



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

**PETITION NO. 288 OF 2013**

**BETWEEN**

**ANDREW WASIKE MUNYOLE..... PETITIONER**

**AND**

**ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Andrew Wasike Munyole, describes himself as a Kenyan citizen adult of sound mind and has brought these proceedings against the 1<sup>st</sup> Respondent, the Attorney General, as the legal representative of the Kenyan Government by dint of **Article 156** of the **Constitution**, and the 2<sup>nd</sup> Respondent, the Commissioner of Police. In his Petition dated 3<sup>rd</sup> May 2013, he alleges that he was wrongly prosecuted by the State and that various constitutional rights that he was entitled to, were violated in that regard and that he ought to be *inter alia* compensated for the violations of those rights.

**The Petitioner's Case**

2. In his Affidavit in support of the Petition sworn on 3<sup>rd</sup> May 2013, the Petitioner contended that on or about 28<sup>th</sup> March 1995, at 12:10 a.m., a then Chief Inspector of Police, Mr. Wachira, together with twelve other people raided his home at Kawangware 46, in Nairobi, and without any reasonable cause, illegally arrested him. That during the raid, the police confiscated his belongings including a Royal double deck and Trident Medium Radio Cassette, one black briefcase, one camera, two projectors, several files with personal effects, and original school and college certificates.

3. The Petitioner also contended that following his arrest, he was unlawfully detained at Naivasha Maximum Prison's Detention Block for twenty one days without being arraigned in Court or any charges being preferred against him and that during the detention, he was subjected to torture, humiliation and embarrassment.

4. Additionally, upon his arrest, he was not informed of the offence he had committed although the police were categorical that they were going to deal with him ruthlessly because of his involvement in political activism and propaganda, alongside other youth from Bungoma, due to the ethnic clashes in which many

people had been killed, maimed, displaced and suffered massive destruction of property. Further, that he was accused of being a member of the February Eighteen Republican Army (FERA), an illegal organisation.

5. It was also the Petitioner's assertion that he was locked up in an isolated cell and subjected to brutal beating with sticks, metal bars and other crude weapons and that he was subjected to verbal abuses, taunts and mocking and as a result he suffered excruciating pain, emotional distress and psychological trauma.

6. It was also his case that after three weeks, he was taken to a Nairobi Court where he was to be charged with the offence of conspiring with other people to overthrow the Kenyan Government. However, the charge was not preferred because there was a technicality about charging people with treason when there was no co-accused or witnesses identifying him as an offender. Accordingly, that he was subsequently charged with the offence of being in possession of Government stores and retaining suspected stolen property and he was also accused of being in possession of sophisticated gadgets which the Prosecutor alleged no ordinary man could possess. In the Petitioner's view however, the alleged sophisticated gadgets were only his projector, video player and cassettes, a television and a small radio.

7. The Petitioner contended further that following his arrest and detention and before he was charged in Court, his family, through the firm of Messrs Onyango Otieno and Co. Advocates, filed a *habeas corpus* Application namely **Misc. Criminal App. No. 157 of 1995** in order to cause Inspector Wachira to produce him in Court. That the Application was allowed and he was subsequently arraigned in Court and charged in **Nairobi Chief Magistrate's Court Criminal Case No. 1425 of 1995**. That the said case was then heard and on 7<sup>th</sup> April, 1997, it was dismissed under **Section 210 of the Criminal Procedure Act, Chapter 75 of the Laws of Kenya** as he had no case to answer.

8. Further to the above, according to the Petitioner, his arrest and prosecution generated a lot of public interest and as a result, the same was published in various media and newspapers. That the allegations against him as stated in the said reports portrayed him as an unfaithful and untrustworthy person in the eyes of the public and that perception lead to immense loss of business opportunities for him. That at the material time, being accused of a political offence was not only life-threatening, but would also lead to social ostracization and collapse of business which he subsequently experienced. Furthermore, that the confiscation of his original school certificates by Inspector Wachira has to date denied him an opportunity of obtaining any meaningful employment and he has thereby been rendered destitute.

9. The Petitioner has therefore asserted that his prosecution in the criminal case was driven by malice and based on flimsy evidence, biased investigations, erroneous and oppressive application of the law and as such, the Respondents ought to be held accountable and ordered to *inter alia* compensate him for the same. That his prosecution was also nothing but a camouflage of a persecution on account of his political persuasions and opposition to oppression of ordinary people. In addition to the above, he stated that in early 1995, a By-election was held in Webuye Constituency, Bungoma, following a successful Election Petition against one, Hon. Musikari Kombo and since he hails from the said Constituency, he was one of the Nairobi-based elites who campaigned vigorously in the By-election as a result, the candidate for Ford-Kenya Party won the By-election and it is his involvement in the said campaigns and the victory that occasioned his predicament as stated elsewhere above.

10. Further, that even after his acquittal, he continued being subjected to political harassment and intimidation by Special Branch Police officers to the extent that he was forced to flee Kenya and seek political asylum in Netherlands. That in the circumstances, his arrest, detention and torture were unlawful under the **Repealed Constitution**, and it was neither safe nor feasible to use the Courts to get substantive justice at the time. Further, through his advocates, he wrote to the officer-in-charge of Kabete Police Station demanding the release of his belongings confiscated during his arrest but the letter elicited no response and none of his items was ever returned to him.

11. In his Written Submissions dated 29<sup>th</sup> April 2016, the Petitioner relied on the decisions in **Chripine Otieno Caleb vs Attorney General, Civil Suit No. 782 of 2007**, **James Karuga Kiiru vs Joseph Mwamburi and 3 Others, Nairobi Civil Appeal No. 171 of 2000**, **Kagane vs Attorney General (1969)**

EA 643, **Simba vs Wambari (1987) KLR 601**, **Thomas Mboya Oluoch and Another vs Lucy Muthoni Stephen and Another, HCCC No. 1729 of 2001**, and **Nzoia Sugar Company Ltd vs Fungututi [1988] KLR 399** in support of his argument that the ingredients of a malicious and wrongful prosecution are that the prosecution must have been instituted by the Inspector General of the Police, the police must have acted without reasonable or probable cause, with improper and wrongful motive in the use of the legal process, and that the criminal proceedings were brought to a legal end and the accused was acquitted of the charge. The Petitioner in that regard submitted that the said ingredients are present in the circumstances of his case.

12. The Petitioner submitted further that the Respondent's actions amounted to a violation of his rights and fundamental freedoms under **Sections 70, 72, and 74 of the Repealed Constitution** and while relying on **Anne Njogu and 5 Others vs Republic [2007] eKLR**, it was his other argument that his right to personal liberty was violated as a result of his illegal detention without being taken to Court within 24 hours of his arrest.

13. The Petitioner further placed reliance on the decisions in **Harun Thungu Wakaba vs The Hon. Attorney General [2010] eKLR**, **Jaoko Ooro vs The Attorney General, Petition No. 133 of 2011 (Consolidated with Petition Nos. 68 of 2011, 35, 37, 39, 40 of 2010)**, and **Szocik vs England and Wales (Attorney General) 1480 of 2012, BCSC**, in support of his case and maintained that the police brutality he experienced caused him excruciating pain, emotional distress and psychological trauma.

14. According to the Petitioner, the Court ought therefore to grant orders of compensation by way of damages and be guided by the decisions in **John Michuki Maina and Another vs Attorney General [2014] eKLR**, **Rumba Kinuthia and Others vs Attorney General, HC Misc App. No. 1408 of 2004**, **Jennifer Muthoni Njoroge and 10 Others vs Attorney General [2012] eKLR**, **Obongo and Another vs Municipal Council of Kisumu [1971] EA 91** and **Rookes vs Benard and Others [1964] AC 1129** in doing so.

15. The Petitioner additionally argued that the Respondent's Grounds of Opposition are merely meant to counter the averments in the Petition and are in no way a response to the allegations levelled against them neither did they respond to the allegations of fact made nor did they bring out any facts to controvert the allegations. He relied on the decision in **Reverend Lawrence Ndege Imunde vs The Republic, JR. App. No. 693 of 2008** in that regard and argued further that he has discharged his burden of proof while the Respondents have failed to address the accusations levelled against them.

16. As regards the records of his alleged detention at Naivasha Maximum Prison, the Petitioner relied on the holding in **Jennifer Muthoni Njoroge and 10 Others vs Attorney General (supra)** thus: *"... it is a matter of public notoriety that the Kenya police in yester years kept no records of certain persons in their custody."*

17. Further reliance was placed on **Jilan Sabila Labo vs Attorney General [2014] eKLR** and **Kariuki Gathitu vs Attorney General, Petition No. 1188 of 2003** and it was additionally submitted by the Petitioner that the Respondents have been mere escapists and have not controverted the facts alleged in the Petition and as such, the Court ought to allow the same.

18. For the foregoing reasons, the Petitioner urges the Court to grant the following orders:

*a. A declaration be issued to declare that the prosecution of the Petitioner was wrongful and malicious.*

*b. A declaration be issued to declare that the Petitioner was arrested and subjected to inhuman and degrading treatment by the police in violation of his rights under Sections 70, 72 and 74 of the Repealed Constitution.*

*c. An order of compensation by way of general damages for wrongful and malicious prosecution.*

*d. An order for compensation of the violation of his rights and fundamental freedoms under Sections 70, 72, 74, 75, 76, 77, and 79 of the Repealed Constitution.*

*e. Exemplary and/or punitive damages.*

*f. Cost of this suit.*

*g. Costs of this Petition be paid by the Respondent in any event.*

### **The Respondents' Case**

19. The Respondents filed Grounds of Opposition dated 26<sup>th</sup> April, 2016 and Written Submissions dated 16<sup>th</sup> May 2016. It was their contention that there is no report or any record at Naivasha Maximum Prison to the effect that the Petitioner was illegally confined there for 21 days as he alleges and neither has he adduced any evidence in support of his allegations that he was tortured. Further, that it is not possible to locate, retrieve and authenticate the relevant entries in the Naivasha Maximum Prison register given that the alleged events took place seventeen or so years ago.

20. The Respondents further asserted that the Kenya Police Service is professional in undertaking its statutory mandate and it does not condone false imprisonment and neither does it torture any suspects who are in their custody. Additionally, that being one of the custodians of the Rule of Law, it respects each individuals equality and freedom before the law, right to own property, right to privacy and freedom of movement and residence as enshrined in the **Constitution**

21. Further, according to the Respondents, the Police are under a statutory duty to investigate complaints of a criminal nature that are reported to them or come to their knowledge and are therefore mandated to take precipitate action that is anchored by law. In their further view, the present Petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Court as the Petitioner's rights and fundamental freedoms have not been breached in any way and as such, the same ought to be dismissed.

22. In addition, in their Written Submissions, the Respondents argued that they did not call any witnesses because of the delay in filing the present Petition, and that concerned officers have since either died or retired. Accordingly, that the documentation relating to the issues raised in the Petition have also since been destroyed, lost or worn out. In the Respondents' further submission, the impossibility of them filing an Affidavit in reply ought not to be used as a red herring by the Petitioner to deny the Attorney General the fruits of justice.

23. The Respondents also pointed out that the Petitioner and his witnesses blatantly lied to the Court in their oral testimony that he was never at any time involved in the affairs of FERA, and yet he knew its activities and was its member. In the Respondents' view therefore, the Court ought not to take regard of the Petitioner's evidence as it is a mere fabrication.

24. While relying further on **Lt. Col. Peter Ngari Kagume and Others vs Attorney General, Petition No. 128 of 2006**, and **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya**, it was the Respondents' other contention that the burden of proof lies with the Petitioner and yet he has failed to discharge the same in the present case. Further, that the Petitioner has not produced any tangible evidence that can assist the Court in granting him the orders sought and as such, the Petition is ill-advised and ought to fail.

25. On the prayer for an award of damages sought by the Petitioner, the Respondents relied on the decision in **Maharaj vs Attorney General of Trinidad and Tobago, (No 2) PC [1979] AC 385** for the proposition that damages in constitutional matters are not meant to restore a person to the state that he was in before a violation as is the principle in tortuous claims but are meant to give just satisfaction. That in the alternative and in event that the Court is inclined to grant the declarations sought in the Petition, it ought to be guided by the principles outlined in the **Peter Ngari Kagume case (supra)**, on the principles

to be followed.

26. For the foregoing reasons, the Respondents argued that the Petition lacks merit and ought to be dismissed with costs.

### **Determination**

27. I have considered the respective pleadings and submissions by the Parties and the key question for determination is whether there has been any violation of the Petitioner's rights and fundamental freedoms as alleged. If the Court answers the question in the affirmative, it will have to further determine the remedies available to the Petitioner, if any.

28. In that regard, the Petitioner has alleged contravention of his various rights under the **Repealed Constitution** namely under **Sections 70, 72, 74, 75, 76, 77 and 79**. I shall address each of those rights herebelow;

### **Whether the Petitioner was arrested and detained beyond the period prescribed by law**

29. **Section 70** of the Repealed Constitution provided for freedom from non-discrimination on the grounds of 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: other rights protected are the following:

- a. life, liberty, security of the person and the protection of the law;
- b. freedom of conscience, of expression and of assembly and association; and
- c. protection for the privacy of his home and other property and from deprivation of property without compensation.

30. **Section 72 (3)** on the other provides as follow;

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.*

4. ...

31. In addressing the above provisions, the first question that I must dispose is whether the Petitioner was arrested and detained at all. In that regard, the Respondents have rebutted the assertions that the Petitioner was arrested and detained and argued that there are no records to prove those assertions. I note however that in a Notice of Intended Prosecution dated 17<sup>th</sup> February 1998, which is on the record, the Petitioner notified the Attorney General of his intention to institute proceedings following his arrest and detention at

a Police Station for 20 days and that the Petitioner had to file an Application for an *habeas corpus* order in **Miscellaneous Application No. 157 of 1995**, when one Inspector Wachira was forced to produce him in Court. Based on those facts alone, I am satisfied that the Petitioner was indeed arrested and detained by police officers as alleged. The Respondents have been unable to challenge those facts in any event.

32. The next question that I must answer is whether the Petitioner's right under **Section 72 (3) (b)** of the **Repealed Constitution** was violated. In that context, as reproduced herein above, the law mandated the State and its agents to ensure that any person arrested for whatever offence, was taken to Court as soon as was reasonably and practicably possible after 24 hours of their arrest. The same provision is reiterated under **Article 49 (f) (i)** of the **Constitution, 2010** which gives an accused person the right to be brought before Court as soon as is reasonably possible but not later than 24 hours. In the present case, as I have already held, the Petitioner was arrested and detained for almost 20 days before being brought to Court. Furthermore, his arraignment in Court was as a result of the Application for an order of *habeas corpus* that was filed in **Miscellaneous Application No. 157 of 1995**. I am therefore inclined to hold that his arrest and detention for more than 24 hours before being taken to Court was in violation of **Section 72 (3) (b)** of the Repealed Constitution.

33. In that context, the holding of the Court in **Republic vs Harun Kimathi Ntoiti, Criminal Case 75 of 2005** is quite insightful on the matter. The High Court at Meru pointed out thus:

*“That old constitution required a person arrested for a capital offence to be produced before court within 14 days. If not produced within 14 days the state was obligated to show that he was produced as soon as was reasonably practicable... Under section 72 (3) (b) of the old constitution, the police were required to present a person charged with a capital offence before court within 14 days of arrest. If they failed to so present a person the state was obligated to show that such a person was presented before court as soon as was reasonably practicable.”*

34. Furthermore, in **Ann Njogu and 5 Others vs Republic, Misc. Cr. App. No. 551 of 2007** it was pointed out that:

*“... the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60<sup>th</sup> minute of the 24<sup>th</sup> hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.....”*

35. As was also stated out in the case of **Evanson K. Chege vs Republic, Misc. Criminal Application No. 722 of 2007**:

*“I hold that there was a violation of the applicant's trial-rights as provided for in S. 72 (3)(b) of the Constitution. I hereby declare that the applicant thus suffered in his safeguarded right; and that the applicant may make an application before the High Court for compensation, by virtue of s. 72 (6) of the Constitution....”*

36. Based on the above findings, it is therefore my holding that the Petitioner was held beyond the period envisaged by law and since the Respondents have failed to justify their actions in that regard, the claim must succeed and the Petitioner is consequently entitled to compensation for his unlawful arrest and detention.

### **Whether the Petitioner was Tortured**

37. **Section 74** of the **Repealed Constitution** was to the effect that:

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

*2. Nothing contained in or done under the authority of any law shall be held to be inconsistent*

*with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11<sup>th</sup> December, 1963.*

38. The Section thus prohibited torture and inhuman degrading treatment and the same prohibition is reiterated under **Article 29 (d)** of the **Constitution, 2010** which prohibits torture in any manner, whether physical or psychological. In that context further, Article 1 of the **Convention against Torture** defines ‘torture’ to mean:

*“... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...”* -see also **Rojas Garcia vs Colombia 687/96 at the Human Rights Committee.**

39. In the present case, the Petitioner alleged that he was subjected to torture in that he was subjected to brutal beatings with sticks, metal bars and other crude weapons. Having found that the Petitioner was arrested and detained, and his arraignment in Court was a result of a Petition for *habeas corpus* and there being no more than a bare denial of this serious assertion, I am satisfied that the Petitioner was subjected to torture and inhuman degrading treatment during his arrest and detention which was in violation of his right under **Section 74 (1)** of the **Repealed Constitution**. I must add here that in doing so, I watched the Petitioner in Court during his oral testimony and his evidence in this regard was also unshaken.

#### **Violation of the Right to Property**

40. **Section 75** of the **Repealed Constitution** guaranteed the right to property in the following terms:

*1. No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –*

*a. the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and*

*b. the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and*

*c. provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.*

*2. Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—*

*a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and*

*b. the purpose of obtaining prompt payment of that compensation:*

*Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.*

3. ...

4. ...

*Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament.*

41. The same right is protected under **Article 40** of the **Constitution, 2010** and on the violation of his right to property, the Petitioner claims that the police seized a Royal double deck and Trident Medium Radio Cassette, one black briefcase, one camera, two projectors, several files with personal effects, as well as original school and college certificates.

42. I also note that in his letter dated 12<sup>th</sup> April 1997, addressed to the Officer-in-charge of Kabete Police Station, and the Notice of Intention to Institute Proceedings dated 17<sup>th</sup> February 1998, addressed to the Attorney General, the Petitioner mentioned the loss of the aforesaid items. No response was however given in that regard. The Respondents have not controverted the assertion that the said items were taken and used as exhibits. It therefore follows that the State was under an obligation to return the same to the Petitioner following his acquittal.

43. Based on the foregoing, I am inclined to reach the inescapable conclusion that the Petitioner has made out a case of violation of his right to property as guaranteed under **Section 75** of the **Repealed Constitution**.

#### **Violation of the Right against Arbitrary Searches and Freedom of Expression**

44. **Sections 76** and **79** of the **Repealed Constitution** made provisions pertaining to protection against arbitrary searches and the freedom of expression.

45. **Section 76** stated that:

*1. Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.*

2. ...

46. **Section 79** provided that:

*1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.*

2. ...

47. The said rights are now also guaranteed under **Articles 31** and **33** of the **Constitution, 2010**, respectively. The Respondents have not controverted the fact that the police forcibly entered into the Petitioner's house prior to his arrest. No justification whatsoever has been given by the Respondents for the forcibly entry and search of the Petitioner's premises and as such, it is my finding that the Petitioner's right against arbitrary search was violated.

48. As regards the violation of the freedom of expression, other than merely asserting that his right to freedom of expression was violated, the Petitioner has not demonstrated the manner in which the said freedom was impeded. It should not be lost that the principle enunciated in the **Anarita Karimi case**

**(supra)** that a party that alleges infringement of any right is under a duty to plead precisely the manner in which their right has been infringed, is still applicable. As such, I am inclined to agree with the Respondents that the Petitioner has failed to demonstrate how his right to freedom of expression has been infringed.

49. Finally, on this aspect of the Petition, the Petitioner contended that his rights under **Section 77** were violated. The said Section provided for the rights of accused persons in the following terms:

***1. If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.***

***2. Every person who is charged with a criminal offence—***

***a. shall be presumed to be innocent until he is proved or has pleaded guilty;***

***b. shall be informed as soon as is reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;***

***c. shall be given adequate time and facilities for the preparation of his defence;***

***d. shall be permitted to defend himself before the court in person or by a legal representative of his own choice;***

***e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and***

***f. shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.***

***3. When a person is tried for a criminal offence, the accused person or a person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.***

***4. No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.***

***5. No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.***

***6. No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.***

***7. No person who is tried for a criminal offence shall be compelled to give evidence at the trial.***

**8. No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed, in a written law:**

***Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed.***

**9. A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.**

**10. Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.**

**11. Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority—**

***a. may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or***

***b. may by law be empowered or required to do in the interests of defence, public safety or public order.***

**12. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—**

***a. subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts;***

***b. subsection (2) (e) to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or***

***c. subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding a trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that a court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.***

**13. In the case of any person who is held in lawful detention, subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in lawful detention.**

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

**15. In this section “criminal offence” means a criminal offence under the law of Kenya.**

50. I have deliberately reproduced the above Section to show that the Petitioner has however not

demonstrated how this provision has been contravened in regard to his case and as such, I am unable to find any violation of the said right as alleged. I say so because he was produced in Court upon an application for habeas corpus orders being filed by his lawyers and thereafter, he was granted all the above rights until his acquittal. How then can it be said that he was denied the above rights? The answer can only be in the negative and I so find.

### **Whether the Petitioner was Maliciously Prosecuted**

51. On the allegations of malicious prosecutions, I can do no better than to produce at length the dictum by the East African Court of Appeal in **Mbowa vs East Menjo District Administration [1972] EA 352**, where it was held as follows:

**“The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...”**

The Court went on to add;

**The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property...The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not.**

The Court then concluded thus;

**The plaintiff could not possibly succeed without proving that the criminal proceedings terminated in his favour, for proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged...The law in an action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge...”** (Emphasis added)

52. I note further that Ojwang, J (as he then was) in **Thomas Mboya Oluoch and Another vs Lucy Muthoni Stephen and Another, Nairobi HCCC No. 1729 of 2001** expressed himself thus:

*“Unless and until the common law tort of malicious prosecution is abolished by Parliament, policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State’s prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes”.*

53. Based on the expositions above, the law is therefore that for a party to make out a case for malicious prosecution, four key essentials must be proved that is, the criminal proceedings must have been instituted by the Respondent; the Respondent acted without reasonable or probable cause and acted maliciously in that, he was motivated by an improper motive; and the proceedings must have been terminated in the Petitioner’s favour, that is, through an acquittal.

54. Applying the foregoing to the present case, the Petitioner’s contention is that he was wrongly prosecuted in **Nairobi Chief Magistrates Court Criminal Case No. 1425 of 1995**. In that regard, it is uncontroverted that the Petitioner was charged therein and acquitted under **Section 210 of the Criminal Procedure Code**. Based on the material before me, I also note that the Petitioner was acquitted on 7<sup>th</sup> April 1997 and following his acquittal, he, through his advocates, in a letter dated 12<sup>th</sup> April 1997, wrote to the Officer-in-Charge of Kabete Police Station demanding the surrender of his items that were being used as exhibits in the said proceedings. Further, on 17<sup>th</sup> February 1998, the Petitioner, through his advocates, served on the Attorney General a notice of intended prosecution pursuant to the **Government Proceedings Act** but no responses were ever received. I am satisfied in that context that the Petitioner has made out a case in support of his allegations of malicious prosecution and that is all to say on the matter.

### Conclusion

55. As I conclude, I must reiterate that cases alleging violation of fundamental rights and freedoms are to be determined on their own merits with each case being looked at in its own circumstances. This Court has in that regard exercised great caution especially when faced with matters alleging violations of rights and fundamental freedoms by the past regimes of governance and that is why the burden and threshold of proof in such cases is applied on a case to case basis following the floodgate of litigation opened as a result of the promulgation of the **Constitution, 2010**.

56. As to the appropriate reliefs in the circumstances, I must reiterate that exemplary damages are not necessary in the circumstances of the present case following the change in regime of Governance and the likelihood of the events leading to this Petition ever occurring again.

57. As I close, I share the sentiments by M.S.A Makhandia J. in **Republic vs James Mwangi Gichuki and Others, Criminal Case 7 of 2007** where he stated thus:

*“We are no longer in 1980’s where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to challenge such conduct. As the court of appeal said recently the courts chose to see no evil and hear no evil giving rise to the infamous Nyayo house torture chambers. The consequences of this silence of conspiracy on the part of the courts was as the court of appeal went on to observe the infamous Nyayo house torture chambers, a history which the courts can never be proud of. It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person...”*

I agree with the Learned Judge and I should add that this Court has been constituent in dismissing

the claim that Petitions such as the present one can be time-barred even with the rider that a Petitioner must explain any inordinate delay and the Petitioner has done so to my satisfaction.

### **Disposition**

58. Based on my findings above, the following are the orders that commend themselves in the circumstances of this case:

**a. It is hereby declared that the Petitioner's right under Section 72 (3) (b) of the Repealed Constitution, not to be held in unlawful custody for more than 24 hours before being taken to Court was violated.**

**b. It is hereby declared that the Petitioner's right to freedom from torture and inhuman degrading treatment, under Section 74 of the Repealed Constitution was violated following the treatment he underwent during his arrest and detention in the hands of police officers.**

**c. It is hereby declared that the Petitioner's right, under Section 75 of the Repealed Constitution, following the withholding of his Royal double deck and Trident Medium Radio Cassettes, one black briefcase, one camera and two projectors.**

**d. It is hereby declared that the Petitioner's right, under Section 76 of the Repealed Constitution, on the right to protection against arbitrary search was infringed following the forcible entry into the Petitioner's house and seizure of his property upon his arrest.**

**e. It is declared that the Petitioner's prosecution in Nairobi CM's Court Criminal Case No.1425 of 1995 was wrongful and was also maliciously undertaken.**

**f. I hereby make an award of Kshs.3 Million as general damages for the above stated violations and as compensation for the Petitioner's wrongful and malicious prosecution.**

**g. The Petitioner shall also have the costs of this Petition plus interest on (f) and costs.**

59. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Mwathe for Petitioner

Miss Irari for Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**