



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.124 OF 2014**

**CONSOLIDATED WITH PETITION NOS. 119, 120, 121, 122, 123, 125, 126, AND 151 OF 2014**

**BETWEEN**

JACOB NTUBIRI JAPHET..... 1<sup>ST</sup> PETITIONER

DAVID KOOME MWITHIMBU ..... 2<sup>ND</sup> PETITIONER

KINOTI SILAS MUGAMBI ..... 3<sup>RD</sup> PETITIONER

JAPHET MURITHI MUKINDIA ..... 4<sup>TH</sup> PETITIONER

GILBERT MURITHI MUGUNA .....5<sup>TH</sup> PETITIONER

PAUL MBAYA MBUI ..... 6<sup>TH</sup> PETITIONER

ZACHARY CHARLES MUTUTA .....7<sup>TH</sup> PETITIONER

JULIUS MWITI THAARA ..... 8<sup>TH</sup> PETITIONER

WILLIAM NGUKU NCHEEBERE ..... 9<sup>TH</sup> PETITIONER

**AND**

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

**JUDGMENT**

**Introduction**

1. It is not lost to everyone that there was an attempted coup in the Republic of Kenya in 1982. It is also in the public domain that various persons were arrested and detained on allegations of being involved in the failed coup in one way or another, and such persons were subjected to various conditions following their arrest and detention. It is against this background that this Court is yet again faced with such a case, where the Petitioners allege violation of various constitutional rights following their alleged arrest and incarceration on the basis that they were involved in the 1982 coup.

## **The Petitions**

2. This Judgment relates to Petitions that were consolidated owing to the similarity in the subject matter therein and they were all filed against the Attorney General of Kenya, who is the Principal Legal Advisor to the Government, and they are as follows:

### **PETITION NO.119 OF 2014**

3. In his Petition dated 20<sup>th</sup> March, 2014, the 1<sup>st</sup> Petitioner, Jacob Ntubiri Japhet, describes himself as an adult male of sound mind and a Kenyan citizen residing in Nairobi. He states that on 1<sup>st</sup> April, 1975 he was recruited in the Kenya Air Force and trained at the Armed Forces Training College in Lanet, (Nakuru Basic Military Training School) after which he graduated as a Private. Further, that he underwent further training at the Eastleigh Ground Training School of Airframe and Engines and graduated as a Senior Private 1 Aeronautical Engineer Class 1 in Air Force Flames.

4. The Petitioner's case is that on 1<sup>st</sup> August 1982 he was at home in Meru and following an announcement on the VOK Radio, he proceeded to Meru Police Station on 7<sup>th</sup> August 1982, together with two of his colleagues, to report as had been required of him and others. That he was thereafter taken to Naivasha Maximum Prison where he was locked up in a water-logged dark cell with no windows and left without food, drink, and proper sanitation for five days. That he was also subjected to torture, stressful interrogation and screening during the said period of incarceration.

5. The Petitioner states further that after four months in remand, he was transferred to Kamiti Maximum Prison for a further three months after which he was discharged and warned never to go near any Armed Forces gate.

6. The Petitioner asserted that he is and was innocent of any charges and as such he was wrongfully remanded and discharged from duty and that his employer, the Kenya Air Force, has not lawfully discharged him from his duties up to date. Further, that his imprisonment resulted in the loss of his personal belongings which were in his billet at the Kenya Air Force Base in Nanyuki. That his physical, psychological, economic and social life was adversely affected and he suffered and continues to suffer physical deformity of the left lower jaw, stigma, as well as post-traumatic stress disorder.

7. It is his other contention that outside the prison walls, life has been unbearable due to stigmatization by employers and the community at large and that the Kenya Army and the Kenya Prisons officers had no powers to hold him in unlawful custody for more than 24 hours and as such, his incarceration for 7 months was in violation of his right to personal liberty as protected under **Section 72 (1) (3) and (5) of the Repealed Constitution**. That they also had no powers to hold him *incommunicado* and withhold his emoluments and salary from 1<sup>st</sup> August, 1982 until February, 2011 being his anticipated date of retirement, and terminal benefits from February 2011 to date.

8. For the foregoing reasons, the Petitioner seeks the following remedies:

***a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prisons officers for 11 months with effect from 1<sup>st</sup> August 1982 up to 23<sup>rd</sup> June 1983 at Kamiti Maximum Prison and Naivasha Maximum Prison.***

***b) A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms.***

***c) General, exemplary, and aggravated damages under Section 84 (2) of the Constitution (1969) be awarded.***

***d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal***

*benefits and pension.*

*e) Costs of this Petition.*

*f) Interest on (c), (d) and (e) above.*

*g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.*

#### **PETITION NO.120 OF 2014**

9. The 2<sup>nd</sup> Petitioner, David Koome Mwithimbu, describes himself as a Kenyan male adult of sound mind and was recruited into the Kenya Air Force in February 1978 and thereafter taken for training in Lanet. That after his basic training, he was posted to Eastleigh Air Base wherein he undertook training as a supplier after which he was posted to Nanyuki Air Force Base to work as a Store man in the F5 (Tiger) Squadron.

10. It is his case that on the morning of 1<sup>st</sup> August 1982 there was a commotion at the Base and he did not know what was happening. That when he stepped out, he was arrested by a Kenya Army officer and taken to 1<sup>st</sup> Kenya Rifles Base in Nanyuki on the same day and that he was thereafter taken to Kamiti Maximum Prison on 2<sup>nd</sup> August 1982 where he stayed until 10<sup>th</sup> August 1982. The Petitioner has alleged further that he was interrogated at Kamiti before being taken to Lang'ata Barracks before a Court Martial wherein he was imprisoned without being given a chance to defend himself and neither was he permitted to retain the services of an advocate.

11. The Petitioner has also contended that he lost all his documents and personal effects and that fact has cost him almost his entire life as he has no record of his studies to enable him obtain any job. That he was unlawfully incarcerated at Kamiti prison for one year and was subjected to mental and physical torture in an isolated prison cell. In that regard, he has argued that his right to personal liberty under **Section 72 (1), (3) and (5) of the Repealed Constitution** was violated and the Kenya army and Prisons officers had no power to hold him *incommunicado*, withhold his emoluments and salary from 1<sup>st</sup> August 1982 until February 2011 being his anticipated date of retirement, as well as his pension and terminal benefits.

12. In a Supplementary Affidavit sworn on behalf of the Petitioner by his wife, Mrs Celina Kagwira Koome, on 4<sup>th</sup> September 2015, she deponed that the Petitioner, Mr. David Koome Mwithimbu, died on 25<sup>th</sup> May 2014 due to pulmonary embolism as a result of severe anaemia caused by hypertension and that the hypertension developed as a result of the physical and psychological torture he suffered while he was detained in prison.

13. In his Written Submissions dated 14<sup>th</sup> April, 2016, the said Petitioner relied on the decisions in **David Gitau Njau and 9 Others vs Attorney General, Petition No. 340 of 2012, Robert Njeru Nyaga vs Attorney General, Petition No. 261 of 2014, Gerald Juma Gichohi and 9 Others vs Attorney General, Petition No. 587 of 2012, and Grace Wanjiru Miano and Another vs Attorney General, Petition No. 226 of 2013** in support of his case and submitted further that the Court ought to take into account the uncontroverted facts in the present case, and judicial notice of the adverse political circumstances that existed prior to the promulgation of the **Constitution, 2010**, which hindered him from filing the present claim against the State. In that regard, he argued that the Court also needs to take into consideration the provisions of the **Repealed Constitution** and the said judicial decisions and grant an award of Kshs. 10, 000, 000/= as reasonable damages in the circumstances of his case.

14. As a result of the foregoing, the Petitioner therefore urges the Court to grant the following orders:

*a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for eight months with effect from 2<sup>nd</sup> August, 1982 up to October, 1982 at Kamiti Maximum Prison.*

***b) A declaration that the Petitioner is entitled to payment and compensation for violations and contraventions of his fundamental rights and freedoms.***

***c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.***

***d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pensions.***

***e) Costs of this Petition.***

***f) Interest on (c), (d), and (e) above.***

***g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.***

#### **PETITION NO. 121 OF 2014**

15. The 3<sup>rd</sup> Petitioner, Kinoti Silas Mugambi, describes himself as an adult male person of sound mind residing in Nairobi. In his Petition dated 20<sup>th</sup> March 2014 together with his Affidavit in support, he deponed largely in regard to his various training, achievements, and employment in various capacities in the Kenya Air Force from 1976 onwards.

16. It is his case that on 31<sup>st</sup> July 1982, he was at Eastleigh Airbase where he stayed until the afternoon when he left to visit his friend at Buruburu Estate within Nairobi. The following day, fighting broke out between Airforce personnel and Army personnel on allegations that the former had wanted to overthrow the then Government in power. He did not return to the Base until 3<sup>rd</sup> August 1982, when he reported at the Eastleigh Airbase following the directive that all Airforce personnel were to report to their respective work stations or a nearby police station, after which, he was arrested and thereafter taken to Kamiti Maximum Prison.

17. The Petitioner has contended that while at Kamiti, he was interrogated by Kenya Army officers and thereafter transferred to Naivasha Maximum Prison. That during his confinement at Naivasha, he volunteered to be interrogated in the hope that he would be released but instead, he was subjected to torture, locked up in a dark cell with no windows and which was a water logged cell. He was also held therein stark naked without food and proper sanitation for five days and thereafter transferred to Kamiti Maximum Prison.

18. It is the Petitioner's further case that he was arraigned before a Court Martial at Langata Barracks on 16<sup>th</sup> October, 1982 and sentenced to three years' imprisonment on charges of Mutiny. That he was thereafter taken to Shimo La Tewa Prison in Mombasa where he served the sentence until 14<sup>th</sup> October 1985, when he was released and thereafter discharged from duty. In that regard, he has asserted that he was and still is innocent and as such, he was charged, convicted and discharged from service wrongfully. Further, that he lost all his personal belongings, academic and professional certificates as a result of his imprisonment and as such, he is to-date unable to secure a job due to the said loss and stigmatization.

19. The Petitioner's other submission is that as a result of the aforesaid events, his physical, psychological, economic and social life was adversely affected and he suffered and still suffers physical pain, stigma, as well as Post-traumatic stress disorder.

20. In addition, that the Kenya Army and the Kenya Prisons officers had no statutory power to hold him in unlawful custody for more than 24 hours and therefore his incarceration for eight months was in contravention of his right to personal liberty as guaranteed under **Section 72 (1), (3) and (5)** of the Repealed Constitution. That they further had no power to hold him *incommunicado* and to withhold his emoluments and salary from 1<sup>st</sup> August, 1982 to February, 2011, being his anticipated date of retirement,

and his terminal benefits from February, 2011 to date.

21. The Petitioner finally asserted that the Kenya Air Force has to-date not dismissed him from his duty and that he seeks for compensation for illegal imprisonment, dismissal, torture, loss of property and loss of terminal benefits. The Petitioner now therefore seeks the following reliefs:

***a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for 8 months with effect from 1<sup>st</sup> August, 1982 up to 14<sup>th</sup> October, 1985 at Shimo La Tewa Prison in Mombasa.***

***b) A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms.***

***c) General, exemplary, and aggravated damages under Section 84 (2) of the Constitution.***

***d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pension.***

***e) Cost of this Petition.***

***f) Interest on (c), (d) and (e) above.***

#### **PETITION NO. 122 OF 2014**

22. In his Petition dated 20<sup>th</sup> March, 2014, the 4<sup>th</sup> Petitioner, Japhet Murithi Mukindia, describes himself as a Kenyan adult male citizen of sound mind. He depones that he underwent training at the Armed Forces Training College in Lanet, Nakuru and subsequently, upon completion, he was posted to the Kenya Air Force headquarters in Eastleigh, pending further deployment. That he thereafter underwent Basic Radio/Radar Systems Training at Ground Training Squadron and he was thereafter posted to the Kenya Air Force Nanyuki Barracks where he was based at the Avionics Workshop for Field Training Detachment and that he was later deployed to the Microwave Communications Project.

23. He contends that on 31<sup>st</sup> July 1982, he was visiting one of his cousins in Limuru where he spent the night. That he was never aware of any plans of the impending attempted coup but only came to learn of it on 1<sup>st</sup> August 1982. That in compliance with the Armed Forces Standing Orders, he reported back to the Eastleigh Base, where to his surprise, he was arrested upon entering, after he had joined a group of Kenya Air Force airmen who were erecting a white flag as a sign of peace and that he was thereafter transferred to Naivasha Maximum Prison as Kamiti Prison was by then full of airforce service men. He was interrogated and tortured incessantly by army officers and eventually, he was charged on allegations of engaging in an attempted coup. That in that regard, he declined to sign a forced confession statement which precipitated all forms of torture including physical harm and denial of food.

24. The Petitioner has contended further that he was denied legal representation in spite of his insistence and demand for the same and his request for a proper Court process was also declined. That he was discharged from the Kenya Armed Forces on condition that he plead guilty to the charges, and alternatively, that he was threatened with further detention or summary execution by a gunshot. Further, that whereas he was initially denied food for several days, the army officers enticed him with tea and biscuits to coerce him to plead guilty to the trumped up charges.

25. The Petitioner's other averment is that on 2<sup>nd</sup> November, 1983, he was picked from Naivasha Maximum Prison, given a Discharge Certificate, a Civilian National Identity Card and a torn shirt to wear upon which he was pushed and bundled into a lorry which dropped him at Machakos Bus Station in Nairobi, and commanded to go home. In that regard, he contended that he was virtually naked, weak, hungry and unshaven for the entire 15 months that he had been in custody.

26. According to the Petitioner, whereas he was discharged unconditionally, he suffered irreparable loss and damage i.e. Kshs. 26,000/= being accrued remuneration having been abroad in India and his July, 1982 salary, gratuity and other terminal benefits. Further, that he was denied the chance to collect his personal effects such as clothing, radios, a television set, sports items and apparel, certificates, land title deeds, passport, driving licence, books, shoes, and a keyboard, which he alleges were all lost after his arrest.

27. He has added that outside the prison walls, life has been unbearable and difficult as no employer wanted to associate with 'a rebel' as he had been branded by the Kenya Army, the Government and the media as portrayed in an article published in *The Standard* newspaper of 23<sup>rd</sup> October 1982. The Petitioner has therefore contended that his physical, psychological, economic and social life was adversely affected and he suffered and continues to suffer physical injury, stigma and post-traumatic stress disorder. That the Kenya Army and Kenya Prisons officers had no powers to torture him for 15 months at Naivasha Maximum Prison by ordering him to strip naked, beating him by kicks, slaps and blows, rubber whips and holding him in a water-logged dark cell. These actions, he argued, were in violation of his right to protection from torture, inhuman and/or degrading treatment, and that his custody for more than 24 hours and his incarceration for the 15 months was unlawful and a blatant violation of his right to personal liberty as was guaranteed under **Section 72 (1), (3) and (5) of the Repealed Constitution**. Furthermore, that his detention *incommunicado* was illegal and that the Defence Council and the Kenya Army officers had no power to withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to September 2020, being his anticipated date of retirement from the Kenya Air Force, and his pensions and terminal benefits.

28. For the above stated reasons, the Petitioner urges the Court to grant the following remedies:

***a) A declaration that the Petitioner's fundamental right and freedom were contravened and grossly violated by the Respondent's Kenya Army and Prisons Officers for eight months with effect from 1<sup>st</sup> August 1982 to 2<sup>nd</sup> November 1983 at Naivasha Maximum Prison.***

***b) A declaration that the Petitioner is entitled to payment of damages and compensation for the violation and contravention of his fundamental rights and freedoms.***

***c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969 be awarded.***

***d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pension.***

***e) Costs of this Petition.***

***f) Interest on (c), (d), and (e) above.***

***g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.***

#### **PETITION NO. 123 OF 2014**

29. Gilbert Murithi Muguna, the 5<sup>th</sup> Petitioner, describes himself as a male Kenyan adult of sound mind. He depones that upon completion of his Secondary School and having sat the East Africa Certificate of Education Examinations, he was recruited in the Kenya Air Force on 2<sup>nd</sup> September, 1977 and he thereafter underwent training at the Armed Forces Training College at Lanet, (Nakuru Basic Military Training School). He was later on posted to the Kenya Armed Forces Base in Eastleigh, Nairobi Ground Training Squadron 1 so as to train as a Safety Equipment Mechanic, having attained Grade II Trades Man. Certification. The Petitioner in that regard depones further as to the various assignments he has undertaken as an officer.

30. It is his case that on 1<sup>st</sup> August 1982, he was woken up by gunshots within Laikipia Airbase at Nanyuki. That a junior Private, whose name he cannot remember, ordered and frog-marched him to the armoury to pick a gun. He in that regard argues that he never knew the intended purpose of the aforesaid action and no information was given to him in regard to the same. Further, that after consultation with one of his colleagues, they decided to move out of the Airbase and walk overnight to their rural homes.

31. Further, that in the morning of 2<sup>nd</sup> August 1982, they spotted a Kenya Army Land Rover around Timau area and persuaded the driver to take their firearms, having not fired any single bullet. That thereafter, a Good Samaritan drove them to Kiirua Police Station in Meru where they reported the matter. The Petitioner in that regard contends that it was then that he heard for the first time about the attempted coup. The Petitioner has asserted that he was remanded at the C.I.D Headquarters in Meru before he was driven to the Nanyuki Base and that he was thereafter incarcerated at Laikipia and Eastleigh Airbases, thereafter to Kamiti Prison and finally to Naivasha Maximum Prison.

32. It is the Petitioner's other contention that in mid-October 1982, while at the Naivasha Maximum Prison, he was locked up for five days in a one-foot water logged cell with no ventilation nor sanitation and was further subjected to mental and physical torture. That on the following day, he was taken before a panel of interrogators and compelled to record a statement. That, on 23<sup>rd</sup> October 1982, he was driven and paraded before a Court Martial sitting in Langata Barracks and the same was presided over by one Col. Kibwana. He was thereafter dismissed from service.

33. The Petitioner has argued further that as a result of his dismissal, he lost his entire belongings such as academic and professional certificates which were at the Laikipia Airbase and as such, he is unable to secure a job. Additionally, that the Kenya Air Force has not formally and lawfully dismissed him from his duties up to date and that his physical, psychological, economic and social life has been adversely affected and he has suffered and continues to suffer physical deformity, stigma, and post-traumatic stress disorder. Furthermore, according to the Petitioner, the Kenya Army and Prisons officers had no powers to torture him for two months at Kamiti Maximum Prison and Naivasha Maximum Prison; to hold him in unlawful custody for more than 24 hours; to hold him *incommunicado*, withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to February 2011, being the date of his retirement; and pension and terminal benefits from February 2011 to date.

34. In the Petitioner's view, his incarceration for more than eight months was in flagrant contravention of his right to personal liberty as guaranteed under **Section 72 (1), (3) and (5) of the Repealed Constitution**. For the foregoing reasons, he therefore seeks the following remedies:

***a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for eight months with effect from 1<sup>st</sup> August, 1982 up to October, 1983 at Kamiti Maximum Prison and Naivasha Maximum Prison.***

***b) A declaration that the Petitioner is entitled to payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms.***

***c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.***

***d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pension.***

***e) Costs of this Petition.***

***f) Interest on (c), (d) and (e) above.***

35. The 6<sup>th</sup> Petitioner, Paul Mbaya Mbui, describes himself as a Kenyan male adult of sound mind. In his Petition, he states that upon completion of his Secondary school education and having obtained an East Africa Certificate of Education, he was recruited in the Kenya Air Force on 22<sup>nd</sup> February 1977 and he underwent training at the Armed Forces Training College in Lanet and subsequently, he was posted to the Eastleigh Base to train as an Aircraft Technician in Airflames and Engines wherein he graduated as a Senior Private II Technician Group T, Class 2.

36. It is his case that in mid-July, there was a joint military exercise by the armed forces and the same ended on 31<sup>st</sup> July 1982. That on 1<sup>st</sup> August 1982, he, together with some of his colleagues, were arrested and taken to Mtongwe Navy Base in Mombasa, where he was cleared on 10<sup>th</sup> August 1982 after screening and interrogation. That, he was later taken to the Eastleigh Base in Nairobi by train where he was given a new Service Number to serve in the 82 Air Force and that after clearance, he was transferred to the Laikipia Base on 12<sup>th</sup> August 1982.

37. The above facts notwithstanding, that following his argument with one of the army corporals at Nanyuki, he was arrested and taken to 1<sup>st</sup> KR Nanyuki cells and later on after one week, he was taken to Naivasha Maximum Prison wherein he remained in incarceration for seven months without being interrogated until he informed the authorities therein that he had not been interrogated since his arrest. Accordingly, that he was subsequently interrogated and cleared by a police officer who had earlier on also interrogated him while at Mombasa.

38. The Petitioner has alleged that although he was cleared of any wrong-doing, he was detained in cells where he was tortured both mentally and physically and that he was subsequently discharged from Service. He has stated further that he has suffered a lot and is living miserably without employment. It is his other contention that his health was adversely affected and continues to deteriorate due to his illegal incarceration and that his right to personal liberty guaranteed under **Section 72 (1), (3) and (5) of the Repealed Constitution** was violated; the army and prison officers had no power to hold him *incommunicado*; withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to February, 2011, being his anticipated retirement date, and his pension and terminal benefits from February, 2011.

39. In his Written Submissions dated 30<sup>th</sup> November 2015, the Petitioner relied on the decision in **David Gitau Njau and 9 Others vs The Attorney General, Petition No. 340 of 2012**, **Grace Wanjira Miano and Another vs The Attorney General, Misc Civil Case No. 1184 of 2003 (OS)**, and **Israel Otieno Agina vs The Attorney General, Petition No. 1374 of 2003 (OS)** in support of his case and submitted that an award of Kshs 10,000,000/= is reasonable damages in the circumstances.

40. For the above reasons, he urges the Court to grant the following orders:

*a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for eight months with effect from 2<sup>nd</sup> August, 1982 up to October, 1983 at Kamiti Maximum Prison and Naivasha Maximum Prison.*

*b) A declaration that the Petitioner is entitled to payment and compensation for violations and contraventions of his fundamental rights and freedoms.*

*c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.*

*d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pensions.*

*e) Costs of this Petition.*

*f) Interest on (c), (d), and (e) above.*

*g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.*

**PETITION NO. 125 OF 2014**

41. In his Petition, the 7<sup>th</sup> Petitioner, Zachary Charles Mututa, describes himself as a Kenyan male adult citizen of sound mind. He states that he was enlisted into the Kenya Air Force on 29<sup>th</sup> March, 1973, while he was still at Machakos Technical School as a Form Four student. That he was then sent to the Armed Forces Training College in Lanet where he underwent Basic Military Training and graduated as a Private. That he was thereafter posted to the Kenya Air Force station in Eastleigh where he trained as an Air Movement Operator and qualified as a Class 1 Tradesman. The Petitioner further alludes to his various trainings and assignments over the period therein.

42. He has also stated that on 31<sup>st</sup> July 1982, he went out of the Eastleigh Air Force base to Nairobi to meet his cousin, one David Muithia, who was by then living at Upper Hill in Nairobi after which they went out to drink. That he spent the night at his cousin's house and the following day, upon waking up, he heard that the Kenya Air Force had staged a coup. He, in that regard, further contended that there were gun shots all over and as such, he could not go back to the Eastleigh Base. He however managed to do so on 2<sup>nd</sup> August 1982 where he was locked up and later taken to Kamiti Maximum Prison.

43. The Petitioner has asserted that while at Kamiti, he was interrogated by Kenya Army officers and thereafter transferred to Naivasha Maximum Prison where he was further interrogated on three occasions. He, in that regard has contended that he was locked up in a water-logged dark cell with no windows while naked with no food and proper sanitation for six days. That his continued interrogation was accompanied by a lot of physical and psychological torture and as a result, he was taken ill about four times with no medical care whatsoever.

44. It is the Petitioner's case further that he was re-employed and allocated a new Service Number namely No. 101852, but he was subsequently discharged. That upon his incarceration, he lost a lot of his personal property made up of clothing, certificates and electronic equipment. Additionally, it is his case that he was unlawfully incarcerated at Naivasha Maximum Prison for 15 months where he was subjected to mental and physical torture and that he suffered and continues to suffer to-date.

45. The Petitioner has therefore argued that his incarceration was in flagrant contravention of his right to personal liberty under **Section (1), (2) and (5) of the Repealed Constitution** and that the Kenya Army and Prisons officers had no powers to hold him *incommunicado*; to withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to September, 2020, being his lawful anticipated date of retirement from the Kenya Air Force; and to withhold his pensions and terminal benefits. The Petitioner as a result of the foregoing urges the Court to grant the following remedies:

*a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for 15 months with effect from 2<sup>nd</sup> August, 1982 up to 2<sup>nd</sup> November, 1983 at Naivasha Maximum Prison.*

*b) A declaration that the Petitioner is entitled to payment and compensation for violations and contraventions of his fundamental rights and freedoms.*

*c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.*

*d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pensions.*

*e) Costs of this Petition.*

*f) Interest on (c), (d), and (e) above.*

*g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.*

**PETITION NO. 126 OF 2014**

46. The 8<sup>th</sup> Petitioner, Julius Mwiti Thaara, describes himself as a male adult Kenyan citizen of sound mind residing in Nairobi. He states that on 3<sup>rd</sup> March 1978, he was enlisted in the Kenya Air Force and underwent training at the Armed Forces Base in Lanet after which he was posted to the Eastleigh Base pending further deployment. Further, that he underwent further training as a driver and attained Grade 1 and was posted to Laikipia Air Base in Nanyuki where he stayed for two years before he was posted to Wajir Air Base until November 1981 when he was finally posted to Moi Air Base in Eastleigh.

47. The Petitioner has contended that he worked at the Moi Base until the night of 31<sup>st</sup> July 1982 at around 3.00 a.m., when he was woken up by a loud siren alarm and gunshots and upon investigating, he discovered that Airforce men were running towards the armoury and he joined them in that regard. That at around 2.00 p.m., army personnel entered the Base and ordered them to surrender and he was arrested and taken to Kamiti prison where he was interrogated for one week and thereafter transferred to Naivasha prison, where he alleged to have undergone dehumanizing torture. Further, that he was submerged in waist deep cold water in a dark cell for three days without any food or drink and was subsequently taken to the Court Martial on 27<sup>th</sup> October 1982 and which resulted to his jailing for ten years without the option of a lawyer or a plea.

48. It is the Petitioner's other contention that he was imprisoned at Kodiaga Maximum Prison in Kisumu where he contracted cholera and typhoid which he alleges almost caused him his life. That through an appeal by the Attorney General, his sentence was reduced to six years until his release in July, 1987 and that his family greatly suffered for lack of education and a bread winner and he also lost his academic certificates and personal effects.

49. The Petitioner has therefore argued that his right to personal liberty under **Section 72 (1), (3) and (5)** of the **Repealed Constitution** was violated; the Kenya Army and Prison officers had no power to torture him for four and a half years; hold him *incommunicado*; withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to February 2011, being his anticipated date of retirement; and withholding his pension and terminal benefits from February 2011 to date. For the above reasons, he therefore urges the Court to grant the following remedies:

*a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for eight months with effect from 1<sup>st</sup> August, 1982 up to July, 1987 at Kodiaga Maximum Prison.*

*b) A declaration that the Petitioner is entitled to payment and compensation for violations and contraventions of his fundamental rights and freedoms.*

*c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.*

*d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pensions.*

*e) Costs of this Petition.*

*f) Interest on (c), (d), and (e) above.*

*g) Any further orders, writs and directions as this Honourable Court may deem just and fit to*

*grant.*

**PETITION NO. 151 OF 2014**

50. In Petition No. 151 of 2014, William Nguku Ncheebere, the 9<sup>th</sup> Petitioner, describes himself as a male Kenyan adult citizen and states that on 2<sup>nd</sup> July 1974, he was enlisted in the Kenya Air Force after which he underwent training at the Armed Forces Training College at Lanet in Nakuru. That he was subsequently posted to the Eastleigh Base and trained as an Aircraft Technician in Electrical and Instruments attaining Grade 1 upon which he served and was subsequently promoted to the rank of a Sergeant.

51. It is the Petitioner's case that on 1<sup>st</sup> August 1982, he was asleep in his room at the Nanyuki Base and at around 2.00 a.m., he was rudely woken up by a young junior Service man who used his dirty boots and gun butt to wake him up. That the man frog-matched him to the Base Guard Room where, to his surprise and relief, he found a whole troop of his colleagues locked up in a small room. That he later on learnt that the Base had been taken over by Junior Service men and that the Commissioned officers had been put under arrest. That, at around 1.00 p.m. they were rescued by army personnel who thereafter made them all record statements.

52. The Petitioner has also asserted that in the following seven months, he was moved from one prison to another until he was finally detained at the Naivasha Maximum Prison. That on 22<sup>nd</sup> December, 1982, he appeared before a Court Martial sitting at Langata Barracks and charged with the offence of Failure to Suppress a Mutiny. That he pleaded not guilty and was taken back to Kamiti Prison to await hearing, which he alleged, never took place. That on 14<sup>th</sup> March 1983, he was unceremoniously released from prison and subsequently discharged from service without any benefits in form of pension, gratuity, unpaid salaries or compensation for the suffering he had endured while in prison.

53. The Petitioner has claimed further that he lost all his personal belongings including certificates and other documents and that while in prison, he encountered much suffering such as sickness, fatigue, hunger and torture. That he was also denied legal representation but instead he was given an army officer who drilled and advised him on how to plead guilty to the charges. That on 26<sup>th</sup> September, 1984, he wrote a letter to the then Department of Defence making inquiries about his unpaid salary, gratuity and pension and that, on 23<sup>rd</sup> November, 1984 he got a response in which the said Department denied owing him anything.

54. The Petitioner has therefore argued that the foregoing events have led to his suffering and continued suffering and his physical, psychological, economic and social life was adversely affected and he suffered and still suffers physical deformity, and stigma, as well as post-traumatic stress disorder. That the army and prison officers had no power to torture him for seven months; hold him in unlawful custody for more than 24 hours; hold him *incommunicado*; withhold his emoluments and salary from 1<sup>st</sup> August 1982 up to February 2011, being his lawful anticipated date of retirement; and his pension and terminal benefits from February 2011. It is therefore the Petitioner's argument that his detention was in violation of his right to personal liberty under **Section 72 (1), (3) and (5) of the Repealed Constitution**.

55. For the foregoing reasons, the Petitioner seeks the following remedies:

*a) A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent's Kenya Army and Prison officers for seven months with effect from 1<sup>st</sup> August, 1982 up to 14<sup>th</sup> March, 1983.*

*b) A declaration that the Petitioner is entitled to payment and compensation for violations and contraventions of his fundamental rights and freedoms.*

*c) General, exemplary and aggravated damages under Section 84 (2) of the Constitution, 1969, be awarded.*

*d) A declaration that the Petitioner merits payment of withheld salary, emoluments, terminal benefits and pensions.*

*e) Costs of this Petition.*

*f) Interest on (c), (d), and (e) above.*

*g) Any further orders, writs and directions as this Honourable Court may deem just and fit to grant.*

### **The Response**

56. In regard to **Petition No. 119 of 2014**, the Attorney General filed Grounds of Opposition dated 7<sup>th</sup> October 2014 in which he contended that the Petition is grossly and incurably defective in substance and ought to be struck out and that in fact the Petitioner was never brutally interrogated, physically and or mentally tortured, incarcerated without contact to the outside world, occasioned extreme duress and excessive inhuman treatment, extreme psychological trauma as alleged.

57. It was the Attorney General's other contention that the Ministry of Defence, the Kenya Defence Forces or its predecessor, the Kenya Armed Forces, were never involved in any alleged brutal interrogation, physical and/or mental torture, excessive inhuman treatment, extreme psychological trauma as alleged in the Petition and as such, it is therefore clear that the Ministry of Defence should not be held accountable for alleged violations of the Petitioner's rights, which violations are said to have been committed at institutions which are not part of the Ministry of Defence.

58. Accordingly, that the Kenya Defence Forces, as it then was, was professional in undertaking its statutory mandate and it did not at any time condone false imprisonment, human rights abuses and torture as alleged in the Petition. Further, that being custodians of the Rule of Law, it respected and still respects and upholds each individual's equality and freedom before the law as enshrined in the **Constitution**.

59. Finally, the Attorney General took the position that the 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 and as such, it ought to be dismissed.

60. In response to **Petition No. 126 of 2014**, the Attorney General filed an Affidavit in reply sworn on his behalf by one Lieutenant Colonel Paul Mwangemi Kindochimu on 5<sup>th</sup> June 2014.

61. The Attorney General denied that any fundamental rights and freedoms of the Petitioner were at any time infringed. According to him, the Petitioner was never wrongfully arrested on 1<sup>st</sup> August 1982, and in the event that he had indeed been arrested, that was only as a result of him committing an offence. Accordingly, that his discharge from Service was lawful and was made in accordance with the provisions of the **Armed Forces Act (repealed)** which governed the employment and discharge of members of the armed forces.

62. The Attorney General maintained that all summary trials, discharges and Court Martial trials conducted after the 1982 attempted coup were done pursuant to and strictly in compliance with the provisions of the **Armed Forces Act (repealed)**. That, at all material times until their discharge or dismissal, the members of the Kenya Air Force or 82 Air Force were members of the Kenya Armed Forces and were subject to the said Act.

63. The Attorney General also denied the allegations of torture alleged by the Petitioner and argued that if indeed the Petitioner had any justiciable grievance against the State, he ought to have moved to Court immediately upon his release. That in any event, if the Petitioner was indeed arrested, detained and confined, it was as a result of his involvement in the failed 1982 coup.

64. In the Attorney General's view, **Section 86 (4)** of the **Repealed Constitution** made provisions on

how the fundamental rights and freedoms applied to members of the armed forces by making an exception and as such, **Section 72 (1), (2) and (5)**, which the Petitioner alleges were contravened, were limited in as far as the members of the armed forces were concerned.

65. It was the Attorney General's other contention that the Petitioner having been dismissed for involvement in a failed coup is by law not entitled to the benefits he is claiming and that no emoluments or salary due to the Petitioner is being held by the State. Further, that there is no pension or terminal dues accruing to the Petitioner. Accordingly, that the Ministry of Defence cannot account or bear responsibility for the alleged happenings or tribulations to the Petitioner for the alleged arrest and detention in civilian prisons which were not and are not under the control of the said Ministry or the Kenya Defence Forces or its predecessor, the Armed Forces.

66. Further, according to the Attorney General, it is not true that the reduction of the Petitioner's sentence was as a result of an appeal because none was filed. That the sentence was however reviewed from 10 years to 6 years by the military. Additionally, that the State had no role in the loss of his certificates and the alleged sufferings to his family.

67. The Attorney General's other argument was that the Petition has been brought after an inordinate long period of approximately 27 years without any explanation. For the foregoing reasons therefore, the Attorney General's final argument was that the reliefs sought by the Petitioner are unjustified and baseless and should be dismissed for lacking in merit.

68. In regard to **Petition No. 120 of 2014**, in an Affidavit sworn on 5<sup>th</sup> June 2014, by Lieutenant Colonel Paul Mwangemi Kindochimu, it was the State's response that the Petitioner therein was neither wrongfully arrested nor unlawfully detained. The Attorney General also denied any violations of the Petitioner's rights. Accordingly, it was his contention that the Petitioner's discharge from Service was lawful and in accordance with the provisions of the **Armed Forces Act (repealed)**; and further that he was accorded a fair trial at the Court Martial.

69. In the Attorney General's further view, none of the Petitioner's fundamental rights and freedoms were infringed and he was neither subjected to any form of torture. Accordingly, the State cannot in any way take responsibility for the Petitioner's health tribulations. That in any event, if the Petitioner was arrested, detained and incarcerated as alleged, the same was lawful as it was as a result of his participation in the failed coup.

70. Lieutenant Paul Mwangemi reiterated his earlier depositions and finally contended that the Petition has been brought after an inordinate long period of approximately 31 years without any explanation and as such, it ought to be dismissed with costs.

71. In response to **Petition No. 121 of 2014**, through an Affidavit in reply, sworn on 5<sup>th</sup> June 2014 by Lieutenant Colonel Paul Mwangemi Kindochimu reiterated his earlier depositions in other Petitions and denied any violations of the Petitioner's rights and argued that the Petition ought to be dismissed for an inordinate long period of delay of about 29 years without any explanation.

72. In Written Submissions dated 8<sup>th</sup> April 2016, the Attorney General submitted that by dint of **Sections 107 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya**, a party that seeks to rely on a fact, bears the burden to show that the fact exist. As such, it was his argument that it is incumbent upon the Petitioners to prove on a balance of probabilities that the allegations they have brought before this Court are true as was held in **Lt. Col. Peter Ngari Kagume and Others vs Attorney General, Petition No. 128 of 2006**. Accordingly, that the Petitioners have not adduced any evidence in support of their contentions in regard to allegations of torture and the same ought to be dismissed.

73. While placing reliance on **Ochieng Kenneth K'Ogutu vs Kenyatta University and 2 Others, Petition No. 306 of 2012** and **Joseph Migere Onoo vs The Attorney General, Petition No. 424 of 2013**, it was the Attorney General's position that the claims in the Petitions in question have been brought after inordinate delay and as such, that action is unreasonable and prejudicial to his defence.

74. On the claim for damages, the Attorney General's submission was that damages in constitutional matters are not meant to restore a person to the state that they were in before as is the principle in tortious claims but are merely meant to give just satisfaction, as was held in the **Peter Ngari Kagume case (supra)**. The Attorney General finally submitted that the Petitions lack merit and ought to be dismissed with costs.

### **Determination**

75. I note that the Petitioners' cases are largely a cut and paste affair with facts being duplicated and therefore the issues for determination in their respective cases are largely the same. I have in that regard considered at length the various pleadings of the Parties as well as their oral evidence and written submissions. The issues that fall for determination are as follows:

- a) Whether the Petitioners' right to personal liberty was violated;*
- b) Whether the Petitioners' freedom from inhuman and degrading treatment was violated including;*
- c) Whether the Petitioners' right not to be held for more than 24 hours before being taken to Court was violated, and whether the Petitioners were held incommunicado and thereby denying them the right to communicate with their family members, friends and advocates of their choice.*
- d) Whether the Petitioners were wrongly discharged from service and whether they are entitled to any emoluments, salaries, pensions and terminal gratuities; and*
- e) The remedies available to the Petitioners, if any.*

76. I must however first dispose of two key issues namely, whether the Petitions ought to be dismissed in light of the delay in their filing, and the jurisdiction of this Court in regard to questions of alleged wrongful termination of employment and withholding of salaries, emoluments, pensions and terminal benefits.

77. On the first issue, this Court has and continues to confront the question of prolonged delay in the filing of Petitions alleging violations of rights in the Bill of Rights. The jurisprudence on the question continues to vary owing to the uniqueness and peculiar circumstances of each case. Before me however, is the question of past atrocities committed by the old regime of Governance and hence, the present Petitions have been filed with the aim of addressing past injustices. The question then to be answered is whether the delay in bringing the present Petitions is prejudicial to the Respondents as alleged?

78. In that regard, in the case of **Jennifer Muthoni Njoroge and 10 Others vs The Attorney General, Petition No.340 to 350 of 2009**, this Court rendered the position that:

***"Having held as above, I can only conclude by stating that each Petitioner has shown that they suffered in the past for the mere fact that they may have held political and other opinions that were not popular with the government of the day. As the new Constitutional dawn continues to unravel its mysteries, one lesson is clear; the Kenyan Courts may have failed the people in the past but today it can be said with Mwendwa CJ in Okunda vs. Republic [1970] E.A 454 that like Dicey said of England, the supremacy of the Constitution rather than any organ of government is what guides the Courts and especially the High Court in executing its mandate under Article 165 of the Constitution, 2010. The Judiciary must therefore never slumber and should not fall into the obvious ignoring of the past."***(Emphasis added)

79. I reiterate the same position and specifically on the question of delay in bringing claims, the Court of Appeal in the case of **Peter Ngari Kagume and 6 Others vs Attorney General, Civil Appeal No. 255 of 2012** in its decision rendered on 17<sup>th</sup> June 2016, affirmed the holding of the High Court that inordinate delay is prejudicial and may at times amount to an abuse of the Court process and that a party must justify

the reason for delaying in filing of such suits. In that case, Okwengu, G.B.M. Kariuki, Azangalala JJ.A. observed thus:

***“[28] That answers the 1<sup>st</sup> issue and as the 2<sup>nd</sup> issue has clearly been answered, the remaining issues relate to delays; the learned trial judge correctly observed that none of the appellants proffered any explanation for the delay of 24 years in coming to court. Whichever way one looks at it in the circumstances of this appeal, the delay spanning 24 years was inordinate. The appellants slept on their rights. We are unable to find fault in the findings made by the learned judge that in absence of a plausible explanation for delay, the suit amounted to abuse of the court process. On this ground also, the appeal would fail.”***

80. Guided as I am by the above decision, it follows that delay *per se* is not the issue to address but the justification for such delay is what is to be given weight by the Court. Applying the foregoing to the present cases, I note that the key argument by the Petitioners is that the prevailing political circumstances prior to August 2010 hindered them from instituting the present claims. In that regard, this Court in **Harun Thungu Wakaba vs Attorney General Misc Applic No. 1411 of 2004**, Okwengu J (as she then was) stated thus:

***“I take note of the fact that there are a series of similar cases of alleged breaches of fundamental rights and freedoms, committed prior to the year 2002, before the change in Government. The explanation that the environment of the fundamental rights and freedoms has been accepted. In that regard, I would borrow the following passage from Wachira Waheire vs the Attorney General (supra): “The elections held in the year 2002 and the consequent wave of change in this County are a historical fact. The explanation given by the Plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after that change, such as Dominic Arony Amolo vs the Attorney General I which the Plaintiff’s claim filed in the year 2003 which was more than 20 years after the cause of action arose was allowed. We are therefore not persuaded that the Plaintiff’s claim should be defeated because of the delay in filing his claim”***

Following the above decision and the explanations by the Petitioners that they were terrified of filing cases for fear of reprisals until post-2010, that to me is a sufficient reason and explanation for the delay and I shall hereby admit the present claims and determine the same on their merits.

81. On the second issue of the jurisdiction of this Court in regard to claims of unlawful termination of employment and alleged withholding of salaries, emoluments, pensions and terminal dues, I must in *limine* state that the said issue is not within the purview of the mandate of this Court. I say so because, **Article 162 (2) of the Constitution** mandated Parliament to establish Courts with the jurisdiction to hear and determine disputes relating to employment and labour relations. The Article states that:

***(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).***

***(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***

***(a) Employment and labour relations;***

***(b) ...***

82. In that context, Parliament enacted the **Employment and Labour Relations Act** which created the Employment and Labour Relations Court whose jurisdiction is outlined under **Section 12** which states that:

***1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of***

**this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—**

**(a) disputes relating to or arising out of employment between an employer and an employee;**

**(b) disputes between an employer and a trade union;**

**(c) disputes between an employers' organisation and a trade union's organisation;**

**(d) disputes between trade unions;**

**(e) disputes between employer organisations;**

**(f) disputes between an employers' organisation and a trade union;**

**(g) disputes between a trade union and a member thereof;**

**(f) disputes between an employer's organisation or a federation and a member thereof;**

**(i) disputes concerning the registration and election of trade union officials; and**

**(j) disputes relating to the registration and enforcement of collective agreements.**

**2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.**

**3) ...**

83. The foregoing ought to be further read together with **Article 165 (5)** of the **Constitution** which states that:

***The High Court shall not have jurisdiction in respect of matters-***

***(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution;***  
***or***

***(b) Falling within the jurisdiction of the courts contemplated in Article 162 (2).***

It therefore follows that this Court does not have the jurisdiction to determine questions touching on employment and labour relations and the Petitioners are at liberty to canvass that issue in the correct forum.

84. I say so because, it should always be borne in mind that the question of jurisdiction is tied to the subject matter of the suit, the parties, and the remedies to be granted. It is therefore my holding that it would not be in order for this Court to usurp the jurisdiction of the Employment and Labour Relations Court and grant orders touching on the Petitioners' employment including salaries, emoluments, pensions and terminal benefits. As such, I decline the invitation by the Petitioners to address issues touching on the validity or otherwise of their termination from service and any dues accruing to them therein. The Prayer to have orders for the payment of their salaries, emoluments, pensions and terminal benefits, if any, must therefore fail and cannot be issued by this Court.

85. Having so held, it follows that I shall confine my determination on whether the Petitioners' rights have been violated as alleged. In that regard, the Petitioners have alleged violation of their rights to personal liberty and that they were also subjected to torture, inhuman and degrading treatment.

86. Personal liberty remains a key right in human existence. In that regard, **Section 72** of the **Repealed Constitution** provided that:

*(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases - in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted; in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal.*

87. The right to personal liberty is also now enshrined in **Article 29** of the **Constitution, 2010** which guarantees the freedom and security of the person and states that:

*Every person has the right to freedom and security of the person, which includes the right not to be-*

*(a) Deprived of freedom arbitrarily or without just cause.*

*(b) ...*

88. In that context, the Court in **Ndegwa vs Republic (1985) KLR 534**, observed thus:

*“No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.”*

89. Similarly, the Supreme Court of India in **Additional District Magistrate vs S. S. Shukla, 1976 AIR 1207, 1976 SCR 172** underscored the importance of the right to personal liberty in the following terms:

*“...the existence of the right to personal liberty in the pre constitution period was surely known to the makers of the Constitution. [395 H, 396 A-D] The right to personal liberty is the right of the individual to personal freedom, nothing more and nothing less. That right along with certain other rights was elevated to the status of a Fundamental Right in order that it may not be tinkered with and in order that a mere majority should not be able to trample over it...”*  
(Emphasis added)

The conclusion to be reached from the above statements is that law thus seeks to protect individuals against any forms of arbitrary detentions and unnecessary and unlawful curtailment of personal liberty.

90. On whether the Petitioners’ freedom from inhuman and degrading treatment was violated including whether the Petitioners’ right not to be held for more than 24 hours before being taken to Court was violated, and whether the Petitioners were held *incommunicado*, **Section 72 (2)** and **(3)** of the **Repealed Constitution** provided as follows:

*(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.*

*(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.*

91. In regard to torture and inhuman and degrading treatment, **Article 29** of the **Constitution, 2010** states that:

*Every person has the right to freedom and security of the person, which includes the right not to be-*

*(a) ...*

*(b) ...*

*(c) Subjected to any form of violence from either public or private sources;*

*(d) Subjected to torture in any manner, whether physical or psychological;*

*(e) Subjected to corporal punishment; or*

*(f) Treated or punished in a cruel, inhuman or degrading manner.*

92. **Section 74** of the **Repealed Constitution** had also provided that no-one shall be subjected to torture or to inhuman or degrading punishment or other treatment. The **Convention Against Torture** defines 'torture' in **Article 1** as follows:

*“For the purposes of this Convention, torture means 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, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”*

93. In the same context, in *Republic vs Minister For Home Affairs and Others ex parte Sitamze, Nairobi HCCC No 1652 of 2004* Nyamu J., after citing various authorities, rendered himself as follows:

*“The provisions of section 74(1) of the Constitution of Kenya are echoed in article 7 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to illicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest It is a deliberate inhuman treatment causing very serious and cruel suffering. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”*

94. Cruel, inhuman and degrading treatment on the other hand has been addressed in a number of cases including that of *Jestina Mukoko vs Attorney General (36/09) [2012] ZWSC 11 (20 March 2012), Constitution Application No. 36 of 2009*, where the Supreme Court of Zimbabwe opined thus:

*“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."*

95. Applying the foregoing to the present Petitions, firstly, I note that the script is almost similar in all of them.

- In **Petition No.119 of 2014**, the Petitioner at paragraph 9 of his Affidavit in support stated that *"I was locked up in a dark cell with no windows and put in water logged cell stack naked without food, drink and proper sanitation for 5 days. I underwent torture, interrogation and screening during my stay for five months."*

- In **Petition No.120 of 2014**, the Petitioner at paragraph 11 of his Petition claims to have been tortured for one year while at Kamiti Maximum Prison by being subjected to mental and physical torture by being held in a water-flooded cell.

- In **Petition No.121 of 2014**, at paragraph 11 of the Petition, the Petitioner states that while at Naivasha Maximum Prison he was subjected to mental and physical torture in an isolated prison cell.

- In **Petition No.122 of 2014**, at Paragraph 12 of the Petition, the Petitioner asserts that he was unlawfully incarcerated at Naivasha Maximum Prison for 15 months and that while in the said prison, he was subjected to mental and physical torture by being held in a water-flooded cell.

- In **Petition No.123 of 2014**, similarly at Paragraph 11, he asserts that he was unlawfully incarcerated at Naivasha Maximum Prison and Kamiti Maximum Prison for two months and that while at Naivasha, he was subjected to mental and physical torture by being held in a water-flooded cell.

- In **Petition No.124 of 2014**, at Paragraph 11 of his Petition, the Petitioner states that while in Naivasha Maximum Prison he was subjected to mental and physical torture by being held in a water-flooded cell.

- In **Petition No.125 of 2014** the Petitioner at Paragraph 12 contended that he was unlawfully incarcerated at Naivasha Maximum Prison for 15 months and that while there, he was subjected to mental and physical torture by being held in a water-flooded cell.

- In **Petition No.126 of 2014** the Petitioner on his part, at Paragraph 11, argued that he was unlawfully incarcerated at Kodiaga Maximum Prison for four and a half years and while there, he contracted cholera and typhoid and almost died. At paragraph 12 he further states that his health was adversely affected and continues to deteriorate due to the illegal incarceration, mental and physical torture in an isolated prison cell.

- In **Petition No.151 of 2014** it was his argument, at Paragraph 11 of the Petition, that he was unlawfully incarcerated at Nanyuki Prison to King'ong'o and finally to Naivasha Maximum Prison for seven months and that, while in Naivasha, he was subjected to mental and physical torture by being held in a water-flooded cell.

96. In all the Petitions, I also note that all the Petitioners claim to have been adversely affected and suffered and still continue to suffer including in the case of the 2<sup>nd</sup> Petitioner, physical deformity of the left jaw, stigma and post-traumatic stress disorder for all the other Petitioners. No Affidavit in Reply was filed by the State in rebutting the assertions as regards the torture and inhuman treatment that the Petitioners underwent save for the assertions in **Petitions Nos. 120, 121, and 126 of 2014** that in the event that the Petitioners were arrested, the same was lawful as it was as a result of the failed coup. That in my view however, cannot be a basis of detaining and subjecting the Petitioners to torture and inhuman treatment. In that context, I am satisfied that the Petitioners have made out a case on violation of their right under **Section 74** of the **Repealed Constitution** and I hold so.

97. Having found that the Petitioners' rights were violated in that regard, I shall now determine whether their right to personal liberty was violated and whether they were held *incommunicado* and for more than 24 hours before being taken to Court.

98. In that regard,

- In **Petition No.119 of 2014**, the Petitioner claims to have been detained from 7<sup>th</sup> August, 1982 to 23<sup>rd</sup> June, 1983, a total of 318 days.

- In **Petition No.120 of 2014**, the Petitioner's case is that he was detained from 1<sup>st</sup> August 1982 to an unclear date in October, 1983, a total of about of 385 days.

- In **Petition No.121 of 2014**, the Petitioner states that he was arrested on 3<sup>rd</sup> August 1982 and taken to the Court Martial on 16<sup>th</sup> October 1982 a total of 58 days.

- In **Petition No.122 of 2014**, the Petitioner asserts that he was arrested on 1<sup>st</sup> August 1982, and released on 2<sup>nd</sup> November, 1983, a total of 418 days.

- In **Petition No.123 of 2014** the contention by the Petitioner therein was that he was arrested on 2<sup>nd</sup> August, 1982 and released on unclear date in October, 1983, a total of about 395 days.

- In **Petition No.124 of 2014**, the Petitioner states that he was arrested on 1<sup>st</sup> August 1982 and released on 15<sup>th</sup> March, 1983, a total of 259 days.

- In **Petition No.125 of 2014** the Petitioner's case was that he was arrested on 2<sup>nd</sup> August, 1982 and released on 2<sup>nd</sup> November, 1983, a total of 418 days.

- In **Petition No.126 of 2014** the Petitioner alleged that he was arrested on 1<sup>st</sup> August 1982 and taken to the Court Martial on 27<sup>th</sup> October, 1982, a total of 86 days.

- In **Petition No.151 of 2014** it was the Petitioner's allegation that he was arrested on 2<sup>nd</sup> August 1982 and released on 14<sup>th</sup> March 1983, a total of 258 days.

99. Were the Petitioners arrested and detained as alleged? My answer is in the affirmative because I have read their respective depositions as reproduced elsewhere above and I note that in **Petition No.120 of 2014 of 2014**, the Petitioner states that he was taken to Kamiti Maximum Prison on 2<sup>nd</sup> August 1982 and stayed there up to 10<sup>th</sup> August 1982 and was interrogated and arraigned before the Court Martial soon thereafter; in **Petition No.123 of 2014**, the Petitioner was only arraigned before the Court Martial on 23<sup>rd</sup> October, 1982 after his arrest on 1<sup>st</sup> August 1982; in **Petition No.126 of 2014**, the Petitioner was only taken before the Court Martial on 27<sup>th</sup> October, 1982; and in **Petition No.151 2014**, the Petitioner was taken before the Court Martial on 22<sup>nd</sup> December, 1982. For the other Petitioners, they were not taken before the Court Martial but were held without charge until their release. In their testimony before this

Court they reiterated that they were arrested and no serious rebuttal of that fact was made. I have also seen their Certificates of Service issued and it is uncontested that they served the Kenya Air Force in different capacities. In that regard, the argument by the Respondent that the Petitioners were never arrested or detained cannot stand. I am satisfied that the Petitioners have made out a case for violation of their right to personal liberty and being held *incommunicado* for more than 24 hours before being arraigned before Court or being released without charge.

100. In any event, while the Respondent maintains that the rights complained to have been infringed did not apply to the Petitioners as they were members of the Forces, I still maintain the position that I held in **David Gitau Njau and 9 Others vs Attorney General (supra)**, thus:

***“[53] To my mind, this explanation cannot hold water and flies right out of the window for simple reasons that even if Section 86(2) and (3) is with regard to members of the disciplined forces as were the Petitioners, that provision applies only in instances where such persons are being disciplined in accordance with the disciplinary law of the force as established under the Armed Forces Act, (Cap 199) (now repealed) and in effect means that a person could not allege a violation of Chapter 5 of the Bill of Rights save for Section 71, 73 and 74 which a court martial cannot derogate from; while being disciplined in accordance with Cap 199 aforesaid.*”**

***[54] The relevant provision of the Armed Forces Act dealing with arrests are to be found in Section 72(2) and (3) which provides as follows;***

***“(1) The allegations against a person arrested under Section 70 or section 71 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be taken to deal with the allegations or he shall be released from arrest.***

***(2) Wherever any person subject to this Act is arrested and remains in custody for more than eight days without his being tried by court martial or dealt with summarily-***

***(a) a special report on the necessity for further delay shall be made by his commanding officer to the prescribed authority in the prescribed manner; and***

***(b) a similar report shall be made to the prescribed authority and in the prescribed manner every eight days until a Court martial sits or the offence is dealt with summarily or he is released from arrest:***

***Provided that, where the person is on active service, this subsection need be complied with only so far as is reasonably practicable, having regard to the exigencies of active service.***

***(3) For the purposes of Section 48 (1), the question whether there has been unnecessary delay in the taking of steps for investigating allegations against a person under arrest shall be determined without regard to subsection (2) of this Section.”***

***[55] As it can be seen, this Section provides that a person arrested for suspicion of having committed an offence under the Act shall be investigated without unnecessary delay. The Respondent thus cannot have any valid answer as to why the Petitioners were not arraigned in any Court within the time stipulated by law.”***

I therefore find the Respondent’s argument in that regard unmerited and I dismiss the same. I am also satisfied that the Petitioners have made out a case for violation of their rights to personal liberty and so I find. I must further add that in regard to **Petitions Nos.120, 123, 126 and 151 of 2014** I shall limit my findings to their confinement up to the time they were arraigned before the Court Martial. This is so because their incarceration thereafter was as a result of the findings of the Court Martial and that was certainly a lawful order.

## **Conclusion**

101. The Petitioners have sought for general, exemplary and aggravated damages among others. In that regard, the South African Court in the case of **Fose vs Minister of Safety and Security (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997)**, in regard to damages, made the observation that:

***“In the leading United Kingdom case of Rookes v Barnard an important distinction was drawn between an award of exemplary damages and one of aggravated damages. The object of damages is normally to compensate whereas the object of exemplary damages is to punish and deter. Aggravated damages fall under the compensatory principle, and are awarded where the injury to the plaintiff has been aggravated by the way in which the defendant has behaved. Lord Devlin saw the true purpose of exemplary damages in “restraining the arbitrary and outrageous use of executive power” and limited their award to three categories, the nature of which is not relevant for present purposes.”***

102. Furthermore, the Indian Court sitting at Madras in the case of **A.Valliammal vs Chitra Travels, 2009**, stated that:

***“[15] Broadly speaking, general damages are compensation for that kind of damage which the law presumes to follow from the wrong complained of and which therefore, need not be specifically mentioned in the pleadings. On the contrary, special damages are compensation for damage of such a kind that it will not be presumed by the law, but must be specially set out and proved by the party who claims it.”***

103. The jurisprudence in regard to aggravated damages in regard to cases of torture by the past regime in Kenya has also been that there is no basis for making such an award owing to regime change and the new constitutional dispensation as well as the likelihood of such acts never occurring again. I do not see any reason to depart from that school of thought and as such, I find no basis for awarding the same. I wish to state further that this Court has always maintained that in awarding damages the following criteria should act as a guide: (i) The torture inflicted on each Petitioner (ii) the length of time the Petitioners were held in unlawful custody (iii) The decided cases on the subject matter (iv) what is fair and reasonable in the circumstances of each case - See **Jennifer Muthoni Njoroge and 10 Others (Supra)**.

104. Lastly, although the Petitioners claimed to have lost some of their personal belongings, they did not seek any orders to that effect and so I shall not address my mind to that question.

### **Disposition**

105. In the circumstances, the following are the orders that commend themselves:

#### **(a) Petition No.119 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 7<sup>th</sup> August 1982 to 7<sup>th</sup> February 1983 by police officers without taking him to court was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.2,000,000 is hereby made as general damages for compensation for the violations of the Petitioner’s rights as stated above.**

#### **(b) Petition No.120 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 10<sup>th</sup> August 1982 by police officers when he was taken to the Court Martial was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the**

**Repealed Constitution.**

**(ii) An award of Kshs.3,000,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(c) Petition No.121 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 14<sup>th</sup> October 1985 by police officers without taking him to court was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.900,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(d) Petition No.122 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 2<sup>nd</sup> November 1983 by police officers without taking him to court was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.3,100,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(e) Petition No.123 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 22<sup>nd</sup> October 1982 by police officers when he was taken to the Court Martial was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.3,000,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(f) Petition No.124 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to October, 1982 by police officers without taking him to court was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.2,000,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(g) Petition No. 125 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 2<sup>nd</sup> August 1982 to 2<sup>nd</sup> November 1983 by police officers without taking him to court was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed**

**Constitution.**

**(ii) An award of Kshs.3,100,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(h) Petition No.126 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 27<sup>th</sup> October by police officers when he was taken before the Court Martial was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.1,200,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

**(i) Petition No.151 of 2014**

**(i) It is hereby declared that the holding of the Petitioner from 1<sup>st</sup> August 1982 to 22<sup>nd</sup> December 1982 by police officers when he was taken to the Court Martial was a violation of his right to personal liberty contrary to Section 72 (3) and the right to freedom against torture or to inhuman or degrading punishment contrary to Section 74 of the Repealed Constitution.**

**(ii) An award of Kshs.2,000,000 is hereby made as general damages for compensation for the violations of the Petitioner's rights as stated above.**

106. The Respondent shall bear the costs of each of the Petitions plus interest on the awards above and costs.

107. 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. Ngatia holding brief for Mr. Jaoko for Petitioner

Miss Gavi for Respondent

**Order**

Judgement duly delivered.

**ISAAC LENAOLA**

**JUDGE**