



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

PETITION NO.201 OF 2013

CONSOLIDATED WITH PETITION NOS.202 AND 203 OF 2013

BETWEEN

WILLIAM MURIITHI NYUIRI WAHOME 1ST PETITIONER

JAMES MAIGUA NDUMO2ND PETITIONER

DAVID MUITA KARIUKI..... 3RD PETITIONER

AND

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. This Judgment pertains to three Petitions filed against the Kenyan Government with the Petitioners alleging violation of rights and fundamental freedoms by past Regimes of Governance in Kenya.
2. The Attorney General has been sued in his capacity as the legal representative of the Government in legal proceedings, as stipulated in **Article 156 (b)** of the **Constitution, 2010**.

The Petitioners' Cases

3. In **Petition No. 201 of 2013**, the Petitioner, William Muriithi Nyuiri Wahome, describes himself as an adult male of sound mind residing in Kenya. His case is contained in the Petition dated 15th April 2013 together with his Affidavit in support sworn on the same date. It was his case that on 14th April 1989, he was arrested at his home in Kabachia Estate in Nakuru and after a three hours' search and two hours of the searching of his office at Pinkam House, Nakuru, he was bundled into a waiting police Land Rover, blindfolded and driven for hours and eventually he was taken to Nyayo House Torture Chambers, and locked in a dark cell at the basement.

4. That on 15th April, 1989, he was taken in a lift to the 24th floor of the said Nyayo House where he was presented to a panel of about ten people led by a tall black man called James Opiyo who interrogated him

and asked him to give details about the Kenya Patriotic Front, a political movement. In addition, that hostile Special Branch police officers ordered him to strip naked and they beat him mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows continuously for eight days and throughout that period he was bleeding with no respite being given. It was his case further that after each session of beatings, he would be returned to the dark cell where pressurized water would be sprayed on him for several hours while naked.

5. The Petitioner contended further that he was locked in the small dark cold cell for eight days without food, a sleeping mat, blanket or drinking water for the said period. In addition, that he was forced to do press-ups and rotate using his finger pointed on the ground as the said police officers continued whipping him.

6. It was also the Petitioner's contention that between the date of his arrest and 22nd April, 1989, neither his family members nor his friends knew where he was and they could not communicate with him. That he was threatened that he would be killed if he did not plead guilty to whatever charges the Special Branch police officers would prefer against him and furthermore, that when he was finally released on 23rd April, 1989 he was sent away with a threat that he would be arrested again if need be and as such, he could not go back to his home or office and instead therefore went into exile in Dar-es-salaam in Tanzania from 26th April, 1989 to December, 1994 when he returned to Kenya after multi-party democracy had been introduced and Nyayo House Torture Chambers closed.

7. The Petitioner therefore argued that as a result of the foregoing, his physical, psychological, economic and political freedoms were grossly violated as he was tortured for being suspected of being involved in the affairs of the Kenya Patriotic Front and he suffered and still suffers torture, trauma and immense loss of earnings (he allegedly lost his business, Business Pata Commercial Agencies). Furthermore, that the foregoing events resulted to violation of his various constitutional rights under **Articles 25 (a), 29, and 49** of the **Constitution** and therefore he now urges this 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 Special Branch police officers who were Kenyan Government servants, agents, employees and in its institutions on diverse dates for eight days at Nyayo House Torture Chambers from 14th April, 1989 to 22nd April, 1989.

(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of eight days.

(c) General damages, exemplary damages and moral damages on an aggravated scale under Article 23 (3) of the Constitution for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

(d) Any further orders, writs, directions, as this Court may consider appropriate.

(e) Costs of the suit, and interest.

8. In **Petition No. 202 of 2013**, the Petitioner, James Maigua Ndumo, in his Petition dated 15th April, 2013, together with his Affidavit in support sworn on the same date, describes himself as a male adult of sound mind residing in Kenya. His case was that on 10th August 1988, he was arrested at his home in Ruiru by Special Branch police officers, where his filming machines, four Honda generators and four Public Address systems were confiscated. He was himself taken to Ruiru Police Station and while at the station, he was interrogated about Mwakenya and the Kenya Patriot Front Movement after which he was locked up in a solitary cell, where he was held *incommunicado* for three days.

9. That in the evening of the third day, he was bundled into a waiting police Land Rover where he was blindfolded and driven for about four hours and eventually taken to Nyayo House Torture Chambers

where he was kept in isolation for a further three days without a sleeping mat, drinking water or even food. That in the morning, he was taken in a lift to the 24th floor of Nyayo House where he was interrogated by one, Mr. James Opiyo, who was among ten other people engaged in that exercise.

10. The Petitioner contended further that he was ordered to strip naked after which he was beaten mercilessly with slaps, rubber whips, broken chair pieces, kicks and blows until blood oozed all over his body and subsequently, he was taken to the basement of Nyayo House where he was locked up in a dark cell for fourteen days from 10th August, 1988 to 24th August 1988. During the said period, he was subjected to further interrogation, tortured by being slapped, beaten with whips and broken pieces of wood from broken chairs, being forced to do press-ups while his fingers were stepped on and while being threatened with death if he did not admit to being a member of Mwakenya and the Kenya Patriotic Front Movements. This, he alleged, continued for hours on end until he became unconscious and in addition, that over the period, he was not allowed to see his family, advocate or friends.

11. The Petitioner also contended that he was released on the fourteenth day and ordered not to tell anybody about where he had been or his ordeal and if he did so, he would be arrested again. In that regard therefore, it was his other argument that he was assisted by one of his cousins to escape to Tanzania and later to Uganda where he stayed until August 1990 when he voluntarily returned to Kenya. However, on his return, he discovered that Special Branch police officers were still looking for him and so he fled back to Uganda where he stayed until September, 1993.

12. It was the Petitioner's further case that upon his arrival in Kenya in September, 1993, he was arrested in mid-November, 1993, by Special Branch police officers at Witeithie village in Thika, bundled into a waiting Land Rover and taken to Athi River Police Station where he was locked up in a filthy cell for one day. That the following day, he was blindfolded and again bundled into a waiting Land Rover and taken to Ngong Police Station where he was locked up for one week in a cell which he alleges was very filthy, before he was taken to Karura Forest by Special Branch police officers who severely tortured him while forcing him to admit that he belonged to Koigi Wa Wamwere's group which was planning anti-Nyayo activities even after multi-party reforms had been introduced.

13. The Petitioner alleged further that on the eighth day after his arrest, he was blindfolded and taken to Gigiri Police Station where he was presented to another panel of Special Branch police officers who continued torturing him for the whole day while interrogating him. That the following day, he was again blindfolded and bundled into a waiting Land Rover and taken to Parklands Police Station where he met his brothers-in-law, Koigi Wa Wamwere and G.G Njuguna Ngengi who had also been arrested. After a day at that Station, they were blindfolded and bundled into a waiting Land Rover and taken to Nakuru Central Police Station where he was separated from the two and taken to Bondeni Police Station where he was locked up for four days in a cell he alleges was stinking. After a day, he was blindfolded and taken to Nakuru Law Courts where he, together with the two and Charles Kuria Wamwere, were charged jointly in **Nakuru Chief Magistrate Court Criminal Case No. 2273 of 1993, Republic vs Koigi Wa Wamwere and three Others** on four Counts namely, attempted robbery contrary to **Section 297 (2)** of the **Penal Code**; threatening to use violence to P.C Ndungu; being in possession of fire arms without a certificate, contrary to **Section 4 (1)** of the **Firearms Act**, Chapter 114 of the Laws of Kenya; and being in possession of rounds of ammunition without a certificate, contrary to **Section 4 (1)** of the said **Firearms Act**.

14. It was the Petitioner's other contention that he remained at the Nakuru Remand Prison for two years where he continued to suffer from deplorable prison conditions until the case in which he had been charged in was determined and Judgment read in his favour on 2nd October, 1995.

15. As a result of the foregoing, the Petitioner alleged that his physical, psychological, economic and political rights and freedoms were grossly violated and he was tortured for being suspected of being close to Koigi Wa Wamwere and Mirugi Kariuki and as such, he suffered and continues to suffer torture, trauma and pain including, as a result thereof the loss of his job after the above ordeal.

16. The Petitioner therefore urges the Court to grant the following remedies:

(a) A declaration that the Petitioner's fundamental rights and freedom from torture were contravened and grossly violated by the Respondent's Special Branch Police Officers, who were Kenyan Government servants, agents, employees, and in its institutions in Nyayo House Torture Chambers for fourteen days from 10th August 1988 to 24th August 1988 and in different police stations and cells in Kenya and lastly in Nakuru Remand Prison for two years from November 1993 to 2nd October 1995.

(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedom from torture under the aforementioned provisions under Articles 22, 23, 25 (a) and 29 (a), (c), (d) and (f) of the Constitution.

(c) General, exemplary and moral damages on an aggravated scale under Article 23 (3) of the Constitution for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

(d) Any further orders, writs, directions, as the Court may consider appropriate.

(e) Costs of the suit, and interest.

17. In **Petition No. 203 of 2013**, the Petitioner describes himself as an adult male of sound mind residing in Kenya. In his Affidavit in support, he deponed that on 14th April 1989, while a teacher at Ghania Primary School, he was arrested at his Kabazi home, bundled into a waiting police Land Rover, blindfolded and driven for several hours and later to Nyayo House Torture Chambers where he was locked up in a dark basement cell. That on 15th April, 1989, he was taken in a lift to the 24th floor of Nyayo House where he was subjected to interrogation by a panel of ten people led by one, Mr. James Opiyo.

18. The Petitioner contended that during his interrogation, he was stripped naked and beaten mercilessly with whips, broken chair pieces, kicks and blows until he was full of blood all over his body and the aforesaid action was repeated for the eight days that he was being held. Additionally, that after each session of beatings, he would be returned to the dark cell which was flooded with cold water and pressurized cold water would be sprayed on him for several hours. That he was locked in the said cell for the eight days and was kept without food, a sleeping mat, blanket or drinking water and was forced to do press-ups and rotate using his finger pointed on the ground while the Special Branch police officers continued whipping his back.

19. It was his further allegation that during the said period, neither his family members nor his friends knew where he was and they could not communicate with him. Furthermore, that he was threatened that he would be killed if he did not plead guilty to whatever charges would be preferred against him.

20. The Petitioner then alleged that he was released on 23rd April 1989, with a threat that he would be arrested if the Special Branch police officers found out that he was involved in the political activities of his brother, the late Hon. Mirugi Kariuki and also Hon. Koigi Wa Wamwere, the latter who was very close to him at family level.

21. For the aforesaid reasons, the Petitioner alleges that his physical, psychological, economic and political rights and freedoms were violated as he was tortured for being suspected of being involved in the activities of the Kenya Patriotic Front, which he alleges he did not know of, and for being related to Hon. Mirugi Kariuki and a friend to Hon. Koigi Wa Wamwere, and he suffered and continues to suffer torture, trauma, and immense loss of earnings.

22. The Petitioner therefore contends that his various rights under **Articles 25 (a), 29 and 49** of the **Constitution** were violated and as such urges the Court to grant the following orders:

(a) A declaration that the Petitioner's fundamental rights and freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers, who were Kenyan Government servants, agents, employees and in its institution at Nyayo House Torture Chambers for eight days from 14th April, 1989 to 22nd April, 1989.

(b) A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of eight days.

(c) General, exemplary and moral damages on an aggravated scale under Article 23 (3) of the Constitution for the unconstitutional conduct by the Kenyan Government servants and agents be awarded.

(d) Any further orders, writs, directions, as this Court may consider appropriate.

(e) Costs of the suit, and interest.

23. In their joint Written Submissions dated 27th July, 2015, the Petitioners submitted that denial of facts or demand for disclosure of facts can only be done through a Replying Affidavit and failure to which, the facts averred in an Affidavit in support of a Petition remain unchallenged, unrebutted and uncontroverted, as was held in **Rumba Kinuthia vs Attorney General, Nairobi HCCC No. 1408 of 2004**. Accordingly, it was their argument that there are in place 62 similar cases decided by this Court and under the doctrine of *stare decisis*, the findings therein on all identical issues of law and similar pleadings should be followed in all remaining cases such as their cases. Further, that there is a lot of evidential material produced over the Nyayo House Torture chambers, which information gives details which they have also deponed to in their respective Affidavits. Additionally, that there are various decided cases which have summarized the ratio decidendi and fair and reasonable quantum to be followed in similar cases, such as was the case in **Oduor Ongwen and 20 Others vs Attorney General, HCCC No. 777 of 2008**.

24. Further and according to the Petitioners, whereas the Special Branch police officers were entitled to arrest them on suspicion of committing cognisable criminal offences, they had no legal or statutory power to torture, keep them in custody for more than 24 hours, deny them communication with members of their family, friends or advocates, hold them in segregation and solitary confinement without food, drinking water, sleeping mats or blankets. They therefore maintained that they have proved their case on a balance of probabilities and they are entitled to the remedies they are seeking. Furthermore, that the alleged torture was instigated by Special Branch police officers and prison warders who were all employees and servants of the Government and in any event, that fact has not been disputed by the Respondent.

25. The Petitioners relied on the decisions in **Dominic Arony Amolo vs The Attorney General, HCCC Misc App. No. 494 of 2003**, **Harun Thungu Wakaba and 20 Others vs Attorney General, HCCC No. 1411 of 2004**, **Wachira Waheire vs Attorney General, Misc Civil App. No. 1184 of 2003**, **James Njau Wambururu vs Attorney General, HCCC No. 3829 of 1994** and **Dr. Odhiambo Olel vs Attorney General, HCCC No. 366 of 1995** in support of their respective cases.

26. As regards the quantum of damages payable to them, the Petitioners relied on the decisions in **Rumba Kinuthia vs Attorney General (supra)**, **Rookes vs Barnard, 1964 AC 1129**, **Dr. Odhiambo Olel vs Attorney General (supra)**, and **Koigi Wa Wamwere vs Attorney General, Civil Appeal No. 86 of 2013** and urged the Court to follow the holdings therein in regard to the damages to be granted in their respective cases and that Kshs.8 million for each of them would be appropriate in the circumstances.

27. In the Petitioners' further view, issues surrounding violation of fundamental rights and freedoms fall under the doctrine of transnational justice where historical injustices are redressed through this Court. Accordingly, that pursuant to **Articles 19, 20, 21, 22, and 23 of the Constitution**, this Court has the duty to address historical injustices and past violations of human rights such as is the case presently.

The Respondent's Case

28. In answer to the Petition, the Respondent filed no Affidavit in response or even Grounds of Opposition to the three Petitions but chose to file Written Submissions dated 7th September, 2015.

29. According to him, only two issues emerge for determination namely, whether the Petitioners have met the threshold of proof in constitutional litigation as per the principle espoused in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**, and whether special and general damages can be awarded to the Petitioners. In that regard, it was his submission that the Petitions are brought under **Articles 22, 23, 25 (a), 29 (a), (c), (d) and (f), and 49** of the **Constitution** and it is expected that each Petitioner would solely prove how their rights under each of the said Articles were violated or threatened with violation in a truthful and genuine manner as opposed to allegations of mere conspiracy, invention and use of copy and paste pleadings to advance their individual cases. Accordingly, that the Petitioners have failed to plead with precision, and to demonstrate, how the said provisions were violated and the Petitions therefore are crafted in a manner depicting conspiracy to defraud the Government of tax payers' money through the Courts.

30. The Respondent also maintained that the Petitioners have failed to meet the threshold of proof as was set out in **Anarita Karimi Case (supra)** and **Meme vs Republic and Another [2004] eKLR** and that the burden of proof entirely lies with the Petitioners and that they ought to have adduced evidence in support of their allegations and further, that it is not enough for them to merely assert that they were arrested by some plain clothed persons whom they believed were police officers. They ought for example to have also produced Occurrence Book Numbers showing their detention at the alleged police stations as proof of such arrest but they had failed to do so.

31. In the Respondent's further view, the Petitioners have not adduced any medical evidence in support of their allegations of torture and as such, this Court should not admit the claims in that regard. In addition, he relied on the holdings in **Kirugi and Another vs Kabiya and 3 Others [1987] KLR 347** and **Nguku vs Republic [1985] KLR 412** and argued further that it is trite law that he who alleges must prove the same.

32. Furthermore, the Respondent submitted that the burden of proof that the Petitioners were tortured, denied access to family members and advocates, their businesses destroyed and that they suffered economic loss has not been discharged. That in any event, they ought to have at least called a family member or friend as a witness to substantiate their claim of either arrest or the denial of access to them at the material times the alleged events occurred. The Respondent further expressed the view that the mere non-filing of an affidavit in reply by him, does not mean that everything alleged by the Petitioners is the gospel truth, and as such, the Court should not be clouded by the well-choreographed allegations fronted by them.

33. In regard to **Petition No. 202 of 2013** the Respondent's further argument was that the Petitioner therein cannot allege that his right to personal liberty was violated for being in remand for two years because the incarceration therein was sanctioned by the law. In that regard, he contended that a party who is dissatisfied by a Court decision is either to appeal against it or apply for review or discharge of the same. Accordingly, the said Petitioner cannot bring a Petition to challenge proceedings before a Court of competent jurisdiction. The Respondent relied on the decisions in **Nation Media Group Limited vs Kamlesh Mansukhlal Damji Pattni and 2 Others [2013] eKLR** and **Maharaj vs Attorney General of Trinidad and Tobago (1979) 385** in support of the foregoing assertions.

34. On whether the Petitioners should be awarded any damages, the Respondent's submission was that newspaper cuttings have no evidentiary value and the same are inadmissible and therefore, they do not prove any of the allegations by the Petitioners. Further, that special damages must be pleaded with precision and strictly proved as was held in **Zacharia Waweru Thumbi vs Samuel Njoroge, Civil Appeal No. 445 of 2003**, **Mawenzi Investments Ltd vs Top Finance Co. Ltd and Another, HCCC No. 2 of 2013**, and **Haji Asuman Mutekanga vs Equator Growers (U) Limited, Civil Appeal No. 7 of 1995** a fact that the Petitioners had failed to prove.

35. It was the Respondent's other submission that aside from orally claiming that they had businesses and

that the same were destroyed, nothing else has been placed before the Court to substantiate the existence of such businesses and any such loss as alleged. That in any event, the Petitioners ought to have at least tendered certificates of incorporation, statements of accounts, and valuation reports showing how much profit they used to make and any losses incurred, daily sales receipts etc.

36. The Respondent finally submitted that exemplary damages, as sought by the Petitioners, are an importation of a criminal law principle of punishment into the realms of constitutional law. That the same are awarded to serve the societal purpose of punishing a wrong doer and deterring him and others from similar conduct in the future. In that regard, the Respondent argued further that there is no justification for such an award, with the current changed political circumstances in the country as was held in **Benedict Munene Kariuki and 14 Others vs Attorney General, Petition No. 722 of 2009**, and as such, this Court should also not grant the same.

37. For the foregoing reasons therefore, the Respondent's position was that the Petitions are conceived and ought to be dismissed with costs.

Determination

38. The key issue for determination is whether there has been any violation of the Petitioners' rights and fundamental freedoms as alleged, and the remedies available to them, if any.

39. In that regard, the Petitioners have alleged violation of their rights under **Articles 25 (a), 29 (c), (d) and (f) and 49** of the **Constitution. Article 25 (a)** therein states that:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment.

40. **Article 29** thereof provides 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) Detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(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.

41. **Article 49** on the other hand provides for the rights of arrested persons in the following terms:

(1) An arrested person has the right-

(a) To be informed promptly, in a language that the person understands, of-

(i) The reason for the arrest;

(ii) The right to remain silent; and

(iii) The consequences of not remaining silent;

(b) To remain silent;

(c) To communicate with an advocate, and other persons whose assistance is necessary;

(d) Not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) To be held separately from persons who are serving a sentence;

(f) To be brought before a court as soon as reasonably possible, but not later than-

(i) Twenty-four hours after being arrested; or

(ii) If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) At the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

42. Have the Petitioners made out a case for violation of the foregoing rights? In answering this question, I must first state that it is now well settled that newspaper cuttings are inadmissible in Petitions such as the present one and that is a position that has been affirmed by this Court on several occasions and on that basis, **Section 35 of the Evidence Act, Chapter 80 of the Laws of Kenya**, stipulates that:

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

(a) If the maker of the document either-

(i) Had a personal knowledge of the matter dealt with by the statement; or

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

43. Further, as early as 1994, in **Karanja Mulliri and 51 Others vs District Commissioner Kiambu, Misc Application No 1292 of 1994**, the Court cautioned against the admissibility of newspaper cuttings. The Learned Judge pointed out that:

“... Courts do not usually rely on newspaper cuttings as a basis for a decision. It may not be possible to ascertain the correctness of the reporting...”

(See also **Kituo Cha Sheria and Another vs Central Bank of Kenya and 8 Others, Petition No. 191 of 2011, Consolidated with Petition No. 292 of 2011, Tesco Corporation Ltd vs Bank of Baroda (K)**

Limited, Civil Case 182 of 2007, and Michael Maina Kamami and Another vs Attorney General, Petition No. 209 of 2013.)

44. Further, I do not see any reason to depart from my holding in *Monicah Wangu Wamwere vs Attorney General, Petition No. 196 of 2013* where I stated thus:

“[47] Without saying more, Rules 9 and 10 (Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules) do not depart from the requirements that only admissible documents should be the basis of any credible evidence. In any event, I do not find that the definition of “informal documentation” in these Rules applies to newspaper cuttings.”

45. On that basis, I shall address my mind to the matter at hand without placing any reliance on the newspaper cutting that have been largely relied upon by the Petitioners. It should also not be lost that **Section 107** of the **Evidence Act** bestows upon litigants the burden of proving their cases and allegations. It states that:

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

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

46. Further to the above, **Section 109** stipulates that:

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

47. Additionally, **Section 112** of the **Evidence Act** is to the effect that:

“In any civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

48. Having so said, I watched all the Petitioners in Court and heard their oral evidence including during cross-examination. They each struck me as being truthful and the fact that they had little by way of documentation in support of their case is no reason for me to disbelieve them. Their cross-examination did not also shake them and I am satisfied that they were held for the number of days before being charged or released without charge hence the fact that in Petition No. 202 of 2013 the Petitioner was actually charged in Chief Magistrate’s Court Criminal Case No. 2273 of 1993 which obviously presupposes an arrest prior to his arraignment in Court. The Respondent has also failed to explain the reason for such incarceration outside the law which required that they ought to have been taken to Court within 24 hours.

49. Turning to the question whether the Petitioners were tortured, this Court has always maintained that when a Party alleges torture, the expectation of the law is that;

i. There must be evidence of severity of pain and suffering – see **Article 1** of the **Convention against Torture**.

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

iii. Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture – see **Sarah Joseph and Melissa Castain, The International Covenant on**

iv. The act of torture must involve a public official – see **Article 1 of the Convention against Torture**.

50. In addition to the above, the effects of torture, inhuman, cruel and degrading treatment are dire and that is why torture has been outlawed in any form and in the present case, the key contention by the Petitioners is that the torture was primarily inflicted as a mode of interrogation. In that regard, I wish to associate myself with the dictum of the Supreme Court of India in **Bhagwan Singh and Another vs State of Punjab, 1992 (3) SCC 249** which appropriately refers to the duties of police officers as far as interrogations are concerned. The Court observed thus:

"... It may be a legitimate right of any police officer to interrogate or arrest any suspect on some credible material but it is needless to say that such an arrest must be in accordance with the law and the interrogation does not mean inflicting injuries. It should be in its true sense and purposeful namely to make the investigation effective. Torturing a person and using third degree methods are of medieval nature and they are barbaric and contrary to law. The police would be accomplishing behind their closed doors precisely what the demands of our legal order forbid. In Dagdu v. State of Maharashtra this Court observed as under: (SCC p.92, para 88) ... The police, with their wide powers, are apt to overstep their zeal to detect crimes and are tempted to use the strong arm against those who happen to fall under their secluded jurisdiction. That tendency and that temptation must in the larger interest of justice be nipped in the bud." (Emphasis added)

51. It therefore follows that the police and every other person has a duty to uphold the law and not to inflict any pain or injuries or subject any individual to torture. I must further add that it is imperative for any person claiming to have been tortured to prove his allegations in that regard to the required standards.

52. In the present case and applying the above expositions of the law, having noted the demeanour of the Petitioners in Court and although again I saw no documentation in support of their cases, I take judicial notice that at the material time, torture of suspects arrested for political offences was routine and since their evidence in that regard was unshaken, I am inclined to accept it.

53. On whether being subjected to the prison conditions, as alleged, constituted torture, I can do no better than to reiterate the holding by the Court in **Koigi Wamwere vs Attorney General, Petition 7373 of 2009** where it was observed as follows:

"[44] I have set out in detail some of the averments of the petitioner with regard to what he considers to be acts of torture committed against him by state and state agents during his detention and incarceration in his two trials. Weighed the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change. To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system. Looked at against the definition of torture, however, I find and hold that there was no violation of the petitioner's rights under section 74 with regard to the above instances cited as illustrations of the torture he was subjected to while in detention." (Emphasis added)

54. The Court of Appeal in **Koigi Wamwere vs Attorney General, Civil Appeal No. 86 of 2013**, also addressed its mind to the same question in the following terms:

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

I am being guided by the above holding and applying them to the present case, I am unable to find any violation of the Petitioners rights under **Articles 25 (a) and 29 (a), (c), (d) and (f) of the Constitution**, in regard to prison conditions that they were subjected to.

55. Having so said, one other issue requires quick resolution i.e. whether the Petitioners lost businesses and income therefrom. On this issue, even in oral evidence, the Petitioners were as vague as they were in their Petitions. No particulars of any kind were given including the nature of these businesses. I cannot, however sympathetic I should be, accept such vagueness as the basis for a favourable finding and so I am unable to find any violation in that regard.

Conclusion

56. The Petitioners have sought general, exemplary and moral damages. The jurisprudence in regard to the award of exemplary damages in torture cases has been that there is no justification in awarding the same following the change in regime of governance and the unlikelihood of the events of ever occurring. I do not see the reason for departing from that reasoning.

57. Having so said, this Court, while continuing its duty to ensure that historical injustices are addressed, must also remind Parties that the near stampede for compensation as the prime mover of the litigation is misguided as that is not the only remedy available for violation of rights.

58. On that question, this Court further reiterates its previous holding that in changed political circumstances, exemplary, punitive and moral damages are not payable - See ***Benedict Munene Kariuki and 14 Others vs the Attorney General High Court Petition No. 722 of 2009, and David Gitau Njau and 9 Others vs Attorney General, Petition No. 340 of 2012.***

59. In any event, looking at the circumstances of the present Petitions, the number of days the Petitioners were held in custody before being taken to Court and the torture inflicted as well as present complaints, I shall make the following global awards:

- i) In **Petition No. 201 of 2013**, the Petitioner is awarded **Kshs.800,000.00**
- ii) In **Petition No. 202 of 2013**, the Petitioner is awarded **Kshs.1.5 Million**
- iii) In **Petition No. 203 of 2013**, the Petitioner is awarded **Kshs.800,000.00**

Disposition

60. Having so said, the following are the final orders to be made:

- (i) In **Petition No. 201 of 2013**

(a) A declaration is hereby made the Petitioner’s fundamental rights and freedom were contravened and grossly violated by the Respondent’s Special Branch police officers who were Kenyan Government servants, agents, employees and in its institution on diverse dates for eight days at Nyayo House Torture Chambers from 14th April, 1989 to 22nd April,

1989.

(b) The Petitioner is awarded Kshs.800,000.00 as compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of eight days.

(c) The Petitioner shall also have the Costs of the Petition plus an (b) above and costs.

(iii) In **Petition No. 202 of 2013**

(a) A declaration is hereby made that the Petitioner's fundamental rights and freedom from torture were contravened and grossly violated by the Respondent's Special Branch Police Officers, who were Kenyan Government servants, agents, employees, and in its institutions in Nyayo House Torture Chambers for fourteen days from 10th August 1988 to 24th August 1988 and in different police stations and cells in Kenya for a further 12 days.

(b) The Petitioner is awarded Kshs.1.5 Million as compensation for the violations and contraventions of his fundamental rights and freedom from torture under the aforementioned provisions under Articles 22, 23, 25 (a) and 29 (a), (c), (d) and (f) of the Constitution.

(c) The Petitioner shall also have the Costs of the Petition plus interest on (b) and costs.

(iv) In **Petition No. 203 of 2013**

(a) A declaration is hereby made that the Petitioner's fundamental rights and freedom were contravened and grossly violated by the Respondent's Special Branch Police Officers, who were Kenyan Government servants, agents, employees and in its institution at Nyayo House Torture Chambers for eight days from 14th April, 1989 to 22nd April, 1989.

(b) The Petitioner is awarded Kshs.800,000.00 as compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution for a total of eight days.

(c) The Petitioner shall also have the Costs of the Petition plus interest on (b) and costs.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Gitau for Petitioner

Miss Iravi for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE