



Chief of Kenya Defence Forces & another v Etyang (Civil Appeal E001 of 2024) [2025] KECA 1409 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1409 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E001 OF 2024
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
JULY 31, 2025**

BETWEEN

CHIEF OF KENYA DEFENCE FORCES 1ST APPELLANT

THE ATTORNEY GENERAL 2ND APPELLANT

AND

MOSES ETYANG RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Bungoma (Keli J) Dated 28th February 2023 in Employment & Labour Relations Petition No. E004 of 2021)

JUDGMENT

1. The Chief of Kenya Defence Forces and the Attorney General, being the appellants herein, have filed this appeal challenging the judgment and decree of the Employment and Labour Relations Court at Bungoma, (Keli J) (ELRC) in which the respondent, Moses Etyang, had brought a petition following his dismissal from service with the Kenya Defence Forces (the KDF). The ELRC did find in favour of the respondent in the said petition.
2. From the record, the facts of the petition before the ELRC were, as follows: The respondent, formally enlisted with the KDF on 1st September 2008. He was thereafter posted to the 15th Kenya Rifles and later the 17th Kenya Rifles. Between 2013 and 2014, he served in AMISOM III in Afmadow, Somalia. In the course of service, he was involved in an accident when the vehicle he was travelling in overturned following an ambush. The accident initially caused him soft tissue injuries to the left frontal and occipital regions, but medical attention was deemed unnecessary by Major Shangata, the officer in charge of the unit at the time. Only first aid was administered, after which the respondent resumed his duties. However, his health progressively deteriorated.



3. Upon returning to Nyali Barracks in 2015, after the aforesaid tour of duty, the respondent exhibited difficulties in duty performance and reported symptoms of memory loss and impaired judgment, which he attributed to the accident. Despite his worsening health condition, it was alleged that no proper medical assessment or treatment was provided by the appellant. Instead, disciplinary proceedings were initiated, accusing him of various service offences, including malingering, insubordination, and absence from duty without leave.

These charges culminated in his conviction, imprisonment for 42 days, and eventual discharge from KDF service on 6th October, 2015, under the grounds of "services no longer required."

4. Considering that his dismissal violated his constitutional rights, as the appellants had failed: to acknowledge his mental health challenges stemming from the accident in Somalia; to fulfill their duty of care, particularly in providing adequate medical support and ensuring his well-being and that his condition was later diagnosed as schizophrenia, a finding affirmed by a Medical Board convened in 2018 which concluded that the respondent's mental illness was directly linked to the injuries sustained in Somalia, the respondent petitioned the ELRC for various declarations and reliefs, to wit: declarations that his dismissal was null, void, and unconstitutional, as it violated his rights to dignity, health, fair administrative action, and a fair trial; reinstatement or, alternatively, compensation for lost earnings, full remuneration, and benefits; sought future medical support of Kshs.40,000 per month, general damages for pain and suffering, loss of earning capacity, and compensation for constitutional violations. Additionally, he sought judicial review order of Certiorari to quash the dismissal, interest on the monetary awards, and costs of the petition.
5. The respondent contended that several constitutional provisions were violated by the appellants, in the manner he was treated and eventually dismissed from employment. He claimed that the following Articles of *the Constitution* were violated: Article 25(a), which guarantees freedom from torture, cruel, inhuman, or degrading treatment, the respondent argued that subjecting him to disciplinary proceedings, imprisonment, and dismissal while suffering from mental illness constituted cruel and inhuman treatment; Article 27, which provides for equality and freedom from discrimination. The respondent felt that he was treated unfairly due to his mental health problems, with no accommodations made to address his condition, unlike what might have been expected for other service members without such challenges; Article 28, which upholds the right to human dignity. The respondent argued that charging him with malingering and labeling his behaviour as inappropriate diminished his respect, dignity, and character among his peers. Article 29(f), which protects individuals from inhuman and degrading treatment, the respondent claimed that the failure to provide him with adequate medical care after his injury in Somalia, coupled with his subsequent dismissal, amounted to inhuman and degrading treatment; Article 41(1), which ensures the right to fair labour practices, arguing that the appellants failed to address his health concerns appropriately, leading to his unfair dismissal; Article 43(1)(a), which guarantees the right to the highest attainable standard of health.
6. It was the respondent's case that this right was breached when he was denied proper medical attention following his injuries, despite displaying symptoms of severe mental distress; Article 47(1) and (2), which provide for fair administrative action, the respondent claimed that the dismissal process was procedurally flawed and devoid of fairness, as he was not given written reasons for his termination or afforded an opportunity to properly respond to the charges against him and lastly, Article 50, which ensures the right to a fair trial, the respondent argued that the disciplinary proceedings were unfair, as he was not informed of his right to representation, and there was no proper assessment of his mental capacity to stand trial.



7. In their response, the appellants asserted that the respondent's dismissal was lawful and in accordance with Section 255(1)(g) of the *Kenya Defence Forces Act* "KDFA" on the grounds of "service no longer required." They argued that the respondent had been properly charged and convicted on multiple service offences under summary disciplinary proceedings. These included absence from duty without leave, insubordination, desertion from duty, and malingering, amongst others. That upon termination the respondent was paid all his dues including gratuity, pension, and compensation for his disability as assessed and determined by the Medical Board. The appellants also pointed out that the respondent did not appeal the decision, which further supported their claim of procedural propriety. Finally, the appellants claimed that the respondent's claim was in any event time barred pursuant to the provisions of the Public Authorities Act. In the end they prayed for the dismissal of the petition.
8. The claim was heard by way of affidavits and oral evidence presented by both parties. The respondent relied on his supporting affidavit to the petition and additional evidence tendered by his father, Julius Etyang. During the plenary hearing, the respondent reiterated and expounded on the facts deposed to in his supporting affidavit. He presented several documents to substantiate his petition being certificate of service and discharge letter dated 2nd October, 2015, which set out the terms of his dismissal from the KDF; Medical report from the Board which concluded that he had developed schizophrenia linked to injuries sustained during the Somalia mission and declared him unfit for service; a diagnosis report from Bungoma Hospital, which confirmed that he had been diagnosed with mental illness following his discharge from military service. These exhibits, were according to the respondent, instrumental in demonstrating his deteriorating health, the link to his injuries in Somalia, and the procedural flaws in the actions taken by the appellants in terminating his employment.
9. His father, Julius Etyang, corroborated the respondent's claims, testifying that the respondent had returned home a changed man, unable to care for himself and requiring constant supervision due to episodes of memory loss and impaired judgment. He also testified that he had assumed the role of a full-time caregiver to the respondent.
10. The appellants, during the hearing, through Major Edwin Kibiru Muta presented several documents to support their opposition to the petition. They were the respondent's enlistment and service records, including promotions, and assignments, discharge; detailed respondent's disciplinary records, outlining charges such as malingering, absence from duty without leave, and insubordination, along with their corresponding dates and outcomes; summarized disciplinary proceedings and their outcomes, showing that the charges were adjudicated upon in accordance with the KDFA, culminating in the respondent's conviction on several of them; records of payment, including the respondent's gratuity and pension; medical records from a Medical Board convened in 2018, concluding that the respondent suffered from schizophrenia linked to the injuries sustained in Somalia, which rendered him unfit for further service; internal correspondence regarding the respondent's discharge, documenting the decision-making process and the commanding officer's recommendations and finally, the respondent's clearance certificate, confirming his official exit from the KDF and evidencing compliance with discharge procedures. These documents were pivotal in the appellants' argument that the respondent's dismissal was lawful, procedurally compliant, and justified within the framework of military regulations.
11. However, the witness made the following concessions, procedural shortcomings in handling the respondent's case, lack of evidence to show that the respondent's mental capacity to stand trial had been assessed before the disciplinary proceedings were undertaken, additionally, the witness confirmed that while procedures were in place to assist service members with mental health issues, there was no proof that the respondent had benefited from such measures. He further admitted that the appellants had failed to investigate the respondent's health concerns following the incident in Somalia or to



- document efforts made to address his condition after his discharge from duty. These concessions, painted a compelling picture of the appellants' failure to ensure fair treatment and proper care for the respondent, which significantly influenced the court's findings.
12. The ELC in its judgment determined that the respondent's discharge was unlawful and procedurally flawed. It found that the appellants failed to provide evidence of proper investigations, mental capacity assessments, or compliance with military disciplinary procedures as required under the KDFA. Furthermore, the court highlighted gross violations of the respondent's constitutional rights, including the right to fair administrative action, fair trial, human dignity, and the highest attainable standard of health. As a result, the court awarded the respondent, a global figure in compensatory damages amounting to Kshs.30,000,000. This award was deemed appropriate to address the gross violations of his constitutional rights and the significant impact on his health, dignity, and livelihood. The court emphasized that the unlawful discharge, failure to provide adequate medical care, and the cruel and degrading treatment the respondent endured warranted such substantial monetary compensation. The other prayers were deemed unnecessary to grant.
 13. This appeal now challenges the judgment and decree of the ELRC aforesaid. In the Memorandum of Appeal, the appellants challenged the judgment and decree on grounds that the ELRC erred in both law and fact by: concluding that the respondent had suffered an unfair trial and dismissal in violation of Article 47 of *the Constitution* of Kenya, finding that the respondent had been denied adequate medical treatment by AMISOM III doctors and that the appellants had failed to assess the respondent's mental capacity prior to trial or conduct an automatic review of his conviction as required by Section 159 of the KDFA, concluding that the respondent had been subjected to multiple punishment, as well as finding a causal link between the respondent's mental illness and the accident in Somalia without sufficient proof; improperly dismissing the issue of inordinate delay in filing the petition; asserting finally, that the compensation of Kshs.30,000,000/- was excessive, based on incorrect legal principles, and lacked proper analysis or rationale.
 14. The appeal was heard by way of written submissions with limited oral highlights. Ms. Tuiyott, learned counsel, appeared for the appellants whereas Ms. Nekesa, learned counsel appeared for the respondent.
 15. On the issue of the respondent's discharge, the appellants submitted that the respondent had been procedurally charged, tried and convicted. He was thereafter discharged from service in accordance with the KDFA. They argued that Section 152(1)(c) of the Act does not impose a mandatory requirement for a Commanding Officer (CO) to conduct a mental assessment unless there are reasonable grounds to believe that the accused is unfit for trial or suffering from a mental disorder. They further emphasized that at the time of the respondent's summary trial, no medical diagnosis of mental illness was available, as the medical board only diagnosed schizophrenia subsequently. The appellants also relied on Section 159 of the KDFA to argue that the respondent's conviction was subjected to an automatic review as required. They contended that the discharge from service under Section 255 of KDFA was an administrative action, not a punishment, and therefore, no double punishment was imposed on the respondent as claimed.
 16. Regarding the procedural conduct of the disciplinary proceedings, the appellants submitted that all required steps, including the reading of charges and providing the respondent an opportunity to appear before the CO, were followed. They maintained that the trial court's findings of procedural flaws were unfounded and unsupported by evidence.
 17. On the alleged violation of constitutional rights, the appellants argued that the respondent's fundamental rights under Articles 25(a) & (c), 27, 28, 29(f), 41(1), 43(1)(a), 47, and 50 of *the Constitution* were not violated at all. They submitted that there was no material evidence to support



- claims of denial of medical treatment while the respondent was serving under AMISOM III or any linkage of his condition to the injuries sustained in Somalia. The appellants reiterated that the disciplinary proceedings and discharge from duty of the respondent followed the law and maintained that the ELRC erred in finding otherwise.
18. The appellants submitted that the ELRC erred in finding that the respondent's rights under Articles 25(a), 29(f), and 43 of *the Constitution* were violated. They argued that the respondent's claims were unsupported by evidence and that the burden of proof, as set out in Sections 107 and 109 of the *Evidence Act*, was not met. Relying on the case of *Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others*, SC Petition No. 12 of 2019, the appellants emphasized that a petitioner bears the evidential burden of providing substantial material to establish constitutional violations before the onus shifts to the respondent to disprove the claims. Similarly, they cited the case of *Monica Wangu Wamwere & 5 Others vs. Attorney General*, SC Petition No. 26, 34 & 35 of 2019, to affirm that even when no contrary evidence is tendered by the respondent, the petitioner must still prove allegations on a balance of probabilities.
 19. On the alleged denial of medical treatment under Article 25(a), the appellants argued that the ELRC erroneously concluded that the respondent was denied access to a medical doctor while serving in AMISOM III, despite evidence indicating that the respondent was treated at the medical camp. They pointed to the contradictions in the respondent's submissions, which acknowledged receiving medical attention initially, and failed to prove that further treatment was denied. They contended that no evidence was provided to substantiate claims that the officer in charge intentionally denied the respondent access to additional medical care.
 20. Regarding the respondent's alleged mental illness under Article 43, the appellants submitted that there was no correlation between the respondent's condition and the accident in Somalia. They relied on the persuasive case of *Fadna Issa Omar v Malne Sirengo Chipu & 3 Others* [2016] eKLR, where the High Court held that a time lapse between an accident and a diagnosis weakened the plaintiff's case. The appellants submitted that a four-year gap between the accident in 2014 and the respondent's schizophrenia diagnosis in 2018, made it unlikely to establish causation. They also noted that the respondent opted out of the Defence Forces Medical Insurance Scheme (DEFMIS), which could have supported his medical needs after discharge.
 21. Additionally, the appellants contended that the respondent failed to produce witnesses or evidence to support his claims of medical negligence. They thus disputed the ELRC's findings that the respondent's constitutional rights under Article 43 were contravened, asserting that the allegations remained unproved.
 22. With respect to Article 28 of *the Constitution* on human dignity, the appellants submitted that the respondent's dignity was not compromised, as the charges against him were lawful and properly instituted under the KDFA. They submitted that the respondent was charged with various service offences, including malingering, insubordination, and absence from duty without leave, all of which were within the provisions of the KDFA. They argued that the offences were unrelated to any mental health condition, as no such diagnosis existed at the time of the disciplinary proceedings.
 23. Regarding Article 41 of *the Constitution* on fair labour practices, the appellants contended that the ELRC erred in finding that the respondent was exposed to unfair labour practices. They argued that the respondent's mental health, diagnosed years after his trial and dismissal, could not have influenced the disciplinary proceedings or working conditions. They relied on the *Mental Health Act* to argue that a diagnosis by a qualified mental health practitioner is necessary to establish mental illness, and no such diagnosis existed at the time of the trial.



24. On the alleged violations under Articles 47 and 50 of *the Constitution*, the appellants submitted that the trial court improperly attributed the respondent's charges to his mental illness. They cited the Supreme Court case of *MMG v Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG* (Petition 10 (EO13) of 2022) to argue that mental illness does not automatically equate to mental incapacity, which must be determined by a qualified doctor.
25. Finally, on the issue of inordinate delay in filing the petition, the appellants submitted that the respondent's claim was barred under Section 3(2) of the Public Authorities Act. They argued that there was an unreasonable time lapse between the respondent's dismissal in 2016 and the filing of the petition in 2021. Citing the case of *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. TDaniel Moi), & another v District Land Registrar Uasin Gishu & 4 others* (Petition 17 (E021) of 2023 & 24 (E027) of 2022) they contended that constitutional petitions must be filed within a reasonable time. That the Supreme Court had also held that although constitutional petitions are generally not subject to limitation periods, this principle is not absolute. It must be applied on a case-by-case basis, considering factors such as the nature of the right claimed, the time taken to raise the alleged violation, and whether the claimant may be acting with ulterior motives. The appellants argued that the ELRC wrongly adopted circumstantial reasons for the delay on behalf of the respondent and failed to require proper explanations as required by law.
26. On compensation, the appellants contended that the ELRC erred in awarding Kshs.30,000,000, arguing that the amount was excessive and arrived at by applying incorrect legal principles. They referred to the case of *Njoru & another v Equity Bank Limited & another* (Civil Appeal 317 of 2018) [2025] KECA 86 (KLR), where the Court of Appeal held that an appellate court may only interfere with a trial court's award of damages if it was based on wrong principles, involved misapprehension of the evidence, or resulted in an amount that was inordinately high or low. The appellants maintained that the ELRC misapplied discretion and failed to provide proper analysis, formulae, or rationale for arriving at the amount awarded. They further relied on the case of *County Assembly of Migori & 3 others v Ouma & 2 others* [2025] KECA 6 (KLR), to argue that awards must adhere to sound judicial principles, must be justified based on the circumstances of the case, and should not be arbitrary. While the ELRC cited the case of *Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another* [2018] KEELRC 509 (KLR), where Kshs.20,000,000 was awarded as compensation to support its award, the appellants argued that it failed to distinguish that the said amount had been pleaded and specifically tied to loss of future earnings and had been calculated based on the claimant's income.
27. The appellants also submitted that the ELRC justified the compensation by presuming costs for future medical needs, dependents' upkeep, and loss of earnings, despite the respondent providing no documentary or oral evidence to substantiate these costs. Moreover, the ELRC found that the respondent deserved more compensation than that awarded by the Kenya Defence Forces (KDF) based on the medical examination, yet there was no evidence specifying a different degree of disability or proving that the respondent was now an invalid. To support their position, the appellants cited the case of *Charles Muturi Macharia & 6 Others* (SC Petition No. 13(E015) of 2022), where the Supreme Court stated that damages may only be awarded if constitutional violations are proved on a balance of probabilities. They maintained that the respondent had not met the evidentiary threshold to justify the compensation and, therefore, was not entitled to the award granted by the trial court. In the end, the appellants pleaded with us to either set aside or reassess the damages in accordance with proper legal principles and precedents.
28. The respondent opposed the appeal by submitting that his dismissal from employment violated Section 147 of the KDFR which incorporates Articles 47 and 50 of *the Constitution*. That the disciplinary process was not in tandem with Section 150 of the KDFR. Further, he was not informed



of his right to legal representation or the need to call witnesses, contrary to Section 151 of the KDFEA. The appellants also failed to ensure that he was mentally fit to stand trial, in violation of Section 152 of the KDFEA despite evident mental impairment. Additionally, he contended that his conviction did not kick in the automatic review mechanism envisaged required under Section 159 of the KDFEA, and that he was subjected to double punishment for a single offence, breaching Section 156(4) of the KDFEA. In support of these arguments, the respondent relied on the cases of Wellington Nzioka Kioko vs. Attorney General [2018] eKLR, to stress the importance of procedural fairness, as well as Peter Ndegwa Kiai t/a Pema Wines & Spirits vs. Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 3.28 (KLR), to justify compensatory damages awarded.

29. The respondent submitted that, his rights under Articles 43, 47, and 50 of *the Constitution* were infringed, specifically his rights to health, fair administrative action, fair trial, and dignity. He argued that he was denied the highest attainable standard of health, subjected to cruel, inhuman, and degrading treatment, and his dignity was disregarded. He relied on the case of Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR) to emphasize the absolute necessity of upholding constitutional rights of individuals.
30. He contended that constitutional petitions are not subject to limitation periods, as stated in the case of Dominic Arony Amolo vs. Attorney General [2010] eKLR. He further submitted that the delay in filing the petition was justified due to his health concerns and in particular his mental status. In support thereof he cited the case of Wellington Nzioka Kioko vs. Attorney General [2018] eKLR, which recognized mental illness as a valid explanation for delay in filing petitions.
31. Lastly, the respondent defended the award of Kshs.30,000,000, arguing that it was proportional to the gravity of the violations and his suffering. He cited the cases of Peter Ndegwa Kiai t/a Pema Wines & Spirits vs. Attorney General & 2 others (supra) and Migori County Government & another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR), which reiterated that damages for constitutional violations are discretionary and depend on the unique circumstances of each case. The respondent concluded by urging the court to dismiss the appeal and uphold the ELRC's findings on all the issues.
32. This is a first appeal. The duty of the first appellate court is to carefully re-evaluate and analyze all the evidence on record from the trial court and come to its own independent conclusions while bearing in mind that it neither saw nor heard the witnesses testify. This duty was explicitly set out in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

33. We have considered the record, rival submissions, the authorities cited and the law. The issues we discern necessary for our consideration are whether the ELRC erred in finding that: the respondent's discharge from the KDF was unlawful; the respondent's constitutional rights were violated; the respondent was not guilty of inordinate delay in filing the petition; and whether the award of Kshs.30,000,000 as compensation was justified.



34. On the first issue, the appellant submitted that the discharge was lawful and procedurally carried out in compliance with the KDEFA with proper review mechanisms under Section 159, and thus maintained that the respondent's dismissal was justified. In opposition, the respondent submitted that his discharge was procedurally flawed and violated several statutory and constitutional provisions.
35. In our view, disciplinary proceedings in the defence forces must comply with the KDEFA and constitutional safeguards, including fair administrative action under Article 47 of *the Constitution*. Article 47(1), (2) and (3) of *the Constitution* provides that: -
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - b. promotes efficient administration.
36. This Court differently constituted in *Judicial Service Commission v. Mbalu Mutava & Another* [2015] eKLR, addressed itself to Article 47 of *the Constitution* stating that Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of State organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, State organs and other administrative bodies are now subjected by Article 47(1) of *the Constitution* to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.
37. In South Africa, the Constitutional Court in *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* CCT16/98) 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court stated that although the right to just administrative action was entrenched in *the Constitution* in recognition of the importance of the common law governing administrative review, it is not correct to see Section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of Section 33, but also its content. The court went on to state that the principal function of Section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.
38. We reiterate that Article 47 of *the Constitution* transcends a mere codification of common law principles on administrative action. Its primary aim is to regulate the conduct of public administration and ensure that any administrative action that affects or threatens individuals is carried out in line with



- constitutional standards of administrative justice. The inclusion of Article 47 in *the Constitution* was a deliberate decision by Kenyans to demand fairness, transparency, and accountability in public administration. As such, public officers are required to adopt this paradigm shift and ensure that their decision-making and execution of administrative actions adhere to the principles outlined in Article 47 and the Fair Administrative Actions Act.
39. The case of *Safepak Limited v Henry Wambega & 11 others* [2019] KECA 510 (KLR) reaffirmed that failure to adhere to procedural safeguards invalidates disciplinary actions. Similarly, the South African case of *Macinezela v The State* (550/2017) [2018] ZASCA 32, highlighted the importance of assessing mental fitness of a person about to undergo disciplinary trials, emphasizing procedural fairness in all legal processes.
 40. Bearing the foregoing in mind, we have no doubt at all that the appellants contravened Article 47 of *the Constitution* in several critical ways in dealing with the respondent. First, the appellants failed to conduct a mental fitness assessment as required under Section 152(1)(e) of the K DFA. This provision mandates that a CO to ensure that an accused is mentally fit to stand trial. Despite the respondent exhibiting clear signs of mental illness following the accident whilst on duty, no such assessment was undertaken. This omission constituted a breach of the requirement for lawful, reasonable, and procedurally fair administrative action under Article 47(1) of *the Constitution*. In the South African case of *Macinezela v. The State* (550/2017) [2018] ZASCA 32, the Court of Appeal held that a failure to assess the mental fitness of an individual undermines the fairness and legitimacy of legal proceedings, as the accused cannot effectively participate in their defence without such an evaluation. This judgment reinforces the broader principle that procedural fairness is an essential aspect of justice, whether in administrative or judicial processes.
 41. Second, the appellants failed to adhere to Section 159 of the K DFA, which requires an automatic review of disciplinary findings by the superior authority. There was no evidence presented to show that such a review was conducted in the respondent's case. This procedural failure violated the standards of fairness and accountability explicitly required under Article 47 of *the Constitution*. Third, the appellants failed to provide the respondent with written reasons for his termination, as stipulated under Article 47(2) of *the Constitution*. The respondent was dismissed on the grounds of "service no longer required," yet no evidence indicated that he received proper written communication outlining the reasons for his dismissal or an opportunity to respond to the charges brought against him. This omission further contravened the procedural fairness demanded by our Constitution. Lastly, the disciplinary proceedings themselves were procedurally flawed. The respondent was charged with malingering and other offences, yet the appellants failed to adhere to essential safeguards, such as informing the respondent of his right to legal representation or ensuring his ability to present a defence. These procedural lapses violated the principles of fairness and transparency enshrined in Article 47 of *the Constitution*.
 42. In our view and just like the ELRC, we are satisfied that the appellants' actions failed to meet the constitutional threshold of fair administrative justice required under Article 47 of *the Constitution*. Their significant procedural shortcomings, collectively led to severe constitutional violations. These breaches justified the trial court's finding and its decision to uphold the respondent's claims.
 43. On the second issue, the appellants submitted that the respondent failed to meet the evidentiary burden required under Sections 107 and 109 of the *Evidence Act*. They argued that the disciplinary proceedings and dismissal adhered to the K DFA and that no constitutional violations were manifested. The appellants maintained that the respondent's claims of denial of medical care and procedural flaws were unsupported by evidence. Conversely, the respondent position was that his constitutional rights under Articles 25(a), 28, 41, 43, and 47 of *the Constitution* were grossly violated.



44. Constitutional rights, particularly those that guarantee dignity, health, and fair administrative action, are fundamental and inviolable. We have already addressed elsewhere in this judgment, the violations of Article 47 of the Kenyan Constitution. We turn to the alleged violation of Article 28 of *the Constitution*. This article guarantees every individual the right to inherent dignity and requires that this dignity be respected and protected. The importance of human dignity was highlighted in the case of Kenya National Commission on Human Rights v. Attorney General [2017] eKLR, where the court stated that dignity is a core constitutional value and serves as the foundation for all other rights. Any action that diminishes or disregards the dignity of an individual is therefore unconstitutional.
45. This principle is further reinforced by international human rights instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 7 of the ICCPR prohibits torture as well as cruel, inhuman, or degrading treatment, affirming the obligation of states to protect individuals from such acts. As correctly submitted by the respondent, human dignity is also a core value of Article 5 of the Banjul Charter which proclaims that every individual “shall have the right to respect of the dignity inherent in a human being”
46. As already stated, Human dignity is one of the national values upon which *the Constitution* of Kenya, is grounded. Article 10 (2) (b) provides that the national values and principles of governance include:
- “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”
47. Article 28 of *the Constitution* guarantees the right to human dignity by providing that “Every person has inherent dignity and the right to have that dignity respected and protected.”
48. In summary, the principles enshrined in this Article and Article 47 of *the Constitution* and as aligned with international and comparative jurisprudence serve as a safeguard against arbitrary and unfair treatment. They impose a duty on public authorities to uphold fairness, transparency, and accountability in their actions, ensuring that the dignity and rights of individuals are preserved. These obligations are particularly critical where an individual’s mental or physical condition necessitates additional considerations, as fairness and reasonableness demand tailored and compassionate approaches to administrative processes.
49. When the foregoing is considered against the two positions by the parties in this appeal, we have no doubt again that Article 28 of *the Constitution*, was breached when the respondent was charged with malingering, and subsequently dismissed from service without a proper investigation into his mental health. Labeling his behaviour as inappropriate, despite documented medical challenges, diminished his respect and standing among peers, violating the principle of inherent dignity.
50. It is also not lost on us that human rights are interlinked. This Court has stated before, that human rights are indivisible, interdependent and interrelated, that they are equal in importance and equally essential for the respect and dignity of each person. In the persuasive case of Republic vs. Minister for Home Affairs & 2 Others ex-parte Leonard Sitamze [2008] eKLR (Misc. Civ Appli 1652 of 2004) Nyamu J (as he then was), considered the rights of an ex parte applicant to obtain a work permit and stated that:
- “Human dignity is of fundamental importance to any society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights.”



51. In *S vs Makwanyane and Another* (CCT3/94) [1995] ZACC 3 the Constitutional Court of South Africa stated as follows with regard to the right to dignity as a fundamental value of *the Constitution*:
- “The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [*the Constitution*].”
52. This aligns with the holding in the case of *Kenya National Commission on Human Rights v. Attorney General* [2017] eKLR, where the court underscored that dignity is central to constitutional rights and any actions degrading it are unconstitutional. We are therefore satisfied just like the ELRC that the respondent’s right to human dignity under Article 28 of *the Constitution* was undeniably violated by the appellants’ actions.
53. As to whether Article 43(1)(a) of *the Constitution* was contravened, we note that this Article guarantees every individual the right to the highest attainable standard of health, which includes access to healthcare services. This Article imposes an obligation on the State and public institutions to ensure that individuals can access adequate and timely medical care without discrimination. In the present case, the appellants breached this constitutional right by failing to provide the respondent with proper medical attention following the accident while on duty. The injuries sustained as a result progressively affected his mental health. Despite clear indications of his deteriorating health, the respondent was denied comprehensive medical care. The situation was further exacerbated by the lack of mental fitness assessments, which the K DFA mandates under Section 152(1)(e).
54. In its decision in *P.A.O. & 2 Others vs Attorney General* (2012) though persuasive, the High Court stated that the right to health is:
- “a fundamental human right indispensable for the exercise of other human rights” and “[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”
55. It further noted that the right to health encompasses:
- “...not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines.”
56. Moreover, under international law, Article 12 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) obliges state parties, including Kenya, to progressively realize the right to health. Kenya thus has a constitutional and international law obligation with respect to ensuring that its citizens have access to the highest attainable standard of health. In light of these standards, the appellants’ failure to address the respondent’s health needs following the accident constituted a violation of Article 43(1)(a). We note that the appellant’s witness did concede to some of these acts of omission or commission. Therefore the ELRC’s determination of this breach aligns with the constitutional principles and case law supporting the fundamental right to health.
57. Article 25(a) of *the Constitution* of Kenya guarantees freedom from torture and cruel, inhuman, or degrading treatment. This provision is categorized as one of the non-derogable rights, meaning it cannot be limited under any circumstances, even during a state of emergency. This right is fundamental to any form of inhuman treatment by state or non-state actors.



58. In the context of the respondent's case, the appellants' actions violated Article 25(a) in several ways. Subjecting the respondent to disciplinary proceedings, imprisonment, and eventual dismissal while he was suffering from an untreated mental health condition constituted cruel and inhuman treatment. It matters not that the diagnosis was made much later after the respondent had been fired from KDF. All the signs were there for any caring employer to see. Had the appellants taken the initiative to go to the root of the problem when the first signs manifested, perhaps they would have arrested the problem and would not have found themselves where they are now. This left the respondent vulnerable and unable to defend himself effectively.
59. The importance of protecting this right has been highlighted in various cases. In *Republic v Minister for Home Affairs & 2 Others ex-parte Leonard Sitamze* (supra), the court reiterated the centrality of human dignity in any society and the importance of safeguarding individuals from inhumane and degrading treatment. Internationally, this principle is upheld by Article 7 of the ICCPR, which prohibits torture and inhuman or degrading treatment, as well as by the Convention Against Torture (CAT), to which Kenya is a party. Further, the South African case of *Macinezela v. The State* (550/2017) [2018] ZASCA 32, emphasizes the critical need for mental fitness evaluations in disciplinary proceedings, reinforcing the notion that fairness and dignity must be upheld.
60. We are therefore satisfied that the ELRC correctly found that the appellants' treatment of the respondent amounted to a violation of Article 25(a) of *the Constitution*. By failing to address his health challenges and subjecting him to punitive measures despite his vulnerable state, the appellants contravened the constitutional mandate providing for freedom from inhuman treatment.
61. Article 41(1) of the Kenyan Constitution guarantees every worker the right to fair labour practices. This fundamental right encompasses an employer's duty to ensure that employment conditions are just, equitable, and protective of the employee's well-being. Employers, including public institutions like the KDF, are required to observe fairness and uphold labour standards in accordance with the law. In the present case, the respondent's right under Article 41(1) was contravened when the appellants failed to accommodate his health condition, which stemmed from injuries sustained whilst in service. The appellants disregarded his mental health challenges, initiated punitive disciplinary proceedings, and subsequently dismissed him from service without addressing his underlying health concerns. This failure to provide reasonable adjustments to the respondent's working conditions constituted a breach of fair labour practices. Case law has reinforced the importance of this right. In the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR, the court held that the right to fair labour practices demands an environment where workers' dignity and health are protected. Similarly, in International Labor Organization (ILO) Convention No. 111 on Discrimination (Employment and Occupation), which Kenya has ratified, it is emphasized that equal opportunities and non-discrimination in employment are essential to fairness in labour practices. Denying the respondent reasonable support for his health challenges ran counter to these principles.
62. Article 50 of the Kenyan Constitution guarantees the right to a fair trial, which includes the right to have any dispute resolved by a court or an independent and impartial tribunal, the right to be presumed innocent until proved guilty, and adequate facilities to prepare a defence, among other procedural safeguards. This Article is critical in ensuring justice and fairness in legal and administrative proceedings. In the respondent's case, the appellants violated it by failing to ensure a fair disciplinary process. Firstly, the respondent was not informed of his right to legal representation during the disciplinary proceedings, depriving him of an essential element of fairness. Secondly, the appellants did not conduct an assessment of the respondent's mental fitness to stand trial, despite his evident mental health challenges. This failure undermined the respondent's ability to defend himself effectively, rendering the proceedings procedurally flawed. Thirdly, the disciplinary process lacked impartiality.



and adequate safeguards, such as the opportunity to present a defence or call witnesses, further breaching Article 50. The importance of these safeguards was emphasized in the case of *Dolo v Kenya Defence Forces & Another* [2025] KEELRC 196 (KLR), where the court held that fair trial rights are indispensable even in military disciplinary proceedings. Additionally, international instruments like Article 14 of ICCPR, to which Kenya is a party, reinforce the right to a fair trial by demanding procedural safeguards and fairness in all trials. To our mind and with the above acts of omission or commission, what the respondent went through was regrettably not better than a kangaroo court. We are satisfied that, the trial court's determination that the respondent's Article 50 rights were violated was well-founded.

63. The appellants' failure to comply with constitutional and international obligations at multiple levels justified the ELRC's findings that the respondent's constitutional rights were indeed violated.
64. On the issue of whether the trial court erred in concluding that the appellant was not guilty of inordinate delay in presenting the petition, the appellants argued that the respondent's claim was time-barred due to the significant time lapse between his dismissal in 2016 and the filing of the petition in 2021. They relied on the principle that while constitutional petitions are generally not subject to limitation periods, this was not absolute right but must be assessed on a case-by-case basis. Conversely, the respondent submitted that the delay was justified due to his mental illness and therefore beyond his control.
65. The ELRC, in its analysis, found that the delay was not inordinate, given the respondent's mental health challenges and the circumstances surrounding his dismissal. The court emphasized that constitutional petitions are not strictly bound by limitation periods, particularly where the petitioner provides a reasonable explanation for the delay. It also noted that the respondent's mental illness was diagnosed and confirmed by a Medical Board in 2018, which provided a credible basis for the delay in filing the petition. In our view this issue was appropriately addressed by the ELRC and we are in agreement with the approach.
66. *Matavo, J, (as he then was)* in addressing a similar issue in the persuasive case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR, stated:
 80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained.....
 85. In considering whether delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010. The reasons cited are inability to secure employment after being released from prison forcing them to travel overseas to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation and detention. All the Petitioners suffered serious injuries and developed life threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable.



67. The Supreme Court in the case of Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & Another v District Land Registrar Uasin Gishu & 4 Others (supra), provides guidance on the issue of inordinate delay as well. The Court held:

“While constitutional petitions are generally not subject to limitation periods, this principle is not absolute. Each case must be assessed on its own merits, taking into account factors such as the nature of the right claimed, the time taken to raise the alleged violation, and whether the claimant acted with ulterior motives.”

68. This judgment underscores the need for a case-by-case evaluation of delays in filing constitutional petitions. It aligns with the ELRC’s reasoning. The trial court’s decision to consider the circumstances and sustain the petition was consistent with the principles articulated in this Supreme Court case. We equally agree with the respondents’ submissions that his case is in line with the case of Wellington Nzioka Kioko v Attorney General (supra), as well, which recognized that mental illness was a valid justification for delays in filing petitions. It emphasized that vulnerable individuals, particularly those suffering from mental health challenges, should not be unfairly penalized for delays caused by their condition. The court stated:

“Mental illness is a valid explanation for delay, as it directly impacts an individual’s capacity to act promptly in pursuing legal remedies.”

69. We therefore come to the conclusion that the ELRC’s finding that the respondent was not guilty of inordinate delay in filing the Constitutional Petition was well-founded.

70. Lastly, we turn to consider whether the award of Kshs.30,000,000 as compensation was justified, reasonable, and supported by the principles governing award of damages. As we do so, we bear in mind that an appellate court may only interfere with an award of damages of the trial court where it is proved that it proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low. See the cases of Peter Ndegwa Kiai t/ a Pema Wines & Spirits vs. Attorney General & 2 others (supra) and Migori County Government & another v Migori County Transport Sacco (supra).

71. The appellants challenged the award arguing that it was excessive and not in consonance with established legal principles governing such awards. They contended that the amount was disproportionate to the harm suffered and lacked proper justification. The respondent defended the award, asserting that it was proportional to the severity of the violations and in line with constitutional principles. He contended that damages for constitutional violations should aim to vindicate the rights breached and deter future infringements. The respondent argued that the trial court correctly assessed his suffering, loss of dignity, and the impact on his health in arriving at the figure.

72. The ELRC awarded Kshs.30,000,000 to the respondent based on significant violations of his constitutional rights, including dignity, health, and want of fair administrative action. The court found the respondent’s discharge from service unlawful noting the lack of procedural fairness and inadequate medical care following a work-related accident that caused him schizophrenia and left him permanently disabled. The appellants’ actions were deemed cruel, degrading and failing in their duty of care. Considering the respondent’s service record and the severity of the harm suffered, the award aimed to vindicate his rights, address his lifelong medical needs, and deter future violations.

73. It is essential to clarify that damages awarded for constitutional violations, commonly referred to as Constitutional Tort Actions, fall under the realm of public law remedies and are distinct from the common law damages for torts under private law. The Privy Council, in the landmark case of



Siewchand Ramanoop v The Attorney General of Trinidad and Tobago, PC Appeal No. 13 of 2004, provided a comprehensive explanation of the principles governing the award of damages for constitutional violations. It emphasized that monetary compensation for such violations is not limited to traditional compensatory damages. In the said case, Lord Nicholls stated:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindication of the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.....”

74. The Supreme Court of Canada emphasized that a remedy in cases of constitutional violations should balance fairness to the opposing party, effectively uphold the rights and freedoms of the claimants, align with the principles of constitutional democracy, and utilize judicial mechanisms to enforce and protect the violated rights. In the case of *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, it was held,

“A remedy must be fair to the party against whom the order is made, must meaningfully vindicate the rights and freedoms of the claimants, must employ means that are legitimate within the framework of our constitutional democracy, and must be a judicial remedy which vindicates the right while invoking the function and powers of a court.”

75. The case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, addressed the issue of awards in constitutional petitions by emphasizing that damages for constitutional violations are not automatically granted but must be justified by evidence of harm suffered. This Court stated:

“The primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.”

76. Further, the Supreme Court in the case of *Peter Ndegwa Kiai t/a Pema Wines and Spirits v Attorney General & 2 others* (supra) stated, “the guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.” This principle underscores that the focus of constitutional remedies is to uphold and protect rights rather than to



provide excessive or unwarranted compensation. From the proceedings, compensation was intended to address broader violations and the petitioner's ongoing needs.

77. We note that the court awarded Kshs.30,000,000 as a global figure to compensate for the respondent's constitutional violations, loss of livelihood, and future medical needs. The reasoning was based on the severity of the respondent's constitutional rights violations, including the right to dignity and health, the inhumane and degrading treatment he endured, and the employer's failure to provide proper medical care or follow due process in his disciplinary proceedings. The court also considered the respondent's permanent disability resulting from a work-related accident and the lack of support provided by the appellants. Guided by legal principles of proportionality and fairness, as well as past precedents, the court determined that this award was necessary to vindicate the respondent's rights, deter similar violations, and provide for his future needs. The ELRC did not necessarily rely on the case of Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another (*supra*), for its assessment of damages contrary to the submissions by the appellants. We also agree with the counsel for appellants' submissions that unlike the instant case, in that case, the damages were specifically pleaded and proved. That notwithstanding the victim in the other case did not suffer permanent mental disability.
78. We appreciate that, public policy considerations also come into play as Excessive awards could hinder the sustainability of institutions and discourage corrective measures, such as future compliance with procedural and substantive rights. Undoubtedly the respondent's circumstances merited substantial compensation, and we concur with that the ELRC's findings that the respondent's constitutional rights were indeed violated as a result of the appellants' failure to comply with constitutional and international obligations at multiple levels. We must also take into consideration the principles of proportionality and fairness established in case law.
79. We recognise as well that that a remedy in cases of constitutional violations should balance fairness to the opposing party, effectively uphold the rights and freedoms of the claimants, align with the principles of constitutional democracy, and utilize judicial mechanisms to enforce and protect the violated rights. Indeed, the cited case of *Siewchand Ramanoop v The Attorney General of Trinidad and Tobago*, PC Appeal No. 13 of 2004, sets out the principles governing the award of damages for constitutional violations; emphasizing that monetary compensation for such violations is not limited to traditional compensatory damages; and addressing the issue thus:
- “If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
- An award of compensation will go some distance towards vindication of the infringed constitutional right. ... The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.....”
80. Our concern however, is whether in arriving at this figure, the ELRC took into account that in the same way that human rights are intertwined, the violations are similarly intertwined, and form a chain reaction of events. For instance, violation of the right to health automatically impacts on the right to dignity, and to some extent the right not to be subjected to cruel and inhuman treatment., We are



keenly alive to the holding in *Kemfro Africa Limited TIA Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1982-88) 1 KAR 727*, that:•

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

81. Unfortunately, we are not able to identify anywhere in the judgment that the ELRC took into consideration the appellant's lament that the respondent opted out of the insurance scheme and was therefore partially the author of his financial burden. We take note that the ELRC was of the view that unique degree of disability was its permanent nature, which in its view warranted such a high figure.

We echo the observation in the case of *Gitobu Imanyara & 2 others v AG (supra)*, which observed that the primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or deter any future infringements.

The appropriate determination is an exercise in rationality and proportionality.

82. In our considered opinion, the ELRC misapprehended the evidence in some material respect, did not take into account the harsh global economic downturn; and thus, arrived at a figure which was inordinately high. Drawing from; and paraphrasing the view expressed in the case of *Peter Ndegwa Kiai t/a Pema Wines & Spirits vs. Attorney General & 2 Others [2021] KECA 3.28 (KLR)*, the guiding principle is that in constitutional petitions, an award of general damages is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss. [underlined for emphasis]

On the question of quantum, the Court considers various factors such as common law and decided cases. Articulating this position, this Court in the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR*, stated:

"In our jurisdiction however, the question of assessment of damages will have to be guided by amongst others, common law and decided cases. Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially [sic] and with regard to the general conditions prevailing in the country, such as inflation, and also prior relevant decisions."

83. For instance, in the case of *Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another [2018] KEELRC 509 (KLR)*, for unfair and illegal actions suffered the court awarded Kshs.20,000,000 as compensation, factoring in loss of future earnings (which had been specifically pleaded) and determined against his earnings as per the payslip and retirement age. In the present case, as a result of the injuries, the appellant suffered a mental condition which resulted on his loss of memory; and reduced his father into his care giver. We have no doubt in our minds that the ELRC's consideration in awarding damages was clouded by the health condition resulting, more than the nature of violation, which was the crux of the matter.
84. To that extent, we are persuaded that the decision on compensation warrants this Court's interference, as the global sum of Kshs.30,000,00, even if intended to act as a deterrent to the appellants' future conduct, is punitive and manifestly excessive. We therefore set aside the sum of Kshs.30,000,000 awarded; and substitute it with a sum of 25million.



85. Further, from the damages awarded, we direct that a sum already paid to the respondent by appellants on account of compensation of his disability as assessed and determined by the Medical Board shall be deducted to avoid double compensation. To this very limited extent, the appeal on the awarded damages succeeds.
86. In the ultimate, the appeal partially succeeds as regards the compensatory component. Each party shall however bear their own costs

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

