REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 145 OF 2018

BETWEEN

PETER MOSABI KIHINGU……. …….PETITIONER

VERSUS

ATTORNEY GENERAL…… ……..RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 13th April 2018 is supported by the Petitioner's affidavit in support of even date, the supplementary affidavit sworn on 18th June 2020 and witnesses' statements of Edward Oyugi, Abraham Khaisa, Mwema Nthome and Benedict Mulonzya Mutatya.

2. At its core, the Petition impugns the Petitioner's alleged unlawful arrest, incommunicado and prolonged detention, charge and sentencing by the Respondent, in violation of his rights under Section 72 and 77 of the repealed Constitution and Articles 49 and 50 of the Constitution. Accordingly, the Petitioner seeks the following relief against the Respondent as follows:-

a) ***A declaration that the actions of the Kenya Army Officers, the Military Intelligence, the Police and the Attorney General against the Petitioner between 14th June 1980 and 4th April, 1987 when the Petitioner was wrongfully arrested, detained, tortured, arraigned in court, convicted, sentenced, illegally kept in jail for 6 Years and 4 Months and eventually unconditionally released constituted a violation of the Petitioner's Constitutional rights.***

b) ***A declaration that the proceedings in Criminal Case No. 1531 of 1980 - Republic -vs- Peter Mosabi Kihingu and the conviction and sentence of the Petitioner therein were illegal, unlawful, null and void.***

c) ***An order of judicial review to quash the conviction and sentence of the Petitioner in the said Criminal Case No. 1531 of 1980 Republic -vs- Peter Mosabi Kihingu.***

d) ***General damages to compensate the Petitioner.***

e) ***Exemplary and/or Aggravated damages.***

f) ***Costs of this petition and interest on damages.***

Petitioner's Case

3. By way of background, the Petitioner was born on 12th December 1957 at Motarakwa village. He thereafter attended primary schools in Kenya and enrolled at Kalawa Secondary School in Kitui County.

4. The Petitioner later on joined the Kenya Army on 2nd September 1976 where he was trained at the Armed Forces Training College at Lanet for 4 months, before he was posted to the 7th battalion at Lang'ata. The 7th battalion which constituted of the Petitioner and 45 others, was deployed on mission to Moyale to work along the Kenya, Somali and Ethiopia borders.

5. The Petitioner depones that following the successful mission, he was selected among the officers to travel to India for further training at Ahamednagar Military Training Centre. Upon his return to Kenya, he was posted to the Armament Training Wing of the 78th tank Battallion and stationed at Lanet.

6. He depones that on 14th June 1980 while on duty, he was approached by military officers from the 78th tank battalion and the neighbouring 3rd battalion and arrested. He avers that he was detained at the 3rd battalion without being granted any information on his arrest. He states that he was held for 3 days before being escorted to Nairobi. He claims that as he was being handed over to the Captain of the Kenya Military Intelligence, the escorting military officer stated verbatim that

"this is senior private Peter Mosabi Kihingu, the Tanzanian spy", to his surprise.

7. He depones that he was detained at the Army headquarters for 3 weeks. He states that during this period he endured cruel and inhuman treatment and told that he is being investigated for espionage for the Tanzanian government. He rebutted this accusation as false as he is a Kenyan citizen. He as such issued information on his parents and background history to establish his position as a Kenyan citizen. He alleges that his account on the same was overlooked by the interrogators.

8. Further to this, he states that he was severely tortured using crude methods. Particularly, he was underwent electrocution, cold water treatment, hunger, deprivation, hang upside down, hot rod treatment, suffocation, nail treatment, insect treatment, indecent exposure, manipulation and flogged while naked. He avers that this caused him severe physical, psychological and mental torture. Despite being ill, he alleges that he was denied treatment and a hospital visit.

9. Additionally, he asserts that he was held incommunicado throughout this period until he was arraigned in Court. He depones that following the 4 -week torture, he was taken to the CID headquarters at Nairobi, where he was threatened with death, if he did not plead guilty.

10. He states that he was arraigned in Court on 10th July 1980 and charged with two counts, under Section 3(1) (c) as read with Section 20 of the Penal Code on doing an act prejudicial to the safety of the Republic of Kenya and Section 129(a) of the Penal Code on giving false information to a person employed in the public service. He states that the prosecutor was the then Attorney General, James Karugu.

11. He claims that at the time the charges were being read to him he could hardly hear or comprehend the charges. He asserts that nevertheless a plea of guilty was entered. He was thereafter set to return to Court on 14th July 1980, for sentencing. He claims that his attempt to change the guilty plea which was obtained against his consent, was in vain and thwarted by the Attorney General and the Court. He was then sentenced to 14 years in Count I and 3 years imprisonment in Count II, to run concurrently at Kamiti Maximum Security Prison.

12. He depones that while serving the illegal term at Kamiti Maximum Security prison, he was as well denied visitation and remission under Section 46 of the Prisons Act, in addition to being segregated from the other inmates. He informs that when he was transferred to Naivasha Prison, he was able to sneak a letter to the then Director of the Criminal Investigation Department, the late Noah Arap Too, outlining his grievances and afflictions. He states that this caused the then Director and

the then Provincial Police Officer to visit him in prison and informed him that the matter would be investigated.

13. He avers that the investigations unearthed a clear case of mistaken identity. He states that the then Director, Noah Arap Too briefed the President, the late His Excellency, Daniel Arap Moi, of the matter. The President proceeded to order the unconditional release of the Petitioner on 14th April 1987, having spent 6 years and 4 months in prison.

14. The Petitioner avers that, upon his release, he reported to the Department of Defence to seek reinstatement to his position, but his request was declined. In fact, he notes that Noah Arap Too advised him to abandon the matter, cautioning that its pursuit might expose him to further adverse consequences. The Petitioner nonetheless continued to pursue the matter which saw him receive a warning from the Deputy Army Commander and later on arrested on alleged trumped up charges of robbery which were later on dismissed.

15. In light of this, the Petitioner argues that his rights under Section 72 and 77 of the repealed Constitution and Articles 49 and 50 of the Constitution were violated by the Respondent, owing to the prolonged detention and torture. He informs that as a result of the unlawful charge, detention, arrest and sentence, he lost his job at the Kenya Army which was his livelihood.

16. Further to this, he asserts that contrary to the Respondent's assertion, his file and records at the Army Headquarters were not destroyed. He states that information concerning his case can easily be retrieved from the National Intelligence Service or Director of Criminal Investigations or Military Intelligence who handled his case. He adds that his medical documents were in possession of the same military officers who tortured him.

17. The Petitioner decries that his life was destroyed as a result of the Respondent's actions and that he was not able to secure employment thereafter. He claims that he was not able to file this Petition earlier for fear of reprisal by the state agents, who in actual fact threatened him. It is on this premise that he seeks this Court's intervention while equally stating that he is entitled to compensation in damages.

18. Edward Oyugi and Abraham Khaisa in their witness statements testified that they were at Kamiti Prison during the same time the Petitioner was incarcerated and witnessed the inhuman treatment the Petitioner was subjected to.

19. Benedict Mulonzya Mulatya the principal of Kawala Boys Secondary School affirms that the Petitioner was a student at the school, having joined in 1974. He regrettably stated that the Petitioner eventually dropped out of school due to lack of school fees. He contends that he was shocked when he learned from the newspapers that the Petitioner was a suspected

Tanzanian spy. He asserts that he alongside the other teachers concurred that this accusation was not true. He notes that she confirmed this fact to Noah Arap Too and Philip Kilonzo, during their investigations.

20. Mwema Nthome affirmed in his statement that the Petitioner was his classmate in Form one and two, from 1974 to 1975.He too echoes that he was shocked to learn from the newspaper that the Petitioner was a Tanzanian spy which he argues was a grave mistake.

Respondent's Case

21. Rebutting the Petition, the Respondent through Major Frankline Oyese Omuse, filed a Replying Affidavit sworn on 24th February 2020. The Respondent as well filed identical Replying Affidavits sworn by Major Jackson Kimathi Muthee on 6th June 2022 and Major Edwin Kibiru Muta on 3rd May 2023.

22. Major Frankline Oyese, asserts that the Petitioner is guilty of inordinate delay as this suit which time barred, was filed 39 years later. In his opinion, the Petition is an afterthought. He contends that the Petition is prejudicial to the Respondent as the documents in relation to this matter have since been destroyed, misplaced and lost. He adds that the witnesses may have long died and others untraceable. Particularly, he informs that the Petitioners' personal file could not be traced at the Ministry of Defence records department. This is since the

documents were destroyed following lapse of the 10-year statutory period in line with Regulation 73 of Chapter 2 of the Defence Forces Standing Orders. On this premise, he argues that the Respondent is unable to defend its case against the Petitioner.

23. He further argues that the Petition is misplaced as relies on hearsay evidence. He points out that the Petitioner has not attached any medical records to support the claim of torture.

24. Notwithstanding the foregoing, he denies the Petitioner's allegations in their entirety. He states that the military officers named by the Petitioner cannot be traced, to confirm or rebut the Petitioner's claims. He avers moreover that the Petitioner has never served in any foreign armed forces neither left the country in that regard. He contends that the Petitioner's arrest and detention were lawful in line with the dictates of the Armed Forces Act as read with Rule 5 and 6 of the Armed Forces Rules of Procedure.

25. Correspondingly, he denies violation of the Petitioner's constitutional rights. He avers that the Petitioner was discharged from service as a direct consequence of violation of Kenyan law and notes that the discharge was in line with the dictates of the Armed Forces Act. Considering this, he asserts that the Petitioner is not entitled to any compensation from the Kenya Defence Forces.

26. He notes that in the criminal suit, the Petitioner failed to appeal the matter. In view of this, he argues that this court lacks jurisdiction to entertain the matter as it was not filed as an appeal. In sum, he asserts that the Petition is an abuse of the Court process and thus ought to be dismissed.

27. Major Jackson Kimathi Muthee and Major Edwin Kibiru Muta responses reiterated the Major Frankline Oyese Omuse averments.

Parties Submissions

Petitioner's Submissions

28. On 9th April 2025, Amuga and Company Advocates filed submissions on behalf of the Petitioner. To commence with, Counsel argued that the Petitioner had indeed proved his claim of liability against the Respondent. Reiterating the facts of the case, Counsel noted that the Petitioner through the adduced evidence detailed the breaches meted out on him by the Respondent.

29. In a nutshell, Counsel submitted that the Petitioner had been arbitrarily arrested on 14th June 1980 on a false claim of espionage, tortured and held incommunicado for an extended period before he was arraigned in Court. The Petitioner was thereafter wrongfully convicted and illegally sentenced for 14 years in addition to rejection of change of his plea by the Court. Counsel pointed out that the Petitioner was released by

the President following the outcome of investigations that proved he was charged falsely. Additionally, Counsel stressed that the sum of the Respondent's actions caused loss of his job and his livelihood.

30. In light of this, Counsel argued that the Petitioner's rights under Sections 70(a), 72(1) and 72(2),74, 76, 79, 80, 81 and 82 of the repealed Constitution as read with Articles 29 and 49 of the Constitution were grossly violated by the Respondent. Counsel added that the Petitioner while serving the illegal term at Kamiti Prison was denied visitation rights or remission in breach of Section 46 of the Prisons Act.

31. Moving on, Counsel argued that the Petitioner's justification for filing this Petition late, was well elucidated thus the same cannot be termed as inordinate delay. Counsel stated that the Petitioner feared reprisal after he was directly threatened by the late Noah Arap Too and Major General Mulinge. Counsel recapped that the Petitioner was further intimidated following institution of the false robbery charges against him as he followed up on his employment on whether he could be reinstated. Counsel urged therefore that the Court find that the Petition is properly placed before this Court.

32. To buttress this point reliance was placed in his case **Peter Musabi Kihingu -vs- Republic [1992] eKLR** where the Court observed as follows:

"While the appellant was still serving the said prison sentence on espionage charge, he testified that he wrote a manuscript entitled "The Veiled Conspiracy" in which he detailed the circumstances pertaining to his arrest and subsequent prosecution and imprisonment. He smuggled out of prison the original manscript but the copy which he retained was confiscated by the prison authorities. That he wrote such a manscript while under segregation was confirmed by one of the prisoners, Eledjius Nyange (DW2) who testified that while they were at Naivasha Maximum

Prison, the appellant wrote a book in some 5 exercise books which he entitled "The Veiled Conspiracy". On the 28th of September 1987 he was arrested by the police and for 24 days he was held at the Provincial Police Headquarters till the 16th October, 1987 when he was officially booked at Langata Police Station. He was kept in police custody till the 4th of November, 1987 when he was brought before the Court to answer the charges that were laid against him in this case. It is his contention that he was framed up by the CID and the security intelligence officers who wanted him confined in prison having illegally held him in police custody for 42 days in an attempt to silence him. He denied having committed any of the

***offences that were laid against him or having been found in possession of the alleged firearm and ammunitions.*"**

33. That said, Counsel submitted that the Courts have pronounced themselves on time limitation with regards to cases concerning constitutional violations. Reliance was placed in **John Muruge Mbogo -vs- The Chief of the Kenya Defence Forces & Another [2018] eKLR** where it was held that:

> *"It is not in doubt that there is no law in this country limiting the period within which one should file a Constitutional Petition for violation of constitutional and human rights. The repealed Constitution did not have such limitation clause either. In the case of Dominic Arony Amolo v Attorney General[2003] eKLR, the Court dealt with the issue and observed that section 3 of the repealed Constitution excluded the operation of section 22 of the Limitation of Actions Act (cap 22) with regard to claims under fundamental rights. The Court also stated that fundamental rights provisions could not be interpreted to be subject to the heads of legal wrongs or causes of actions enumerated under that Act."*

34. Counsel on quantum of damages submitted that an award of Kshs. 50 million will be reasonable compensation as general damages. To make this claim, Counsel relied in **Otieno Mak'anyango -vs- Attorney General & Another [2012]**

eKLR, where the Claimant was awarded Kshs. 20 million as general damages. In the matter, the Petitioner was detained for only a period of 4 years and not exposed to the kind of torture, which the Petitioner herein went through.

35. Further reliance was placed on **Peter M. Kariuki -vs- Attorney General [2014] eKLR** and **Denis Itumbi -vs- Attorney General & 2 Others [2018] eKLR**.

36. Counsel as well argued that the Petitioner was entitled to the aggravated and exemplary damages of Ksh. 10 million, owing to the torture he went through and losing everything as a result. Counsel stressed that lack of medical evidence cannot alter the fact that the Petitioner was tortured during the period of his unlawful detention or unlawful confinement. Reliance was placed in **Otieno Mak'anyango** (supra) where it was held that:

> *"Then comes his custody at GSU Headquarters and the treatment he faced on the hands of security personnel headed by late Mr. Ben Gethi and Peter Mbuthia.I am only concerned with his allegations of physical torture as made in the plaint. My task becomes more difficult in view of non-availability of any hospital records and inconclusive medical report. I would, however, agree that the circumstances under which the plaintiff was held in custody were most difficult and emotive. The officers could have been more forceful than what they would be in normal circumstances.*

But the burden to prove the allegations as averred on balance of probability rests squarely on the plaintiff. His averments in the plaint and evidence supported by that of Prof. Osindo and Hon. Raila Odinga are not contested by the defendants. The acts of brutality committed by officers of the state are proved to my satisfaction and I do find that the plaintiff on the night of 20th August, 1982 was subjected to torture and inhuman treatment contrary to Sec. 74 (1) of the Repealed Constitution. I may observe that Sec. 6 of the Transitional and Consequential Provisions (sixth Schedule of the Constitution) gives continued effect to the rights and obligations of the Government or the Republic subsisting immediately before the effective date that is 27th August 2010."

37. Moreover, Counsel submitted that the Petitioner also prays for an order of judicial review to quash the conviction and sentence entered against him in **Criminal Case No. 1531 of 1980, Republic v Peter Mosabi Kihungu**. Reliance was placed in **Commission on Administrative Justice v Insurance Regulatory Authority & another [2017] eKLR** where it was held that:

"On reliefs available from this court, Article 23(3) provides that the court may grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates,

infringes, or threatens a right, compensation and an order of judicial review. Thus, judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the Constitution."

38. More reliance was placed on **Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] KEHC 460 (KLR)** and **John Muendo Musau vs Republic [2013] eKLR**.

Respondent Submissions

39. The Respondent's Counsel, A.K. Tuitoek filed submissions dated 20th June 2025 and underscored the issues for examination as: *whether the Petitioner is guilty of inordinate delay, whether the documents attached by the Petitioner in support of the Petition are admissible, whether the Petitioner proved the allegations of violations of fundamental rights and freedoms as guaranteed by the Constitution, whether the Petitioner exhausted the process of appeal or review and whether the Petitioner is entitled to the prayers sought*.

40. Counsel in the first issue, answered in the affirmative. Counsel submitted that the Petition is an afterthought and an abuse of the Court process. Further it was argued that it was absurd that the Petitioner was pegging his threat accusations on deceased persons, Noah Arap Too, Philip Kilonzo and General Mulinge, who are not available to rebut the allegations and further that the threat allegations cannot be corroborated by

any witness. On this basis, Counsel argued that the Petitioner is forum shopping and guilty of indolence having sat on his right to seek judicial redress for 39 years.

41. Reliance was placed in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR** where it was held that:

> *"The Respondents counsel's contention is that this suit is burred by the doctrine of latches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel. Laches (latches'') refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing (defending party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay. circumstances have changed, witnesses or evidence may have been lost or no longer*

available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity. "Equity aids the vigilant, not the sleeping ones that is, those who sleep on their rights). Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches."

42. Comparable reliance was placed on **Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR, Wellington Nzioka Kioko v. Attorney General [2018] KLR, Gilbert Guantai Mukindia-v-Attorney General, Petition No, 118 of 2014, [2019) eKLR** , **Peter M.Kariuki v Atorney General [2019]eKLR**, **Abraham Kaisha Kanzika alias Moses Savala Keya TIA Kapco Machinery Services and Milano Investments Limited -v Governor Central Bank of Kenya and 2 others[2006] eKLR** and **Rawal -v- Rawal, Mombasa Civil Case No. 128 of 1962, [1990] KLR 275**, among others.

43. Turning to the second issue, Counsel submitted that the Petitioner under Section 110 of the Evidence Act is required to proof admissibility of the documents he has adduced. Counsel emphasized that the burden of proof is on the Petitioner as provided under Section 107(1) and (2) of the Evidence Act. In this regard, Counsel pointed out that the first document relied on by the Petitioner is an uncertified copy of proceedings. Counsel argued that the Petitioner in breach of Section 67 and

68 of the Evidence Act did not give reasons for relying on secondary evidence as required by law. In Counsel's view, the Petitioner is barred from relying on secondary evidence where primary evidence can be acquired.

44. Reliance was placed in **In re the Estate of Charles Nd1egwa Kiragu alias Ndegwa Kiragu - Deceased [2016] eKLR** where it was held that:

> *"Secondary evidence, as a general rule is admissible only in the absence of primary evidence. Essentially, secondary evidence is evidence which may be given in the absence of that which the law requires to be given first, when a proper explanation of its absence is given."*

45. Counsel as well pointed out that newspaper cuttings are inadmissible in Court as constitute hearsay evidence. To buttress this point reliance was placed in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where it was held that:

> *"On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the*

Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper."

46. Additional reliance was placed on **Andrew Omtata Okoiti & 5 Others vs Attorney General & 2 others [2010] eKLR** and **Apollo Mboya v Attorney General & 3 others; Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR**.

47. On the third issue, Counsel submitted that the Petitioner had not demonstrated that his constitutional rights had been violated as alleged. Counsel stressed that the Petitioner's allegations had not been corroborated. Counsel as well pointed out that the Petitioner had not raised the issues herein during his trial. Counsel submitted that the Petitioner had a right to appeal the matter but forfeited this right. In light of this, Counsel argued that the proper manner to entertain this matter is an appeal.

48. Ultimately, Counsel submitted that the Petitioner failed to discharge the burden of proof bestowed upon him. Reliance was placed in **Monicah Wangu Wamwere -v. Attorney General [2016] KLR** where it was held that:

> *"When a party alleges torture, the expectation of the law is that;*
>
> ***(i) There must be evidence of severity and suffering.***
>
> ***(ii) There must be an intent in reckless indifference to the possibility of causing pain and suffering.***
>
> ***(iii) Acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture.***
>
> ***(iv) The act of torture must involve a public official."***

49. Further reliance was placed on **Robert Njeru -v- Attorney General, [2014] eKLR and John Cheruiyot Rono v Attorney General (Petition No.536 of 2015).**

50. Tying to this in the following issue, Counsel submitted that the Petitioner had not exhausted the process of appeal before filing this matter. Counsel maintained that the Petitioner's remedy lies in an appeal not a constitutional petition. Reliance

was placed in **Anne Nzaumi Munyaka v Oliver Nzeki Munyaka & another (as the Legal Rep' of the Estate of George Munyaka Kavulu) [2019] eKLR** where it was held that:

> *"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22) ... Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."*

51. Corresponding reliance was placed on **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**.

52. On the last issue, the Respondent submitted that the Petitioner is not entitled to the reliefs sought including the order of judicial review in prayers (ii) and (iii) as granting them would be in violation of mandatory provisions of Section 9(2) of the Law Reform Act which provides for the time limit for filing judicial review orders. Dependence was placed in **Raila**

Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC (1990-1994) EA 482 where it was held that:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand 0. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 5 3 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of

mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose ... As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

Analysis and Determination

53. Having regard to the submissions and pleadings of the parties, this Court is of the considered view that the following are the issues for determination:

   i. ***Whether the Petitioner is guilty of inordinate delay.***
   ii. ***Whether the Petition offends the doctrine of exhaustion.***
   iii. ***Whether the Respondent violated the Petitioner's rights Sections 70(a), 72(1) and 72(2),74, 76,***

79,80, 81 and 82 of the repealed Constitution as read with Articles 29, 49 and 50 of the Constitution in the circumstances of this case.

iv. Whether the Petitioner is entitled to the relief sought.

Whether the Petitioner is guilty of inordinate delay.

54. The equity maxim, the law aids the vigilant, not the indolent is a principle of universal application. Unexplained and/unjustified delay in pursuing a legal right may at times extinguish a legal remedy. The Court will always examine the reasons for the inertia, if it finds the reasons unsatisfactory or unjustified and it is manifest that such delay has caused evidential prejudice to the adverse party such as being unable to secure key witnesses either because they are dead, have relocated to places where they cannot be reached, or due to passage of time, memories are so eroded that they cannot give meaningful testimonies or material documents in relation to the case are not available, the Court retains the discretion to dismiss such a claim in the interests of justice and fairness.

55. The Court of Appeal in **James Kanyiita Nderitu v Attorney General & Director of Public Prosecution [2019] KECA 1006 (KLR)** stated as follows:

"28. We have considered the appellant's submission and the learned judge's finding that there was inordinate delay in the filing of the petition. In this context, the learned judge invoked the principle of laches. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).

29. We are alive to the decision of this Court in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings

may have his claim denied as an abuse of the court process. (See Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341.

30. We appreciate that in Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015, this Court heard and determined a claim which arose in the mid-1980s and was lodged by a petition dated 26th August 2010. This Court stated:

"Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the respondent), who was sued on behalf of the Government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era.

The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of

the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary."

31. In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi –v- The National Police Service [2017] eKLR, where the learned judge correctly expressed:

"While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional

petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution."

32. In Lt. Col. Peter Ngari Karume & Others vs. Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR, Justice Nyamu aptly expressed:

"The petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view, the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process…In view of the specified time limitation in other jurisdictions, the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame, but in my mind, there can be no justification for the petitioner's delay for 24 years…."

33. In the instant matter, the appellant asserts that the delay of over 26 years was explained. We remind ourselves as was aptly stated in David Gitau Njau & 10 Others vs. the AG Petition No. 340 of 2012 that there is no limitation period imposed by the constitution in seeking redress for violation of fundamental rights and freedoms. In this matter, we have examined the record of appeal and more particularly the affidavit in support of the petition. We are unable to discern any specific paragraph which explains the delay in filing the petition. All the appellant submitted on this issue is rehashing the background facts from the date of his arrest to the date when the High Court quashed his conviction. In his written submission, it is urged that by the time the appellant was lodging the petition in 2011, it was shortly after the promulgation of the new 2010 Constitution that ushered in a new regime in the protection and enforcement of the Bill of Rights.

34. Promulgation of the 2010 Constitution is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a

petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution.

35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay…"

56. As to what amounts to inordinate delay, it depends with the circumstances of a particular case as was held in **Wanjau v Wanyoike (Sued on Behalf of the Estate of Njoki Kibe) [2025] KEELC 7183 (KLR)**, where the Court held as follows:

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; among others. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however,

advised for Courts not to take the word ''inordinate'' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality."

57. One of the crucial pieces of evidence by the Petitioner is the assertion that while serving the alleged illegal term at Kamiti Maximum Security prison, he was able to sneak a letter to the then Director of the Criminal Investigation Department, the late Noah Arap Too, outlining his grievances and afflictions. He states that this caused the then Director and the then Provincial Police Officer to visit him in prison and informed him that the matter would be investigated. He testified that the subsequent investigations unearthed a clear case of mistaken identity. That the then Director of CID, Noah Arap Too briefed the then President, the late His Excellency, Daniel Arap Moi, of the matter. The President proceeded to order the unconditional release of the Petitioner on 14th April 1987, having spent 6 years and 4 months in prison.
58. According to the Respondent, these witnesses mentioned here would have been very crucial in rebutting the Petitioner's case as the Respondent was categorical that the Petitioner was genuinely charged, prosecuted, convicted and sentenced in accordance with the law. However, none of these witnesses is alive as the Petition was filed 39 years after the incident. Again, the critical evidential material in terms of documents could also not be traced.

59. According to the Petitioner, he feared for possible reprisals as he had been warned by the late CID Director, Noah Arap Too not to pursue the matter any further.
60. The Petitioner's claims do not in my view add up. The retired President's Moi's regime ended in or around 2003. Around 2008, I would like to take judicial notice that, just after the post-election violence 2007, a Commission, known as Truth Justice and Reconciliation Commission was set up with a wide-ranging mandate which not only included the investigation of 2007 election violence but all incidents of violation of human rights abuses including torture at the infamous Nyayo House Torture Chambers. I deliberately refer to this to demonstrate that the fear of reprisals could not have been sustained until 2018 when this Petition was filed.
61. Besides this fact, in 2010, the current constitution was birthed opening up new frontiers of freedom and the spirit of fear was erased from the hearts of Kenyans who were guaranteed their rights in unimaginable proportions.
62. The claim therefore that the Petitioner's inertia was caused by a lingering fear of being harmed if he took legal action against the Respondent cannot be excused 8 years after the constitutional watershed and 15 years the regime he claimed was responsible for his tribulations ended. The consequences of this delay to a fair trial are obvious in term of evidential prejudice since even the Respondent is entitled to a fair trial. The persons of interest the Petitioner is mentioning as critical

witnesses that would have corroborated material facts are no longer available, they are all dead. Secondly, in terms of documentary evidence, the Respondent lamented that it was handicapped as it is was not possible to retrieve any documents relating to the Petitioner or the proceedings in question. It is thus evident that there is material prejudice yet the explanation given for delay is factually unacceptable in my view. Allowing such a Petition to proceed in the circumstances would be condoning abuse of the judicial process as exposes the Respondent to an unfair trial.

63. This finding is dispositive as the instant Petition which makes it unsustainable. I need not consider any other issue in this Petition which I hereby dismiss accordingly.

64. I do not make any orders as to costs.

Dated, signed and delivered virtually at Nairobi this 30th day of April, 2026

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L N MUGAMBI

JUDGE