of fundamental freedoms is said to have occurred in 1968.
2. The Petitioner, a lawyer by training and who was a former Town Clerk of the City of Nairobi has stated that all material times, he was also a member and Administrative Secretary of the Kenya Peoples' Union (KPU), a political party registered but later proscribed in Kenya.
3. In his Petition, amended on 24<sup>th</sup> March 2015, he has further claimed violation of his rights both under the **Repealed Constitution** and the **Constitution 2010** when he was allegedly kidnapped/abducted in Kampala, Uganda by officers from the Kenya Police (specifically the Special Branch) and later detained without trial at the Shimo La Tewa Prison in Mombasa for nine (9) months.
4. He now prays for the following declarations and orders:

***“1.a) That in detaining the Petitioner unlawfully from 7<sup>th</sup> March, 1968 to 19<sup>th</sup> December, 1968, the Respondent and/or its agents, breached the Petitioner’s fundamental right to personal liberty and security of the person, right to fair administrative action.***

***b) That by mistreating and mishandling the Petitioner while in detention, the Respondent and/or***

*its agents violated the Petitioner's right to human dignity and freedom from torture, cruel, inhuman and degrading treatment.*

*c) That in detaining the Petitioner purely on the basis of his political affiliation, the Respondent and/or its agents infringed on the Petitioner's right to freedom of conscience, religion, belief and opinion, right to freedom of expression, freedom of association and political rights.*

*d) That by subjecting the Petitioner to an unwarranted searches, destroying his property and stifling his economic development, the Respondent encroached on the Petitioner's right to privacy and right to protection of property.*

*2) Special damages as set out in paragraph 3 (c) hereinbefore cumulatively computed as appreciative by a factor of 300 to-date as follows;*

*Kshs.750,000/-(1968) x 380 = Kshs.285,000,000/- (2015)*

*US\$ 2000 (1968) x 7\$ x 380 = Kshs.5,320,000/-(2015)*

*Kshs.290,320,000/-(2015)*

*3) General damages as compensation in respect of the foregoing violations.*

*4) Aggravated, punitive and/or exemplary damages for the arbitrary, highhanded and oppressive conduct of the Respondent's agents.*

*5) Costs and interest from the date hereof until payment in full.*

*6) Interest on all monetary awards from the date hereof until payment in full.*

*7) Such further orders as this Honourable Court may deem to be just and appropriate."*

### **Petitioner's Case**

5. The Petitioner's case is contained in the Amended Petition aforesaid, the Affidavit in support of and in verification of the Petition sworn on 24<sup>th</sup> March 2015, the Witness Statement of Kimani Mwega, the oral evidence of both the Petitioner and Mr. Mwega as well as written Submissions and authorities filed on 16<sup>th</sup> February 2016 and highlighted by Mr. Kigano, his advocate, at the hearing.

6. According to the Petitioner, on or about 7<sup>th</sup> March 1968 at about 2.00 a.m., he was asleep in his rented cottage in Kampala, Uganda when officers from the Special Branch Department of the Kenya Police under the command of one, Aggrey Okwirri, together with about 20 officers from the then Uganda Research Bureau, pounced on him, searched his house, spirited him away to a number of secret locations including forests manned by the Research Bureau officers where he was subjected to grievous assault and inhuman and cruel treatment. He was also allegedly tortured by being stripped naked and humiliated on the size and characteristics of his private parts/genitals.

7. He also stated that whilst handcuffed and blindfolded, on 8<sup>th</sup> March 1968, he was renditioned across the Kenya/Uganda border and shuttled between various Police Stations in Nairobi before he was finally taken to Embakasi Police Station where he was stripped naked and he spent the night hungry. The following day, he was allegedly flown to Mombasa whilst blindfolded and transferred to Shimo La Tewa Prison where he was detained without trial until 19<sup>th</sup> December 1968 when he was taken to State House, Nairobi and released in the presence of the late President Jomo Kenyatta.

8. In his oral testimony, he blamed Charles Njonjo, the then Attorney General of Kenya for his detention and alleged that prior to his detention, he was not given a detention order and that he only learnt of

Gazette Notice No.997 of 22<sup>nd</sup> March 1968, publicising his detention, after his released.

9. It has his further case that he verily believes that his detention was ordered solely because of his political beliefs, preferences and affiliations and the intention was to achieve denial as well as restriction thereof. Amongst his complaints during his arrest and detention, the Petitioner at Paragraph 3(b) pleaded the following i.e. that he:

***“i) Was abducted; there was no arrest warrant and/or Detention Order;***

***ii) Was not charged, given any reason for the actions alluded to hereinbefore;***

***iii) Was subjected to illegal searches on his person and premises; and his belongings to include, his cherished possessions, personal letters, monies, air tickets and personal documentation were contemptuously destroyed and/or stolen;***

***iv) Was gravely and grievously assaulted and subject to inhuman and cruel treatment and torture and was greatly traumatised;***

***v) Was stripped naked and subjected to physical exposure of his private parts/genitals and publicly taunted and humiliated on the size and characteristics thereof***

***vi) Was in constant fear of execution during his abduction and detention;***

***vii) Was shuffled between various locations under very inhumane conditions, often time at the back of a truck while handcuffed and soaked by rain;***

***viii) Was deprived of food and water for long hours and medical attention;***

***ix) Was denied legal representation and visitations;***

***x) Was isolated and held in solitary confinement;***

***xi) Was renditioned and not subjected to due legal process;***

***xii) Was incarcerated under grossly deplorable and dilapidated conditions without sanitary and toiletry facilities and invariably in cells next to howling lunatic prisoners;***

***xiii) Was denied legal representation and access or communication to family and friends.”***

10. Regarding losses he incurred, he pleaded that:

***“i) the Petitioner’s family was irretrievably traumatised, ostracised and shunned by the public and ultimately torn asunder;***

***ii) the Petitioners bar and restaurant business in Kampala worth then about Kshs.300,000/- was ruined;***

***iii) the Petitioner’s Hillman Minx” motor vehicle KAX 125 then worth about Kshs.200,000/- was vandalised;***

***iv) the Petitioner’s personal cash of Kshs.150,000/- and US\$2000 and clothings, shoes and furniture worth then about Kshs.100,000/- was stolen by the persons alluded to in paragraph 2(a) hereinbefore.***

***In all the Petitioner then suffered total loss of Kshs.750,000/- and US\$ 2000 vide sub-paragraphs (ii) to (iv) (inclusive).”***

11. In addition to the above, the Petitioner, in oral evidence, stated that after his release from detention, he was unable to obtain employment anywhere as the political environment was hostile to him. Later however, President Jomo Kenyatta interceded and he was granted a license to practise law.

12. During cross-examination, the Petitioner explained that he had no document to back his claims because all were either taken away and torn into pieces by the Police after his arrest. He however produced his Detention Order which he obtained after his release.

13. In support of the Petitioner's claim for compensation, Kimani Mwega, his witness, filed a Witness Statement and gave oral evidence in justification of his quantum of damages. According to him, a career banker and economist, he used data from the Kenya Bureau of Statistics and a consumer Price Index (CPI) to compound the Petitioner's losses from 1968 to 2015. He concluded that the Petitioner's losses amounted to Kshs.290 Million.

14. When questioned as to the source of the primary figure of Kshs.750,000/- as the alleged loss incurred by the petitioner in 1968, he stated thus;

***“I am not certain of the source of the figures given by the Petitioner – Kshs.750,000.00. I had no back up documents”***

15. For the above reasons, the Petitioner now prays for orders as elsewhere set out above.

### **Respondent's Case**

16. In response to the Petition, the Attorney General on behalf of the Republic of Kenya filed a Replying Affidavit sworn on 25<sup>th</sup> September 2015 by one Henry Barmao, a Commissioner of Police in the Operations Department of the Kenya Police Service. Submissions dated 2<sup>nd</sup> March 2016 were also filed on his behalf.

17. In a nutshell, his case is that the entire Petition is unsupported by any credible evidence and it is therefore misconceived. Specifically, that the claims of the Petitioner's alleged arrest, torture and detention as well as his claim for damages amounting to Kshs.290 Million were all wanting and unsupported by any credible evidence.

18. Regarding the Petitioner's detention, it is the Respondent's case that if he was indeed detained, the same was lawfully done pursuant to the **Public Security Act (Detained and Restricted Persons) Regulations, 1966**.

19. On allegations of torture, the Respondent's case is that there is no evidence whatsoever that the Petitioner was ever tortured while in lawful custody or elsewhere.

20. Lastly, it was the Respondent's case that a delay of 49 years in filing the Petition is unreasonable and that since no explanation has been preferred to justify such a delay, more so when the Petitioner is an Advocate of this Court, then the Petition is an abuse of Court process and should be dismissed.

### **Submissions**

21. In his Submissions, Counsel for the Petitioner stated that vindication of fundamental rights has no limitation of time and in any event, the Petitioner explained that he has been living in fear of repercussions under previous regimes and his claims ought therefore to be admitted.

22. On quantum of damages, Counsel sought special damages in the sum of Kshs.290,320,000 being what he termed the value of directly expropriated property under **Article 40** of the **Constitution**. He also submitted that following the decision in **David Njau Gitau and 9 others, H. C. Petition No.340 of 2012**, this Court ought to grant a global sum in general damages for the arbitrary, high-handed and oppressive conduct of the Respondent's agents in perpetrating the alleged violations.

23. On his part, Counsel for the Respondent submitted that under **Section 107** of the **Evidence Act**, where a Respondent controverts an assertion of facts by a claimant, then the claimant is under a legal duty to prove that those facts exist. That the Petitioner in that regard had failed to meet that test and all his claims are rendered baseless and unsubstantiated. On that proposition he further relied on Nyamu J's decision in **Peter Ngari Kagume and Others v AG, Constitutional Application No.128 of 2016** where the Learned Judge stated that in determining contested matters, the Court must be guided by evidence of probative value and not speculation and imagination.

24. Turning to the claim for special damages, Learned Counsel submitted that all the allegations in that regard are wild and following the decision in **Kampala City Council v Nakunye [1972] E.A 446** he stated that without specific proof of special damages, the same cannot be granted and the same finding was made in **James Mwangi v Alex Njuguna & 3 Others [2011] e KLR**, both which he urged this Court to follow.

25. On the delay in filing the Petition, Counsel relied on the decision in **H. C. Petition No.306 of 2012, Ochieng Kenneth K'Ogutu v Kenyatta University and 2 Others** where the Court decried the unexplained delay in the filing of a Petition twelve years after the incident complained of. He also relied on the decision in **Onoo v AG H. C. Petition No.424 of 2013** where the same finding was made in a Petition filed twenty seven years after the fact.

26. Further relying on the decision in **Maharaj v AG of Trinidad and Tobago** (no citation given) cited with approval in **Peter Ngari Kagume (supra)**, Counsel submitted that damages in Constitutional Petitions are not akin to damages in tort but are awardable for purposes of compensation for deprivation of rights alone and that where other remedies are available to an injured party, that other remedy should initially be granted.

27. He concluded by submitting that exemplary and aggravated damages should not be granted and in any event, any quantum of damages should be on the lower side compared to awards in tortious claims.

### **Determination**

28. Having considered the Pleadings and Submissions on record, I deem it prudent to address the question whether the Petition is time-barred since the events complained of, occurred 47 years ago. In that regard, the issue of limitation of time in Petitions alleging violation of constitutional rights and freedoms has been a vexing one before this Court and there does not seem to be uniformity in the approaches taken by various High Court Judges.

29. Having so said however, in **Joan Akinyi Kabasellah and 2 Others v Attorney General, Petition No.41 of 2014** the Learned Judge observed that:

*“[24] Nonetheless, 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 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 (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 filing of the present claim.” (Emphasis added)*

30. Further, in **Ochieng’ Kenneth K’Ogutu v Kenyatta University and 2 Others** (supra), the Learned Judge stated thus:

*“[35] As I conclude this matter, I will address the issue of delay in filing this petition. The respondent has argued that the petitioner is guilty of inordinate delay, and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The petitioner’s counsel submitted that he was so traumatised that he could not come to court before, but I can see no basis for this submission. While the petitioner alleges that he was arrested and charged, and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatised that it has taken him 12 years to recollect that he had a claim against the respondents. 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.”*

He then went on to express himself 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 Learned Judge thereafter 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. I also note that in **Joseph Migere Onoo v Attorney General, Petition No. 424 of 2013** the Court summarised the emerging position regarding delays in filing constitutional Petitions claiming violation of fundamental rights and freedoms by stating that:

*“[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. Notwithstanding the above position, I am also alive to the obita dictum in **Gerald Gichohi and 9 Others v Attorney General Petition No. 487 of 2012** where it was stated 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.”***

33. It is therefore clear that it is imperative for a Petitioner to demonstrate some justification for any prolonged delay in instituting 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 and the point was even made more poignantly recently 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 Civ Appil 1759 of 2004** where 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 limitation periods...”***

34. Similarly, the Court In **Charles Gachathi Mboko v Attorney General, Civil Case No.833 of 2009 (O.S.)**, warned against the dangers of allowing claims brought long after the fact without explanation. The Court stated as follows:

***“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.”***

35. In applying the above expositions of the law to the present Petition, I note that the Petitioner stated that he came to Court late only after the **Constitution 2010** had been promulgated and when Mr. Charles Njonjo who he largely blames for his predicament, was no longer in power. I also note that during cross-examination, Counsel for the Respondent did not press the point but submitted on the issue in his written submissions. Is the above explanation reasonable?

36. In my view, it is indeed true that prior to the promulgation of the **Constitution 2010**, those who were tortured, or detained without trial had little faith in the judicial system to right the injustices meted out to them. This is a matter of judicial notice and it is also true that Petitions such as the present one were only filed from 2003 onwards after the end of the Moi regime. Few Petitions, if at all, have been filed relating to alleged excesses of the Jomo Kenyatta regime and this is one of those Petitions.

37. Although the Petitioner as a lawyer ought to have moved with speed after 2010 to institute his Petition, I have taken into account his age, his impecunious status (he filed the Petition as a pauper) and despite the delay thereof, I will admit his Petition for determination on its merits.

38. Having so said, the following issues require resolution;

- i) Whether the Petitioner’s right to privacy and to protection of property were violated.
- ii) Whether the Petitioner’s right to personal liberty, security of the person and right to fair administrative action were violated as alleged.
- iii) Whether the Petitioner’s right to human dignity, freedom from torture, cruel, inhuman and degrading treatment were violated.

iv) Whether the Petitioner's right to freedom of conscience, religion, belief and opinion, right to freedom of expression, freedom of association and political rights were violated.

v) Whether the Petitioner is entitled to the remedies sought.

39. Before delving into a determination of the above issues and although Parties did not address me on the issue, it would be remiss of me not to address a crucial foundational question i.e. What constitutional rights were applicable to the period and events complained of? I say so because in 1968, the **Repealed Constitution** was operative but by dint of **Section 7** of the **Schedule Six** of the **Constitution**, the **Constitution 2010** would be applicable where certain rights were transited from the Repealed Constitution - See **Petition No.94 of 2011, Duncan Otieno Waga v AG.**

40. In that context, the **Repealed Constitution** provided for the following rights relevant to this Petition;

i) Right to protection of privacy and property in **Section 70(c).**

ii) Right to personal liberty and security of the person in **Section 72.**

iii) Right to protection of privacy and property in **Section 70(a).**

iv) Freedom from cruel, degrading and inhuman treatment in **Section 74.**

v) Freedom of conscience, of expression and of assembly in **Section 70(b).**

vi) Freedom of thought and religion in **Section 78(1).**

41. The right to fair administrative action in **Article 47** of the **Constitution 2010** cannot be properly invoked in the present circumstances as it had no equivalent in the **Repealed Constitution.**

42. In that context, were the above rights violated in the case of the Petitioner?

### **Right to Privacy and Property**

43. Prayer 2 of the Petition relates to special damages for loss of business, motor-vehicle registration No.KAX 125, personal cash of Kshs.150,000.00 and USD 2000. The total loss was quantified at Kshs.750,000.00 and the view of PW2, Kimani Mwega the value thereof as at the year 2015 is Kshs.290,320,200.00.

44. In that regard, the Court of Appeal in **Gitobu Imanyara & 2 Others v AG [2016] e KLR** cited with approval the decision in **Banque Indosuez v D.J. Lowe & Company Ltd [2006] 2 KLR 208** where it was held thus;

***“It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”***

45. The Court further stated thus:

***“The appellants in this case did not specifically plead and prove the damages from the losses they allegedly suffered. This could have been done by proof of receipts, bank statements or any invoices to show the liquidated losses incurred as a result of their Constitutional violations. In this case, we find the particulars lacking.”***

46. Applying the same principles to the present case, there is absolutely no evidence before me that the Petitioner lost or even had any of the properties in issue. He is a lawyer and one with experience at that.

Old as he is, he also has Counsel and ought to have made more effort than mere assertion to give proof of his claim for special damages. What was difficult, for example, in getting registration details for motor vehicle Registration No.KAX 125? What was also difficult about getting specific details of his businesses? Without such facts properly tabled in evidence, a claim for special damages cannot be sustained and the claim for violation of the right to property must hit a dead end.

47. Although therefore the Petitioner was indeed entitled to the right to property under **Section 70(c)** of the **Repealed Constitution**, proof thereof and entitlement to special damages is lacking and the claims must fail.

As for the right to privacy, save for mention of it in the Petition, it is unclear to me how it was violated and no evidence or submissions were made on the same. It too must fail.

### **Right to Personal Liberty, Security of the Person and Fair Administrative Action**

48. The Petitioner has protested that his arrest or abduction from Uganda and his confinement for 12 days was unconstitutional and so was his detention at Shimo La Tewa Prison.

49. From the evidence available there is no doubt that by **Gazette Notice No.997 of 22<sup>nd</sup> March 1968**, the Petitioner was ordered to be detained under **Regulation 6(1) of the Public Security (Detained and Restricted persons) Regulations 1966 (L. N. 212/1966)**. The Notice was dated 19<sup>th</sup> March 1968 but according to the Petitioner, he was in fact arrested on 7<sup>th</sup> March 1968 and was therefore in police detention from that day until 19<sup>th</sup> March 1968, a period of 12 days. Two questions arise thereby;

i) Was the detention for 12 days, lawful?

ii) Was his detention thereafter until his release on 19<sup>th</sup> December 1968, lawful?

50. On the 12 days' detention, I watched the Petitioner in Court and saw his demeanour. Although the Respondent casually denied his arrest, I have no doubt that prior to his detention, he was indeed held in custody and looking at his detention order signed by one, J.M. Oswald, Security Officer, it is obvious to me that the reasons for his detention must have been the basis for his prior arrest and later, detention. He was believable in that regard and I shall admit his evidence.

51. In that context, **Section 72 (a)** and of the **Constitution** provided as follows;

**“(1) ...**

**(2) ...**

**(3) A person who is arrested or detained –**

***(a) for the purpose of bringing him before a court in execution of the order of a court; or***

***(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”***

52. Without any explanation by the Respondent as to why the Petitioner was held in custody beyond the

above period(s) and since he was never charged in any Court of law, it follows that his detention in Special Branch custody for 12 days was unconstitutional.

53. As for the period after his detention, it cannot be denied that at the time, **Section 27(2)(b)** as read with **Section 83** and **Section 85** of the **Repealed Constitution** as well as the Regulations aforesaid allowed detention without trial. The latter provided as follows;

*“(1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72, 76, 79, 80, 81 or 82 when Kenya is at war, and nothing contained in or done under the authority of any provision of Part III of the Preservation of Public Security Act shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under section 85.*

*(2) Where a person is detained by virtue of a law referred to in subsection (1) the following provisions shall apply –*

*(a) he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained;*

*(b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Kenya Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorized;*

*(c) Not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the president from among persons qualified to be appointed as a Judge of the High Court;*

*(d) He shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; and*

*(e) At the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear I person or by a legal representative of his own choice.*

*(3) On a review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.*

*(4) Nothing contained in subsection (2) (d) or (e) shall be construed as entitling a person to legal representation at public expense.”*

54. In upholding the operation of the above provision, the Court of Appeal, had this to say in **Koigi Wamwere v AG [2015]e KLR**;

*“We find it convenient to deal with the four points we have distilled from the memorandum of appeal in reverse order. We thus need to first decide whether the appellant’s two stints in detention had constitutional sanction at the material time. The retired Constitution at Section 83 provided for the constitutionality of detention without trial in so far as it legitimized Part III of the Preservation of Public Security Act as follows;*

*‘Given that clear provision of the Constitution, we respectfully are unable to agree with the*

***appellant's submission on the learned judge's reliance on some authorities to buttress her view that the Constitution then in place did countenance detention without trial'.***"

55. I am duly guided and it is therefore my finding that the detention of the Petitioner, however painful, was an act sanctioned by law.

56. Having so found however, the Petitioner has stated that he was never furnished with a Statement specifying the grounds of his detention neither was he given an opportunity to obtain legal counsel or to have his detention reviewed as was the expectation of **Section 83(2) (a), (c) (d) and (e)**. In his Replying Affidavit Mr. Barmao steered clear of this aspect of the Petition and learned State Counsel said nothing of it. I take that to be an admission of the Petitioner's claim and there was therefore a violation of his constitutional rights to that extent.

### **Right to human dignity, freedom from torture, cruel and inhuman treatment**

57. The Petitioner claimed that after his arrest he was *inter alia* stripped naked, kept hungry, publicly humiliated and taunted and denied legal representation. He was later detained without trial.

58. In that regard, **Section 74(1)** of the **Repealed Constitution** provided as follows:

***"No person shall be subject to torture or to inhuman or degrading punishment or other treatment."***

59. It was the Petitioner's further case that his rights above were violated when he was kept in isolation during detention and not allowed visitors and in that context, it is my understanding that human dignity is the foundation of all rights and there is a presumption in law that every human being ought and must be treated with dignity and should not be tortured or subjected to cruel and inhuman treatment. Having so said, were these rights violated in the Petitioner's case?

60. I have elsewhere above held that the Petitioner was certainly renditioned from Uganda and that he was thereafter held unlawfully for 12 days. I need not reproduce what claims he has made about the treatment he received in those 12 days.

61. Regarding prohibition from torture, inhuman and degrading treatment, the most comprehensive definition was given in **Jestina Mukoko v AG (36/09) [2012]ZWSC 11 (20 March 2012), Constitutional Application No.36 of 2009** where the Supreme Court of Zimbabwe stated thus;

***"The prohibition protects the dignity and physical integrity of every person regardless of his or her conduct. No exceptional circumstance such as the seriousness of the crime the person is suspected of having committed, or the danger he or she is believed to pose to national security can justify infliction of torture, or inhuman or degrading treatment. There cannot be a value in our society over which there is so clear a consensus as the prohibition of torture inhuman and degrading treatment of a person in the custody of a public official. That such a treatment should never form part of the techniques of investigation of crimes employed by law enforcement agents, is a restatement of the principle that the law which it is their duty to enforce, requires that only fair and humane treatment ought to be applied to a person under criminal investigation."***

***"There is a distinction intended to be made under s 15(1) of the Constitution between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment depends on the circumstances of each case."***

The Court went on to state;

*“Inhuman treatment is treatment which when applied or inflicted on a person intentionally or with premeditation causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: Ireland v United Kingdom [1978] 2 EHRR 167 para 167.*

*Degrading treatment is treatment which when applied to or inflicted on a person humiliates or debases him or her showing a lack of respect for or diminishing his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person’s moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment: Woods v Commissioner of Prisons & Anor 2003(2) ZLR 421(S) at 432C-B.”*

The Court then concluded thus;

*“It follows from the definition of the relevant concepts that not every treatment which causes some discomfort to the person in detention violates s 15(1) of the Constitution. Otherwise no one could be arrested, detained and interrogated in the investigation of crime. The treatment must reach the minimum level of severity before it constitutes a breach of the absolute prohibition under the section. The assessment of the minimum level of severity is relative. The question whether or not the requisite threshold of breach of the fundamental right has been reached in a particular case is determined by the consideration of such factors as the nature and context of the treatment; manner and method of its execution, as well as the duration of the treatment, its physical and mental effects and in some cases the age, sex and state of health of the victim: Ireland v United Kingdom supra para 162, S v Ncube & Ors 1987(2) ZLR 246(S) at 271A-G, Soering v United Kingdom [1989] 11 EHRR 439 para 100. Woods v Commissioner of Prisons & Anor supra at 431G.”*

62. I adopt the above reasoning as if it were mine and noting the complaints by the Petitioner, I am satisfied that he was subjected to treatment that was degrading and inhuman but I cannot find sufficient evidence of torture. I say so because evidence of severity of pain on him inflicted is completely lacking although he was certainly heavily mistreated before his detention.

63. Regarding his detention at Shimo La Tewa and the provision conditions therein, I can do no better than quote the decision in **Koigi Wamwere (supra)** where, having complained of deplorable conditions at his detention centres, the learned High Court Judge declined to find that such conditions amounted to torture. In upholding that decision, the Court of Appeal stated thus;

*“We take the view, as did the learned judge, that whereas prison conditions as picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined. We do not understand the learned judge to have been speaking as an apologist for, or gatekeeper for the State in stating, obiter, that to hold that the appellant had been tortured would be opening floodgates of litigation on the same basis by all persons who passed through the Kenya prisons system at the time. Such an avalanche of litigation would, of course, have grave and deleterious effects which the judge, as a responsible judicial officer, could not afford to be oblivious to.”*

64. I take the same position and save for my findings on degrading treatment, the claim of torture is dismissed.

**Whether the Petitioner’s right to freedom of conscience, religion, belief and opinion, right to freedom of expression, freedom of association and political rights were violated**

65. According to the Petitioner, all the above rights were violated when he was abducted from Kampala, subjected to torture, inhuman and degrading treatment and later detained for holding differing beliefs from those of the Government of the day. In that regard **Section 70** of the **Repealed Constitution** provided thus;

*“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –*

*(a) ...*

*(b) freedom of conscience, of expression and of assembly and association and*

*(c) ...”*

66. Further **Section 78(1)** provided as follows;

*“(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.”*

67. Juxtaposing the Petitioner’s complaints with the above provisions, it is unclear to me how the freedom of religion may have been violated because nowhere is there evidence that the Petitioner’s religion was in any way an issue leading to his arrest and detention.

68. Further, **Section 70** of the **Repealed Constitution** had the following proviso;

*“... the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”*

69. In that regard, in the detention order signed by Mr. J. R. Oswald, it was alleged that the Petitioner had consorted within and without Kenya for purposes of overthrowing, by subservice means, the lawfully constituted Government of Kenya; that he had used propaganda directed at the said Government; that he had obtained money from foreign sources for the purpose of undermining the political order and stability of Kenya; that he had planned and conspired to conduct guerrilla warfare against the people and Government of Kenya; that he had assisted in the preparation, circulation and distribution of subversive literature urging and inciting people to take up arms against the Government and the people of Kenya and that these **“activities as set out above have been aimed at seizure of the Government of Kenya by violence and subversive means and at the destruction of the system of Government established by law. The preservation of public security makes [his] detention necessary”**.

In that context and having looked at the record, it is impossible to tell whether the above allegations were true or not. The Petitioner, in his evidence, never explained why he relocated to Uganda having held high profile jobs in Kenya. I have no doubt however that he was arrested in Uganda and spirited back to Kenya before his detention and since the rights set out above were never absolute and could be limited in the public interest including public security, to hold that his rights were violated in an evidential vacuum would be to descend to the realm of speculation as a basis for adverse findings against the Respondent.

## **Remedies**

70. From my findings above and revisiting the prayers in the Petition, I have found that there was a

violation of the Petitioner's right to personal liberty prior to his lawful detention. I have also found in favour of the Petitioner with regard to the cruel, inhuman and degrading treatment that he was subjected to.

71. I have however not found in his favour with regard to the freedom from torture, right to property, freedoms of religion, expression and association for purely evidential reasons. I have specifically found that where the claim to property was couched in terms of special damages, proof thereof was necessary and even with the forensic evidence of PW2, Kimani Mwega, the foundational basis for the claim was lacking and his evidence was thereby rendered redundant.

72. In the above context, the Petitioner has sought general damages for the alleged violation of his rights. He has also sought aggravated, punitive and/or exemplary damages for the arbitrary, high handed and oppressive conduct of the Respondent's agents.

73. On the latter claim, I can do no better than quote the Court of Appeal holding in **Gitobu Imanyara (supra)** as follows;

*“ ... we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the Government in dealing with human right violations.”*

I am duly guided and I will say no more on that issue.

74. On general damages, the same Court stated that ;

*“...that the assessment of damages is a discretionary relief ...”*

and that being the case and doing the best I can in the unique circumstances of this case, I will award the Petitioner **Kshs.3 Million** for the violation of his rights as explained above. In doing so, I have taken into account past decisions of the High Court in **Wachira Weheire vs AG, H.C.C.C. 1184 of 2003** where the Petitioner was awarded Kshs.2.5 Million for unlawful confinement and torture as well as **Harun Thungu Wakaba and Others v AG Nairobi, Miscellaneous Application 1411 of 2004**; where the Plaintiffs were awarded between Kshs.1 Million and 3 Million in similar circumstances.

### **Disposition**

75. For the above reasons, the proper orders to make in this case are as follows:

*i) That in detaining the Petitioner unlawfully from 7<sup>th</sup> March, 1968 to 19<sup>th</sup> December, 1968, the Respondent and/or its agents, breached the Petitioner's fundamental right to personal liberty and security of the person.*

*ii) That by mistreating and mishandling the Petitioner while in the custody of Special Branch officers during the above period, the Respondent and/or its agents violated the Petitioner's right not to be subjected to cruel, inhuman and degrading treatment.*

*iii) The Petitioner is awarded **Kshs.3 Million** as general damages for the above violations.*

*iv) The Petitioner is awarded costs and interest on the above sum and on costs until payment in full.*

76. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Kiragu for Petitioner

Mr. Oburah for Respondent

**Order**

Judgment duly ready.

**ISAAC LENAOLA**

**JUDGE**