



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.340 OF 2012**

**BETWEEN**

**DAVID GITAU NJAU.....1ST PETITIONER**  
**SHABAN DOSHO MWADOSHO.....2ND PETITIONER**  
**JOHANA KIPTARUS KISORIO.....3RD PETITIONER**  
**HASSAN MOHAMED HASSAN.....4TH PETITIONER**  
**DANIEL WILLIAM KOI.....5TH PETITIONER**  
**KHAMISI ALI MWAMGUTE.....6TH PETITIONER**  
**PETER MUTUNE MUNGAI.....7TH PETITIONER**  
**JACOB MWALIKO WANGAI.....8TH PETITIONER**  
**ALFRED KAHINDHI MWATHETHE.....9TH PETITIONER**  
**GRAHAM WAMBAA NJAU.....10TH PETITIONER**

**AND**

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

**JUDGMENT**

**Introduction**

1. The 10 Petitioners, are all ex-service officers of the Kenya Air Force. They were serving officers at the time of the attempted coup of 1st August 1982 and in their Petition, they allege that they were all arrested by officers of the Kenya Army on diverse dates between 1st and 4th August 1982 on suspicion of participating in the attempted/failed coup on the mere account of their being officers of the Kenya Air Force. In that Petition dated 3rd August 2012, they allege a violation of

their fundamental rights and freedoms as enshrined in **Sections 70(a), 72(3), 74(1)** and 77 of the **Repealed Constitution** and now **Articles 27(1), (2), 29(a) 49(1)(f)** and **50(2)** of the **Constitution, 2010** by the officers of the Kenya Army in 1982 and 1983 and on diverse dates therebetween.

2. They claim that in the cause and immediately after their arrests, they were subjected to untold torture, cruel, inhuman and degrading treatment by officers of the Kenya Army and in particular, they allege that they were stripped naked in public, were made to walk on their knees on concrete floors, whipped, kicked around, bludgeoned all over their bodies, being taunted that they were 'educated rubbish' and moved into custody in military trucks whilst naked and in full view of the public in violation of their rights as to human dignity, protection of the law and freedom from cruel, inhuman and degrading treatment under **Sections 70(a)** and **74(1)** of the **Repealed Constitution**.
3. They further allege that they were frequently moved from one place of detention to another and held incommunicado without access to any persons from the outside world who could render assistance to them including their family members, friends, lawyers and doctors in violation of their constitutional rights to human dignity, protection of the law and freedom from torture, cruel, inhuman and degrading treatment.
4. They also claim that they were held in detention for a period of eight (8) months between August 1982 and March 1983 when they were all released without charge, without having been arraigned before a court of law and without being accorded a hearing and were dismissed from service on the ground of redundancy without a hearing and without any dues in violation of their fundamental rights to human dignity, protection of the law, personal liberty, freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial.
5. They averred that in the said period of per-arraignment detention of 8 months, they were held illegally in designated prisons and (save for the 8th Petitioner, **Jacob Mwaliko Mwangai**, despite not having been charged with any criminal offence or arraigned before a Court of Law and without court orders remanding them to such prisons. They therefore seek the following reliefs;

***“a) A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the petitioners upon being taken into custody, the cruelties, violence, brutalities and extreme and inhuman and degrading conditions that the Petitioners were subjected to in the various military, police and prisons custody that they were held constituted breaches of the fundamental rights and freedoms of the Petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by Sections 70(a) and 74(1) of the former Constitution (now Articles 27(1),(2), 28 and 29(a), (c), (d), (f) of the Constitution of Kenya, 2010).***

***b) A declaration that the period of 8 months that the petitioners were detained incommunicado in military, police and prisons' custody between August 1982 and March 1983 when they were released without charge, without being arraigned before a Court of law or without being accorded a trial constitute a period of arbitrary, unlawful, illegal detention and a violation of the fundamental rights as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial guaranteed by sections 70(a), 72(3), 74(1) and 77 of the former Constitution (now Articles 27(1), (2), 29(a) 49(1)(f) & 50(2) of the Constitution of Kenya, 2010).***

***c) General damages consequential to the declarations of violations of the fundamental rights and freedoms of the petitioners in prayers (I) and (ii) above as may be assessed by this Honourable Court.***

***d) Aggravated, punitive and/pr exemplary damages for the arbitrary, highhanded and oppressive conduct by security officers of the government towards the petitioners.***

- e) *Costs of the Petition.*
- f) *Interest on all monetary awards.”*

### Case for David Gitau Njau

6. In his Affidavit and in oral evidence before this Court, the 1st Petitioner **David Gitau Njau**, stated that he was enlisted in the Kenya Air Force on 29th March 1973 under Service No.021621 and rose through the ranks to the rank of Sergeant. He stated that on the morning of 1st August 1982, whilst asleep at the Air men's Married Quarters at Eastleigh Air Base, he woke up to the sound of alarms and gunshots and as was the standard drill, proceeded to the armory but before he could enter it, he was confronted by a group of soldiers in combat gear who forced him at gunpoint to enter a Land Rover parked at the main gate and drive it. That when he reached the main guardroom, he was ordered to stop and park the vehicle while the soldiers in it alighted and headed to the guardroom. He also alighted and ran to the Sergeants' Mess where he heard on radio that officers of the Kenya Air Force had attempted to overthrow the government but they had been overpowered and then suddenly everything returned to normal at the Eastleigh Air base.
7. However, later on the same day, while at the Mess, he was surrounded together with other Air Force officers by Kenya Army officers who pointed rifles at them and ordered them to remove everything they had on including watches, money, rings and ordered them to strip naked and remain in underpants only. They were also ordered to board a prison truck parked at the Mess as they were kicked, slapped and whipped all over their bodies. Whilst naked they were driven to Kamiti Maximum Prison where he claimed that they were received by prison warders who beat them with clubs and he sustained body injuries as a result of the beatings.
8. He claimed that he spent the first two days in the cell at Kamiti Maximum Prison without food, water or medical attention for the bodily injuries and aches that he had sustained. He remained at Kamiti Maximum Prison for two weeks where he was confined in an overcrowded cell without blankets, deprived of sleep as they were being counted every two hours while standing up and subjected to continuous interrogation by army officers so many a times as they tried to coerce him to confess to participation in the failed coup and committing the offence of mutiny. Towards the end of August, he was transferred to Naivasha Maximum Prison where he was given completely torn prison uniform that could not cover his nakedness and he was forced to use pieces of torn blankets to do so. At Naivasha, he was detained in a very crowded cell without enough ventilation, in starving conditions with very little food of ugali and beans served once per day and even as army officers continued to interrogate him. And because he refused to confess, to any role in the aborted coup, he was removed from the overcrowded cell and put in solitary confinement in a section called “segregation” where he was allowed to mix with other prisoners only two hours a day.
9. He claimed that sometimes in January 1983, he was transferred to Langata Barracks in Nairobi, where he was taken to an Army Major who introduced himself as 'a mitigation officer' and who tried to persuade him to plead guilty to whatever charges that would be read to him at the Court Martial but he refused to take that advice and demanded to be allowed to get himself a lawyer upon which the Major became hostile and ordered him to be locked up at Kamiti Maximum Prison. At Kamiti Maximum Prison, he was detained in solitary confinement in Block G in a tiny, dirty cell that had a very bright bulb that was permanently lit day and night. He was given a pair of very dirty and torn blankets. He was also detained on a starvation diet of a half cup of porridge for breakfast and slice of ugali and few pieces of green vegetables for lunch and supper. He was in solitary confinement for 3 weeks, after which he was allowed to mix with the inmates in Block G who had been sentenced to death, some of whom were insane and were yelling all the time. He was later on transferred after two weeks to Block D where he met other fellow servicemen who had pleaded guilty to coup related offences at Court martial.
10. Afterwards, on 14th March 1983, he was taken to Kahawa Barracks where he was told that he

had been released from prison, dismissed from the Air Force and given some old clothes to wear. Thereafter, he was driven in a military truck and dropped at the Railways Bus stage and given Kshs.20 as bus fare and warned never to be seen near a military place again. He was re-united with his wife and four children who had been evicted from the Air men's Married Quarters and were now living with relatives in Kangemi whilst undergoing great hardship. He was subsequently, employed as a Motor Vehicle Mechanic by Tana and Athi Rivers Development Authority.

### **Case for Shaban Doshu Mwadosho**

11. The 2nd Petitioner, **Shaban Doshu Mwadosho** in his Affidavit sworn on 3rd August 2013, and in oral evidence stated that he was enlisted in the Air Force on 3rd March 1978 under service number 102166 and employed as a driver after completing his basic military training and was posted to serve at Moi Air Base, Eastleigh in Nairobi. At the time of the coup, he claimed that he was on his annual leave at his elders' brother's house, Salim Njama Doshu in Likoni Mombasa and he learnt through the radio announcement made by one, Leonard Mambo Mbotela that there had been an attempted coup in Nairobi.
12. He stated that on 2nd August 1982, he also heard an announcement through the radio requesting all soldiers on leave to report to the nearest police station or military camp. He claimed that on 3rd August 1982, together with his brother who was working with the Kenya Army. They reported to Kwale Police Station where they were received by the OCS and the DC. His brother was let to go home and he was arrested and locked up in a police cell. Later in the evening, he was picked up by Kenya Navy officers and driven in a Land Rover and locked up in the guardroom of the Kenya Navy Barracks.
13. On 4th August 1982, he claimed that he was interrogated by one Col. Kibwana who ordered him to sign a statement falsely confessing his participation in the coup which he refused to sign. He was detained for two weeks together with other soldiers of the Air Force who had been brought in and thereafter, he was transferred to Moi Air Base and upon arrival, he was stripped naked and beaten thoroughly by Army Officers. He was detained there for the night and in the morning, he was transferred half-naked to Kamiti Maximum Prison where on arrival, he was thoroughly beaten up by the warders, detained incommunicado without access to anybody for one month, and in an overcrowded cell under inhuman conditions as he was allowed only one meal a day served at 3pm and also allowed only two hours a day out of the cell.
14. He was later transferred to Naivasha Maximum prison where he was detained in a waterlogged cell, denied food and water for days, denied sleep and access to his relatives and was continuously interrogated while being coerced to falsely confess involvement in the failed coup. He remained detained until 26th March 1983 when he was transferred to Kahawa Barracks where he was detained for a night and the following day, 27th March 1983, he was informed that he had been released and dismissed from service and instructed to go home and never to be seen near a military installation. He claimed that throughout his 8 months detention, he was detained incommunicado without any access to relatives and was never charged with any offence or presented before a court of law and was not heard before being dismissed from the Air Force or paid any dues for that period.

### **Case for Johana Kiptarus Kisorio**

15. The 3rd Petitioner, Johana Kiptarus Kisorio in his affidavit sworn on 3rd August 2012, claims that he was enlisted in the Kenya Air Force on 1st April 1975 under service N0. 022008 and rose to the rank of a corporal. At the time of the attempted coup on 1st August 1982, he was serving at Nanyuki Air Base. He claimed that he was awoken at 8.00am on the morning of 1st August 1982 by his wife who informed him of the coup. He then woke up, put on his uniform and went straight to the Air Base where he found his colleagues and he noticed that most of them were armed. He was also issued with a firearm and he claimed that the situation was confusing as there was no real

command. That at around 10.00am, he stated that officers of the Kenya Army from the 1st Army Battalion Nanyuki arrived at the Air Base in support of the coup and at around 6.00pm the situation changed, and the Kenya Army officers turned against the Air Force officers and ordered them to surrender their guns, strip naked and arrested all of them. After the arrest, he claimed that some of them were taken to Nanyuki Prison, Nanyuki Police Station and Meru Prison, half naked.

16. He remained detained at Nanyuki Prison for 18 days having been beaten up daily by police officers until 18th August 1982 when he was taken back to Kenya Air Force Base Nanyuki when he was made to write a statement containing an account of the events of 1st August 1982. He was later in the evening transferred to Nyeri Kingo'ng'o Prison and on arrival, he was thoroughly beaten by the warders using their buttons, kicks and slaps and left alone while almost unconscious. He was detained in this prison for about 2 weeks and in September, 1982, he was transferred to Kamiti Maximum Prison where he was, upon arrival, subjected to thorough indiscriminate beatings by prison warders and thereafter locked up in a tiny overcrowded cell in Block G that housed insane inmates who were yelling all the time. After one month, he was transferred to Naivasha Maximum prison in November 1982 whereupon he was again descended upon and beaten by warders and detained in a dark, waterlogged cell for 3 days while naked, without food and drinking water. Subsequently, he refused to sign papers handed to him by one Major Mbewa confessing that he was guilty of having failed to suppress the coup or mutiny by air force.

17. In January/February 1983, he was transferred to Kamiti Medium Prison where he was detained for about two weeks. On 14th March 1983, he was transferred to Kahawa Barracks where he was informed that he had been released from prison, his civilian identity card returned to him and informed that he had been dismissed from service. He was also given bus fare home and issued with a stern warning that he should never be seen near a military installation again.

18. He claimed that throughout his 8 months detention between 1st August 1982 and 14th March 1983 he was not charged with any offence or arraigned before any court of law. He was also not given a hearing before he was dismissed from service without any dues save for the bus fare he was given to take him home.

### **Case for Hassan Mohamed Hassan**

19. The 4th Petitioner, Hassan Mohamed Hassan in his Affidavit sworn on 3rd August 2013 claimed that he was arrested on 1st August 1982 at KAF Nanyuki by Kenya Army Officers who stripped him naked and detained him in the barracks for 1 month. He alleged that he was denied food, drinking water and sleep and was subjected to indiscriminate beatings all over his body, solitary confinement and continuous interrogation while being coerced to falsely confess involvement in the failed coup. He was later escorted to Kamiti Maximum Prison where he was detained for 2 months in a prison block with insane inmates who were screaming at all times. He was subjected to beatings and continuous interrogations by officers of the Kenya Army and later taken to Naivasha Maximum Prison, where he was detained for 1 month, brutally beaten up, confined in a tiny waterlogged cell lit for 24 hours causing him disorientation and he lost knowledge of day or night. From Naivasha he was escorted to Lang'ata Barracks where he was advised by a senior army officer to plead guilty to all charges that would be read to him but he refused to do so and was escorted by the Military Police to Industrial Area Prison where he was detained for 3 months and later to Kodiaga Prison where he was detained for 2 months and released on 21<sup>st</sup> March 1983. Like other Petitioners, he was not charged with any offence or arraigned before any Court of law or served with a detention order for the 8 months he was detained *incommunicado* without access or visitation by anybody from outside this place or detention. Upon his release from Kodiaga Prison on 21<sup>st</sup> March 1983, he was informed that he had been dismissed from service but was not given a hearing before dismissal or paid any dues including for the 8 months he was in detention as a serving officer.

### **Case for Daniel William Koi**

20. The 5<sup>th</sup> Petitioner, **DANIEL WILLIAM KOI** was arrested on 1<sup>st</sup> August 1982 at KAF Nanyuki by officers of the Kenya Army. The army officers allegedly stripped him naked, slapped, kicked and beat him all over his body as they called him “*educated rubbish*” and locked up him in a tiny room at the Base with very little ventilation where he almost suffocated. Later, on 4<sup>th</sup> August 1982 he was escorted to Kamiti Maximum Prison in an open truck while half-naked and on arrival, he was subjected by the prison warders to thorough, random and indiscriminate beatings all over his body as he was led into a cell which was dark and overcrowded with no ventilation no lighting, no blankets and as a result he became disoriented and lost count of days or nights. He was thereafter detained at Kamiti Maximum Prison and Naivasha Maximum Prison where he was locked up in an overcrowded cell without enough ventilation, without blankets, with lights on all the time and allowed out of the cell to bask for only 2 hours a day.
21. He claimed that throughout his detention in Kamiti and Naivasha Maximum Prison, he was subjected to countless interrogations by officers of the Kenya Army as they coerced him to falsely confess involvement in the failed coup in Nairobi. He was held totally *incommunicado* and denied access to a lawyer or any of his relatives throughout his time in detention.
22. On 12<sup>th</sup> March 1983 he was escorted from Naivasha Maximum Prison to Lang'ata Barracks where he was informed that he was going to be presented before a Court martial and advised to plead guilty to all charges that would be read out to him. He rejected the advice and asked for a lawyer to assist him and was instead immediately escorted to Kahawa Barracks where he was detained for 2 days. On 14<sup>th</sup> March 1983 he was escorted to an office where he met a senior army officer who informed him that he had been dismissed from service and should never be seen near a military base. He alleged that he was not given a hearing before dismissal from service and save for Ksh.80 given to him for bus fare home he was not given any dues even for the period of 8 months that he was in detention as a serving officer.

#### **Case for Khamisi Ali Mwamgute**

23. The 6<sup>th</sup> Petitioner, **KHAMISI ALI MWAMGUTE** stated that he was enlisted into the Kenya Air Force on 12th September 1979. He was arrested on 4<sup>th</sup> August 1982 at KAF Eastleigh by Kenya Army officers who stripped him naked and locked him up in the cells. Later he was escorted to Kamiti Maximum Prison where he was received by warders who beat him thoroughly using with batons, rungs, kicks and slaps. In Kamiti he was detained in solitary confinement in a cell without enough ventilation, without blankets and denied food or drinking water for the first 3 days. From Kamiti he was escorted to Naivasha Maximum Prison where he was locked up in a waterlogged cell, subjected to endless beatings, denied sleep or rest as he was interrogated by army officers as he was being coerced to confess his role in the planning of the coup. After 1 month in Naivasha he was escorted to Lang'ata Barracks where he was advised by a senior army officer that he was going to be charged before a Court Martial and was required to plead guilty to all offences but he refused to do so and was escorted back to Kamiti where he was detained until early March 1983 when he was escorted to Kahawa Barracks. On 14<sup>th</sup> March 1983, while still in detention at Kahawa Barracks he was escorted to the office of a senior army officer who informed him that he had been dismissed from service, and the officer gave him bus fare home and warned him never to be seen near a military establishment. He was not given a hearing before dismissal from service or any benefits or pay even for the 8 months that he was in detention an officer. He claimed that throughout the 8 months detention he was held *incommunicado* and his relatives all along thought he had died in the course of the failed coup.

#### **Case for Peter Mutune Mungai**

24. The 7<sup>th</sup> Petitioner, **PETER MUTUNE MUNGAI** was enlisted in the Kenya Air Force on 12th September 1979, and was arrested on 1<sup>st</sup> August 1982 by Kenya Army officers at the KAF Nanyuki and detained at the aircraft runway for the whole of 1<sup>st</sup> August 1982 without food or

water. He claimed that from 2<sup>nd</sup> August 1982 he was locked up in the supplies store for 4 days while being subjected to random assaults and insults by the army officers who kept referring to him and his fellow KAF detainees as “*educated rubbish*”. He was later escorted to Kamiti Maximum Prison where he was detained for 3 months while being subjected to brutal endless interrogations while being beaten senselessly, denied rest, sleep, food and drinking water in a bid to coerce him to confess involvement and commission of unspecified offences in the failed coup.

25. He alleged that from Kamiti he was escorted to Naivasha Maximum Prison for further interrogation and on arrival in Naivasha he was subjected to interrogation by officers from the Kenya Army and on refusal to confess involvement in the coup he was stripped naked, locked up in solitary confinement in a dark waterlogged cell for 2 days without food or drinking water. When he was removed from the waterlogged cell he could not walk because of numbness and hunger. Throughout the 2 days of solitary confinement in the waterlogged cell army officers would check on him and ask him if he was ready to make a confession but he refused to do so. After solitary confinement he was escorted to an office where he found two officers from the Department of Defence (DoD) who tried to cajole him to admit to involvement in the coup and sign a prepared confession statement in order to be considered for re-employment or discharge with benefits. He declined to sign the confession and claimed that at the beginning of March 1983, he was escorted from Naivasha to Kamiti Maximum Prison and from Kamiti Maximum Prison to Kahawa Barracks where he and his KAF inmates met senior army officers who issued them with change of dirty clothes, informed them that they had been released from prison and dismissed from service and he was given Kshs.17/- as bus fare home and escorted to the Country Bus Station and dropped off with a warning that he should never be seen near a military station.

26. He alleged that throughout his detention of 8 months he was not charged before a court of law and was detained *incommunicado* without access or visitation by anybody including his relatives who all along thought he had been killed during the failed coup. Further, he was not given a hearing before dismissal from service or any benefits including pay for the 8 months he was in custody as a serving officer of the KAF.

### **Case for Jacob Mwaliko Wangai**

27. The 8<sup>th</sup> Petitioner, **JACOB MWALIKO WANGAI** stated that he was enlisted in the Kenya Air Force on 2<sup>nd</sup> September 1977 and that he was arrested on 1<sup>st</sup> August 1982 by Kenya Army officers at KAF Nanyuki. Together with other KAF officers he was stripped naked, slapped, kicked and beaten as they were taunted as “*educated rubbish*” and locked up in a tiny room at the Base with very little ventilation where they almost suffocated to death. Later on they were brutally frog marched into 2 lorries as they were beaten, kicked and hit all over their bodies by the army officers and escorted to Meru GK Prison where they were received with more beatings by prison warders using gun butts, sticks, kicks and slaps. He was detained for 3 days at Meru GK Prison in an overcrowded cell and denied food throughout the 3 days as the prison warders said there was no ratio for the KAF soldiers.

28. He claimed that he was escorted back to KAF Nanyuki on 4<sup>th</sup> August 1982 where he was detained until 6<sup>th</sup> August 1982 when he was escorted to Nyeri G.K. Prison (King'ongo) where he was received with beatings, kicks, fists, slaps and hit with gun butts and there he was detained for about 6 days until 11<sup>th</sup> August 1982 when he was escorted from King'ong'o to KAF Nanyuki and locked up in an overcrowded guardroom without enough ventilation, lighting or toilet facilities. On 13<sup>th</sup> August 1982 he was escorted from KAF Nanyuki to Naivasha Maximum Prison where he was locked up in solitary confinement in a cold waterlogged cell for a month. During this period army officers visited him several times cajoling him to confess to knowledge of the planning of the coup which he declined to do so. Thereafter, he was escorted from Naivasha to Kamiti Maximum Prison, where he was detained until sometime in December 1982 when he was escorted to the Court Martial at Lang'ata Barracks and he pleaded “*not guilty*” to charges of mutiny and was remanded back to Kamiti awaiting trial. However, he alleged that he was not returned to the

Court Martial again and remained detained at Kamiti Maximum Prison without trial, in an overcrowded cell, underfed and always subjected to random beatings and insults by warders. On 22<sup>nd</sup> March 1983, he was escorted to Kahawa Barracks, given his certificate of discharge from service and officially released from custody. He claimed that he was not given a hearing before dismissal from service or any benefits or salary for the 8 months he was in detention as a serving officer. He was given bus fare after he was dumped at Machakos Country Bus Station and told to go home. He alleged that throughout his detention of 8 months he was not allowed access or visitation by anybody from the outside world including his relatives who all along thought he had died in the course of the failed coup.

### **Case for Alfred Kahindhi Mwachethe**

29. The 9<sup>th</sup> Petitioner, **ALFRED KAHINDHI MWATHETHE** was enlisted in the Kenya Air Force on 3<sup>rd</sup> March 1978. He claimed that he was arrested on 2<sup>nd</sup> August 1982 by police officers when he reported at Jogoo Road Police Station following an order that all KAF officers should report to the nearest military base or police station. When army officers came for him from the police station, they stripped him naked, randomly beat him up and escorted him in an open truck to Kamiti Maximum Prison where he was detained in an overcrowded cell without enough ventilation, blankets, food or drinking water for the first 3 days. A few days later, he was escorted to Naivasha Maximum Prison where he was subjected to a series of brutal interrogations by army officers who thoroughly beat him up, denied him sleep or rest as they coerced him to falsely confess his role in planning the failed coup. From Naivasha he was escorted to Lang'ata Barracks where he was advised by a senior army officer that he was going to be charged before the Court Martial with mutiny and was required to plead guilty. He declined the advice and instead requested for an advocate to defend him upon which he was escorted back to Naivasha Maximum Prison where he remained detained without trial until early March 1983 when he was escorted to Kahawa Barracks where he met a senior army officer who informed him that he had been dismissed from service, given bus fare home and warned never to be seen near a military base.

30. He alleged that he was not given a hearing before dismissal from service or any benefits or pay even for the 8 months that he was in detention as a serving officer. And further that throughout his detention of 8 months he was held *incommunicado* without access or visitation by anybody from the outside including his relatives who all along thought he had died in the course of the failed coup.

### **Case for Graham Wambaa Njau**

31. The 10<sup>th</sup> Petitioner, **GRAHAM WAMBAA NJAU** was enlisted in the Kenya Air Force on 24<sup>th</sup> December 1980 and he claimed that he was arrested on 1<sup>st</sup> August 1982 by army officers as he made his way to his station at Kahawa Barracks from home where he had been spending his duty off days. Upon arrest, he was beaten up all over his body with gun butts, slaps and kicks as he was being escorted to DoD headquarters. At DoD he found army officers waiting for him and they forced them to strip naked and beat him brutally and afterwards, he was detained with others in an open field naked, injured, bleeding and writhing in pain up to about 7.00 p.m. He claimed that from DoD, he was frog marched into a truck and escorted to Kamiti Maximum Prison where he was subjected to indiscriminate beatings by the prison warders and the army officers as he was booked in the prison blocks. That was starved and denied any food or drinking water for the whole of 1<sup>st</sup> August 1982.

32. From 2<sup>nd</sup> August 1982, he claimed that he was detained in complete lock-up, on sugarless porridge for breakfast and one meal a day for several days as the prison warders claimed that soldiers were not accounted for in the prison rations. After a week in Kamiti he was called for interrogation by army officers who kept coercing him to confess participation in the coup, an invitation he declined to accept. After the interrogation at Kamiti Maximum Prison he was escorted to Kamiti Medium Prison where he was detained for 3 months completely

*incommunicado* without access to any person from the outside world as he was subjected to daily, random and indiscriminate vicious beatings by the prison warders. In January 1983 he was escorted from Kamiti Medium to Naivasha Maximum Prison where for the first 2 days he was locked up naked, in solitary confinement in a dark, waterlogged cell without food or drinking water. After intense interrogations, he was removed from solitary confinement to an overcrowded cell where he met some of his fellow KAF soldiers who had been similarly tortured and those who were strong carried those who could not walk because of numbness in the legs after being in the waterlogged cells for too long. He claimed that he was further interrogated sometimes in February 1983 and upon denying the participation in the failed coup, on 13<sup>th</sup> March 1983 he was escorted from Naivasha to Kamiti Medium Prison and on 14<sup>th</sup> March 1983 he was taken to Kahawa Barracks where he met a senior army officer who informed him that he had been freed from prison and dismissed from service. He was dropped at Country Bus Station and given Kshs.50/- as bus fare home and warned never to be seen near a military establishment. He alleged that throughout the 8 months detention he was not arraigned before a Court of law and he was not heard before dismissal from service or paid any dues.

### **Petitioners submissions**

33. The Petitioners in their written submissions claimed that their arrest was brutal and inhuman. That they were beaten up and stripped in public upon arrest and also transported to prisons while naked or semi-naked. On arrival in prisons they were thoroughly beaten up before being held *incommunicado* and in filthy overcrowded cells in the same block with some noisy and insane death row prisoners or in solitary confinement in filthy waterlogged cells, or in filthy dark cells or filthy permanently lit cells. They were all denied basic needs i.e. food, drinking and bathing water, sleep and medical attention so as to coerce them to breakdown and admit participating in the 1982 coup attempt. They were frequently transferred from one detention facility to another whilst naked. And they were also subjected to endless brutal interrogations accompanied by physical and mental assaults as they were encouraged to confess “*guilt*” in planning the coup. They alleged that these acts were in violation of **Sections 70(a) and 74** of the **Repealed Constitution**.
34. The Petitioners further claimed that their detention for 8 months or thereabout without charge or trial was a violation of the Petitioners rights under **Section 72(3), 74(1) and 77** of the **Repealed Constitution**. They relied on the cases of *Ann Njogu & 5 Others v Republic (2007) e KLR* and *Albanus Mwasii Mutua v Republic (2006) e KLR* on their unlawful detention beyond the period prescribed by law. They also submitted that their detention in the conditions described elsewhere above are a violation of the right to human dignity and amounts to cruel, inhuman and or degrading treatment or punishment.
35. The Petitioners further submitted that the 8 months' detention without charge or trial amounted to holding the Petitioners in servitude contrary to **Section 73(1)** of the **Repealed Constitution** and they relied on the case of *Dominic Arony Amolo (supra)* in that regard. In case of the 8th Petitioner, who was arraigned in the Court Martial, that he was not accorded a trial later amounted to a denial of his right to a fair trial within a reasonable time guaranteed by **Section 77(1)** of the former Constitution.
36. The Petitioners in extrapolating on the award of damages in various torture case by the High Court, (*Dominic Arony Amolo (supra), Jenniffer Muthoni Njoroje and 10 Others v Attorney General Petition No. 340 to 350 of 2009, Odhiambo Olel v Attorney General Civil Case No.366 of 1995, Peter Kariuki v Attorney General Petition No. 233 of 2009*) submitted that a lump sum award of general damages of Kshs.15,000,000.00 to each Petitioner would be fair and reasonable compensation for the deprivation of personal liberty, human dignity, physical and psychological torture, cruel, inhuman and degrading treatment, deprivation of the fundamental right to the protection of law and fair trial for the 8 months of unlawful detention without trial. They also claimed exemplary damages of Kshs.5,000,000.00 per Petitioner for the constitutional violations.

### **The Respondent's Submission**

37. The Respondent, the Attorney General did not file any response in the matters of fact raised the Petition. He however opposed the Petition and his case is contained in his written submissions dated 10th June 2013.
38. The Respondent claimed that none of the Petitioners has filed any documents in Court showing that they were arrested and detained in any police station. He also submitted that the Petitioners failed to lead evidence that would show that they were subjected to untold torture, cruel, inhuman and degrading treatment. And further that their claims were not corroborated by any independent witness(es). He questioned why the Petitioners did not avail medical evidence of the torture allegedly meted upon them. He claimed that under Section 107 and 109 of the Evidence Act whoever alleges must prove that those facts exist. He relied on the case of *Peter Ngari Kagume & Others v Attorney General Const. Application No. 128 of 2006* where Nyamu J held that when a party alleges and the rival side disputes, the person alleging assumes the burden of proving the allegation and it was incumbent upon the Petitioner to avail tangible evidence of violation of their rights and freedoms.
39. The Attorney General further submitted that most of the Petitioners (PW 3, 4, 5, 6 and 7) had indeed confessed their participation in the failed 1982 coup attempt and submitted that under **Section 71(2) of the Repealed Constitution**, a person was not regarded as having been deprived of his life if he died as a result of use of force to such an extent as is reasonably justifiable. He claimed in that regard that the Petitioners participated in a mutiny contrary to **Section 25(3) of the Repealed Armed Forces Act** and as such the force used against them was reasonable and humane enough and was therefore lawful.
40. He also submitted that the Petitioners have filed their Petitions 30 years, after the accrued cause of action and none of them gave any credible reason why the Petition was filed 30 years late. He relied on the case of *Attorney General of Uganda & Anor v Omar Awadh & 6 Others (EACJ) No. 2 of 2012* where it was held that a person whose constitutional rights have been violated should have some zeal and motivation in enforcing his or her rights. He claimed that the earlier the enforcement of a right the better so as to avoid evidence being lost or memory fading.
41. With regard to the dismissal claims, he submitted that under **Section 176(g) of Cap 199 of the Armed Forces Act** (now Repealed) a serviceman could be discharged if his services were no longer needed by the force.

### Determination

42. Before I turn to examine whether the Petitioner's have established that their alleged rights and freedoms have been violated by the Respondent, I will first deal with what I would deem as a preliminary issue raised by the Respondent that the Petitioners have filed this Petition 30 years from the date of their cause of action.
43. To my mind, I do not know any law or a particular provision of the **Repealed Constitution** that provided that a claim based on fundamental rights and freedoms has a limitation period within which the claim ought to be filed. A claim made under the Constitution is neither a claim in tort nor contract that would necessitate the application of the **Limitation of Actions Act, Cap 22 Laws of Kenya**. Further, a casual reading of the rules contained under the Legal Notice No. 133 of 2001 (Constitution of Kenya (Protection of Fundamental rights and Freedoms of the individual) Practice and Procedure Rules, 2001) would show that they do not place any limitations on the citizens' rights to institute a suit for the redress of violation of fundamental rights and freedoms under **Section 84 of the Repealed Constitution**. I therefore agree with the reasoning of Hayanga J while determining a preliminary issue in *Dominic Arony Amolo (supra)* that;

***“I therefore, think and I so hold that section 3 of the Constitution excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated***

*under the Limitation Act, Cap 22.”*

Despite my position on this issue as can be seen above, I strongly believe that I must hereby state that I am not persuaded by the authority of *Peter Ngari Kagume & Others v Attorney General (supra)* cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply in my view did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breaches occurs but for obvious reasons, I am clear in my mind that there is no limitation period imposed by the **Repealed Constitution** and the rules made thereunder under **Section 84** for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case.

44. Turning to the authority of the East African Court of Justice, *Attorney General of Uganda & Anor v Omar Awadh & 6 Others (supra)* also relied on by the Respondent, I find it to be distinguishable with the instant case. As stated above, the **Repealed Constitution** was silent on time frames within which to institute a claim for violation of fundamental rights and freedoms. But the East Africa Community Treaty at **Article 30(2)** has stipulated a time limit within which a claim to the court can be instituted as either within two months of the action complained of or on the day it came to the knowledge of the complainant. I therefore find that the Petition is properly before this Court and having so said. I must now proceed to examine whether the Petitioners have established any violation of their fundamental rights and freedoms.

45. I am aware of course that the Respondent did not file any response to the Petitioner's allegations to controvert the same. He merely alleged in the submissions that the Petitioners have failed to lead cogent evidence that they were tortured or detained for 8 months without trial. At the hearing, the Petitioners gave specific details under oath relating to how they were arrested, tortured and how they were moved from one detention prison to another. The fact that the Respondent or any witness on his behalf did not deny these allegations under oath indicates that the allegations are true. I therefore have no reason to doubt the veracity of the testimony of the Petitioners. I so find notwithstanding that none of the Petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the Respondents. It is true that the medical evidence would have corroborated the Petitioners evidence and would have been enough to establish the Petitioners allegations, but, to my mind, the absence of such evidence is not fatal because of what I have said above; that their averments of facts were not specifically or in any way contradicted by the Respondent. The issue before me now is whether the various acts as seen in the facts disclose a violation of fundamental rights as alleged.

### **Protection from Torture and other Cruel and Degrading Treatment**

46. The Petitioners alleged that their right not to be subjected to torture and other cruel and degrading treatment protected under **Section 74(1)** of the **Repealed Constitution** was violated for the duration of 8 months they were held in detention in various prisons, police cells and also in military barracks. Torture, cruel, inhuman and degrading inhuman treatment are all prohibited under international human rights law. **Article 5** of the United Nations Universal Declaration of Human Rights (“UDHR”) states that “**No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.**” Since the adoption of the UDHR on December 10, 1948, this provision has been reproduced and extended in scope in several other international human rights instruments. For example, Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) includes the provision of the UDHR but goes even further in specifying that “**in particular, no one shall be subjected without his free consent to medical or scientific experimentation.**” Other international instruments that prohibit torture include; The Convention Against Torture (CAT), The International Covenant on Civil and Political Rights (ICCPR), The European Convention on Human Rights (ECHR), The American Convention on Human Rights (AmCHR), the Inter-American Convention to Prevent and Punish Torture and the

African Charter on Human and Peoples Rights (Banjul Charter).

47. The European Court of Human Rights has defined torture and inhuman treatment in the *Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R)* in the following terms;

*“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”*

48. The issue of what amounts to torture and cruel, degrading treatment has also been defined in *Samwel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003*, per Visram J (as he then was) as:

*“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonour or contempt”*

I am duly guided by the above definitions and expressions of the law and will take the same approach in this judgment.

49. **Section 74 (1)** of the **Repealed Constitution** provided as follows;

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

The Petitioners claimed that immediately upon their arrests, they were stripped naked in public, were made to walk on their knees on concrete floors, whipped with a whip, kicked around, bludgeoned all over their bodies as they were being taunted that they were 'educated rubbish'. They were also moved into custody in military trucks whilst naked and in full view of the public. In the circumstances I find and hold that the Petitioners were subjected to torture, cruel and degrading treatment contrary to **Section 74(1)** of the former constitution. In doing so, I will quickly dismiss the Respondent's submission that the Petitioners may have been involved in a mutiny; torture is not permissible or excusable under any circumstance.

### **Rights to personal liberty under Section 77 of the Repealed Constitution**

50. The Petitioners alleged that they were detained for 8 months from August 1982 and March 1983 without trial. Except the 8th Petitioner, all the other Petitioners were not arraigned before a court of law and even the 8th Petitioner was not arraigned within the stipulated constitutional period and even after his arraignment in Court, he was never returned to court to proceed with his trial. They thus claim that their detention was illegal and a violation of the fundamental rights as to personal liberty as guaranteed by **Section 72** of the former **Constitution**. This Section provided as follows;

*“(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases -*

*(a) 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;*

*(b) 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;*

*(c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;*

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

**(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;**

**(f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;**

**(g) for the purpose of preventing the spread of an infectious or contagious disease;**

**(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;**

**(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or**

**(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.**

**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.**

**(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.**

**(5) If a person arrested or detained as mentioned in subsection (3)**

**(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless**

**he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to**

*ensure that he appears at a later date for trial or for proceedings preliminary to trial.*

***(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person. ”***

51. It is clear to my mind that the holding of the Petitioners for 8 months without charge and their being arraigned in Court and in case of the 8th Petitioner for 4 months, was unlawful and was a clear violation of section 72(3)(b) of the Repealed Constitution. In the celebrated case of *Albanus Mwasia Mutua v Republic Criminal Appeal No. 120 of 2004*, it was held that where an accused person is not arraigned in Court within 24 hours of his arrest, the burden of proving that the person arrested has been brought before a Court as soon as is reasonably practicable rests upon any person alleging that the provisions of the section have been complied with.

52. The Respondent in what appears to be his defence and explanation for not arraigning the Petitioners in court within the stipulated time, claimed that the Petitioners had confessed their participation in the failed 1982 coup attempt and as such the measures and force used upon them was reasonably justifiable as the Petitioners participated in a mutiny. **Section 86(2) and (3)** of the Repealed Constitution provided that;

***“(1)...***

***(2) In relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 71, 73 and 74.***

***(3) In relation to a person who is a member of a disciplined force raised otherwise than as aforesaid and lawfully present in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.”***

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.

56. On the other hand, **Section 48** of that Act deals with irregular arrest and confinement. It provides that;

***“(1) Any person subject to this Act who, when another person subject to this Act is under arrest-***

***(a) unnecessarily delays the taking of such steps as it is his duty to take for investigating the allegations against that other person, or for having the allegations against that other person investigated by his commanding officer or the appropriate superior authority or tried by court martial; or***

***(b) fails to release, or effect the release of, that other person when it is his duty to do so, shall be guilty of an offence.***

***(2) Any person subject to this Act who, having committed a person (in this subsection referred to as the prisoner) to the custody of a provost officer or other officer or of a warrant officer or non-commissioned officer, fails without reasonable cause to deliver-***

***(a) at the time of the committal; or***

***(b) if it is not practicable so to do at the time of the committal, then within twenty-four hours thereafter, to the person to whose custody the prisoner was committed a report in writing signed by himself of the offence which the prisoner is alleged to have committed shall be guilty of an offence.***

***(3) Where any person (in this subsection referred to as the prisoner) is committed to the charge of a person subject to this Act who is in command of a guard, then if without reasonable cause that person does not, as soon as he is relieved from his guard and any further duty and in any case within twenty-four hours after the committal, give to the officer to whom it is his duty to report-***

***(a) a written statement containing, so far as known to him, the prisoner’s name and alleged offence and the name and rank or other description of the person by whom the prisoner is alleged to have committed the offence; and***

***(b) if he has received it, the report required by subsection (2), he shall be guilty of an offence.***

***(4) Any person who is guilty of an offence under this section shall be liable, on conviction by court martial, to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”***

57. It is clear to me that the object of these provisions is to ensure that there are no unnecessary delays in undertaking investigations of arrested persons. It therefore follows that the Act endeavored to ensure as much as is possible; the arrest, confinement, prosecution and punishment of an offender under the Armed Forces Act and to ensure conformity with the provisions of the Constitution. The argument advanced by the Respondent therefore cannot be true. It is also obvious to me that the Respondent failed to ensure that the provisions of **Section 72 of Cap 199** relating to avoidance of delay after arrest were complied with. The Petitioners were held in detention for 8 months without charge and although he was later charged, or trial in Court martial or in any other Court contrary to the provisions of **Section 72(3)(b)** of the **Repealed Constitution**. The 8th Petitioner was held for 4 months without charge and his trial has never commenced. I therefore find and hold that the

Petitioners rights to personal liberty were violated by the Respondent.

58. The Petitioners also claimed that they were dismissed from the force without any benefits or pay for the 8 months they were held in detention as a serving officer. The Petitioners seemed to have abandoned this allegation as they neither pursued it in their Affidavits nor did they seek a relevant prayer for the same. In the circumstances, I cannot delabour it further. Suffice it to say that under **section 176(g)** of Cap 199, a serviceman could be discharged from the armed forces, if his services were no longer needed by the force. I have seen all the 10 certificates of discharge from the armed forces produced by each of the Petitioner. It states that they were dismissed since their services were no longer needed. I say no more, on this aspect of the Petition.

### Damages

59. Having found that the Petitioners rights were violated as above, I must now determine the amount damages awardable to them. The Petitioners prayed for both general damages and aggravated/exemplary damages of Kshs.15,000,000.00 and Kshs. 4,000,000.00 respectively.

60. In **Jennifer Muthoni Njoroge & 10 Others (Supra)**, this Court articulated the criteria to be used in awarding damages in these type of cases and where torture is alleged. I expressed my mind as follows;

***“In awarding damages therefore, I shall use the following criteria; (i) The torture inflicted on each Petitioner (2) 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, and I have chosen to give a lumpsum in each case.”***

In **Dominic Arony Amolo (supra)**, the Court decided to award a lumpsum global compensation in general damages and stated as follows;

***“For our part, we have two options both of which are attractive and reasonable in our view. The first is an award of a lumpsum for all the breaches cited elsewhere and posit that, because the breaches happened almost within a defined period and within the defined area of E Block at Kamiti Prison, it would be a fair proposition to award such lumpsum figure in damages. A further reason to be advanced in support of this position is that the breaches happened contemporaneously with each other and it would be difficult, nay impossible to separate each of them and give a fair and reasonable award in respect of each. The alternative approach is to award damages for each of the heads of breach of Fundamental Rights. The difficulty with the latter in the circumstances of this case has been expressed and this may not be the right place to explore the efficacy of such an approach. We must as we hereby do, come to the firm conclusion that a lumpsum figure in damages would be the better, the fairer and the more reasonable approach to take in this matter. Having said so and taking into account all matters raised herein and aware of the controversial nature of the issue before us, we have determined that in our view, an award of Kshs.2,500,000.00 would be a fair and reasonable award in damages in the novel situation arising from this case.”***

61. I am also alive to the fact that the Petitioners have sought exemplary damages in addition to general damages for the violation of their rights by the state. The High Court has recently stated its view on the issue of exemplary damages and has declined to grant exemplary damages in cases where torture has been alleged to amount to violation of constitutional rights. See **Benedict Munene Kariuki and 14 Others -v- the Attorney General High Court Petition No. 722 of 2009, Samuel Waweru Kariuki (supra)**. I see no reason to depart from the reasoning in those cases with regard to exemplary damages.

62. On the basis of the above principles, and bearing in mind that the violation of the Petitioner's rights as set out elsewhere above were part of the same transaction, I believe that a global award in respect of all violations is sufficient. In the circumstances, I award the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Petitioners **Kshs.5,500,000.00** each, as general damages and I do so on the basis of the criteria set out at paragraph 61 above. The Petitioners shall also have the costs of this Petition plus interest on damages from the date of judgment until payment in full.

63. Judgment is consequently entered against the Respondent in the above terms and therefore prayers

(a) and (b) in each Petition are allowed while prayers (d) in each Petition are dismissed.  
64.Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

**Irene – Court clerk**

**Mr. Moimbo for Respondents**

**1st, 3rd, 5th, 8th, 9th, 7th and 10th Petitions Present**

**Mr. Mureithi for Petitioner**

**Order**

**Judgment duly delivered.**

**ISAAC LENAOLA**

**JUDGE**