Muchai & 5 others v Attorney General (Civil Appeal 524 of 2019)
[2025] KECA 525 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 525 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 524 OF 2019

DK MUSINGA, F TUIYOTT & GV ODUNGA, JJA

MARCH 21, 2025

BETWEEN

IRENE WAMBUI MUCHAI ..... 1ST APPELLANT

GLADYS THITU GAKINYA ..... 2ND APPELLANT

JOSEPHAT MBUGUA NJOROGE ..... 3RD APPELLANT

FRANCIS NDEGWA NJOROGE ..... 4TH APPELLANT

TERESAH WANJIRU NJUGUNA ..... 5TH APPELLANT

MARY WANJIKU NJOROGE ..... 6TH APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya, Nairobi (Lenaola, J). dated 5th June, 2017 in High Court Petition No. 211 of 2013)

JUDGMENT

1. The background of this appeal is that vide a petition dated 18th April 2013, the appellants (as petitioners), claimed that their fundamental rights to be protected from torture under Articles 25(a) and 29 (a), (c), (d) and (f) of the *Constitution* of Kenya, were contravened and grossly violated by Kenya Police Force and General Service Unit (G.S.U) officers and other Kenyan Government servants, agents, employees and institutions. According to them, on diverse dates and times from 3rd March 1992 up to 19th January 1993, following a peaceful demonstration they had held at Uhuru Park's Freedom Corner while agitating for the release of Hon. Koigi Wa Wamwere and 53 other political prisoners, they were brutally battered with tear gas, boots and batons, slaps, rubber whips, kicks and blows all over their bodies by the said officers. It was their contention that the said actions violated their fundamental rights and freedom from violence under Article 29(c) and (d) of the *Constitution* and freedom from being

treated or punished in a cruel, inhuman or degrading manner under Article 29 (f) of the *Constitution* (section 74 of the repealed Constitution).

2. The appellants therefore sought the following orders:

> " a) A declaration that the six (6) Petitioners' fundamental rights and freedom from torture were each contravened and grossly violated by the Respondent's Kenya Police Officers and General Service Unit officers (G.S.U) who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and times on 3rd March, 1992 up to 19th January, 1993.
>
> b) A declaration that the six (6) Petitioners are each entitled to the payment of general damages, exemplary and moral damages and compensation for the violations and contraventions of their fundamental rights and freedoms under sections 25 (a) and 29(a), (c), (d) and (f) of the *Constitution* of Kenya, 2010. (sic)
>
> a. General damages, exemplary and moral damages for the torture for each Petitioner. (sic)
>
> b. Any further orders, writs, directions as this Honourable Court may consider appropriate
>
> c. Costs of the suit and interest."

3. In their affidavits in support of the petition sworn on 17th April 2013, the petitioners reiterated the aforesaid averments and added; that the brutality and atrocities they underwent together with fellow women and supporters of the campaign for the release of political prisoners in Kenya was not justified; that on 28th February 1992, they had visited the then Attorney General, Hon. Amos Wako, and presented him with a petition addressed to the Government of Kenya seeking the release of all political prisoners who had by then been jailed for the political offences of treason, sedition or belonging to an unlawful organization during the dictatorial KANU one party regime because political pluralism had just been re-introduced in the country; that the days preceding the attack, on 28th February, 1st March and 2nd March 1992, they were together with other women at the Freedom Corner waiting for the Attorney General to respond to their petition; that they were unarmed, save for their clothes, blankets, water, Bibles, Hymn books and a tent which had been donated to them by well-wishers, who also provided them with moral support, food, clothing and water; that on 3rd March 1992, they, together with other women, were suddenly and surprisingly attacked and intense brutality unleashed on them by over 100 police and GSU officers with tear gas, batons, slaps, rubber whips, kicks blows and gun butts; that as a result, they were badly injured and some of them were taken to various hospitals, unconscious; and that the brutal attack was perpetrated between 4.00 pm and 9.45 pm and the same night, using the cover of darkness, 50 police officers, all women, raided the tents where the women and men were hurdled, arrested and bundled them into police vans before dispersing them to various police stations in Nairobi, after which they were deported back to their rural homes.

4. Unbowed, the appellants contended, after one to five days, they went back to Nairobi and began their peaceful campaign and hunger strike afresh at the All Saints Cathedral where they were hosted and camped in a bunker from 4th March, 1992 up to 19th January, 1993 when all the political prisoners were released; that during that period, the police and GSU officers continued to attack them while at the Cathedral and inflicted serious injuries on them; and that their physical, psychological, economic and

political lives were destroyed as they were tortured for lawfully campaigning for release of all political prisoners and consequently, suffered and continue to suffer trauma, pain and damage to-date.

5. The reply to the petition was by a replying affidavit sworn on behalf of the respondent on 22nd July 2014, by Philip Ndolo, Deputy Director of Operations in the Kenya Police Service. While denying the appellants' allegations, it was deposed that the *Constitution* does not apply retrospectively, and that the petitioners can only rely on rights under the retired Constitution and not the 2010 Constitution; that in any event, the appellants were never in police custody and the Kenya Police Service is a stranger to their claims; that the appellants did not in any event disclose the names and identities of the police officers who allegedly contravened those rights; that the allegations that they were kicked and beaten by police and GSU officers do not meet the threshold of the definition of torture under section 74 of the repealed Constitution as well as under the 1984 Convention Against Torture; that the respondent was highly prejudiced in defending the petition given that the alleged cause of action took place more than twenty two years before the appellants filed the petition; that old newspaper articles that formed part of the petitioners' evidence are neither admissible nor conclusive evidence of any claim in a court of law; and that the petition did not disclose any cause of action against the respondent and should be dismissed with costs.

6. In his judgment, guided by the decisions of Dominic Arony Amolo v Attorney General and Others, Misc Case No.1184 of 2003 (OS), Attorney General, Petition No.41 of 2014, High Court Petition No.306 of 2012 Ochieng' Kenneth K'Ogutu v Kenyatta University and 2 Others, Joseph Migere Onoo v Attorney General, Petition No.424 of 2013 and Gerald Gichohi and 9 Others v Attorney General Petition No.487 of 2012, the learned trial Judge held: that while the High Court has generally stated that no limitation of time can be imposed in matters where violation of rights has been alleged, many Judges have decried the filing of such petitions after a considerable length of time had lapsed since the alleged occurrence of the violations; that emphasis has now shifted to the fact that each case must be examined and gauged on its own merits and the question whether the delay is inordinate is therefore left to the discretion of each court based on the justification for any delay; that Kenyan Courts, like the Executive Branch of Government, have accepted that in the past, they have failed to address violations of constitutional rights even in obvious cases and thereby caused injustice to deserving litigants; that certain measures have now embraced that must be applied in the proper circumstances of each case to redress historical injustices in the field of human rights, including criminal prosecutions, the setting up of a Truth and Justice Commission, reparations programs and various kinds of institutional reforms (such as in the police service); that even then, every petitioner must demonstrate a measure of justification for any delays in instituting their claims, especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance; and that as early as the year 2003, persons aggrieved by the acts of the Moi regime, where most claims emanated from, have approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms during that regime.

7. According to the learned Judge, from the evidence and submissions before the court, no clear justification was given as to why there was delay in presenting the petition which was filed on 17th April 2013 alleging torture that occurred from 3rd March 1992 up to 19th January 1993; that in their oral evidence before the court, the appellants did not allude to the matter at all, although it was properly raised by the respondent who claimed prejudice in defending the claim; that on the basis of the decisions in Rawal v Rawal [1990] KLR 275, Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited v Governor Central Bank of Kenya and 2 Others, Misc. Civil Appl. 1759 of 2004, Charles Gachathi Mboko v Attorney General, Civil Case No.833 of 2009 (O.S.) and D'Souza v Union of India 1976 A.S.R. 91, each case alleging violation of constitutional rights and fundamental freedoms must be determined on its own merits and in its

own circumstances, taking into account the pleadings before the court, the evidence tendered and the submissions made because no two cases are ever alike; and that since many cases arising from injustices by those who were agitating for the release of amongst others, Koigi wa Wamwere in 1992, have long been filed and determined, it was very difficult to understand why the appellants herein did not institute their claims in good time if the said claims were genuine and founded on a serious claim such as torture.

8. Having stated thus, the learned Judge opined that the wider interests of justice necessitated that the claims, like others before them, should ultimately be determined on their merits. The learned Judge, relied on sections 35, 107 and 109 of the *Evidence Act* as expounded in China Wuyi and Co Limited v Samson K Metto [2014] eKLR, Tesco Corporation Ltd v Bank of Baroda (K) Limited, Civil Case No.182 of 2007 and Kituo Cha Sheria and Another v Central Bank of Kenya and 8 Others, Petition No.191 of 2011, Consolidated with Petition No.292 of 2011 and held that mere assertions and newspaper articles are not admissible as evidence in petitions alleging violations of rights and fundamental freedoms since only admissible documents should be the basis of any credible evidence. In his view, the definition of "informal documentation" rule 10(3) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules which provides for admission of an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom, does not apply to newspaper cuttings.

9. The learned Judge found that whereas the appellants made various assertions that they were tortured, no material evidence was placed before the court to corroborate those averments. While appreciating that medical records are not the only pieces of evidence to prove torture, he maintained that a reasonable man ought to appreciate the fact that the length of the alleged torture would certainly have had catastrophic effects on the appellants' physical and mental well-being but this allegation was very casually made as the appellants made no mention of any treatment they received after the serious injuries they claimed to have sustained.

10. In the judgement of the learned Judge, the following elements must be present in proof of torture: there must be evidence of severity of pain and suffering (see Article 1 of the Convention Against Torture); there must be an intent in reckless indifference to the possibility of causing pain and suffering (see J. Burgers and H. Danelius, The United Nations Convention Against Torture, (Martinus Nijhoff, 1988) page 118); acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture (see Sarah Joseph and Melissa Castain, The International Covenant on Civil and Political Rights, Third Edition, page 218); and the act of torture must involve a public official (see Article 1 of the Convention against Torture).

11. The learned Judge found that while the appellants gave no evidence of any pain and suffering on the dates that they alleged that they were tortured, the allegations that they were slapped, kicked and beaten did not amount to torture if the criteria in the Convention on Torture is applied. He maintained that looking at the petition and affidavits in support, since it was torture that was alleged, all the submissions by Counsel for the petitioners on other matters were misplaced and irrelevant if the elements of torture were not proved.

12. Based on the foregoing, the learned Judge found that the appellants failed to make out a case for violations of their right to protection against torture and dismissed the petition but directed each party to bear own costs.

13. Dissatisfied with the decision, the appellants lodged this appeal and in their memorandum of appeal complained that the learned Judge erred in:

1. Finding that there was no torture, be it physical, psychological torture perpetrate by the Police and GSU Officers upon the appellants while there was no evidence offered by the respondent to rebut, contradict or controvert the same.

2. Finding that there was no torture, inhuman and degrading treatment contradicting his own findings in Nairobi Petitions No.281 of 2011, 282 of 2011, 337 of 2011 and 338 of 2011 Milkah Wanjiku Kinuthia & 2 Others vs Attorney General which was Freedom Case Corner where he found violation of fundamental rights and freedoms.

3. Ignoring the subsisting decision in the earlier torture case Nairobi HC. Misc. Application No. 1411 of 2004 Harun Thungu Wakaba & 20 Others vs Attorney General where court observed that the Treatment cards and medical reports of injuries sustained long ago are not important as torture is broadly combination of physical pains, psychological pains, exposure to dangers, mental anguish which only the victim can bring out in his eye witness account

4. Law and fact in finding that the appellants had no right to institute their Petitions for violation of the fundamental right from torture, inhuman and degrading treatment after 20-22 years whereas violations of fundamental rights have no time limitations under the repealed Constitution and the 2010, Constitution or under the Human Rights law and International human rights law.

5. Law and fact in shifting the cause of action from brutal torture at Freedom Corner on 3rd March, 1992 and brutal torture on diverse dates between 4th March, 1992 to 19th January, 1993 at All Saints Cathedral Bunker where the appellants were holed into far away rural places and unavailability of treatment cards which was deliberate disregard of the particulars of torture in paragraphs 3,4,5,6,7,8,9,10,11,12, and 13 of the individual affidavits.

6. Closing his eyes to the uncontested affidavits evidence which was wholly adopted as the appellants' oral evidence which gave sufficient particulars of the torture, physical and psychological sheer brutal torture.

7. Failing to find the respondent did not call the maker of its replying affidavit to contradict the appellants affidavit evidence.

8. Law and fact by personally addressing the appellant's counsel remarking after reading the judgment that there is no more government money for past torture victims and that the court will restrict filing the torture case to Nyayo House Torture Chambers only which was uncalled for.

9. Law and fact by allowing his personal opinion biases and fixed mindset against allowing other categories of torture, inhuman and degrading treatment apart from Nyayo House torture which he equated to abuse of court process.

10. Law by relying on discredited decision of Nyamu J. in Peter Ngari Kagume & Others vs Attorney General where court opined that there was no specific limitation of time to file suits of fundamental rights cases.

11. Narrowing proof of torture to prove by treatment cards or medical reports in all the decided torture cases when due to passage of time, lack of treatment cards was not crucial to prove the ingredient of torture in its broad legal sense in local human rights law and international human rights law.

12. Not awarding general damages for torture, inhuman and degrading treatment as pleaded in the uncontested petition and evidence that was not rebutted or contradicted by oral evidence by the respondent witnesses.

13. Not awarding general damages for physical and psychological torture by the respondent's brutal police officers and GSU Officers who were the respondent's servants.

14. Filing to find that the factual and historical record in the Society Magazine of 23rd March, 1992 was not challenged, controverted or rebutted by the respondent in a replying affidavit at all.

15. Law and fact in failing to find that appellants questioned the inhuman, degrading treatment, unwarranted and unconstitutional acts of 3rd March, 1992 at Freedom Corner and repeatedly on diverse days 3rd March, 1992 to 19th January, 1993 as pleaded in their uncontested petition and the supporting affidavit.

16. Law and fact in failing to comprehend that the police attacks, police raids, police harassment occurred on diverse dates 3rd March, 1992 to 19th January, 1993 and not daily as he clearly misled the pleadings and the evidence adduced by the 3rd appellant.

14. We heard this appeal on 4th February 2025 on the Court's virtual platform during which learned counsel, Mr Emmanuel Bitta, appeared for the respondent. Although served, there was no representation on behalf of the appellant who had, nevertheless, filed their written submissions as directed at the case management session, hence signifying their prosecution of the appeal. Mr Bitta informed us that he would be filing his submissions before the end of the week, which he did.

15. It was submitted on behalf of the appellants: that this Court should be guided by its decision in *Wamwere & 2 others v Attorney General (Civil Appeal 102 of 2018)* [2024] KECA 487 and be bound by the decision of the Supreme Court in Wamwere & 5 Others v Attorney General [2023] KESC 3 since the facts in the latter were similar to the facts of the instant case and the mode of prosecution of the cases was the same; that the Supreme Court found that there is no limitation of time in matters relating to violation of rights under the *Constitution* which are evaluated and decided on case to case basis; that the matter was in the nature of transitional justice claims hence context sensitive and therefore the public interest requires the court to consider the fairness of the case; that the 2010 Constitution envisages redress for historical injustices that occurred during the repressive era; that given the explanation advanced by the appellants, the delay in filing the claims was not inordinate and was reasonable in the circumstances; that the Court should take judicial notice of the fact that Freedom Corner incident took place; that since the appellants gave uncontroverted evidence, the court ought to have found that the appellants proved violation of their rights and freedoms from torture and inhuman and degrading treatment since torture covers mental and physical ill treatment; and that the appellants' rights and freedom from inhuman treatment as protected under section 74(1) of the repealed Constitution were violated by the Government through the actions of police officers and GSU Officers who were its agents and/or servants.

16. It was submitted that since the Supreme Court awarded the appellants in the above case Kshs 2,500,000 each, the appellants should each be awarded Kshs 5,000,000 with interest from the date of filing of the petition till payment in full.

17. The submissions filed on behalf of the respondent were, in summary, to the effect: that based on this Court's decisions in Monica Wangu Wamwere v Attorney General [2019] KECA 579 and Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, the appellants did not discharge their onus of proof as required in law; and that since the instant appeal appears to have been

drafted on similar lines as the one in Monica Wangu Wamwere Case, it should suffer the same fate of being dismissed as lacking in merit.

18. We have considered the appeal and being a first appeal, as was observed in Abok James Odera Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR), our primary duty is to re-evaluate, re-assess and re- analyze the evidence on record and draw our own conclusions thereon, while making allowance for the fact that the trial Judge had the advantage of seeing and hearing the witnesses who testified before him.

19. In this appeal, apart from the petitioners who filed the case before the trial court, the facts are similar to and the cause of action is the same as in Wamwere & 2 others v Attorney General (supra) and Wamwere & 5 Others v Attorney General (supra). This Court as well as the Supreme Court has had occasion to re-evaluate, re-assess and re-analyze the evidence in both cases which is the same, in material particulars, as the evidence presented before the trial court in the instant matter. Whereas, the law expects us, in carrying out our mandate as the first appellate court to review the evidence before the trial court in order to determine whether the conclusion originally reached upon that evidence should stand, in our view, that duty is rendered unnecessary where, as in this case, the circumstances are similar and the Supreme Court, the highest Court in the land, whose decisions are binding upon all other courts in this country, has pronounced itself in similar set of circumstances. In other words, we cannot, under the guise of re-evaluating the evidence and re- analysing it, come to a conclusion different from the one arrived at by the Supreme Court if the facts, the evidence and the authorities relied upon are the same. As this Court appreciated in Wamwere & 2 others v Attorney General (supra):

> " The appeal now before us raises exactly the same issues that were canvassed before the Supreme Court in Wamwere & 5 Others vs. Attorney General (supra). Given the striking similarities between this appeal and those aforesaid, and considering that they arise from the same facts and circumstances, by and large, the Supreme Court decision has substantively determined the main issues that were raised by the parties herein. We say so because Article 163(7) of the *Constitution* stipulates that:
>
> > " All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.'"

20. The learned Judge, in his decision captured the following issues: whether the petition was caught up by limitation; and whether the appellants had proved their case against the respondent. Tied to the second issue is whether the newspaper reports were admissible and sufficient evidence to prove violation of the appellant's rights and whether the appellants' allegations against the police officers and GSU officers amounted to cruel, inhuman or degrading treatment.

21. Regarding the issue of limitation, the learned Judge stated that:

> " ...from the evidence and submissions before this Court, no clear justification has been given as to why there was delay in presenting the present Petition which was filed on 17th April, 2013 alleging torture that occurred from 3rd March 1992 up to 19th January 1993. In their oral evidence before this Court, the Petitioners did not allude to the matter at all although it was properly raised by the Respondent who claimed prejudice in defending the claim... Further to the above and turning back to the present case, I am aware, and it was so pleaded, that the Petitioners, together with fellow women (mothers of the political prisoners) and their supporters, were agitating for the release of amongst others Koigi wa Wamwere in 1992. It is also common knowledge that many claims arising from alleged injustices arising

from that event have long been filed and determined. It is very difficult for me therefore to understand in the circumstances why the Petitioners herein did not institute their claims in good time if the said claims were genuine and founded on a serious claim such as torture."

22. The learned Judge nevertheless felt that the wider interests of justice necessitated "that the present claims, like others before them, should ultimately be determined on their merits". It is therefore clear that, notwithstanding his misgivings concerning the delay in bringing the action, the learned Judge proceeded to determine the matter on its merits. Accordingly, nothing turns on this ground of appeal.

23. On the issue whether or not the appellants proved their case, the learned Judge expressed himself as follows:

> "On the evidence placed before me therefore, save for the evidence contained in their Affidavits, the Petitioners, like all others before them who made claims that they were tortured at Freedom Corner, and at All Saints Cathedral, placed reliance on an article in the "The Society" Magazine of 23rd March, 1992. In previous similar Petitions, I have asked the question, and I ask it again, are mere assertions and newspaper articles admissible as evidence in Petitions alleging violations of rights and fundamental freedoms" Like in those other Petitions, I must answer the question in the negative."

24. The Supreme Court, on its part, dealt with the issue in Wamwere & 5 Others v Attorney General (supra) as follows:

> "On this issue, we begin our consideration from the premise of uncontested historical facts. On February 28, 1992 mothers of political prisoners, who had been detained by the then regime, together with their supporters convened at freedom corner. They went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. It is common ground that on March 3, 1992 police officers stormed freedom corner and dispersed the demonstrators. This incident drew widespread press coverage nationally and internationally as well as condemnation across the globe. It is a matter that we can comfortably take judicial notice of as a matter of general notoriety.."

25. The Supreme Court, in this decision that came later than the impugned decision, pronounced itself on the notoriety of the incident in question and held that judicial notice ought to have been taken of the incident. It being so the holding of the learned Judge on this matter must yield to the pronouncement of the apex Court.

26. On whether the appellants proved that they were tortured, the learned Judge found that:

> "...whereas the Petitioners made various assertions that they were tortured, i.e. that they were subjected to "inhumane and brutal battery with boots, batons, slaps, rubber whips, kicks and blows all over her body; attacks by over 100 Kenya Police Officers and General Service Unit officers" which they further alleged occurred continuously from 3rd March, 1992 to 19th January, 1993, no material evidence was placed before this Court to corroborate those averments. Even if I were to accept the view I held in Milkah Wanjiku Kinuthia (supra) that medical records are not the only pieces of evidence to prove torture, I maintain the view that a reasonable man ought to appreciate the fact that the length of the alleged torture would certainly have had catastrophic effects on the Petitioner's physical and mental well-being but this allegation was very casually made. While referring to Prof. Wangari Mathai, for example, who was in fact said to have been rendered unconscious during the incident

of 3rd March, 1992 and was hospitalised, the Petitioners made no mention of any treatment they received after the serious injuries they claimed to have sustained. In fact they were quick to point out that they immediately returned to Nairobi after being deported to their rural homes without any evidence of injury. Whatever their resolve and focus, had they been seriously tortured as they claim that they were, they should surely have been treated, healed and returned to Nairobi after sometime but this was not to be. The same finding applies to the alleged torture at all Saints Cathedral."

27. The learned Judge was of the view that the allegations that the appellants "they were slapped, kicked and beaten will not amount to torture if the criteria in the Convention on Torture is applied."

28. Dealing with the same issue, the Supreme Court in the above cited case expressed itself as hereunder:

> " It is evident that the exact boundaries between 'torture' and other forms of 'inhuman or degrading punishment or other treatment' are often difficult to identify; and may depend on the particular circumstances of the case as well as the characteristics of the particular victim. Nonetheless, both terms cover mental and physical ill-treatment that has been intentionally inflicted by or with the consent or acquiescence of state authorities...We find that "inhuman or degrading punishment or treatment" refers to ill- treatment which does not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which amount to or result in the ill- treatment has to exist. Exposing a person to conditions reasonably believed to constitute ill- treatment will entail responsibility for its infliction. Further, degrading treatment may involve less severe pain or suffering than torture; and will usually involve humiliation and debasement of the victim. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or physical pain or suffering... taking into account the violent nature of the disruption of the subject protest/assembly, it is more likely than not that the whole episode had a psychological traumatic effect on the appellants, who we have held were at the locus in quo. Although the appellants did not exhibit any physical injuries or medical reports, we are persuaded that the whole incident had a psychological/ traumatic effect on them. This in our view can be equated to inhuman treatment which was a violation section 74(1) of the repealed Constitution. This is because the respondent did not give any justifiable reason(s) whatsoever why it was necessary to violently disrupt and disband the protests by the appellants who were harmless. To that extent and unlike the two superior courts below, we find that the appellants' right to freedom of association and assembly was interfered with and due to the violent methods employed by the police, this amounted to a violation of their human rights which were duly protected under section 74(1) of the repealed Constitution.."

29. Again, on torture, the holding of the learned Judge must give way to the manner in which the Supreme Court resolved the question in the latter decision.

30. We reiterate that the facts as pleaded by the appellants and the law relied upon in the petitions giving rise to this appeal were similar and the to those in Wamwere & 5 Others v Attorney General (supra). That being the position, the only fact that the appellants needed to prove was whether they were actually present at the Freedom Corner on the material days and whether they were also the subject of the treatment that was meted against the petitioners in Wamwere & 5 Others v Attorney General (supra). At the hearing the 1st, 3rd and 6th appellants testified and relied on the contents of their supporting affidavits. The 3rd appellant, in particular, even identified himself in the photograph in the newspaper cutting. The affidavits of the other appellants were adopted without objection from the respondent.

As was the case in Wamwere & 5 Others v Attorney General (supra), the respondent did not adduce any evidence to controvert the evidence of the appellants. Just like the learned Judges in the above case, we note that:

> " the appellants' evidence of having been at freedom corner was not displaced during cross-examination. In addition, the Attorney General did not call any witness(es) to challenge the evidence of their participation in the subject protest/assembly. Consequently, weighing the evidence adduced before the trial court, we come to the conclusion that the appellants' proved their participation in the subject protest/assembly at freedom corner to the requisite standard."

31. Having considered the decision of this Court in in Wamwere & 2 others v Attorney General (supra) as well as the binding decision of the Supreme Court in Wamwere & 5 Others v Attorney General (supra), we come to the conclusion that the learned Judge erred in dismissing the appellants' case.

32. As regards damages, we are of the view that whereas the appellants were entitled to general damages, there was no sufficient material placed before the court to warrant the award of exemplary damages.

33. We accordingly, allow the appeal, set aside the judgement and substitute therefor a judgement for the appellants for:

    a. A declaration that the appellants' fundamental rights and freedom from torture were each contravened and grossly violated by the Respondent's Kenya Police Officers and General Service Unit officers (G.S.U) who were Kenyan Government servants, agents, employees and in its institutions on diverse dates and times on 3rd March, 1992 up to 19th January, 1993.

    b. A declaration that each appellants is entitled to payment of general damages and compensation for the violations and contraventions of their fundamental rights and freedoms under sections 25 (a) and 29(a), (c), (d) and (f) of the repealed Constitution of Kenya, which we assess in the sum of Kshs 2,500,000.00 for each appellant.

    c. We award costs of the appeal and of the High Court proceedings to the appellants.

34. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.