Attorney General v W.O.1 Samuel Chege Gitau & 283 others (Civil Appeal E093 of 2021) [2023] KECA 1386 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1386 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E093 OF 2021

HM OKWENGU, AK MURGOR & J MOHAMMED, JJA

NOVEMBER 24, 2023

BETWEEN

HON. ATTORNEY GENERAL .... APPELLANT

AND

W.O.1 SAMUEL CHEGE GITAU & 283 OTHERS .... RESPONDENT

(An appeal from the judgment and Decree of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated15th April, 2016 and subsequently the judgment on quantum dated 22nd September, 2017 in ELRC NO. 2212 of 2012)

Court upholds awards of compensation for torture claims relating to the 1982 coup d'état.

The appeal was initiated from actions incidental to the historical 1982 coup in Kenya. The respondents were aggrieved by the manner in which they were dismissed from service as officers of the Kenya Air Force (KAF) which was disbanded following the failed coup attempt. The underlying issues concerned allegations of gross violations of fundamental rights and freedoms regarding right to a fair trial, right to liberty, freedom from torture, cruel, inhuman and degrading treatment at the time of dismissal from service which were sufficiently proved by testimonies of various witnesses. Ultimately, the appellant took issue with the manner which the high court went about assessment of damages and quantum of damages awarded claiming that the trial court was functus officio when it assessed and ascertained the quantum of damages after the initial judgment. Since the respondents had provided a sufficient basis for their claims on violation of their constitutional rights and the trial court had the inherent power to reopen a case to take in additional evidence, the Court of Appeal found the procedure for assessment adopted by the trial court to be fair and the amounts awarded to be reasonable.

Reported by John Ribia

Civil Practice and Procedure *– damages – award of general and special damages – principles to be considered in award of special damages – assessment of quantum of damages – deferment of assessment of quantum by the court after issuance of an initial judgment – filing of computations to assist with assessment of quantum of damages – whether the trial court was functus officio when it assessed and ascertained the quantum of damages after the initial judgment – whether courts had the authority to defer the assessment of quantum of damages*

to a subsequent date – whether courts had the authority to require the filing of additional documents after the judgment so as to assess the quantum of damages – whether a court that required parties in a constitutional petition to file their computations for damages had delegated its functions to the litigants - Civil Procedure Rules, (Sub Leg Cap 21) order 21, rules 7 and 8.

Law of Evidence *– burden and standard of proof – burden of proof in constitutional petitions – burden of proof in a case alleging human rights violations - whether the respondents met the burden of proof to prove that they were tortured and treated with cruelty and inhumanely – whether courts could take judicial notice of the inhumane/ cruel treatment and torture of members of the Air Force post the 1982 coup attempt – whether the respondents successfully proved on a balance of probabilities that they were part of the Kenya Air Force and that they were subjected to torture, inhuman, and degrading treatment during the crackdown that occurred in the aftermath of the coup – whether the violation of the respondents' right to a fair hearing and right not to be held in servitude were proved – Evidence Act (Cap 80), sections 107 and 108; Constitution of Kenya (repealed) sections 72, 73, 74, and 77.*

Constitutional Law *– fundamental rights and freedoms – right to a fair trial; right to liberty; freedom from torture, cruel, inhuman and degrading treatment – disciplinary action relating to the 1982 coup d'état – allegations of detention without trial, unfairness/bias in trials, torture, inhuman and degrading treatment before discharge from service -Constitution of Kenya (repealed), sections 72, 74, and 77.*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – applicability of the bill of rights to persons in disciplined forces – whether the service member of the Air Force that was disbanded following the 1982 coup had the capacity to file petitions claiming the violation of human rights considering that the repealed Constitution expressly provided that the Bill of Rights did not apply to members of the disciplined forces – whether the service member of the Air Force that was disbanded following the 1982 coup had the capacity to file petitions claiming the violation of human rights considering that the repealed Constitution expressly provided that the Bill of Rights did not apply to members of the disciplined forces - what was the definition and distinction between inhumane/cruel treatment and torture - whether courts could take judicial notice of the inhumane/cruel treatment and torture of members of the Air Force post the 1982 coup attempt - whether the respondents have proved on a balance of probabilities that they were part of the Kenya Air Force and that they were subjected to torture, inhumane and degrading treatment during the crackdown that occurred in the aftermath of the coup - Constitution of Kenya (repealed) sections 72, 74, 77, and 86.*

Employment and Labour Law *– labour and employment rights – unfair dismissal from service – dismissal from the Kenya Air Force – disciplinary action relating to the 1982 coup d'état – dismissal without due process and payment of terminal dues and benefits – detention without trial, unfairness/bias in trials, torture, inhuman and degrading treatment before discharge from service – whether service members formerly employed under the Kenya Air Force that was disbanded after the 1982 coup attempt had their employment rights violated through their dismissal from service – whether service members formerly employed under the Kenya Air Force that was disbanded after the 1982 coup attempt were unfairly treated in their dismissal and denial of benefit – whether the dismissal from service was lawful - Armed Forces Act (Cap 199) (repealed) sections 72 and 48.*

Law of Evidence *– evaluation of evidence – burden and standard of proof – standard of proof in constitutional matters – number of witnesses – admissibility of affidavit evidence – whether, in a case with such a large number of plaintiffs that it was impractical for the court to hear all of them present oral evidence, courts were empowered to use their discretion to allow a few plaintiffs to present oral evidence on behalf of the others – Evidence Act (Cap 80) sections 107 and 108; Constitution of Kenya, article 159.*

Civil Practice and Procedure *– appeals – duty of the first appellate court – duty of an appellate court in relation to appeals on interlocutory decisions – whether an appellate court had jurisdiction to reopen the issue of limitation period in the absence of appeals filed against the interlocutory decisions on the issue of limitation period – whether the Court of Appeal had jurisdiction to consider, review, or set aside the findings and determinations of the interlocutory decisions made by the High Court - Court of Appeal Rules (Cap 9 Sub Leg) rule 31(1)(a).*

Civil Practice and Procedure *– limitation of time – limitation of time for filing constitutional petitions and claims arising from infringement of human rights - whether there was a limitation of time set for filing constitutional petitions and claims arising from infringement of constitutional rights - whether inordinate delay in filing constitutional petitions and claims arising from infringement of constitutional rights should be explained - The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution Sub Leg) rule 10(3); Public Authorities Limitation Act (Cap 39) section 3(2), 4, 5, and 6.*

Jurisdiction *– jurisdiction of the Employment and Labour Court – jurisdiction to determine violation of human rights – whether the Employment and Labour Relations Court had jurisdiction to adjudicate on matters of alleged violation of fundamental rights and freedoms – Constitution of Kenya, 2010, articles 162 and 165(3).*

Words and Phrases *– standard of proof – definition – the degree or level of proof demanded in a specific case in order for a party to succeed – Black's Law Dictionary (9th Ed 2009) 1535.*

Brief facts

The appeal was one of many cases arising from the aftermath of the 1982 attempted coup. In the instant appeal, the respondents were all serving as officers of the Kenya Air Force (KAF) at the material time. They were arrested, detained, arraigned and in some cases charged before a Court Martial; and then all dismissed from the Kenya Air Force. The respondents were aggrieved by their dismissal which they contended was unfair and that their constitutional rights were violated during arrest and pre-arraignment. They jointly filed a suit where more applicants later joined the proceedings. The matter was transferred from the Civil Division of the High Court to the Human Rights Division and eventually to the defunct Industrial Court *(now Employment and Labour Relations Court (ELRC))* which was opined as best fitted to hear employment matters.

At the trial court hearing, only eight of the respondents were allowed to testify. Their testimonies established the pattern of arrest, torture and imprisonment. In its judgement, the court gave declarations that the respondents had suffered in the hands of an illegal authority called "82 Air Force" which had no authority to retire, dismiss or terminate their services and that they had suffered wrongful torture, arrest, unfair trial, imprisonment and discharge from service without payment of arrears salary, terminal benefits and pension. As a result, they were awarded both general and aggravated damages and, their pension benefits reinstated as if they had served up to retirement. Additionally, their ranks, honours and decorations were restored.

Aggrieved by the decision of the trial court, the appellants filed the instant appeal.

Issues

i. Whether the Employment and Labour Relations Court had jurisdiction to adjudicate on matters of alleged violation of fundamental rights and freedoms.
ii. Whether there was a limitation of time set for filing constitutional petitions and claims arising from infringement of constitutional rights.
iii. Whether inordinate delay in filing constitutional petitions and claims arising from infringement of constitutional rights should be explained.
iv. Whether an appellate court had jurisdiction to reopen the issue of limitation period in the absence of appeals filed against the interlocutory decisions on the issue of limitation period.
v. Whether the Court of Appeal had jurisdiction to consider, review, or set aside the findings and determinations of the interlocutory decisions made by the High Court.
vi. Whether the Kenya Air Force, in being disbanded and replaced by a new body in 1982 after the failed coup, formally retired, dismissed, or terminated service members formerly employed under the disbanded Kenya Air Force.
vii. Whether service members formerly employed under the Kenya Air Force that was disbanded after the 1982 coup attempt had their employment rights violated through their dismissal from service.
viii. Whether service members formerly employed under the Kenya Air Force that was disbanded after the 1982 coup attempt were unfairly treated in their dismissal and denial of benefits.

ix. Whether the trial court was *functus officio* when it assessed and ascertained the quantum of damages after the initial judgment.
x. Whether courts had the authority to defer the assessment of quantum of damages to a subsequent date following the issuance of a judgment.
xi. Whether courts had the authority to require the filing of additional documents and inviting parties to make presentations after the judgment so as to assess the quantum of damages
xii. Whether a court that sought for parties to file additional documents to assess the quantum of damages after it had already issued a judgment was *functus officio*.
xiii. Whether a court that required parties in a constitutional petition to file their computations for damages had delegated its functions to the litigants.
xiv. Whether a court that required parties in a constitutional petition to file their computations for damages had shifted the burden of proof and delegated its duty to the parties by its approach of assessing quantum.
xv. What principles should courts consider in the award of general and special damages for:
    1. Civil disputes
    2. Constitutional disputes asserting violation of rights and fundamental freedoms.
xvi. Whether, in a case with such a large number of plaintiffs that it was impractical for the court to hear all of them present oral evidence, courts were empowered to use their discretion to allow a few plaintiffs to present oral evidence on behalf of the others.
xvii. Whether the service member of the Air Force that was disbanded following the 1982 coup had the capacity to file petitions claiming the violation of human rights considering that the repealed Constitution expressly provided that the Bill of Rights did not apply to members of the disciplined forces.
xviii. What was the definition and distinction between inhumane/cruel treatment and torture?
xix. Whether the respondents met the burden of proof to prove that they were tortured and treated cruelly and inhumanely.
xx. Whether courts could take judicial notice of the inhumane/cruel treatment and torture of members of the Air Force post the 1982 coup attempt.
xxi. Whether the respondents have proved on a balance of probabilities that they were part of the Kenya Air Force and that they were subjected to torture, inhuman, and degrading treatment during the crackdown that occurred in the aftermath of the coup.
xxii. Whether the violation of the respondents' right to a fair hearing under section 77(1) of the repealed Constitution was proved.
xxiii. Whether the violation of the respondents' right not to be held in servitude guaranteed under section 73(1) of the repealed Constitution was proved.

Held

1. Being a first appeal, the role of the court as stipulated by rule 31(1)(a) of the Court of Appeal Rules, 2022 was to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw its own conclusions.
2. As article 165(5) of the Constitution precluded the High Court from entertaining matters reserved to the ELC and ELRC, it should be inferred that the ELC and ELRC too could not hear matters reserved to the jurisdiction of the High Court. As several authoritative decisions had been made regarding the jurisdiction of the ELRC, there was no need to re-address it as it was sufficiently clear that the ELRC was properly clothed with jurisdiction to handle the dispute which was rooted on both an employment relationship and violation of fundamental rights and freedoms.
3. Proceedings of the trial court indicated that there were 16 petitioners who applied to be included in the judgment on quantum post judgment, having earlier partially withdrawn from the proceedings on reason that they severed their constitutional claims and filed them as a separate petition in the High

Court. As such, they were denied compensation awarded at the trial court. The court was alive to the fact that the suit concurrently raised employment and constitutional matters and opined that such petitions needed not to be severed into separate suits as long as they had been filed in the appropriate forum to avoid transfers that would delay dispensation of justice.

4. At the time the suit was commenced 1995, the Chief Justice was yet to issue the rules envisaged under section 84 of the repealed Constitution to govern the enforcement of fundamental rights and freedoms. The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice & Procedure Rules, 2001 (Chunga Rules) were later superseded by the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Gicheru Rules). The Gicheru Rules were eventually replaced by The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules).

5. Rule 10(3) of the Mutunga Rules provided for acceptance of oral applications which disclosed denial, violation, infringement or threat to a right or fundamental freedom. The oral application would later be reduced into writing by the court. As such, that the matter of violation of fundamental rights and freedoms was ripe for determination irrespective of it being raised in a plaint as opposed to originating summons required by the Chunga Rules or petition as required by Gicheru and Mutunga Rules.

6. The first court to deal with the matter granted leave to file the suit out of time. Subsequent courts considered and upheld the same order which rendered it *res judicata* since the appellants failed to appeal any of the interlocutory decisions. When no appeal was lodged against an interlocutory ruling by a trial court, the issue in dispute was definitively settled by judicial decision and thus *res judicata*. It was only in election petitions where the court had deferred the right to appeal an interlocutory decision until the final decision in the interests of good order and in keeping with timelines of such matters. Therefore, the issue of limitation of time had not been properly raised in the appeal.

7. For extension of time under the , the appellant did not appeal against any of these interlocutory rulings. The trial court correctly in the final judgment considered the issue of limitation period *res judicata* and finally settled. The issue of limitation of time had not been properly raised before the appellate court, the same having been definitively settled at the interlocutory stage. The appeal stemmed from the judgment and not the interlocutory orders of the trial court. There was no reason to resurrect a matter that had already been definitely settled and was not properly before the court.

8. Section 3(2) of the (the Act) required proceedings founded on contract to be brought against the Government within three years from the date on which the cause of action accrued. Sections 4 and 5 of the Act allow for extension of a limitation period on account of disability (legal not physical), but only for claims founded on tort. Section 6 of the Act allowed it to be read together with specific provisions of the Limitation of Actions Act.

9. An extension of a limitation period could only be granted where the action was founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort. There was no jurisdiction to the court to extend time for cases involving contract. Nonetheless, the court had some leeway to determine the precise point at which the period of limitation begins to ran or when the cause of action accrued.

10. The period of limitation began to run on August 25, 1993 upon reinstatement of the claimants' rightful employer, the Kenya Air Force, the claimants would then have not been out of time when they filed their plaint on February 21, 1995.

11. There was no limitation of time set for filing constitutional petitions and claims arising from infringement of constitutional rights. There should be no inordinate, inadvertent or unreasonable delay in instituting such proceedings. The petitioners or claimants must proffer a plausible explanation for the delay in instituting of proceedings. Enforcement of constitutional rights was not affected by limitation of time.

12. Despite a claim based on fundamental rights and freedoms not being affected by limitation of time and doctrine of laches, there should be no inordinate delay in filing proceedings and any delays must be sufficiently explained.
13. The instant claim was filed on February 21, 1995, twelve years after the violations of rights occurred. The claimants had explained the circumstances responsible for their delay. In their application for extension of time, they had expressed difficulty in dealing with '82 Air Force' which they termed an illegal entity. They were only confident to pursue their claims when their employer, the Kenya Air Force was reinstated on August 25, 1993. The majority of claims made by persons who were in similar position as the respondents herein were allowed despite being filed as late as 2015.
14. The claim having been founded partly on violations of fundamental rights and freedoms, there was a plausible explanation for the delay in instituting the suit. The claim was therefore not subject to periods of limitation and laches.
15. Whether a constitutional claim had been instituted within a reasonable time was a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice would be done.
16. The issue of joinder of the parties had been settled in several interlocutory decisions of the trial court thus not properly raised in the appeal. The instant appeal stemmed from the judgment of the Employment and Labour Relations Court and not the interlocutory orders of the trial court. The Kenya Air Force was disbanded on August 12, 1982 and replaced with an entity known as 82 Air Force.
17. Where certain facts were sworn to in an affidavit, the burden to deny them was on the other party. If the other party did not deny those facts, they were presumed to have been accepted as procedural and lawful. The respondents had proved beyond reasonable doubt that they were employees of Kenya Air Force who were purportedly sacked without due procedure by an illegal entity known as the "82 Air Force" and sent home without terminal benefits and pension. Since the purported dismissal was illegal and unlawful, the respondents were deemed to have continued working with the appellants until retirement.
18. *Functus officio* was a principle of law that prevented the re-opening of a matter before a court that had already rendered the final decision. Until the orders or decrees arising from a judgment were perfected, there was jurisdiction for a court to change its mind. So long as the order had not been perfected the court had a power of re-considering the matter, but, when once the order had been completed, the jurisdiction of the judge over it had come to an end.
19. Assessing quantum of damages was incidental/natural to an award of damages made in a judgment and hence, an instance the court could properly exercise supplemental jurisdiction. A simple assessment of quantum, having already substantively decided on the issue of liability would not amount to a merit-based decisional re-engagement with the case. Order 21, rules 7 and 8 of the Civil Procedure Rules, 2010 provided that an order or decree of the court was only completed and/or perfected when signed and sealed by the Registrar of the Court.
20. The decree relating to the judgment delivered on April 15, 2016 was only issued, signed and sealed by the Registrar of the Court on November 8, 2017. The trial court was not *functus officio* and retained control over the case until November 8, 2017. The trial court still had supplemental jurisdiction to assess and ascertain quantum of damages. The trial court's jurisdiction until November 8, 2017 was broad, not limited to the exceptions to the *functus officio* rule. The *functus officio* rule only kicked in after November 8, 2017.
21. The only time the court could interfere with the merits of the case would be in exercise of powers of review under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 or within the two exceptions to the *functus officio* doctrine which were inferred from section 99 of the

Civil Procedure Act that either there had been a slip in drawing up the judgment or there was an error in expressing the manifest intention of the court.

22. Once a court had awarded damages, it was its duty to assess the quantum of damages, conduct computations and declare the entitlement of each of the claimants before them.
23. The ELRC had adopted the practice of rendering the substantive judgment and reserving the decision on quantum to a later date upon consideration of computations from either the employer, labour commissioner, or employees. A trial court could exercise its duty to assess the quantum of damages any time after judgment, but before issuance and perfection of the consequential decree. Reserving the assessment of quantum of damages to a later date was merely postponing the performance of the duty to a time when all relevant information to precisely determine the quantum was made available.
24. The trial court was determining the quantum of damages, an essential ingredient of a complete judgment. The quantum of judgment was indispensable in ensuring finalization and perfection of the earlier judgment. It was in the interests of justice since it avoided numerous later applications at different times by each claimant seeking precise quantification of damages.
25. On whether the trial court was right in requiring filing of additional documents and inviting parties to make presentations after the judgment; the trial court ordered for filing of computations. Further, the trial court's judgment could not be characterized as a pure declaratory judgment or a judgment *in rem*.
26. The Civil Procedure Act and the Civil Procedure Rules had no express provision on reopening a case at the trial court or admission of additional evidence or documents after close of pleadings other than by way of amendment of pleadings. It was only expressly provided for at appeal due to the inherent power of the appellate court to reopen a case and admit fresh evidence being well established at common law. Inherent jurisdiction was a residual intrinsic authority which the court could resort to in order to put right that which would otherwise be an injustice. Kenyan courts exercised inherent jurisdiction through article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act.
27. A court could exercise its inherent powers either on its own motion or upon application by a party. However, the inherent power and discretion to reopen a case or admit additional evidence was an extraordinary measure that must be exercised sparingly, judiciously and with a view to doing justice between the parties. The Civil Procedure Rules under order 3 rule 2 and order 11 imposed a legitimate expectation that parties shall make full disclosure of evidence and lay out the whole of their case by the close of pleadings to facilitate a smooth pre-trial conference. There should be finality to the litigation process at the close of each party's case and courts must discourage litigation in instalments. Parties should not rely on one set of facts, and when they had been discredited by the opponent, try to adduce more or other facts. There would be no end to litigation if the inherent power was used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence.
28. It was not uncommon for Kenyan courts to require parties to file documents that aided in determining precise quantum after judgment. Kenyan courts had entertained and allowed or denied applications to reopen a case or admit additional evidence after closure of pleadings at different stages in a trial.
29. The trial court had jurisdiction to on its own motion or on application of any party reopen the case and/or allow additional evidence or documents. The inherent power and/or discretion could be exercised at any stage of the trial, any point after closure of pleadings, after hearing and closure of the plaintiffs' and defence cases, and even after delivering his judgment on April 15, 2016 but before the consequential decree was perfected. However, he could only exercise the inherent power and/or discretion judiciously, with a view to doing justice between the parties and within the safeguards mentioned above.
30. The respondents had sufficiently pleaded the special damages in their pleadings, affidavits and witness statements by stating the salaries and benefits they were earning and respective durations of service at the time of purported discharge. Those would have been useful in ascertaining severance pay as damages for wrongful dismissal. Payment of severance pay related to the number of years the affected

employee had already served. It did not relate to the years the employee was yet to serve before reaching retirement age.

31. The respondents were never dismissed from service and therefore awarded salary arrears based on the current salary payable to servicemen and officers in their respective ranks at the time of discharge. Information on current salaries and other pertinent aspects necessary in precise determination of the entitlement of each of the claimants was in the custody of the employer/ appellants. The appellants had a duty to produce the documents to aid the just determination of the dispute.

32. The *suo moto* reopening of the case by the trial court after judgment and the requirement to file additional evidence was justified and within the established criteria and guidelines for exercise of the discretion.

33. The information ordered to be filed by the trial court was not within the knowledge of the claimants in the trial, could not have been obtained with reasonable diligence for use at the trial and could not have been produced at the time of the suit. The respondents served notice on the appellants to produce the requisite documents on August 5, 2004. The appellant objected and refused to produce the documents, claiming not to have them in its possession. The appellant's position was untenable and contrary to their duties before the trial court. The appellant had acknowledged their duty to produce the documents and promised to avail them after determination on liability.

34. The documents required to be filed by the trial court were relevant and had a direct bearing on fair and just ascertainment of the quantum of the awarded damages. They were intended to remove any vagueness on the current salaries being paid to military servicemen and officers.

35. The additional document called for was an official government document, originating from public offices having proper custody thereof. It was apparently credible and presumably believable. The appellant filed an undated and unstamped statement of the current salary payable to servicemen and officers on July 18, 2017 and vouched for its credibility orally. Further, the aspect of filing and making comments on computations did not open up an extremely complex and convoluted exercise. The current rates of pay in the military and the computation of the award would be obvious facts which did not lend themselves to protracted litigation. The computations were not so voluminous to occasion undue difficulty in the appellant responding to the same.

36. There was no prejudice to be suffered by the appellants if the required documents were admitted. The trial court granted the appellant first priority in filing their computations. The respondents were to file the computations if the appellant failed to do so. The appellant was granted opportunity to either file an alternative computation or dispute the figures in the respondents' computations by challenging their veracity, commenting on them and rebutting them. Moreover, the appellant suffered no prejudice by filing a statement of current salary payable to servicemen and officers, which was at all times within its legal possession.

37. The appellant was granted leave to peruse the respondents' computations and file comments and responses within 30 days. The appellant had only filed comments and responses to only one of the computations in respect of 20 respondents. The appellant was afforded adequate opportunity to file its own computations and also be heard on the respondents' computations.

38. A trial court's exercise of discretion could only be interfered with by an appellate court if the exercise of the discretion was clearly wrong on account of a misdirection or for acting on irrelevant matters as a result of which the court arrived at a wrong conclusion.

39. The trial court on its own motion, properly invoked the inherent jurisdiction of the court to reopen the case and require filing of additional documents. The approach was necessary to assist the court make a fair and just determination on the quantum of salary arrears due to each of the claimants. There was no credible reason or sufficient basis to interfere with the trial *court's suo moto* exercise of its inherent power or discretion to reopen the case after judgment and admit the parties' computations and information

on the current salary scales, allowances, other dues and conditions of service for all the ranks of military officers.

40. Inviting parties to compute entitlements did not always amount to abdication or delegation of the judicial function to the parties. The computations were mere additional material to assist the court correctly assess the quantum and were not final, thus free to be challenged. That did not amount to delegation of the judicial function of assessing damages. Ordering the appellant to file its computation was merely extending a second opportunity for the appellant to discharge its duty in aiding precise quantum of salary arrears. It did not shift the burden of proof, but merely gave the appellant an opportunity to discharge a legal duty. The trial court properly situated the burden of proof where it properly lay all along.

41. An employer was the legal custodian of all employment records. The employer had a burden to prove certain employment matters to assist the court resolve a dispute. The procedure adopted by the trial court did not amount to either shifting of the burden of proof or abdication of judicial duty to assess damages.

42. Assessment of quantum of damages was a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in Kenya. Majority of the previously decided cases relating to the issue of disciplined officers dismissed from the Kenya Air Force in 1982 were constitutional petitions focusing solely on violation of constitutional rights. The damages awarded should be comparable to those awarded in similar cases, bearing in mind the peculiar circumstances of each case.

43. Claimants in constitutional claims were to plead with a reasonable degree of precision, particularize in a precise manner and enumerate the Articles of the Constitution granting the rights violated or threatened with violation. However, precision was not exactitude. The respondents in their pleadings, state in detail particulars as to the allegations of breach of their constitutional rights and the manner of the alleged infringements. The particulars were detailed enough to disclose the relevant sections of the repealed Constitution that granted the allegedly violated rights. The appellants were well aware of the sections of the repealed Constitution and the particulars that the claimants were relying on. The plaint met the competency threshold. The plaint was drafted to a degree of precision that enabled the court and parties to clearly identify the claimants' claims.

44. The Civil Procedure Rules allowed for a trial based on pure affidavit evidence but the trial court in its discretion allowed *viva voce evidence* (oral evidence) from selected respondents. The discretion was well within the powers granted by the Mutunga Rules. The suit had 284 plaintiffs which meant that hearing each claimant on *viva voce evidence* would have taken an extremely long time to conclude the matter and overall improper use of judicial resources.

45. The rules allowed for a trial based on pure affidavit evidence. However, the court in its discretion allowed *viva voce* evidence from selected respondents. The trial court correctly exercised its discretion to require 8 claimants to tender *viva voce* evidence on behalf of the other respondents.

46. As provided in section 107 and 108 of the Evidence Act, whoever alleges must prove. The burden of proof must also be discharged to the requisite standard. Standard of proof was the degree or level of proof demanded in a specific case in order for a party to succeed. Constitutional claims were by nature civil causes and the appropriate standard of proof in such claims was on a balance of probabilities. The respondents were under a duty to place before the court sufficient material to establish and authenticate that indeed their fundamental rights and freedoms were violated. It was only upon discharging that duty that the burden would shift to the appellant to rebut the allegations.

47. The fact that evidence was un-controverted did not automatically discharge the onus of proof on the claimant. Section 86(4) of the repealed Constitution limited the rights of members in the disciplined forces. Nothing contained in or done under the authority of the disciplinary law of disciplinary forces was to be held to be inconsistent with or in contravention of any of the provisions of the Bill of Rights

other than sections 71, 73 and 74. Section 71 protected the right to life, section 73 prohibited slavery and forced labour, while section 74 prohibited torture, cruel and inhuman treatment. A claim of torture which was contrary to section 74(1) was triable in respect to members of the Armed Forces.

48. The essential elements of torture were:
    1. the infliction of severe mental or physical pain or suffering; and
    2. for a specific purpose, such as gaining information, punishment or intimidation.

49. Inhumane or degrading punishment or treatment was intentional or deliberate exposure of individuals to conditions which amounted to or result in mental and physical ill-treatment, which did not have to be inflicted for a specific purpose.

50. The 1982 coup received widespread press coverage nationally and internationally. The treatment of soldiers in the coup aftermath was well documented. The instant court took judicial notice of the fact that there were numerous reports of torture of suspects and detention without trial of suspected dissidents and coup plotters in the ensuing crackdown and suppression of mutiny.

51. Upon their arrest by Kenya Army and police officers, they were subjected to standardized torture and ill- treatment taking the following forms:
    1. they were severely beaten up;
    2. stripped naked and transported to custody while naked;
    3. on arrival in the detention facilities they were again brutally beaten up and detained totally incommunicado;
    4. they were held in solitary confinement in waterlogged cells or in overcrowded cells with full time noisy insane prisoners or totally dark or permanently lit cells; and
    5. they were frequently moved from one detention facility to another while naked and subjected to endless interrogations, physical and mental assaults and coerced to confess to planning the failed coup.

52. The acts that the respondents were subjected to upon arrest by army officers in various barracks was in violation of their right to protection from torture and other inhuman-treatment.

53. Poor prison conditions, although deplorable, did not by themselves amount to torture. Such conditions were suffered in common with the other inmates. The appellant had not demonstrated that the harsh prison conditions were peculiar to them as compared to other inmates in the civilian prisons they were locked in. There was no justification for isolating the appellants' case and paying them separately for their pain, while not compensating the other inmates incarcerated together with them.

54. The treatment that the respondents detailed in their averments which included beatings, being locked up naked in dark, waterlogged cells and solitary confinement and at times with insane prisoners, were personal and had nothing to do with general conditions obtaining in prisons then. The respondents had proved to the requisite standard that they were subjected to torture, cruel and degrading treatment which was a violation of section 74(1) of the repealed Constitution. It was also within the definition of torture as per article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7(2)(e) of the Rome Statute of the International Criminal Court.

55. On the lack of medical evidence, courts had distinguished the necessity for medical reports in personal injury claims from claims of torture and ill- treatment. The respondents proved to the requisite standard that they were subjected to torture, cruel and degrading treatment.

56. The acts to which the respondents were subjected of being kept hungry and denied sleep for several days, being physically assaulted by being kicked, whipped and burned with cigarettes, pricked with pins, hose piped and being held naked in water-logged cells, were all cruel and degrading treatment and therefore a violation of section 74(1) of the repealed Constitution.

57. Even though section 86(2) of repealed Constitution excluded members of disciplined forces from protection under section 72 on personal liberty and section 77 with regard to fair trial, sections 72

and 48 of the Armed Forces Act (repealed) protected the right not to be held unduly without being subjected to trial. It made it an offence for a person who was under a duty to do so to fail to take steps for the trial of the arrested person. The appellant did not provide any valid explanation as to why the respondents were kept in custody for up to 8 months without being charged in any court of law or through a Court Martial. Thus, the respondents had established on a balance of probability that their rights to personal liberty was violated when they were held at various civilian prisons.

58. The respondents had provided a sufficient basis for their claim regarding the infringement of their constitutional rights therefore, the amount awarded by the trial court was neither based on the wrong principle nor was inordinately too high. Accordingly, the awards were upheld as granted by the trial court.

Appeal dismissed.

Orders

Each party to bear own costs.

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2. Statute of the International Court of Justice, 1945 — article 7(2)(e)

Advocates

None mentioned

JUDGMENT

Background

1. This appeal joins a long list of cases arising from the aftermath of an infamous event in the history of Kenya; the 1982 attempted coup, an event that happened some forty [40] years ago.

2. As aptly stated by this court in *Peter M Kariuki v Attorney General* [2014] eKLR:

> " In the early morning of Sunday, August 1, 1982, non- commissioned officers of the Kenya Air Force mutinied and launched a bid to overthrow the Government of the Republic of Kenya. After taking over the Air Force Headquarters at Eastleigh and the air bases at Embakasi and Nanyuki, they seized the international airport, the post office and the national broadcaster, then called the Voice of Kenya. They even managed to broadcast to the country and the world that they had taken over power in Kenya. Within twelve [12] hours of the mutiny however, the tide had turned against the mutineers, as they were swiftly routed out by loyal soldiers from the other services of the Kenya Armed Forces, leaving in the wake of the coup attempt an official tally of 159 dead, mass looting and rape in Nairobi. Then the respondent's tribulations began."

3. In the instant appeal, the respondents who were all serving as officers of the Kenya Air Force (KAF) at the material time, were arrested, detained, arraigned and in some cases charged before a Court Martial; and then all dismissed from the Kenya Air Force.

4. The respondents were all aggrieved by their dismissal which they contended was unfair, they also claimed that their constitutional rights were violated during their arrest and pre-arraignment. They therefore jointly filed a suit instituted via a Plaint dated February 21, 1995 which was later amended on 19th of September, 2000 and re-amended on June 4, 2004. Before the matter was heard, some sixty (60) applicants filed a chamber summons application dated January 27, 2005 seeking to be enjoined as co-plaintiffs. Upon hearing the application, J.B Ojwang, J. (as he then was) allowed the application to enjoin the applicants which led to the further re-amended plaint dated June 24, 2005 where the sixty (60) applicants were enjoined in the suit.

5. The matter was fixed for hearing before several judges but ultimately on August 30, 2012, Odunga J (as the then was) transferred the matter to the defunct Industrial Court and held that the Industrial Court was best fitted to hear employment matters.

6. The respondents' claim and more specifically as contained in the re- amended plaint dated June 24, 2005 at paragraphs 3 to 10 as reproduced below averred that:

> " 3. The claimants aver that at all material times they were conscripted enlisted and or commissioned officers and/ or servicemen of the Kenya Air Force within the Kenya Armed Forces between 14th May, 1964 and 30th march, 1983 which is the period spanning up to 19 years of distinguished service.
>
> 3A. The claimants were at all material times to this suit enlisted in the Kenya Air Force as officers and service men.
>
> 4. The claimants aver that on diverse dates between 1.08.1982 and 30.03.1983 the commanding officer of an authority known as the "82 Air Force"

purported to dismiss, discharge and/or terminate the claimants' services with loss of all their dues, terminal benefits – pension, gratuity and unpaid salaries.

4A. The claimants were wrongfully discharged from the Kenya Air Force with loss of all benefits/ dues on diverse dates after the coup d'état of 1st 08.1982 and are aggrieved as their respective discharges were in contravention of the Armed Forces Act and the Armed Forces Standing Orders made thereunder.

5. The claimants aver that their dismissal, discharge and or termination were wrongful for want of jurisdiction because the claimants were neither in the service nor had they contracted services with the said "82 Air Force" as the claimants were enlisted and/or recruited officers and servicemen of the Kenya Air Force from 14/05/1964 to date.

6. The claimants aver that the commanding officer of the said "82 Air force" had no power or jurisdiction to discipline, dismiss, discharge, terminate and or take any enforceable action against the officers and servicemen contracted for service by the Kenya Air force (KAF) as constituted by the *Armed Forces Act*, cap 199 of the laws of Kenya (now repealed).

7. The claimants aver that on or around 25.08.1982 the Kenya Armed Forces reinstated the Kenya Air force which is the legal authority as by law established hereby replacing the illegal authority as held by the High Court and with which they had lawful contracts of service without considering the fate of the claimants"rights/claims herein and/or outstanding salaries and benefits.

9. The claimants aver that after the attempted *Coup D'état* of August 1, 1982 the claimants were between 1.08.82 and 30.03.83 wrongfully confined and kept in prison custody without trial for 8 months and were released without being charged and/or pardoned and hence their confinement was wrongful and false imprisonment as the claimants were not in any way implicated and or involved in the said coup d'état and the claimants claim general damages' for wrongful arrest, false imprisonment and loss of earnings to date.

9A. The claimants aver that most of them were subjected to trials and/or court martial which was not fair as they were subjected to biased treatment, tortured to confess, not accorded legal representation or advise and the decisions were made against them without being given an opportunity to defend themselves.

10. The claimants aver that while in prison custody at Kamiti and Naivasha, the claimants were tortured, beaten, stripped naked and sustained permanent physical injuries. And the claimants claim general damages for pain and suffering."

7. From the averments, the following orders were prayed for:

"a. Full retirement benefits;

b. A declaration that the claimants were members of the Kenya Air Force and are still in the Kenya Air Force and have never been members of "82 Air force";

c. Terminal Benefits;

d. A declaration that the claimants were under the commanding officer of the Kenya Air Force and not the Commanding Officer of the so called “82 Air force”;

e. General damages;

f. A declaration that the claimants suffered in the hands of an illegal authority called “82 Air Force” which had no authority to retire, dismiss, or terminate their services as they were contracted by the Kenya Air force which at no time dismissed them;

g. Aggravated damages for wrongful imprisonment, confinement, trumped up arrest, torture etc;

h. Payment of full current salary, privileges and benefits in respect of each claimant’s rank and or higher ranks from the date of discharge and/or termination until the date of retirement of each officer;

i. Terminal and/or severance benefits from the date each claimant was enlisted until retirement; and

j. Full pension, terminal allowance and other further allowances each claimant is entitled.”

8. At the hearing at the Industrial Court, only eight respondents as directed by the court testified, the eight included; Moses Njiriri Mburu, Charles Kamande Kanari, Josephat Kiriungi Mwangi, Kelvin Okeyo Ogutu, Major Josphat Nathan Irungu, George Ndambuki Makosi, Major Fredrick Allan Wachira and Titus Njiru Michael Macharia.

Summary of the Evidence

9. Moses Njiriri Mburu (Mburu) – claimant No 110 who was 55 years of age when he testified, stated that on March 3, 1978 he was enlisted in the military, trained at Lanet Armed Forces Training College for six (6) months and was posted to Eastleigh Airbase as a junior private. After further training in the catering section, he became a grade 1 cook and was posted to Nanyuki Air Base.

10. Mburu testified that on August 1, 1982, he was at his house outside the barracks where he lived with his wife and child. He was at home because on July 31, 1982 he had participated in the Armed Forces athletics competition and he had been given seven (7) days off duty. He heard over the radio that the military had overthrown the Government. It was the first time he had heard of the coup attempt.

11. At around 9.30 am on the same day, Mburu was outside discussing what had happened with his neighbours when a Land rover stopped and told them to go to the camp. They were taken to the Armoury, given arms and ordered to report to the station at the Sergeant’s mess. At about 2pm a siren sounded and Mburu together with other officers left the mess and went outside. Kenya Army officers arrived and surrounded them, fired shots in the air, ordered them to drop their arms, raise their hands and lie down on the ground.

12. Thereafter, Mburu and other officers were taken to the field where they were ordered to kneel down for about 2 hours, then ordered to move on their knees for a distance of about 300 metres while being hit with gun butts. After moving for 200 metres, their clothes got torn. Mburu who refused to move any further because he was bleeding, was beaten ruthlessly with gun butts on his right ear and back.

To-date, he cannot hear well and he suffers from back pains. The Major ordered the beatings to stop and they were locked in the hangers.

13. Mburu testified that all their personal effects were taken away and they were denied food for three days. They were not given beddings and they slept on a concrete floor which was very cold. Five Kenya Army officers interrogated them on the 4th day and he was asked to say what he knew about the coup but he said that he knew nothing. He was then told to report to work at the Sergeant's mess where he continued to work until August 15, 1982 when he was to be transferred to Eastleigh but he was taken to Kamiti prison instead. While there he was whipped, stripped naked and locked up with eight other people in a cell which would normally hold 2-3 people. The cells had no beddings so he slept on a concrete floor together with his cell mates. They used buckets as toilets which they emptied in the morning. They were fed every three days but were not given any drinking water.

14. After ten (10) days in prison, Mburu together with 30 others were transported to Naivasha Prison in a lorry where Mburu found his colleagues from Nanyuki and stayed there until September 1982. He was called and interrogated about the coup and he denied knowledge of it, but. the officers interrogating him did not believe him. Consequently, he was put in a room with water reaching his knees which water contained human waste where he remained for nine days without being given any food or water.

15. Mburu further testified that the Kenya Army officers continued with the interrogation and when he did not admit knowledge of the coup, he was taken back to a solitary room for two days and then back to the room with water where he stayed for four (4) days. He was thereafter taken to Naivasha upto October 19, 1982 then back to Kamiti Prison. On October 22, 1982 he was taken to Court Martial at Langata where he was charged with participating in the coup. He pleaded not guilty but was found guilty immediately and sentenced to 6 years imprisonment. He was taken to Shimo La Tewa to serve his prison term and after serving 3 years he was released after being given a remission of 3 years. He testified that he served in the Armed Forces for 4 years, 152 days and by then he was a Senior Private.

16. Charles Kamande Kanari (Kanari), testified that he was 62 years old and had enlisted in the military on July 2, 1974 when he was 22 years old. He trained at Lanet Military College for 6 months, graduated as a junior private and was thereafter posted to Eastleigh Airbase Nairobi. At Eastleigh he was trained at the Airfield Defence Unit for 6 months and thereafter he became a private.

17. On July 30, 1982, Kanari was at the Agricultural Show of Kenya (ASK) show in Nyeri where he had gone to help his sister-in-law who had a stand there. He spent the night in Nyeri town. On July 31, 1982 he went to the show ground again until evening when he went back to his hotel room for the night. On August 1, 1982 he left the hotel for the showground but outside the hotel he found people talking in whispers and upon asking what was going on he was informed that the Government of Kenya had been overthrown by the military. Shortly thereafter, he heard an announcement over the radio to the effect that all military personnel should report back to their base.

18. On reaching Eastleigh Air base, he found the gate open with soldiers walking around. He proceeded to the billet where he was advised to go to the armoury which he did, but he did not get any arms so he went to the officer's mess. At around 4 o'clock the same day, Kenya Army officers started shooting in the air telling people to raise their hands and surrender. Kanari surrendered, knelt down and he together with others were ordered to walk on their knees on a tarmac surface for a distance of about 600 yards. After about one hundred yards, his knees started bleeding and he could not move any further.

19. Kanari stated that Army officers hit them with gun butts and he was hit on his cheek and he lost his teeth. As a result, he bled profusely and had to be rushed to the dispensary in an ambulance. He was stitched and was taken back to the barracks where he was stripped naked, locked in a room where together with others, they slept without beddings and were neither given food nor water.

20. From the barracks, they were taken to Kamiti Prison where he and 17 others were locked up in a cell without any beddings. They were denied toilet facilities save for a bucket which they would use for the said purpose. Kanari was denied medical attention while in Kamiti and his fellow inmates pulled out the stitches. It was his further evidence that they stayed in Kamiti Prison for 3 months.

21. From Kamiti Prison, they were transferred to Naivasha Prison where they were locked up in similar conditions. Kanari was then taken for interrogation where he was given a statement which he refused to sign. He was subsequently locked up in a pitch-dark room with ankle deep smelly water for 4 days and denied food and water.

22. Kanari further testified that he was taken back to the interrogators who gave him a statement to sign failing which he would be locked up again until he died. Kanari refused to sign the statement but this time he was locked up in a normal cell together with other servicemen. On December 5, 1982 they were taken to Langata Barracks where charges were read to him but he refused to plead stating that he did not understand the charges. He was taken out and brought back after some time and different charges were read to him but he still did not admit to the charges. He was jailed for six (6) months and he served his term at Shimo la Tewa Prison in an underground cell until June, 1983. He testified that at the time of discharge he was a Corporal earning about Kshs 1,600/=.

23. Kanari testified that he lost his certificates and his wife and child were harassed by the army officers while they were being chased out of the barracks. Further, that he also lost his household furniture, clothes, radio cassette player and motorbike. He was given a discharge book indicating that he had been discharged on 1st August, 1982 as his services were no longer required. He obtained a job in a hotel where he worked for 1½ years before he left due to harassment from the police. It was his testimony that he has not been able to secure another job to-date.

24. Kanari prays for his salary from 1982, pension, to be returned to his status, restoration of his medals and honour, to be cleared with the Armed Forces as per the law and general damages for suffering, torture before imprisonment and unlawful detention for 8 months.

25. Josphat Kiriungi Mwangi (Mwangi) testified that he was in the Force and his service No was 023721 having enlisted on October 29, 1974. He was trained at Lanet Forces Training College for 6 months and graduated as a private whereupon he was deployed to Langata 7th KA for 1½ years and then to Gilgil where he served for 2½ years and then transferred to Embakasi.

26. On July 31, 1982 Mwangi reported off duty having been on night duty on July 30, 1982. He spent the night in town and on August 1, 1982 he heard sounds outside and upon inquiry he was informed that the Government had been overthrown. He immediately reported to the nearest military station which was at Eastleigh Airbase. He did not try to go to Embakasi as he had heard rumours that the Military was killing people and he was afraid.

27. There was an air raid but when Mwangi together with other soldiers surrendered and hoisted a white flag, they were not bombed. The army surrounded them, ordered them to strip naked, beat them up and confiscated his personal items. While they were lying on the ground they were hit with gun butts all over their bodies. It was Mwangi's testimony that he still bears a gun butt scar on his head.

28. Mwangi testified that Army officers formed a corridor where they were to pass as they boarded a lorry to take them to Kamiti Prison. As they passed the human corridor they were beaten as they made their way to the lorry where they were packed one on top of another. At Kamiti Prison, he and 60 others were locked up in a 15 x 15 cell which remained lit throughout the night, as a result of which they could not sleep.

29. It was Mwangi's evidence that he was finally called by army officers for interrogation and upon being asked to explain the events of August 1, 1982, he denied participation and having prior knowledge of the coup attempt. He was graded yellow and taken back to the cells where he was locked up for two weeks before being transferred to Naivasha prison.

30. After about a week in Naivasha, he was called for further interrogation but denied participation in the attempted coup and was subsequently locked up in a water-logged room for 4 days. Further, that he was denied food and water forcing him to drink the dirty smelly water below his knees for survival.

31. Mwangi was called for further interrogation but this time he could not move because his legs were rotten and swollen and he had to be carried to the interrogation room. He again denied participation in the coup which led to him being taken back to the water-logged room for a further 3 days. He stayed at Naivasha for 2 months before being moved to Kamiti Medium Prison where he stayed until 1983 when he was taken before an army captain who had a pre-recorded statement for him to sign. He refused to sign leading to his being locked up again in a solitary room. He was called yet again to the room where the captain was, ordered to sign the statement without reading it and eventually he signed the statement under duress. To date he does not know what the contents of that statement were.

32. Mwangi further testified that on January 13, 1983 he was taken to the Court Martial and charges were read to him but he refused to plead. The Court sentenced him to 3 years' imprisonment and he was taken to Kodiaga GK prison to serve his term. He appealed against sentence which was reduced to 2 years which he served until 10th January, 1985.

33. Mwangi testified that at Kodiaga Prison, life was bad as he was seriously beaten by prison warders leading to his admission at Russia Hospital in Kisumu. He was placed in segregation with mentally challenged prisoners who would splash faeces on his face. He was at the hospital for a week and the whole period he was in hospital he was in handcuffs.

34. Mwangi further testified that he was discharged on August 1, 1982 before the Court Martial and that he was 28 years old at the time of his arrest. He managed to get employment at a security company where he worked for 1 year but he lost that job after the employer realized that he was an ex Air Force soldier. It was his evidence that he has not been able to secure another job to date.

35. Mwangi further testified that he lost his personal items and academic certificates which he has not been able to recover to date and his family was harassed. Further, that the torture and treatment meted on him and his colleagues violated all the military law and the Constitution of Kenya. In cross examination he denied participating in or having prior knowledge of the attempted coup.

36. Kelvin Okeyo Ogutu (Ogutu) ID No 91XXX00 testified that he joined the Force on September 14, 1976, trained at Lanet for 8 weeks and graduated as a junior private. Thereafter he was posted to Eastleigh where he received further training as an air craft technician and was thereafter posted to Nanyuki in 1977. He advanced in radar fitters training in the United Kingdom and was posted to Kenya Armed Forces, Nanyuki as a Senior Private.

37. It was Ogutu's evidence that on July 31, 1982 he was in Githurai where he was living with his wife and child. On August 1, 1982 he heard an announcement on radio that the Government was in the hands of the Armed Forces and all soldiers must report back to work. He testified that he immediately started making his way to Kahawa Garrison but before he could reach there an Army lorry came and they were ordered to get in. They were taken to Eastleigh Airbase where he stayed until evening when Kenya Army soldiers arrived and surrounded the camp shooting indiscriminately. It was his further testimony that he hid in a trench until the next day when he submitted himself to those in authority. He was captured by army men, ordered to raise his hands, searched, beaten up, his clothes torn, stripped down

to his inner wear, forced to kneel down and crawl for a distance of about 500 yards. He was then led to the holding area.

38. Ogutu further testified that he was beaten until he passed out for an unknown period of time. When he came to, he was taken to a holding cell of about 12 x 12 feet in size where he was held together with 140 others for about an hour. They were then taken to Kamiti Prison in an old lorry where all 140 of them fitted and on reaching Kamiti Prison they were mercilessly beaten. They were then ushered into a bigger cell where 200 of them were squeezed and hardly had room to move. They were denied food, water, beddings and toilet facilities.

39. Ogutu testified that on August 3, 1982, people were moved but he stayed in that cell for 3 weeks in his inner wear. He was taken before an Army officer for interrogation but was only asked one question and then put in a lorry wearing only a shirt and a torn trouser to be taken to Naivasha prison. At Naivasha they were received by a line of soldiers on both sides who beat them as they made their way to the cells.

40. It was Ogutu's evidence that the cells in Naivasha were bigger, fitting around 20 people. They were however not given any beddings and had to sleep on the cold concrete floor. He stayed in the cell at Naivasha until October 1983. He and others were held incommunicado for about 80 days. He further testified that he eventually volunteered for interrogation and was taken to a dark cell where three army soldiers pounced on him and beat him mercilessly and a bucket of cold water was poured on him and the cell door was closed.

41. It was his further testimony that the soldiers later came back to the cell and threatened him stating that if he wanted to see his wife and daughter again, he needed to cooperate with them. He was later taken for interrogation before a panel of officers in civilian clothing. He was asked about himself and in the midst of telling them, he was told that he was wasting their time and taken to a water-logged cell with water reaching just below the knees where he was locked for 3 days. It was his testimony that the water in the cell was dirty and smelly and he could not tell what else was in the water. He was not given any food and he was told that he was to live like a fish.

42. On the third day he was taken back to the interrogators who threatened him saying that if he wanted to see his family again, he should cooperate. As a result of the said threats, he signed a confession that had been handed to him without even reading it.

43. He was then taken to a holding cell until October 22, 1983 when he was taken to Langata Barracks to the Court Martial where charges of participating in the mutiny were read to him. It was his testimony that he requested for legal representation but was told to keep quiet and was sentenced to 6 years in prison. He served his sentence at Shimo la Tewa prison. It was his testimony that he did not have the benefit of seeing the charge sheet or the proceedings thereafter.

44. Ogutu further testified that he left prison on August 21, 1986 after serving for 4 years. He found his family had moved to an unknown location and has not seen them to date. He also lost his personal belongings. Further, he received a discharge book for service (which was sent to him before he left prison), stating that he had been discharged on August 1, 1982 signed by Department of Defence (DoD) personnel. It was his testimony that this was irregular as the discharge is usually given upon clearance with all departments including a medical check-up. He stated that he did not appear before his commanding officer for interrogation neither was he interrogated by any KAF officers. He maintained that the entire treatment was contrary to the Armed Forces laws and regulations.

45. Ogutu prayed that his name be cleared, that he be awarded damages for unlawful imprisonment, torture, compensation for loss of income, a good discharge certificate, a good recommendation, retirement package, salary from 1982 to date and compensation for deteriorated health.

46. Major Josphat Nathan Irungu (Irungu)testified that he joined Kenya Air Force on May 14, 1965 and trained at Central Bank as a Clerk General. He was posted to the only unit of Kenya Air Force at Eastleigh. On 1st August, 1982 he was at his house at the DoD when he heard some commotion. It was his testimony that at first he thought it was jubilant people who were coming from games but he was later informed that it was a result of shooting everywhere by Army personnel. He tried leaving the camp but he was barred at the gate by marauding soldiers forcing him to go to the officers' mess.

47. Irungu further testified that a Board from the Army interrogated them.

The chairman of the Board was familiar to Irungu as he had sent a candidate to him for interview but the candidate failed to qualify as he could not speak English which made the Chairman very unhappy. It was his further testimony that he was taken to Kamiti together with other soldiers where he did not undergo any interrogation but stayed for two days before being taken to Naivasha. At Kamiti they were more than 50 people in a cell leaving no space to sit or lie down and they were denied food for 27 days before being transferred to Naivasha.

48. At Naivasha where he stayed for more than a month, he was placed in a room which was cold and was not provided with a blanket. He was called for interrogation by Criminal Investigations Department (CID) officers where he was asked about his role in the coup but he denied participation and stated that he never used to interact with Air Force officers. The Officers then told him that he had not been involved in the coup and that he would be reinstated back to work but they never returned after that day. After a month, a Major brought a statement for him to sign as a condition precedent to his release but he refused to sign.

49. Irungu further testified that he was released on March 1, 1983 and that he was never cautioned, never told his mistake or court martialled. He was thereafter given a certificate of discharge as he was sent home. He avers that he was never given terminal dues neither was he paid salary for the 8 months he was in Naivasha. He prays for the Kenya Air Force to terminate him since the 1982 Air Force did not exist in law. He also prays for damages and to be honourably retired as a Commanding Officer.

50. George Ndambuki Makosi (Makosi) – Warrant Officer 1 testified that he currently lives in Lukenya carrying out peasant farming for his daily living. He joined Kenya Armed Forces on November 18, 1966 and was taken to Kiganjo College for training and upon graduation he was posted to Eastleigh Airbase. Makosi testified that on August 1, 1982, he was at Eastleigh where he was living at the time when he was woken up by some commotion and he was arrested with many others without cause by Army soldiers. After arrest they were taken to one area guarded by Army soldiers, stripped naked before they were carried off in a Land Rover to Kahawa Garrison where they were beaten ruthlessly with whips and gun butts and then taken to Kamiti Prison in a very horrified state, all the while they were not informed of the offence they had committed. At Kamiti they were beaten repeatedly and put in a 10 x 10 cell which had the capacity to hold 30 of the arrested soldiers. They slept on a very cold concrete floor while naked and were not provided with beddings. Makosi testified that they were at Kamiti for 10 days.

51. Makosi further testified that an interrogation was carried out by Army officers on failure to prevent a mutiny which led to him being given a red card and then taken away. They were then taken to Naivasha on August 11, 1982 where they were received with kicks and blows. It was Makosi's further testimony that he sustained a gash on the head but did not receive any treatment. That the cell was dark, had no ventilation, no beddings, the floor was rough concrete and the food was very little, dirty and mixed with sand. Further, that people fell ill with diarrhoea as a result but were not afforded medical attention. It was his testimony that he suffered immense cold which has led to health problems and to date he cannot stand up properly.

52. It was his further testimony that his family was not aware of his whereabouts. That he requested to see his lawyer and doctor but his requests were denied. Further, that he was taken for interrogation before police officers which according to him was wrong because the proper person to question him was his commanding officer. That he was asked about his role in the attempted coup but denied having knowledge of it. It was his evidence that after interrogation he was taken to Kamiti and then to Kahawa garrison where he was released on 15th March, 1983. Further, that he was given fare to go home and ordered to never go near any Armed Forces base. That he was never charged in any court of law and that when he received his discharge certificate it read "bad conduct" and he was not given discharge benefits. It was his evidence that he demanded for another certificate of discharge and he was issued with another stating that he had been discharged as his services were no longer required. Further, that his wife and 4 children suffered as a result of rough treatment by the Army soldiers as they were kicked out of his married living quarters. That as a consequence, his property and personal effects were destroyed in the process.

53. It was his further testimony that he has not been able to secure a job to date as his certificates were all destroyed. He therefore prays for damages, his retirement benefits in full and to be retired honourably.

54. CW7 – Major Frederick Allan Wachira (Wachira) testified that he currently resides in Nairobi where he runs a small shop. That he trained as an air traffic controller and was employed by the East African Community as an Air Traffic controller. Further, that KAF advertised for air traffic controllers, he applied and was enlisted on January 11, 1971 whereupon he served for 3 months and was then taken to the United Kingdom for cadet training. That he attended several courses over the years such that at the time of discharge he had risen through the ranks and was a Major. He had served for 12 years and 63 days.

55. In June 1982, Wachira was informed by one Major Macharia that a military coup was being planned by servicemen and that the matter was being investigated by military intelligence but he was cautioned not to leak this information to anyone below the rank of a commanding officer since investigations were in the early stages.

56. It was Wachira's testimony that on July 31, 1982 at 11p.m. he was sleeping in his married living quarters where he stayed with his wife and 3 children when he received information from a Major Kiarie who had also received information from one Lieutenant Wambua that there were plans to overthrow the Government that night and he tried to report the matter to the Colonel but he did not find him. That consequently, he decided to report the matter to the next senior most office. Wachira further testified that he rang the intelligence officer and asked him to verify the information and was informed that the matter was with the Special Branch at Nanyuki Police Station.

57. Wachira testified that he proceeded to the Officer's mess to interrogate Lieutenant Wambua further and upon confirmation from the said officer, Wachira ordered for his arrest to buy him time to take the information to the police station. Wachira gave orders at the gate that the gates were to remain closed until he returned.

58. Wachira further testified that he returned to the camp and found that the said Lieutenant Wambua had disappeared. They trailed him to a room where there was a meeting with other soldiers who were all placed under arrest. It was Wachira's evidence that he sent Major Kiarie to the Guard room for reinforcement but major Kiarie did not return. It was Wachira's evidence that upon following up, he found out that the servicemen had already armed themselves and arrested Major Kiarie. Wachira testified that he became very cautious and remained out of sight and when he got an opportunity, he jumped over the fence. It was his evidence that he noticed trucks dropping sergeants and officers but he could not tell on what mission they were on. It was Wachira's further testimony that he walked

for 6 kilometres to the police station and tried to report the matter but was informed that there was already an announcement that the Government of Kenya had been overthrown and the police had been directed to remain as civilians. At this point, Wachira realized that he was fighting a losing battle.

59. He further testified that he rang DoD and narrated the story and he was informed that everything was under control and that the matter was being treated as a mutiny and not a coup. It was Wachira's further testimony that on 2nd August, 1982 he was locked up in the Guard room following the orders of an Army officer. That he was not provided with food or water until the following day. Further, that he was taken for interrogation and thereafter he was given a white card then ordered to remain in the mess with 20-30 other Air Force officers where they were heavily guarded by Army men. That after about a week he was taken to Kamiti Prison.

60. It was Wachira's further testimony that at Kamiti Prison he experienced all sorts of torturous treatment including being denied food, squatting and being hit on the head with clubs and being locked up in narrow cells. That they were there for two days and later taken to another room with 200 servicemen where the lights were constantly on and toilet facilities were not provided save for a bucket to be used as a toilet facility. That beddings were not provided and they were fed raw ugali with water and labelled "State Guests". That after two months he was transferred to Naivasha prison where they were locked up four officers in a cell, stark naked. That after 3 weeks at Naivasha, interrogation began and thereafter he was taken to solitary confinement. That he was subsequently taken back for interrogation where he denied participation in the attempted coup. He was made to write down his version of events and during that week he was taken to a different cell then to a regular cell where he and others were locked up four people in a cell.

61. Wachira further testified that on March 14, 1983 he, together with others were was taken to Kahawa Garrison and were given bus fare to go home. That he was never taken to any court of law and was imprisoned without trial, without cause. Further, that he was not given terminal benefits by the Air Force despite requesting for them. That he was informed that he lost his benefits when he was discharged.

62. It was Wachira's further testimony that he was later employed by the Ministry of Transport where he worked for 3 years and opted to retire due to frustrations. That he got another sales job in Mombasa where he worked upto 1996 when he came back to Nairobi and joined his family. He testified that his family suffered while in the hands of the Army and his health deteriorated as a result of the incarceration under very harsh conditions. He therefore prays for salary of 7½ months when he was in prison before being discharged, pension, gratuity, general damages for wrongful termination and torture and any other payments deemed necessary. In cross examination he admitted having had prior knowledge of the coup but maintained that he reported to the appropriate authorities and did his best to avert the coup, albeit unsuccessfully.

63. Titus Njiru Michael Macharia (Macharia) testified that he worked for Kenya Air Force and his Service Number was 021181 having enlisted on January 20, 1970 and was terminated on August 22, 1983 by which time he was a senior sergeant. It was his testimony that on August 1, 1982 he was in his house at Eastleigh Section 7 when he heard an announcement over the radio that the Government had been overthrown by the armed forces. He dressed up and reported to the nearest base which in his case was Eastleigh Airbase.

64. He immediately reported to the guard room but there was such confusion he could not tell what was happening. He then proceeded to the armoury to get a gun but did not find any so he proceeded to the Sergeant's Mess where he found other soldiers. It was his evidence that at about 2pm on the same day Army officers came to the Mess, ordered them to strip naked and put their clothes in front of them.

That the soldiers went through their clothes and took all their money and any other valuable item they found. Further, that they were then locked up in 10 x 12 rooms and each room held about 100 soldiers where they stayed up to about 6pm.

65. It was Macharia's further testimony that prison vehicles from Kamiti came to the Sergeants' mess and they were removed from the rooms and ordered to proceed to the vehicles. They made their way to the vehicles through a human corridor of soldiers who hit them and beat them with gun butts and made them walk on their knees for about 30 feet. On arrival at Kamiti they were forced to remove the inner wears and yet the soldiers were of different ages which according to Macharia was very degrading.

66. It was Macharia's further testimony that they were then ordered to put their inner wear back on and then taken to a prison cell where they were locked up together with mentally-challenged people. Macharia testified that he was the only officer in the cell which was very cold and beddings were not provided. That he stayed in that cell for two weeks during which period he suffered anxiety, confusion and hopelessness. They were moved to a bigger cell and interrogations started conducted by Army men. It was Macharia's further testimony that he was interrogated and given a green card and ordered to speak the truth whereupon he confirmed that he was telling the truth. That the interrogation was repeated for 3 days with the purpose of coercing and torturing them in order for them to confess to participation in the coup. Macharia was thereafter taken to Kamiti medium prison where he was locked upto mid-October when he and others were transferred to Naivasha Maximum Prison until March 22, 1983.

67. Further, Macharia testified that they were taken from Naivasha to Kamiti to remove prison clothes then dropped at Kahawa where he was given fare to go home and advised to collect benefits from the District Commissioner's (DC's) office. He later went to the DC's office and received Kshs23,000/= which he did not understand how it was computed. It was Macharia's testimony that he was ordered to report to his area Chief regularly and to never leave the area without the Chief's authority.

68. Macharia asserted that he was arrested on August 1, 1982 upto March 22, 1983, was never charged with any offence, never tried before any court, imprisoned unlawfully in civilian jails without a trial for 8 months, held incommunicado, tortured for no reason, discharged without cause and lost all his property in his quarters upon arrest. He prays for compensation for the foregoing atrocities committed against him.

69. It was Macharia's further testimony that while in prison his testicles started swelling and when he sought medical attention, it was denied. That the swelling continued and became worse and persisted until August 27, 2014 when he underwent surgery at Kikuyu Hospital to remove the swelling.

70. Macharia added that at the time of discharge his salary was Kshs2,200.00 per month and that he was retired and not discharged, and was therefore not given any discharge certificate. In cross examination, he testified that he did not know anything about the coup until he heard an announcement over the radio on August 1, 1982. After termination he got employment from 1993-1996 and thereafter, he has been selling jua kali furniture.

71. The Claimants closed their case after the evidence of the 8 witnesses who established the pattern of arrest, torture and imprisonment. The suit was opposed by the appellant who presented one witness in Court; Nicholas Mutuku Mulinge, State Officer II. His duty was to maintain records for the officers in the appellant's force. He testified that the offences in the Armed Forces are either summarily tried by the Commanding Officer or Court Martial depending on the offence. He also stated that if a soldier is sentenced in a civil jail, all benefits are forfeited.

72. Having considered the claim, pleadings together with the submissions of both parties, the learned Judge (Nduma Nderi, J.) made the following orders:

> "a. A declaration that the claimants suffered in the hands of an illegal authority called 82 Air Force which had no authority to retire, dismiss or terminate their services as they the claimants had contracted their services with the Kenya Air Force authority and not any other illegal establishment out of the Kenya Armed Forces Act, cap. 99 of Laws of Kenya.
>
> b. A declaration that the claimants suffered wrongful torture, arrest, unfair trial, imprisonment and discharge from service without payment of arrears salary, terminal benefits and pension.
>
> c. General damages are awarded to each of the claimants comprising salary arrears and based on the current salary payable to servicemen and officers in their respective ranks at the time of discharge set out in the witness statements and affidavits filed by the claimants and summarized in schedule 'A' to this Judgment from the date of their respective discharge to the date of their respective retirement or to the date of this Judgment whichever is earlier.
>
> d. The claimants are awarded aggravated damages for wrongful imprisonment, torture, inhuman and degrading treatment and violation of their right to fair hearing in the sum of Kenya shillings One Million each (Kshs1,000,000).
>
> e. The claimants ranks, honours and decorations be restored from the date of Judgment since their discharge was unlawful.
>
> f. The claimants be paid pension from the date of this Judgment.
>
> g. The award in (c) and (d) above be paid with interest at court rates from date of this Judgment till payment in full.
>
> h. Costs of the suit be paid by the respondent.
>
> i. The computation of the award in (c) above be filed with the court by the respondent within sixty (60) days from the date of this Judgment failing which the claimants to file their computation within 30 days upon expiry of 60 days."

73. On September 22, 2017, the learned Judge delivered the judgment on quantum indicating the amounts payable to the appellants. He also indicated the claims that had been withdrawn on November 27, 2013 and February 17, 2015 in respect of which he did not award any compensation.

74. The appellants who were aggrieved with the judgment have now filed this appeal in which they have listed twenty-five (25) grounds of appeal. In brief, the appellants faulted the trial Judge for erring in law and fact by failing; to terminate Petition No 548 of 1995 which had originated the suit and was earlier in time and thus the suit/petition proceeded while there was an existing suit to the prejudice of the appellant; to dismiss the suit as against the plaintiffs who did not seek orders to file their suit out of time; by admitting new plaintiffs/claimants who had not sought leave to file their suits/claims out of time; to find that the substratum of this matter was violation of human rights and as such did not fall under the jurisdiction of the defunct Industrial Court or the jurisdiction of the ELRC; to find that Human Rights Petitions must be filed within reasonable time; by making an order for aggravated damages for wrongful imprisonment, torture, inhuman and degrading treatment and violation of the

claimants' right to fair hearing against the evidence before court; by giving a global award for all the plaintiffs/petitioners and failing to appreciate the unique circumstances of each.

Submissions by Counsel.

75. The parties filed their written submissions which were orally highlighted in this court via the virtual platform. Learned state counsel, Mr Mugiira appeared for the appellant. Learned counsel, Mr Kuria held brief for Mr Rumba Kinuthia for the 1st to 16th and the 18th to 24th respondents. Mr Ojwang Agina appeared for the 25th to 283rd respondents, while learned counsel, Mr Isuchi appeared for the 17th respondent.

76. In support of the appeal, the appellant relied on written submissions and supporting bundle of authorities that had been filed by Mr HM Mugiira, the learned state counsel. The appellants submitted that the pleadings were mixed up; that the matter is said to be based on a plaint yet paragraph 1 of the judgment and paragraph 140 of the plaint talk of the plaint and petition; that initially 21 plaintiffs sought leave to extend time but they ended up to be 284 claimants; and that their ranks were not defined in the plaint while the ranks are used in calculating quantum. Further, that even if the matter is assumed to be a constitutional petition, it should have been filed within a reasonable time. He also contended that the ELRC did not have jurisdiction to hear the matter.

77. Mr. Mugiira further faulted the learned judgefor finding that the respondents were tortured without medical evidence being produced in court; that the learned Judge reached the conclusion out of generalization as only 7 witnesses testified in court, that the damages awarded by the court were neither pleaded nor evidence adduced at the hearing; that the burden shifted to the appellant to submit the amount that each party was earning; and that the quantum was based on the wrong principles and were inordinately high.

78. Counsel submitted that the principle in *Anarita Karimi Njeru v Republic* [1979] eKLR was not adhered to, and that the same requires that constitutional petitions be pleaded with reasonable precision.

79. In opposing the appeal, Mr Kuria, submitted in response to the issue raised regarding the mix up in pleadings as alleged by the appellant. He submitted that the ruling of Ojwang J. (as he then was) allowed adding of co-plaintiffs, and that the appellant did not appeal against the said ruling and as such it cannot be raised at this point. Further, that the ELRC directed that only some of the respondents would testify on the torture that they underwent that resulted in bodily harm to them.

80. Mr Esuchi for the 17th respondent submitted that there are three (3) rulings regarding limitation of time and joinder which have never been appealed against. That the ELRC gave directions that all the 284 respondents could not all testify but were all given an opportunity to give evidence by swearing affidavits. As such, the appellant was free to cross- examine the respondents. Counsel submitted that the learned Judge reserved his pronouncement on quantum to enable the appellant to file documents which it failed to do.

81. Mr Angina for the 25th to 283rd respondents submitted that the respondents were employees. As such, the ELRC was the right court to hear and determine the case. Counsel adopted the submissions by Mr Esuchi and Mr Kuria on the other issues raised.

Determination

82. This being a first appeal, our role as stipulated by rule 31 (1)(a) of the *Court of Appeal Rules, 2022* is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. The same was aptly emphasized in *Selle v Associated Motor Boat Co.*, [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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)."

83. This courthas further reiterated in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 that:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

84. Cognizant of our role and duty, we have carefully considered the judgment of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, the authorities cited and the law. We have recapitulated the evidence adduced before the trial court above. We, thus, proceed to reconsider that evidence to make our independent conclusion as to whether the learned Judge's decision should be upheld or set aside.

85. We discern the following issues for our determination:

    1. Whether the Employment and Labour Relations Court (ELRC) has jurisdiction to adjudicate on violation of fundamental rights and freedoms?
    2. Whether this case is based on contract or constitutional violations? Does a 'mixed grill' suit occasion injustice?
    3. Whether this case is time barred through limitation of actions
    4. Whether there was improper joinder of parties without leave of the court?
    5. Whether the respondents have proved on a balance of probabilities that their employment rights were violated?
    6. If the answer to 5 is in the affirmative, what is the appropriate remedy in the circumstances?
    7. Whether the respondents have proved on a balance of probabilities that their fundamental rights and freedoms were violated?
    8. If the answer to 7 is in the affirmative, what is the appropriate remedy in the circumstances?

86. We now turn to the determination of these issues.

87. Whether the Employment and Labour Relations Court (ELRC) has jurisdiction to adjudicate on violation of fundamental rights and freedoms - The appellant in ground 6 of the memorandum of appeal argues that the learned Judge should have held that the substratum of this matter was a violation of human rights and as such did not fall under the jurisdiction of the defunct Industrial Court or the jurisdiction of the current Employment and Labour Relations Court (ELRC).

88. We find it imperative that we first determine whether the trial court had jurisdiction to hear and determine the suit that is the subject of the appeal before us. This is in light of the celebrated case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1, where Nyarangi, JA, expressed himself as follows:

> "By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

89. Similarly, the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR expressed itself as follows:

> "A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

90. A cursory perusal of the pleadings reveals that the substance of the dispute in this case is rooted on both an employment relationship and violation of fundamental rights and freedoms. Several decisions have been handed down by the courts in this jurisdiction regarding the issue of the bounds of the jurisdiction of the ELRC.

91. The demarcation of the jurisdiction between the High Court and Courts of Equal Status was addressed by the Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR, where the court expressed as follows:

> "It is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the court's operation…Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the Employment and *Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."

92. The closely related question of whether the ELRC can deal with violations of fundamental rights and freedoms has been addressed extensively by this court and the High Court. In *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR this court held that:

> "Believing as we do that the approach taken by Majanja J is the correct one, and in endevouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.
>
> In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."

93. In *Registrar of Trade Unions v Nicky Njuguna & 4 others* [2017] eKLR this court held as follows:

> "This same issue was central in the following matters; *Prof Daniel N Mugendi v Kenyatta University & others* Nairobi Civil Appeal No 6 of 2012 (Unreported); *USIU v AG &others* (2012) eKLR *Seven Seas Technologies v Eric Chege* Nairobi HC Misc Appl No 29 of 2013 (Unreported) and *Judicial Service Commission v Gladys Boss Shollei & another* Civil Appeal No 50 of 2014. In all the aforesaid decisions by this court differently constituted, it was emphasized that although article 165(3) (c) of *the Constitution* gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of ELRC to deal with such issues especially when the interpretation of *the Constitution* is intricately interwoven with a labour issue or is central to the determination thereof. In any case the court found that under article 20, *the Constitution* gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.

94. In addition, in *International Centre for Insect Physiology and Ecology (ICIPE) v Nancy Mcnally* [2018] eKLR this Court held as follows:

> "27. There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of *United States International University (USIU) v Attorney General* [2012] eKLR which was upheld by this Court in *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] eKLR."

95. In the persuasive High Court decision of *United States International University (USIU) v Attorney General & 2 others* [2012] eKLR, Majanja, J held that:

> 41. Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the *Industrial Court Act, 2011* or to interpret the *Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.
>
> 42. Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya's democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour

rights protected under article 41 is reiterated in the *Employment Act*, 2007 and *Labour Relations Act, 2007* does not create a separate wall of jurisdiction for the High Court and the Industrial Court as contended by Mr Obura. The reiteration of these rights is merely a consequence of article 19 and recognition of their universality and indivisibility in application is all spheres of labour and employment law.

43. The intention to provide for a specialist court is further underpinned by the provisions of article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the *Constitution* or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by article 165(6).

96. Applying these principles to the instant appeal, we see no need to reinvent the wheel on the issue of the jurisdiction of the ELRC to interpret the *Constitution* on fundamental rights when they are intricately connected with labour issues. We adopt the findings in the above cases and are thus, satisfied that the ELRC was properly clothed with jurisdiction to handle the dispute before it.

97. On the question whether this case is based on contracts or constitutional violations - the appellant in its grounds 1 and 4 contends that the learned Judge erred by failing to terminate and give directions on the pleadings filed in High Court Petition number 548 of 1995. Mr. Mugiira, the learned State Counsel, submitted that the suit was transferred from the Civil Division of the High Court to the Human Rights Division and eventually the Industrial Court (later renamed the Employment and Labour Relations Court (ELRC)). It was his submission that the transfers substantively changed the nature and character of the suit, leading to mixed-up pleadings, which the learned Judge then "cherry picked" certain issues to determine in the final judgment. In counsel's submissions, the learned Judge categorized the matter as a 'cocktail of a suit,' which he claimed in ground 6 is grounded on violations of human rights. Counsel concluded that the mix-up has occasioned absurd results and serious injustice to the appellant.

98. Counsel for the respondents, in their submissions, contended that the nature of their pleadings has never changed. They stated that there were only three amendments to the original plaint, on September 19, 2000, June 4, 2004 and June 24, 2005. The further amended plaint dated June 24, 2005 was eventually relied on at trial. They denied the existence of the purported High Court Petition number 548 of 1995 cited by the appellant and maintain that their case has always been High Court Civil Suit Number 548 of 1995, later renumbered Cause 2212 of 2012 upon being transferred to the Industrial Court.

99. The issue of the nature of the pleadings in this case has been dealt with by four Judges in this matter. We reproduce here below an extract of their judgments to show how the learned Judges dealt with the

issue: First, Ojwang J (as he then was) in a ruling on joinder of 58 parties in *Samuel Chege Gitau & 23 others v Attorney General* (unreported) on April 15, 2005 stated:

> " The basis of claims in the plaint is set out in paragraphs 5, 6 and 7 of the re-amended plaint of June 4, 2004 – particularly in paragraph 6 which reads:–
>
> > " 'The plaintiffs aver that the commanding officer of the said so- called "82 – Air Force" had no power or jurisdiction to discipline, dismiss, discharge, terminate and/or take any enforceable action against the servicemen contracted for service by the Air Force (hereinafter known as KAF) as constituted by the *Armed Forces Act* cap 199, Laws of Kenya.'
> >
> > Considering that this is the background to all the claims of unlawful dismissal, denial of retirement benefits, loss of terminal benefits, loss of privileges, denial of severance benefits, denial of pensions, etc, which mark practically all of the claims by the scoresome plaintiffs, I would not agree with the learned counsel who have maintained that the suit is concerned purely with contracts and torts. The foundation of the claims is lack of jurisdiction and violation of statutory safeguards for employees of the armed forces. I would entertain no doubts at all that such claims are at a general level public law claims which must be seen as belonging to the categories of constitutional law and administrative law contrary to the position taken by counsel for the plaintiffs, a determination of the specific claims on the plaint must start with declarations of a constitutional nature. Unless such declarations are made, the pleadings on file may not facilitate effective proof of the employment issues which are presented as the proximate grounds for damages." [Emphasis supplied].

100. Further, Nambuye, J (as she then was) in her ruling in *Samuel Chege Gitau & 23 others v Attorney General* [2008] eKLR dated 15th August, 2008 held thus:

> " (4) The 4th question deals with a determination of the nature of the plaintiffs' claim. Whether tortious, contractual and or constitutional. The current plaint is the one dated 24th June 2005 and filed the same date. As observed by Ojwang J, the cause of action is set out in paragraph 6, 7, 8, 9 and 9 A of the further amended plaint. This court has given due consideration to the same and it is satisfied as did Ojwang J., in his ruling aforementioned that it is not easy definitely to say that these claims can be ruled to be exclusively tortious, contractual, administrative or constitutional. This is so because:-
>
> 1. Breach of contractual terms of employment is contractual.
> 2. Failure to comply with the terms of the Armed forces Act is both contractual and administrative.
> 3. Being subjected to inhumane treatment is both tortious, constitutional and human rights.
> 4. Loss of terminal benefits is also both contractual, constitutional and a human rights issue

5. Failure to follow the correct procedure when terminating the respective employment and failure to give them a right of hearing is both a constitutional and human rights issue.

From the above, it is clear that the said claims qualify to be termed as mixed grill sort of claim. As such in this court's opinion, it is not easy to confine them to the provisions of section 27, 28 and 30 of the *Limitation of Actions Act* cap 22 Laws of Kenya. It is therefore possible to tuck them into those provisions and require compliance with those provisions, and yet at the same time, tuck them into constitutional and human rights swaddling clothes. For this reason, it is better to consider these issue under all these possibilities."

101. In addition, Odunga, J (as he then was) in his suo moto ruling dated October 30, 2012 transferring the matter from the Human Rights Division of the High Court to the Industrial Court (later ELRC), noted that the pleadings raised both issues of wrongful dismissal and violation of the respondents' constitutional rights.

102. Eventually, Nduma, J in the final judgment in *Samuel Chege Gitau & 283 others v Attorney General* [2016] eKLR, rendered on 15th April, 2016, stated thus:

"144. The suit was filed as civil suit before the High Court at Nairobi and it proceeded as such before various Judges of the High Court until on August 30, 2012 when Justice G Odunga transferred it to the Employment & Labour Relations Court. As at the time, the matter was part-heard before Lady Justice Nambuye J, (as she then was) who had already heard one witness after the commencement of the trial.

...

147. The respondent did not appeal the finding by the Judge of the High Court that this matter though commenced as a civil suit dealt with violations of the *Constitution of Kenya 1969* (now repealed) and the same cannot competently be revisited before me more than twelve years down the line.

...

56. The violations of human rights and fundamental freedoms disclosed in this suit must be adjudicated upon by this court without undue regard to form and technicalities to lay the ghosts of past injustices to rest once and for all."

103. We agree with the counsel for the respondents that this case was instituted as a normal civil suit, via a plaint dated February 21, 1995. The plaint was later amended with the leave of the court on September 19, 2000, re-amended on June 4, 2004 and further amended on 24th of June 2005. The further amended plaint dated June 24, 2005 was the one eventually relied on during the trial.

104. This court remains alive to the fact that a suit may contain a 'mixed grill' of issues, concurrently raising employment as well as constitutional matters. In *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR, this court held that:

> "(43) From the respondent's petition, it was evident that although the dispute between the appellant and the respondent was anchored on the employment labour relationship, the respondent's claim arose from the alleged violation of her fundamental rights in the disciplinary process."

105. This court further held in *Daniel N Mugendi v Kenyatta University & 3 others* (*supra*) that such 'mixed grill' petitions need not be severed into separate claims on violation of rights and breach of contract of employment as long as they are filed in the appropriate forum to avoid transfers that delay dispensation of justice.

106. Our perusal of the proceedings of the trial court indicates that there were 16 petitioners who applied to be included in the judgment on quantum post judgment, having earlier partially withdrawn from the proceedings. They explain that they severed their constitutional claims and filed them as a separate petition in the High Court, obtaining favourable judgment in 2013. Counsel for the respondents opposed the application accusing the 'latecomers' of attempting to reap where they did not sow, partial litigation and suing in instalments. Nduma, J. delivered his ruling on November 9, 2016 and dismissed the application with no orders as to costs. The learned judgeheld as follows:

> "It is the court's considered view that the court was not inadvertent in omitting the applicants from the judgment but this was a natural consequence of the failure by the applicants to participate in the hearing upon withdrawal culminating in the judgment of this court.
>
> Rule 32(1) of the *ELRC (Procedure) Rules* which guides review of matters before this court provides:
>
> 32(1) A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling –
>
> a. if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or
>
> b. on account of some mistake or error apparent on the face of the record; or
>
> c. on account of the award, judgment or ruling being in breach of any written law; or
>
> d. if the award, the judgment of ruling requires clarification; or
>
> e. for any other sufficient reasons.
>
> The applicants have failed to satisfy any of the requirements of the applicable rules of this court.

If this application was allowed, it would be prejudicial to the other 283 applicants who already have a judgment and are in the process of getting the fruits of the same in that it would lead to further delay in concluding the matter. Furthermore, there is real risk that the applicants would benefit twice from the same set of facts having chosen to pursue their claims at the High Court."

107. In the final quantum judgment delivered on September 22, 2107, there is no compensation against the names of the 16 servicemen who withdrew their claims. A note indicating "claim withdrawn on November 27, 2013" is marked next to their respective names. The court did not allow the applications to be enjoined after judgment on account of their withdrawal from the suit. Accordingly, the attempts to introduce sixteen (16) brand new claims at the tail end of the matter were nipped in the bud by the court.

108. We consider that if all the plaintiffs took the route of severing their claims and filing separate suits at the High Court, we would have ended with numerous multiple suits, all based on the same set of facts, resulting in delay, backlog and duplicity in the dispensation of justice. We also agree with the advocates for the respondents that it would have amounted to litigation in instalments.

109. In the light of the above findings of this court, we agree with the findings of the learned judges that this is a 'mixed grill' suit, concurrently raising matters of wrongful or unfair dismissal and violation of constitutional rights. It is both contractual and constitutional in nature. Counsel for the appellant has asked us to find that the substratum of this matter is violation of human rights. We respectfully disagree. In our view, the further amended plaint dated June 24, 2005 sets out breaches of a contract of employment as the main cause of action. The suit is anchored on the employment relationship between the respondents and the appellant. The alleged violations of human rights and fundamental freedoms occurred during the process of the respondents' purported dismissal from service.

110. Closely related to the nature of the proceedings is the manner in which they were instituted. Nambuye, J (as she then was) in her ruling in *Samuel Chege Gitau & 23 others v Attorney General* (*supra*) dated 15th August, 2008 held thus:

> "Turning to the constitutional and administrative clothing of the claims, it is clear that the plaintiffs in their claims complain of irregularities and illegalities. This court has already made observations that these irregularities and illegalities can be easily tucked into the constitutional and human rights swaddling clothes. It is further noted that a reading of the entire plaint does not reveal that the core of the claim is constitutional law and human rights based. It is also to be noted that the claim has not been presented by way of a petition as it is provided for by the former Chunga rules and now the Gicheru rules.
>
> Counsel for the plaintiffs submitted that as at the time the plaintiffs came to court in 1995 these rules were not yet promulgated and as such the only way they could come to court was by way of plaint. The question to be raised herein is whether despite failure to follow the current procedures on presentation of constitutional law claims, this court can still go ahead and consider whether these claims can take refuge under the constitutional and human rights prescriptions in order to bring them above the operation of the provisions of the Limitation Actions Act, in order to escape the penalties under
>
> the said provisions, should the court, ultimately find that the claim falls squarely into the cap 22 Procedures.
>
> ...

2. This court having concurred with Ojwang J's ruling of 15.4.2205 that the plaintiffs' claims fall into the category of constitutional claims and are thus elevated above the cap 22 Laws of Kenya limitation provisions and procedures, the limitation provisions cannot operate to oust the constitutional protection of these claims."

111. Further, Nduma, J in the impugned judgment in *Samuel Chege Gitau & 283 others v Attorney General* [2016] eKLR, rendered on April 15, 2016, stated thus:

> " It would be discriminatory in my view to deny the Claimants access to justice on similar considerations as those who came before the courts before and after them simply because they filed a civil suit as opposed to a constitutional petition."

112. We observe that at the time the suit was commenced 1995, the Chief Justice was yet to issue the rules envisaged under section 84 of the *Former Constitution* to govern the enforcement of Fundamental Rights and Freedoms. The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice & Procedure Rules, 2001 (Chunga Rules) were only issued vide Legal Notice No 133 of September 21, 2001. The Chunga Rules were later superseded by the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006* (Gicheru Rules), issued vide Legal Notice No 6 of September 16, 2006. The Gicheru Rules were eventually replaced by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules), issued vide Legal Notice No 117 of June 28, 2013.

113. Section 10(3) of The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, which are the rules that were in force at the time of the hearing, stated that:

3. Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

4. An oral application entertained under sub rule (3) shall be reduced into writing by the court.

114. In view of the foregoing, we hold that the matter of violation of fundamental rights and freedoms was ripe for determination irrespective of it being raised in a plaint as opposed to originating summons required by the Chunga Rules or petition as required by Gicheru and Mutunga Rules.

115. On the question whether the suit was time barred through limitation of actions - the appellant avers that the respondents' claim was based on contractual and tortious claims and is, therefore, subject to the *Public Authorities Limitation Act* (cap 39). A further ground is that the learned judge erred by making contradictory holdings that there is no limitation for claims on enforcement of fundamental rights while at the same time acknowledging that time was enlarged for filing of the suit the subject of this appeal.

116. Further, they also claim that the learned Judge did not find that Human Rights Petitions must be filed within reasonable time or delays in filing Human Rights Petitions must be explained. They claim that the delay greatly prejudiced the appellant as they could not produce eye witnesses or documents to rebut the allegations against them.

117. The cause of action occurred on diverse dates between August 1, 1982 and March 30, 1983. The 24 original respondents filed their case on February 21, 1995, 22 of them having earlier applied on February 2, 1995 and obtained leave to file the suit out of time under sections 27, 28, 29, 30, and 43 of the *Limitation of Actions Act* from Aluoch, J (as she then was) on February 14, 1995.

118. The issue of limitation has been dealt with by four (4) different Judges in this matter. It was first addressed by Aluoch, J. (as she then was) while granting leave to file the suit out of time. The ruling and orders by Aluoch, J. are not part of the record and we do not have the benefit of reviewing them. However, from the application before her, which is part of the record, we glean that the applicants argued that their rightful employer, the Kenya Air Force was disbanded in 1982 and for 10 years, they could not effectively pursue their claim against an illegal entity, Air Force 82. They argue that pursuant to Akiwumi, J's ruling in *Captain Geoffrey Kujoga Murungi v Attorney General* Misc Civil Application No 293 of 1993 in April, 1993, the Kenyan Government reinstated their former employer, the Kenya Air Force, on 25 August, 1993. It is only then that they were able to plan how to jointly pursue their claims against their former employer.

119. Three other Judges addressed this matter at the trial court at different times. We reproduce here below an extract of their judgments to show how the respective learned Judges dealt with the issue.

120. Ojwang, J. (as he then was) in a ruling on joinder of 58 parties in Samuel Chege Gitau & 23 others v Attorney General (unreported) on April 15, 2005 stated:

> " It means therefore and with much respect that the contention of counsel that the limitation periods for torts and contracts as specified in section 3 of the *Public Authorities Limitation Act* (cap 39) is not well founded in law; and that the position of counsel for the applicants is preferable.
>
> Several, learned counsel, for the respondents, contended that the applicants had acted in bad faith, after failing to meet the terms of the limitation periods, by seeking a joy ride on a suit process founded on contract and tort, they urged the applicants to start a new process based on constitutional reference. Such a submission with much respect has no basis as I have already found and held that the foundation of the existing suit is constitutional and not contractual or tortious."

121. Nambuye, J. (as she then was) in *Samuel Chege Gitau & 23 others v Attorney General* (*supra*) held thus:

> " (a) Under the provisions of section 27, 28, 29 and 30 of the *Limitation of Actions Act*, cap 22 Laws of Kenya, a perusal of these provisions reveals that the main considerations are mainly 2:-
>
> i. The reason as to why the action was not filed in time.
>
> ii. The nature of the cause of action.
>
> Concerning the reason as to why the cause of action was not filed in time, a reading of paragraphs 6, 7, 8, 9 and 9 A of the further amended plaintiff, it is clear that the plaint alleged that they were bundled out of their offices by the defendant, robbed of their ranks, employment emoluments, and terminal benefits by an unlawful entity called "82 Air Force". That it was not until August 25, 1993 that the entity which had lawfully employed them before they were bundled out was reinstated. Should this

court find at the end of the trial and give a declaration to the effect that the "82 Airfoce" was a non-entity, it will mean that there was a vacuum between the period starting August 1, 1982 upto August 25, 1993, when the existence of the entity which had employed them was restored. In this courts' opinion, this is the only entity that can provide a link between the plaintiffs and the office of the Attorney General. It is the spring board or anchor on the basis of which the plaintiffs can stand to file their claims.

It therefore follows that even if lack of existence of an entity to act as a spring board or anchor on which to stand and file the action is not cited as a reason for the delay, but if in the courts opinion, it is a sound legal argument to be put forward, it alone can suffice to bring the plaintiffs claim into the provisions of section 27, 28, 29 and 30 of Cap 22 Laws of Kenya.

...

It is clear that the case law on the subject handed down to the superior court, on the subject by the court of appeal did not explore the possibility of claims being availed the constitutional and administrative veils in order to bring them above the reach of the limitation axe found in sections 27, 28 and 30 of cap 22.

...

(ii) The basis of Ojwang J's refusal to uphold the defences plea of limitation was because the plaintiffs' claims are unique in that they fall into the categories of both administrative and constitutional claims. By virtue of which they are elevated above the sections 27, 28, 29 and 30 of the Laws of Limitation Act cap 22 Laws of Kenya, procedures because of the supremacy of *the constitution* over other laws among them cap 22 Laws of Kenya, and which constitution does not have any limitation clause giving time frame through which claims anchored on its provisions can be presented and agitated.

...

(2) This court having concurred with Ojwang J's ruling of 15.4.2205 that the plaintiffs' claims fall into the category of constitutional claims and are thus elevated above the cap 22 Laws of Kenya limitation provisions and procedures, the limitation provisions cannot operate to oust the constitutional protection of these claims.

...

The plaintiffs' plea that the "82 Air Force" which is the entity that terminated their services and denied them their emoluments, is in effect a non-entity, then subject to proof, it would appear to have been a vacuum in the exercising authority from the time the plaintiffs were relieved of their employment till 25th August

1993 when KAF which had initially employed them became operational again. This would mean that should the "82 Air Force" be ultimately found to have been a non-entity, then in the intervening period, time would not start running against the plaintiffs. It means further that if calculated to run form August 25, 1993 to the period the plaintiffs came to court in April 1995 the period of limitation as we know it both for tort and contact had not run out on the plaintiffs. Should this court be right in that holding, then it would mean that even the leave sought in the first instance was uncalled for though there is no harm in the plaintiffs having taken that precautionary step in the event that the "82 Air Force" would in any event be ultimately have been found to be a legal entity after all time could only start running from the time there was a competent entity (KAF) in office which was capable of suing and being sued."

122. Finally, Nduma, J. in the impugned judgment in *Samuel Chege Gitau & 283 others v Attorney General* [2016] eKLR, rendered on 1April 5, 2016, stated thus:

" 146. With that the learned Judge now a Judge of the Supreme court allowed the joinder of more claimants to the suit and the issue of limitation was put to rest, hence the commencement of the hearing of the main suit at the high court.

147. The respondent did not appeal the finding by the Judge of the High Court that this matter though commenced as a civil suit dealt with violations of the *Constitution of Kenya 1969* (now repealed) and the same cannot competently be revisited before me more than twelve years down the line.

...

152. In this light, the court also recognizes the repeal of Section 2A of the *Constitution of Kenya 1969* (now repealed) in 1992 as a historical fact. This was in fact the beginning of the new dawn in Kenya, since the amendment ushered in multiparty democracy. It is quite understandable that the claimants found courage to bring this suit immediately thereafter.

153. This explanation was advanced by the claimants before the High Court and at the Employment and Labour Relations Court and I find it reasonable explanation for the delay.

...

156. The violation of human rights and fundamentala freedoms disclosed in this suit must be adjudicated upon by this court without undue regard to form and technicalities to lay the ghosts of past injustices to rest once and for all."

123. In our understanding of the above decisions, Ojwang, J. and Nambuye, J. (as they then were) considered and upheld the ex-parte order of Aluoch, J. (as she then was) for extension of time under the *Limitation of Actions Act*. The appellant did not appeal against any of these interlocutory rulings. In our view, Nduma, J. correctly in the final judgment considered the issue of limitation period res judicata and finally settled.

124. We at the onset note that the appellants failed to appeal the interlocutory decisions on the issue of limitation period by Ojwang, J. (as he then was) and Nambuye, J. (as she then was). In the absence of appeals filed against the rulings of Ojwang, J. & Nambuye, J. (as they then were), does this Court have jurisdiction to reopen the issue of limitation period? Do we have jurisdiction to consider, review or set aside their findings and determination? Can the notice of appeal lodged in the instant appeal be used to appeal against the rulings by Ojwang, J. & Nambuye, J.?

125. The Supreme Court of Kenya has established that when no appeal is lodged against an interlocutory ruling by a trial court, the issue in dispute is definitively settled by judicial decision and becomes res judicata. In *Mawathe Julius Musili v Independent Electoral & Boundaries Commission & another* [2018] eKLR the Court held:

> "(94) The application was heard, and a ruling delivered on 8 November 2017: the trial court holding that the petition was not incurably defective for non-joinder of the Returning Officer.
>
> No appeal was lodged against this decision; and the issue, therefore, was definitively settled by judicial decision.
>
> (95) It is therefore unwarranted for the appellant to maintain that the issue of joinder of the Returning Officer was not res judicata. Both superior courts having found that no appeal was made on this issue of joinder, the matter has to rest."

126. It is only in election petitions where this court has deferred or delayed the right to appeal an interlocutory decision until the final decision of the election court in the interests of good order and in keeping with timelines of election petition matters. See *Kakuta Maimai Hamisi v Peris Tobiko & 2 others*, Civil Appeal No 154 of 2013 [2013] eKLR; *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others*, Civil Appeal No 23 of 2013 [2013] eKLR; *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR; among others.

127. This court in *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR, in a similar circumstance to the one before us held thus:

> "36. In *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR, a five judge bench of this court noted that there was no notice of appeal filed against the ruling of Ang'awa, J. delivered on December 22, 2009. It was held in the absence of a notice of appeal against the ruling of Ang'awa, J. this court lacked jurisdiction to grant any relief against the said ruling.
>
> 37. Guided by the decision of this court in *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR, and bound by the Supreme Court dicta in *Mawathe Julius Musili v Irshadali Sumra & others*, SC Petition No 16 of 2018, we find that the failure by the appellant to appeal against the ruling of Mwera, J. on the limitation period makes this court lack jurisdiction to re-open, review and re-consider the issue of limitation as determined on merit by Mwera, J. in his ruling.
>
> The issue of the respondent's suit not being time-barred was conclusively determined by the ruling of March 7, 2001.
>
> ...

Taking all these into account, it is our considered view that the ruling of 7th March 2001 was immediately appealable and the failure to appeal against the same the limitation issue was conclusively determined as between the parties hereto. (See *Mawathe Julius Musili v Irshdali Sumra & others*, SC Petition No 16 of 2018)."

128. The appeal before this court stems from Nduma, J.'s judgment and not the interlocutory rulings of Ojwang, J. (as he then was) and Nambuye, J. (as she then was). Indeed, Nduma, J. in his judgment noted that the issue of limitation was already res judicata thus:

> " 146. With that the learned Judge now a Judge of the Supreme Court allowed the joinder of more claimants to the suit and the issue of limitation was put to rest, hence the commencement of the hearing of the main suit at the High Court.
>
> 147. The respondent did not appeal the finding by the Judge of the High Court that this matter though commenced as a civil suit dealt with violations of the *Constitution of Kenya 1969* (now repealed) and the same cannot competently be revisited before me more than twelve years down the line."

129. In the circumstances, we find no reason to disturb the finding of the learned Judge in this regard as the issue of limitation of time has not been properly raised before us, the same having been definitively settled at the interlocutory stage at the trial court by Aluoch, J., Ojwang, J. and Nambuye, J. (as they then were). In the absence of notices of appeal against their rulings, this court lacks jurisdiction to grant any relief against the said rulings. The appeal before us stems from the judgment and not the interlocutory orders of the trial court. We find no reason to resurrect a matter that has already been definitely settled and is not properly before us.

130. Notwithstanding the foregoing finding, we are inclined to consider the appellant's submissions on the matter of limitation. We have held above that this matter is an employment dispute (rooted in the law of contract) but founded on constitutional law, we shall explore the issue of limitations from both a contractual and constitutional perspective.

131. We first examine the issue of limitation as it relates to the employment law claims in this suit, rooted in law of contract. It is clear to us that section 3(2) of the *Public Authorities Limitation Act* (the Act) requires proceedings founded on contract to be brought against the Government within three years from the date on which the cause of action accrued. Sections 4 and 5 of the Act allow for extension of a limitation period on account of disability (legal not physical), but only for claims founded on tort. This court, in Richard Oduol Opole v Commissioner of Lands & 2 others [2015] eKLR, held that section 6 of the Act allows it to be read together with specific provisions of the *Limitation of Actions Act*, cap 22.

132. It is settled law in this jurisdiction that an extension of a limitation period can only be granted where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort. There is no jurisdiction to the court to extend time for cases involving contract. See decisions of this court in *Mehta v Shah* [1965] EA 321; *IGA v Makerere University* [1972] EA 65; *Divecon Ltd v Shirinkhanu Sadrudin Samnani* [1995 - 1998] 1 EA 48; *Willis Onditi Odhiambo v Gateway Insurance Co Ltd* [2014] eKLR, *Mary Osundwa v Nzoia Sugar Co. Ltd* [2002) eKLR; *Haron Onyancha v National Police Service Commission & another* [2017] eKLR.

133. Nonetheless, it is our view that the court has some leeway to determine the precise point at which the period of limitation begins to run or when the cause of action accrued.

134. We find the holding by Nambuye, J. (as she then was) that the period of limitation began to run on 25th August, 1993 upon reinstatement of the claimants' rightful employer, the Kenya Air Force, sound and based on proper legal reasoning. The claimants would then have not been out of time when they filed their plaint on February 21, 1995.

135. We move on to examine the issue of limitation as it relates to the foundations of breach of fundamental rights and freedoms in this case. The issue relating to delay in filing claims on breach of fundamental rights and freedoms has been adjudicated in myriads of cases. Courts in this jurisdiction have clearly identified two principles. First, as a general rule, there is no limitation of time set for filing constitutional petitions and claims arising from infringement of constitutional rights. Second, there should be no inordinate, advertent or unreasonable delay in instituting such proceedings. The petitioners or claimants must proffer a plausible explanation for the delay in instituting of proceedings.

136. First, it is settled law that enforcement of constitutional rights is not affected by limitation of time. The authorities on this matter are a legion. The Supreme Court of Kenya in *Monica Wangu Wamwere & 6 others v Attorney General* [2023] eKLR held that:

> "[37] In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under *the Constitution* which are evaluated and decided on a case by case basis." [Emphasis supplied.]

137. This court, in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR held thus:

> "61. Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in *the Constitution*, the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in *the Constitution*. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.
>
> ...
>
> 62. In our view, subject to the limitations in article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*."

138. In a chain of decisions commencing with *Dominic Arony Amolo v Attorney General* [2003] eKLR, the High Court has reiterated that constitutional claims are not subject to limitation and laches. In *Joan Akinyi Kaba Sellah and 2 others v Attorney General*, Petition No 41 of 2014, [2014] eKLR the learned Judge observed that:

> "Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as *Dominic Arony Amollo v Attorney General*, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) 2010 eKLR, *Otieno Mak' Onyango v Attorney General and another*, Nairobi HCCC No

845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights."

[Emphasis supplied].

139. We now address the second principle. Despite a claim based on fundamental rights and freedoms not being affected by limitation of time and laches, there should be no inordinate delay in filing proceedings and any delays must be sufficiently explained. The Supreme Court in *Monica Wangu Wamwere & 6 others v Attorney General* [2023] eKLR held that:

> "(38) Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights…Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court."

140. Similarly, this court reiterated, in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, that:

> "(51) We reiterate the position that where there has been inordinate delay in bringing an action for violation of fundamental rights, appropriate facts must be placed before the court to enable the court exercise its discretion judicially, in accepting or rejecting the explanation for the delay, with the benefit of all information regarding the particular circumstances before it.
>
> …
>
> (52) Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under article 50 of *the Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason. For this reason, we find that the appellants' action was properly dismissed."

141. Further, this court reiterated in *Wellington Nzioka Kioko v Attorney General* [2018] eKLR that:

> "The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be a plausible explanation for the delay."

142. In addition, in *Peter M. Kariuki v Attorney General* [2014] eKLR, this Court held thus:

> "In *Kamlesh Mansuklal Damji Pattni & another v Republic* (*supra*), the High Court noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay." [Emphasis supplied].

143. The High Court has echoed the need to explain any delays. In *Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another* [2021] eKLR, Makau, J. held that:

> "31. I find that though there is no limitation period for filing proceeding to enforce fundamental rights and freedoms, the court in considering whether or not to grant reliefs sought in a constitutional petition for enforcement of fundamental rights and freedoms, is entitled to consider whether there has been inordinate delay in filing a Petition and consider further whether there is plausible explanation for delay and whether justice will be served by proceeding on with the matter."

144. Further, Majanja, J. in *James Kanyita Nderitu v A.G and another*, [2013] eKLR held that:

> "Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of *the constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time."

145. We cite with approval the decision of Mativo, J. (as he then was) in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR in which he stated as follows:

> "80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two-stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.
>
> 81. The respondents counsel's contention is that this suit is barred by the doctrine of latches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.
>
> 82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim

of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches."

The learned Judge went on to state:

" 83. To invoke laches the delay by the opposing party in initiating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favorable to the defendant becoming lost or degraded, witnesses favorable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.

84. The respondent's counsel cited latches but never attempted to mention how the respondent will be prejudiced. As pointed out earlier, no argument was advanced that witness or evidence cannot to traced. In any event the respondent is the government which has institutional succession and perpetuity, hence, evidence and records cannot be easily affected by lapse of time.

85. In considering whether delay in 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 oversees 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."

146. We also note that the Supreme Court in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) emphasized on the need to grant all victims of historical injustices equal protection and equal benefit of the law without discrimination by treating them equally and affording an equal opportunity for redress. In this regard, we summarize the positions on the issue of limitation for claims filed by ex-service officers of the Kenya Air Force in the table below.

CASE	DATE FILED/ DELAY IN FILING	SUCCESSFUL OR NOT
Dominic Arony Amolo v Attorney General [2003] eKLR	22.4.2003	Allowed by the High Court
James Mwangi Wanyoike & 9 others v Attorney General [2012] eKLR	1st February, 2006	Allowed by the High Court
Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR	10th March 2006- 24 years since 1982.	Rejected by the High Court & Court of Appeal - No explanation as to the delay
Peter M. Kariuki v Attorney General [2014] eKLR	21st July 2006	Allowed by the High Court confirmed by Court of Appeal
Peter Tonny Wambua & 17 others v Attorney General [2017] eKLR	15th July 2008	Allowed by the High Court
Estate Of Cpt Kariuki Kingaru Murebu (Dcd) & 8 others v Attorney General [2014] eKLR	2008	Allowed by the ELRC
Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR	2nd October, 2012	Rejected by the High Court & Court of Appeal - No explanation as to the delay
Gerald Juma Gichohi & 9 others v Attorney General [2015] eKLR	21st December 2012	Allowed by the High Court
David Gitau Njau & 9 others v Attorney General [2013] eKLR	2012	Allowed by the High Court
Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & another [2013] eKLR	2012	Allowed by the High Court
Wellington Nzioka Kioko v Attorney General [2018] eKLR	29th October, 2013	Rejected by the High Court & Court of Appeal - No explanation as to the delay

Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another [2017] eKLR	27th November, 2013	Allowed by the High Court
John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR	27th December 2013	Allowed by the High Court
Stephen Gaitho Njihia & 5 others v Attorney General [2016] eKLR	2013.	Allowed by the High Court
Joel Benard Lekukuton & 4 others v Attorney Geneal [2017] eKLR	2013.	Allowed by the High Court
Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR	11th March 2014	Allowed by the High Court
Jacob Ntubiri Japhet & 8 others v Attorney General [2016] eKLR	20th March, 2014	Allowed by the High Court
Gilbert Guantai Mukindia v Attorney General [2019] eKLR	20th March, 2014	Allowed by the High Court
Preston Kariuki Taiti & 9 others v Chief of the Kenya Defence Forces & another [2021] eKLR	2014	Allowed by the High Court
Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another [2021] eKLR	27th August 2015- 33 years delay	Allowed by the High Court

147. The claim before us was filed on February 21, 1995, twelve years after the violations of rights occurred. We note that the claimants had explained the circumstances responsible for their delay. In their application for extension of time, they had expressed difficulty in dealing with '82 Air Force' which they termed an illegal entity. They were only confident to pursue their claims when their employer, the Kenya Air Force was reinstated on August 25, 1993.

148. It is not lost to us as summarized in the above table that the majority of claims made by persons who were in similar position as the respondents herein were allowed despite being filed as late as 2015. In this regard, we agree with Nduma, J.'s holding in his judgment thus:

> " 149. I would further note that suits emanating from the failed Coup d'etat of 1982 by the Kenya Air Force including HCCC Petition No340 of 2012 David Gitau Njau & 10 others v The Hon. Attorney General; *Peter M. Kariuki v Attorney General* Civil Appeal No79 of 2012 (2014) eKLR that were filed many years after the failed coup d'état were entertained and heard on the merits by the High Court and the Court of Appeal. It would be discriminatory in my view to deny the Claimants access to justice on similar considerations as those who came before the courts before and after them simply because they filed a civil suit as opposed to a constitutional petition."

149. Considering all the above factors, it is our view that if the issue of limitation was properly before us, we would hold that this claim having been founded partly on violations of fundamental rights and freedoms, there was a plausible explanation for the delay in instituting the suit. The claim was therefore not subject to periods of limitation and laches.

150. In this regard, the appellant's case is distinguishable from the cases of *Peter Ngari Kagume & 7 others v Attorney General* [2009] eKLR; *Wellington Nzioka Kioko v Attorney General* [2018] eKLR, *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, where the appellants did not provide sufficient reasons for delay.

151. The upshot of the foregoing discussion is that whether a constitutional claim has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. In instant case, the learned Judges on two occasions at the trial court determined, correctly in our view, that limitation periods do not apply to this matter. The learned Judges were also satisfied that the claim was not defeated under the doctrine of laches. We do not have a basis for interfering with those decisions. We nonetheless conclude by reiterating that the issue of limitation has not been properly raised before us.

152. On the question whether there was improper joinder of parties without leave of court - the appellant, in grounds 2 and 3 of the memorandum of appeal, claim that the learned Judge erred in law and fact by admitting new plaintiffs/claimants who had not sought leave to file their suits/claims out of time. They aver that the learned Judge should have dismissed the suit as against the claimants who did not seek orders to file their suit out of time.

153. The respondents contend that joinder was made properly by leave of court, in a ruling which the appellants have never challenged until now, 17 years later. This court addressed the issue in *Morris Ngundo v Lucy Joan Nyaki & another* [2016] eKLR thus:

> " Again, in overruling the appellant's objection, the trial court opined and rightly so in our view that the appellant should have preferred an appeal challenging her earlier order in which she had allowed the respondents to be joined in the suit. However, he did not do so. The appellant having failed to appeal against the interlocutory order could not raise the issue again before the trial court. The first appellate court was alive to that fact as well. It took the view and rightly so again in our thinking that having not filed an appeal challenging the decision of the trial court on joinder, he could not canvass the same after the delivery of the

judgment. That the appeal before him was in respect of the judgment of the trial court and not the interlocutory ruling.

The appeal before the High Court and indeed before this court stems from the judgment and not the interlocutory orders of the trial court. It may well be that the trial court erred in allowing the joinder. However, that was not the appeal before the High Court and indeed before this court. The appeal before the High Court was against the judgment and decree of the trial court dated October 9, 2013, and not the ruling and order of the same court dated February 8, 2012. The High Court was therefore right in dismissing that ground of appeal on the foregoing basis."

154. Applying the above principle and the earlier observations about failure to appeal interlocutory decisions to this present case, we hold that the issue of joinder of the parties was definitely settled in several interlocutory decisions of the trial court and it has not been properly raised before us. The appeal before this court stems from the judgment of the ELRC and not the interlocutory orders of the trial court.

155. On the question whether the respondents have proved on a balance of probabilities that their employment rights were violated - the appellant faults the learned Judge for finding that the respondents had been dismissed by an illegal entity known as '82 Air Force' whereas no such entity ever existed.

156. The thrust of the respondents' case is whether Kenya Air Force ever retired, dismissed or terminated the respondents' services. We note that the Kenya Air Force was disbanded on 12th August, 1982 and replaced with an entity known as '82 Air Force.'

157. In *Cpt. Geoffrey Kujoga Kujoga Murungi v A.G.* Misc. Application No 293 of 1993 (unreported), Akiwumi J. ruled that the outfit called "82 Air Force" was not anchored in the Armed Forces law hence was unknown in law. Kenya Air Force had not been deleted from the *Armed Forces Act* Cap 199.

158. Nyamu, J. (as he then was) in *Peter Ngari Kagume & 7 others v Attorney General* [2009] eKLR reiterated that:

> " 5. The petitioners want the court to declare that the respondents authority pursuant to which the Air Force was on the August 12, 1982, disbanded, was unconstitutional and not reasonably justifiable in a democratic society. The High Court on a different occasion has already dealt with that issue and indeed found that the disbanding of Kenya Air Force and replacing it with 82 Air Force was unconstitutional and the 82 Air Force reverted to Kenya Air Force after that decision. It is superfluous for this court to go making repetitive orders which in the real sense are vanities and of no effect.
>
> ...
>
> 8. As I have stated that the disbandment of the Air Force on 12.8.1982 was unconstitutional, it consequently follows that the creation of 82 Air Force was also unconstitutional. However, those are issues that are already moot having been decided on much earlier by this court and cannot add any value to this judgment."

159. The respondents have in their pleadings, affidavits and annexures, witness statements and oral evidence placed sufficient evidence, including discharge vouchers before the court to establish: that they were

enlisted in the Kenya Air Force as officers and servicemen; that they were purportedly discharged on diverse dates between August 1, 1982 and March 30, 1983; and that their discharge was processed by an entity known as "82 Air Force" which was not their rightful employer.

160. The respondents have also in their pleadings, affidavits and annexures, witness statements and oral evidence, established that their purported discharge did not follow rules and procedures well laid out in the *Armed Forces Act* and Standing Orders. They were never accorded a fair hearing before termination and neither were they terminated by following due process.

161. The respondents' case before the High Court was that the respondents' employment with the Armed Forces is contained in the records of personal files of each serviceman or woman kept with the forces even after one is retired from service.

162. It is trite law that where certain facts are sworn to in an affidavit, the burden to deny them is on the other party. If the other party does not deny those facts, they are presumed to have been accepted as procedural and lawful.

163. In the circumstances, we find that the learned Judge did not err in finding that the respondents had proved beyond reasonable doubt that they were employees of Kenya Air Force who were unprocedurally purportedly sacked by an illegal entity known as "82 Air Force" and sent home without terminal benefits and pension. We also find that since the purported dismissal was illegal and unlawful, the respondents are deemed to have continued working with the appellants until retirement.

164. On the question whether the respondents' employment rights were violated, and what is the appropriate remedy in the circumstances - the appellant assails the amount and the procedure that the learned Judge used in ascertaining the quantum of damages in relation to employment law claims. On the procedure, the appellant's counsel submitted that the learned Judge erred in computing 'Schedule A,' which was not a pleading for all intents and purposes. They contend that the process of inviting parties to make presentations after the judgment was wrong. They further urge that the order requiring them to file with the court a computation of salary arrears shifted the burden of proof from the respondents to the appellant, greatly prejudicing its case. Further, they claim that the learned Judge erred and made computations on quantum without affording them a fair opportunity to be heard.

165. On the amount, the appellants take issue with the learned Judge categorizing salary arrears as general damages and basing their calculation on the current salaries payable to Servicemen and Officers. They fault the determination that the same be paid from the respective dates of purported discharge to the respective retirement dates or the date of judgment. They take the view that the finding that the claimants were entitled to pension and consequently ordering for its payment was in blatant disregard of the provisions of law that govern administration of pension for members of the Armed Forces. They fault the learned Judge for failing to make any analysis, findings, formulae, rationale or otherwise give his reasons for the computation on quantum in his judgment of September 22, 2017. In the end, they take the position that the Kshs6,252,192,896.00 aggregate computation is excessive and unwarranted in the circumstances.

166. On the other hand, the respondents submit that the process of arriving at the quantum judgment was proper. They submit that the learned Judge merely reserved the assessment of quantum of damages to a later date. To them, the deferment was justified, to allow the appellant time to produce employment records to enable the court to accurately ascertain the damages payable. They reject the appellant's claim of a shift in burden of proof since the judgment had already been entered and the appellant found to be at fault. Moreover, the appellant was the sole custodian of the employment records required to ascertain the quantum for each claimant with precision.

167. This issue as framed gives rise to six sub-issues, being:

a. Whether the court was *functus officio*}} when determining the quantum of the employment related damages;

b. Whether the court was right in reserving the assessment of quantum of damages to a later date;

c. Whether the court was right in requiring filing of additional documents and inviting parties to make presentations after the judgment;

d. Whether the court shifted the burden of proof and delegated its duty to the parties by its approach of assessing quantum;

e. Whether the respondents specifically pleaded and proved 'general' or special damages related to employment law; and

f. Whether the quantum of damages on violation of employment rights was correct.

We now turn to the determination of these issues.

168. On the question whether the court was *functus officio* when determining the quantum of the employment related damages - The appellant in ground 24 of the memorandum of appeal argues that the learned Judge erred by conducting proceedings while the court was already *functus officio*.

169. Among the final orders issued by Nduma, J. in his judgment of April 15, 2016 include:

> " c. General damages are awarded to each of the claimants comprising salary arrears and based on the current salary payable to servicemen and officers in their respective ranks at the time of discharge set out in the witness statements and affidavits filed by the claimants and summarized in schedule 'A' to this Judgment from the date of their respective discharge to the date of their respective retirement or to the date of this Judgment whichever is earlier.
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> ...
>
> i. The computation of the award in (c) above be filed with the court by the respondent within sixty (60) days from the date of this Judgment failing which the Claimants to file their computation within 30 days upon expiry of 60 days."

170. The Supreme Court of Kenya, in its ruling on October 24, 2013 in *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR, cited with approval two sources while addressing the doctrine of *functus officio* thus:

> " (18) We, therefore, have to consider the concept of "*functus officio*," as understood in law. Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832, has thus explicated this concept:
>
> > " "The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle]

is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

(19) This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:

> " "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

171. Further, this court in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR, pronounced itself on the doctrine of *functus officio* as follows:

> "*functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> > " "The general rule that a final decision of a court cannot be re- opened derives from the decision of the English Court of Appeal in *Re St. Nazaire Co.*, (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
> >
> > Where there had been a slip in drawing it up, and,
> >
> > Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v J.O. Rose Engineering Corp.*, [1934] S.C.R. 186"
> >
> > ...
> >
> > The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re- engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *Jersey Evening Post Ltd v AI Thani* [2002] JLR 542 at 550, also cited and applied by the Supreme Court."

172. Further, this court in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR reiterated thus:

> "(35) To sum up, a court is functus when the proceedings are fully concluded and the judgment or order has been perfected. This, however, does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court including any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court. (See *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR)."

173. Finally, the High Court in *Bellevue Development Company Limited v Vinayak Builders Limited & another* [2014] eKLR) had aptly expressed itself thus:

> "The issue of ex officio should be seen within the jurisdiction of that court vis-à-vis finality of litigation, and the nature of the relief which was being sought... Properly understood, whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."

174. There are several persuasive decisions from English courts on the point at which a court becomes *functus officio*. These decisions are made in reference to the common law principle of judicial tergiversation which states that until the orders or decrees arising from a judgment are perfected, there is jurisdiction for a judge to change his or her mind. Three quotations from the decisions of English courts on the latter doctrine are useful to us in determining the point at which Nduma J. became *functus officio*.

175. AL Smit LJ of the UK High Court held in *Preston Banking Co. v William Allsup & Sons* (1895) 1 Ch D 143 (pp 144-145); which is reproduced with approval by Fry LJ of the UK Court of Appeal in *Re Suffield and Watts, Ex p Brown* (1888) 20 QBD 693 (p 697); thus:

> "So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."

176. Further, the UK Court of Appeal in *Re Harrison's Share Under a Settlement* [1955] Ch 260 (pp 283-284) held thus:

> "When a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed. This control must be . . . exercised judicially and not capriciously."

177. Finally, Lady Hale of the UK Supreme Court in *Re L and B (children)* [2013] UKSC 8, [2013] 1 WLR 634 held thus:

> " 19. Thus, there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the *Civil Procedure Rules* (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind."

178. A litany of authorities, including: *Re St Nazaire Company* (1879) 12 Ch D 88; *Re Australian Direct Steam Navigation (Miller's Case)* (1876) 3 Ch D 661; *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717; *Re Barrell Enterprises* [1973] 1 WLR 19; *Stewart v Engel* [2000] EWCA Civ 362, [2000] 1WLR 2268; *Robinson v Fernsby* [2003] EWCA Civ 1820, [2004] WTLR 257; *Paulin v Paulin* [2009] EWCA Civ 221 ,[2010] 1 WLR 1057; and *Altus Group (UK) Limited v Baker Tilly* [2015] EWHC 12 (Ch) reiterate and reinforce the above positions on the principle of judicial tergiversation.

179. We associate ourselves with the above erudite findings on the matter of *functus officio* and would apply them squarely to the appeal before us.

180. We are of the view that the act of assessing the quantum of damages is critical in resolving the real issues in controversy in any suit. It is incidental to or a natural consequence of an award of damages made in a judgment of the court. It is therefore a matter which the court can properly exercise supplemental jurisdiction. We are convinced that a simple assessment of quantum, having already substantively decided on the issue of liability would not amount to a merit-based decisional re-engagement with the case. The critical issue would be the timing of the assessment, is it done before or after issuance and perfection of the consequential decree or order?

181. In Kenya, order 21, rules 7 and 8, specifically rules 8(3), 8(4) and 8(6) of the *Civil Procedure Rules, 2010* provide that an order or decree of the court is only completed and/or perfected when it is signed and sealed by the Registrar of the court.

182. In the instant appeal, the decree relating to the judgment delivered on April 15, 2016 was only issued, signed and sealed by the Registrar of the Court on November 8, 2017. We, therefore, hold that Nduma, J. was not *functus officio* and retained control over the case until November 8, 2017.

As such, he still had supplemental jurisdiction to assess and ascertain quantum of damages. His jurisdiction until November 8, 2017 was broad, not limited to the exceptions to the *functus officio* rule.

183. Therefore, the trial court in delivering the judgment on quantum dated September 22, 2017 and issuing the subsequent decree of November 8, 2017 was not *functus officio*. The *functus officio* rule only kicked in after November 8, 2017.

184. Having held that Nduma, J. became *functus officio* on November 8, 2017, he could thereafter not perform any merit-based decisional re- engagements on the case except either in exercise of his powers of review under Section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules, 2010* or within the two exceptions to the *functus officio* doctrine namely: where there had been a slip in drawing up the judgment or where there was an error in expressing the manifest intention of the court. These two exceptions appear to be codified in section 99 of the *Civil Procedure Act*.

185. On the question whether the court was right in reserving the assessment of quantum of damages to a later date - Once a court has awarded damages, it is its duty to assess the quantum of damages, conduct computations and declare the entitlement of each of the claimants before them. This principle was pronounced by this court in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR, thus:

> "With respect, it was erroneous to convert a judicial function into a ministerial function. Both the award and the level or quantum of damages is in our view, judicial functions which the superior court cannot rightfully delegate to a Deputy Registrar. Indeed, both aspects are appealable to this Court and not to the superior court whereas orders of the Deputy Registrar under order 48 are appealable to the superior court.
>
> ...
>
> A judgment must be complete and conclusive when pronounced and therefore it cannot be left to the deputy registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by order 48 of the *Civil Procedure Rules* and a direction to "assess" or "calculate" damages in a judgment would be contrary to the requirements of order 20 of the *Civil Procedure Rules* because it would be incomplete without the assessment and would patently be a nullity."

186. We note that the ELRC has regularly adopted the practice of rendering the substantive judgment and reserving the decision on quantum to a later date upon considering computations from either the employer, labour commissioner, or employees. Recent decisions disclosing this practice include: *Trailink Group Limited v Kenya Long Distance Truck Drivers & Allied Workers Union* [2019] eKLR; *John Elego & 103 others v Press Master Limited* [2019] eKLR; *Jared Omondi Ober & another v County Government of Homa-Bay* [2019] eKLR; *Patrick Kipsang Cheburet v Board of Management Biwott Mixed Day Secondary School* [2021] eKLR; *Kenya Scientific Research International Technical and Institutions Workers Union v Sana Industries Limited* [2021] eKLR; and *Kenya Hotels & Allied Workers Union v Nyanza Club* [2022] eKLR.

187. We are satisfied that a trial court can exercise its duty to assess the quantum of damages any time after judgment, but before issuance and perfection of the consequential decree.

188. We therefore hold that by reserving the assessment of quantum of damages to a later date, the learned Judge was merely postponing the performance of the duty to assess the quantum of damages to a time when he has all relevant information to precisely determine the quantum. Therefore, by rendering his judgment on quantum on September 22, 2017, the learned Judge was merely determining the quantum of damages, an essential ingredient of a complete judgment. The quantum of judgment was indispensable in ensuring finalization and perfection of the earlier judgment of April 15, 2016. It was in the interests of justice since it avoided numerous later applications at different times by each claimant seeking precise quantification of damages.

189. In this regard the appellants' case is distinguishable from the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR where applications on assessment of quantum were filed and decided after the judgment and decree had been perfected and even appealed against.

190. Whether the court was right in requiring filing of additional documents and inviting parties to make presentations after the judgment - the approach of requiring filing of additional documents and inviting parties to make presentations after the judgment, taken by Nduma J. in ascertaining quantum in this case, has come up for scrutiny in this court in respect to a labour dispute at least on one occasion

in *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR. In that case, Mwera J. (as he then was) had in his judgment at the trial court issued an order that the plaintiffs be paid severance pay computed as 2 ½ months' salary for each year of completed service. Waweru, J. had in a later application issued the following orders:

i. The defendant shall file and serve within 30 days an affidavit setting out in respect of each plaintiff the number of completed years of service and their monthly salary at the time they were retrenched. This shall be accompanied by a calculation of the severance pay due to each plaintiff at the rate of two and a half months salary for each completed year of service.

ii. In default of complying with the direction, the Plaintiffs may file one or several affidavits setting out the facts and details of their own calculations. They may similarly file an affidavit or affidavits if they do not agree with the facts or details given by the defendant in its affidavit filed under (i) above.

iii. This matter shall be mentioned on a date to be given at the time of delivery of this ruling for further directions or orders.

iv. Costs shall be in the cause.

191. The appellants in that case challenged the directions of the trial court. This court, differently constituted, correctly identified the approach as an attempt to use inherent power of the court to reopen proceedings and admit fresh evidence. It then overruled Waweru J. noting:

> " We are of the respectful view that the learned Judge was clearly wrong when he failed to declare the court *functus officio* and devoid of jurisdiction to grant the respondents' prayers.
>
> This was only compounded by the order directing that the appellant file an affidavit indicating the salary and length of service of each plaintiff plus a calculation of severance pay due to each. The judge in our view was trying to convert the judgment in rem into a judgment in personam using a procedure alien to law in that he was trying to improperly admit evidence after a suit had been heard and concluded. The documents that were ordered to be filed had not been
>
> introduced at the trial of the suits and could not be brought in after the judgment had been proclaimed. This has obvious evidentiary implications in terms of authenticity, veracity and admissibility and leads to the question whether the makers of the documents and the deponents to the affidavits could be amenable to cross-examination on the same at that that post- judgment stage.
>
> Nor was there need or jurisdiction, within the same suit, for the learned judge to attempt to so convert the character of the judgment entered by Mwera J. who had, in what must banish any notion that there was any error or omission in the judgment as framed, stated in an earlier ruling in the matter that he would deliver a judgment "*in rem*", not "*in personam*".

192. We have already held that the above decision is distinguishable from the matter before us since the trial court in this matter was not *functus officio*. Waweru, J. was revisiting the matter of quantum long after Mwera, J.'s (as he then was) consequential decree had been issued and perfected. We further note that the trial court in the *Telkom Kenya case* had asked for additional evidence in the form of affidavits setting out the facts and details of their own calculations. In the matter before us, Nduma, J. only ordered for filing of computations. Further, Nduma, J.'s judgment of 15th April, 2016 cannot be characterized as a pure declaratory judgment or a judgment in rem.

193. We note that the *Civil Procedure Act* and the *Civil Procedure Rules* have no express provision on reopening a case at the trial court or admitting additional evidence or documents after close of pleadings, other than by way of amendment of pleadings. They only expressly provide for the same during appeal.

194. Nonetheless, the inherent power of the court to reopen a case and admit fresh evidence is well established at common law. Inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. The extent of inherent powers of any court is eloquently explained in *Halsbury's Laws of England, 4th Edn*. Vol. 37 Para. 14 thus:

> "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

195. The inherent power of Kenyan courts is further augmented in Kenyan law in article 159 of *the Constitution* and sections 1A, 1B and 3A of the *Civil Procedure Act*. A Court can exercise its inherent powers either on its own motion or upon application by a party.

196. However, the inherent power and/or discretion to reopen a case or admit additional evidence is an extraordinary measure that must be exercised sparingly, judiciously and with a view to doing justice between the parties. It must not be exercised capriciously. Courts must be careful so as not to invite fraud and abuse of the court process.

197. There are sufficient policy reasons militating against capricious exercise of this inherent power. The *Civil Procedure Rules, 2010* (Order 3 rule 2 and order 11) impose a legitimate expectation that parties shall make full disclosure of evidence and lay out the whole of their case by the close of pleadings to facilitate a smooth pre-trial conference. Moreover, there should be finality to the litigation process at the close of each party's case and courts must discourage litigation in instalments. Parties should not rely on one set of facts, and when they have been discredited by the opponent, try to adduce more or other facts. There would be no end to litigation if the inherent power was used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence.

198. We finally observe that it is not uncommon for Kenyan courts to require parties to file documents that aid in determining precise quantum after judgment. For instance, this Court in *Esther Wanjiru Githatu v Mary Wanjiru Githatu* [2019] eKLR upheld a direction by the trial Judge to order for appointment of a valuer whose valuation report and findings were to be final for purposes of distribution of the estate.

199. We equally note that Kenyan courts have entertained and allowed or denied applications to reopen a case or admit additional evidence after closure of pleadings at different stages in a trial. Some recent decisions on this matter include: *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR; *Nakuru Automobile House Ltd v Lawrence Maina Mwangi & another* [2017] eKLR; *Joseph Ndungu Kamau v John Njihia* [2017] eKLR; *Emily Cherono Kiombe v Jacob Kamoni Kari* [2018] eKLR; and *David Muthami Muthee v Estate of James Titus Wambua & 4 others* [2022] eKLR.

200. Applying the above principles in the case before us, we conclude that Nduma, J. had jurisdiction to on his own motion or on application of any party reopen the case and/or allow additional evidence or documents. The inherent power and/or discretion could be exercised at any stage of the trial, any point after closure of pleadings, after hearing and closure of the plaintiffs' and defence cases, and even after delivering his judgment on April 15, 2016 but before the consequential decree was perfected. However, he could only exercise the inherent power and/or discretion judiciously, with a view to doing justice between the parties and within the safeguards mentioned above.

201. We are now tasked with applying the principles we have set out above to the specific circumstances of this case to determine whether Nduma, J.'s exercise of the inherent power and/or discretion met the established criteria. To evaluate this, we analyze the situation facing Nduma, J. in the trial court.

202. We have already held that the respondents sufficiently pleaded the special damages in their pleadings, affidavits and witness statements by stating the salaries and benefits they were earning and respective durations of service at the time of purported discharge. These would have been useful in ascertaining severance pay as damages for wrongful dismissal. Payment of severance pay relates to the number of years the affected employee has already served. It does not relate to the years the employee has yet to serve before reaching retirement age.

203. However, the trial court held that they were never dismissed from service and therefore awarded salary arrears based on the current salary payable to servicemen and officers in their respective ranks at the time of discharge. Information on current salaries and other pertinent aspects necessary in precise determination of the entitlement of each of the claimants was in the custody of the employer, the appellants in this case. This court has held above that the appellants had a duty to produce the documents to aid the just determination of this dispute.

204. Based on the four reasons below, we are satisfied that the suo moto reopening of the case by the trial Judge after judgment and the requirement to file additional evidence was justified and within the established criteria and guidelines for exercise of the discretion. First, we are convinced that the information ordered to be filed by the trial judge was not within the knowledge of the claimants in the trial, could not have been obtained with reasonable diligence for use at the trial and could not have been produced at the time of the suit. The respondents herein exercised all due diligence by attempting to secure the documents before trial through disclosure. We note from the record that the respondents served notice on the appellants to produce the requisite documents on August 5, 2004. The appellant objected and refused to produce the documents, claiming not to have them in its possession. The appellant's position was untenable and contrary to their duties before the trial court. We also note that a Mr. Mutula for the appellant acknowledged their duty to produce the documents and promised to avail them after determination on liability.

205. Second, we are convinced that the documents required to be filed by the trial Judge are relevant and have a direct bearing on fair and just ascertainment of the quantum of the awarded damages. They are intended to remove any vagueness on the current salaries being paid to military servicemen and officers.

206. Third, the additional document called for is an official government document, originating from public offices having proper custody thereof. It is, therefore, apparently credible and presumably believable. We note from the typed proceedings of the trial court that the appellant filed an undated and unstamped statement of the current salary payable to servicemen and officers on July 18, 2017 and vouched for its credibility orally. Further, the aspect of filing and making comments on computations did not open up an extremely complex and convoluted exercise. The current rates of pay in the military and the computation of the award would be obvious facts which do not lend themselves to protracted litigation. The computations were not so voluminous to occasion undue difficulty in the appellant responding to the same.

207. Finally, we see no prejudice to be suffered by the appellants if the required documents are admitted. The trial court granted the appellant first priority in filing their computations. The respondents were to file the computations if the appellant failed to do so. Further, the court proceedings reveal that the appellant was granted opportunity to either file an alternative computation or dispute the figures in the respondents' computations by challenging their veracity, commenting on them and rebutting them. Moreover, the appellant suffered no prejudice by filing a statement of current salary payable to servicemen and officers, which was at all times within its legal possession.

208. The typed proceedings of the trial court indicate that the appellant was granted leave to peruse the respondents' computations and file comments and responses within 30 days through an order of court on January 24, 2017. By May 18, 2017, the appellant had only filed comments and responses to only one of the computations in respect of 20 respondents. On the same day, further leave was granted to respond to computations filed by 32 respondents within 14 days. We are therefore satisfied that the appellant was afforded adequate opportunity to file its own computations and also be heard on the respondents' computations.

209. In our final analysis on this matter, it is trite law that a Judge's exercise of discretion can only be interfered with by an appellate court if the exercise of the discretion is clearly wrong on account of a misdirection or for acting on irrelevant matters as a result of which the court arrived at a wrong conclusion. See *Mbogo & another v Shah* (1968) EA 93. We are further persuaded by the holding of the Canadian Supreme Court in *Hamstra (Guardian ad litem of) v British Columbia Rugby Union*, 1997 CanLII 391 (SCC), [1997] 1 S.C.R. 1092 (para 26) thus:

> "26 It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial... It cannot be overstated that the trial judge is in the best position to determine how to exercise this discretion."

210. We, therefore, find that Nduma, J. on his own motion, properly invoked the inherent jurisdiction of the court to reopen the case and require filing of additional documents. The approach was necessary to assist the court make a fair and just determination on the quantum of salary arrears due to each of the claimants. We find no credible reason or sufficient basis to interfere with the trial court's suo moto exercise of its inherent power or discretion to reopen the case after judgment and admit the parties' computations and information on the current salary scales, allowances, other dues and conditions of service for all the ranks of military officers.

211. In this respect, this case is distinguished from this Court's decisions in Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR; *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR and *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.

212. On the question whether the court shifted the burden of proof and delegated its duty to the parties by its approach of assessing quantum - the appellant claims that the learned Judge, by ordering them to file computations, erred in law by shifting the burden of proof to them.

213. We have already held above that assessment of quantum of awards is a non-delegable judicial duty. A closely related question is whether by requiring parties to file their computations, a court delegates its functions to the litigants.

214. This matter has arisen previously in a case before this court. In *Telkom Kenya Limited v John Ochanda (Suing on His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited)* (*supra*), this Court stated that:

> "There is also the obvious misdirection on the part of the learned Judge in imposing upon the appellant the very obligation that by law resides in the courts, to conduct computations and declare the entitlement of claimants before them. It is not a task that can, without a species of violence to the judicial tradition, be placed upon defendants. The assessment of damages is purely a judicial function that cannot be delegated.
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> ...
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> This judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages.
>
> ...
>
> We respectfully reject the notion that article 159(2)(d) of the Constitution and the overriding objectives of *Civil Procedure Act* and Rules could be invoked to justify a departure from well- used procedure for perfecting declaratory judgments by inviting parties to compute entitlements and the filing of affidavits as happened in this case. We reiterate that it would be a serious abdication of the judicial function were the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned Judge's ruling on that score is well-founded and upheld."

215. We are cognizant that inviting parties to compute entitlements does not always amount to abdication or delegation of the judicial function to the parties. In the circumstances of this case, the computations were mere additional material to assist the court correctly assess the quantum. The learned Judge made it clear that the computations were not final, and the other party was free to challenge them. The learned Judge would eventually judiciously consider each computation in arriving at is final decision on the precise quantum. This, in our view does not amount to abdication or delegation of the judicial function of assessing damages.

216. We cite with approval the ruling of Ongaya J. in *Communication Workers Union of Kenya v Telkom Kenya Limited* [2020] eKLR in which he held that:

> "While ordering the claimant to file the computation the court did not seek to delegate the matter to the claimant as urged for the respondent but that the court by itself, at the mention, would record the computation in presence of both parties and taking into account their respective concerns (as per opportunity as is being urged in the present notice of objection).
>
> ...

The computation would be considered judiciously at a mention as the court's judicial function was not abandoned or delegated to the claimant. The claimant's computation and one by the respondent as was subsequently directed would fall for conclusive determination by the court. The computations by the parties would, in the opinion of the court amount to resources on record for use by the court and not a final determination by the parties in that regard and therefore not a delegation as urged for the respondent."

217. We hold that Nduma, J., having rendered a judgment that awarded damages on April 15, 2016, was duty bound to assess, calculate, compute and declare the entitlement of each of the claimants.

218. Further, it is our finding that the learned Judge, in ordering the appellant to file its computation of the award, was merely extending a second opportunity for the appellant to discharge its duty in aiding precise quantum of salary arrears. Having earlier held that it was the respondents' duty to produce the documents, we hold that the learned Judge did not shift the burden of proof but merely gave the appellant an opportunity to discharge a legal duty. The learned Judge properly situated the burden of proof where it properly lay all along.

219. We note that an employer is the legal custodian of all employment records. This court has established that the employer has a burden to prove certain employment matters to assist the court resolve a dispute. In *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR this court held thus:

> " Section 10 of the Act requires the contract of service to have certain prescribed particulars including the job description of the employee. Section 10 (7) provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. There was a clear burden of proof on the appellant which it did not discharge."

220. Similarly, in *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR this court reiterated that:

> " 20. In this regard, the learned Judge correctly appreciated that by virtue of section 10(7) of the *Employment Act* the appellant was under a duty as the employer to produce written particulars of the respondent's employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent's allegation. See *Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others* [2018] eKLR.
>
> 21. In our view, the appellant did not discharge the above burden. It was not enough for him to just state that the respondent was a casual employee. More was needed to support his position.
>
> ...
>
> Similarly, by dint of section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under section 74 of the *Employment Act*."

221. We cite with approval the holding of the ELRC (Linnet Ndolo, J.) in *Sylvanus Otieno Odiaga v Attorney General* [2014] eKLR that:

> "16. In employment matters, a specific burden is placed on the employer to produce documents in its possession to aid the just determination of disputes. Unlike in ordinary civil matters, it is not enough for a respondent to simply put a claimant to strict proof."

222. The appellant failed to file its computation within the required timeline. The respondents were then forced to file their own computations as per the orders of the trial court. The appellant was still seeking for additional time on January 24, 2017 when the respondents had long filed their computations.

223. The record of proceedings at the trial court reveals that the appellant was further ordered to file in court information on the current salary scales, allowances, other dues and conditions of service for all the ranks of military officers on December 15, 2016. This was to aid in verification of the computations filed by the claimants. A second order requiring the same information be filed by July 10, 2017 (ostensibly indicating the first order was not complied with) was issued on June 30, 2017. A third order requiring the same information be filed by 18th July, 2017 was again issued on July 12, 2017.

224. The appellant eventually filed the current salary scales and its computations on 18 July, 2017, over a year since being required to do so by the judgment of April 15, 2016, and in disregard of several court orders on the same as enumerated above. This enabled the court to verify the respondents' computations, finalize the computations and render its judgment on quantum dated September 22, 2017.

225. In conclusion on this matter, we take the view that the procedure adopted by the learned Judge did not amount to either shifting of the burden of proof or abdication of judicial duty to assess damages.

226. On the question whether the respondents specifically pleaded and proved 'general' or special damages related to employment law - the respondents had in their pleadings, witness statements and affidavits, stated their ranks, salaries, and length of service at the point of unlawful dismissal, and other information relevant to the calculation of their salary arrears, pension, and other terminal benefits. Paragraphs 11 to 16 and 19 to 36 of the further amended plaint dated June 24, 2005 detail some of the information. Further, each of the claimants in their affidavits and witness statements set out the requisite information, with others including detailed estimations of the claimed salary arrears, pensions and other terminal benefits. The appellant did not swear replying affidavits or call any evidence to challenge what the respondents had deponed.

227. On the question whether the quantum of damages on violation of employment rights was correct - the respondents had in paragraph 36 and 40 of the plaint specifically prayed that the court awards them salary arrears until retirement. They also prayed that their salary arrears, if any, be calculated based on the current pay for officers holding the ranks they held at the time of their purported discharge.

228. This court established in *Southern Engineering Company Ltd v Mutia* [1985] eKLR that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the Country and to prior relevant decisions.

229. The Supreme Court has held that in determining the quantum of damages, courts should bear in mind the principle of equal protection and equal benefit of the law. In *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) it held thus:

> "In light of the dictate of article 27(1) of *the Constitution* on equal protection and equal benefit of the law, we are inclined to the view that all victims of historical injustices must be

treated equally and afforded an equal opportunity for redress. This chimes with the demands for harmonious interpretation of *the Constitution*."

230. Majority of the previously decided cases relating to the issue of disciplined officers dismissed from the Kenya Air Force in 1982 are constitutional petitions focusing solely on violation of constitutional rights. A case in point is *Peter M. Kariuki v Attorney General* (*supra*) where this court awarded the appellant Kshs22,965,460.00 being his salary arrears and allowances based on the current basic salary and allowances of an officer of his rank at the time of his dismissal, for the period between 1983 and the date of the decree of the High Court in 2006. We are therefore of the view that the damages awarded should be comparable to those awarded in similar cases, bearing in mind the peculiar circumstances of each case.

231. On the question whether the respondents have proved on a balance of probabilities that their fundamental rights and freedoms were violated - the appellant, in ground 10 of the memorandum of appeal, faults the learned Judge for applying the testimony of eight witnesses who testified, which testimonies were personal in nature, to the rest of the 276 plaintiffs/claimants/petitioners thus causing substantial injustice to the appellant herein. In grounds 12 and 13, they claim that there was no sufficient evidence before the court to lead to a finding that the claimants suffered unlawful arrest and imprisonment, torture, inhuman and degrading treatment, unfair trial and servitude against the evidence placed before court.

232. This issue as framed gives rise to seven sub-issues, being:

a. Whether the suit was competent in respect to violation of fundamental rights and freedoms?

b. Whether the courts direction to have a few plaintiff's tender *viva voce* evidence on behalf of other plaintiffs was correct?

c. Whether the plaintiffs/claimants discharged their burden of proof up to the required standard?

d. Whether violation of the respondents' right not to be subjected to torture and other cruel and degrading treatment was proved?

e. Whether violation of the respondents' right not to be arbitrarily deprived of personal liberty under Section 77 of the *Repealed Constitution* was proved?

f. Whether violation of the respondents' right to a fair hearing under section 77(1) of the repealed Constitution was proved?

g. Whether violation of the respondents' right not to be held in servitude guaranteed under section 73(1) of the *Repealed Constitution* was proved?

We now turn to the determination of these issues.

233. On the question whether the suit was competent in respect to violation of fundamental rights and freedoms - the appellant contends that the plaint ought to be dismissed for failing to meet the minimum competency threshold. They claim that the respondents did not frame their case or complaint with precision since they did not reveal with the requisite degree of precision the articles of *the Constitution* violated as well as the manner of violation.

234. This court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reiterated the principle in *Anarita Karimi Njeru v The Republic* (*supra*) requiring claimants in

constitutional claims to plead with a reasonable degree of precision, particularize in a precise manner and enumerate the Articles of *the Constitution* granting the rights violated or threatened with violation. However, the court noted that precision is not exactitude thus:

> " However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

235. We also note that section 10(3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules), which are the rules that were in force at the time of the hearing, states that:

> " (3) Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the court."

236. Without watering down the importance of preciseness, we agree with the decision of this court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (*supra*) that precision is not exactitude. We also note the flexibility infused by the Mutunga Rules to the earlier settled '*Anarita Karimi Njeru* rule.'

237. The respondents in their pleadings, witness statements and affidavits state in detail particulars as to the allegations of breach of their constitutional rights and the manner of the alleged infringements. The particulars are detailed enough to disclose the relevant sections of the repealed Constitution that granted the allegedly violated rights. A perusal of the appellant's defence and submissions and Nduma, J.'s decision reveals that they were well aware of the sections of the repealed Constitution and the particulars that the claimants were relying on.

238. We cite with approval the late Onguto J's holding in *Stephen Gaitho Njihia & 5 others v Attorney General* [2016] eKLR thus:

> " 52. The precision required is however not absolute precision and where the court can painlessly identify the Petitioners claim then the claim must be heard on its merits. The idea around the reasonable precision rule is to let the Respondent be aware of the case it is faced with. The sentiments expressed by both the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR and *Nation Media Group Ltd v Attorney General* [2007] 1 EA 261, that a constitutional court should be liberal in the way it dispenses justice is relevant. As long as a party is aware of the case he is faced with, the matter ought to proceed to substantive hearing and determination on its merits."

239. We have perused the further amended plaint as drawn. It is discernible to us what the claimants' claim was about. In paragraphs 9, 9A, 10, 38, 39, 44-48, 51 and 54 of the plaint, the claimants allege: arrest and illegal detention; torture-both mental and physical, cruel inhuman and degrading treatment; being held in servitude; and unfair trial. These claims easily fit into violations of the rights guaranteed by

sections 70, 71, 72, 74 and 77 of the [*Repealed Constitution*](). The plaint also describes in detail the manner of the alleged violations.

240. As such, we are satisfied that the plaint meets the competency threshold. We find that the plaint was drafted to a degree of precision that enables the court and parties to clearly identify the claimants' claims.

241. On the question whether the courts direction to have a few plaintiff's tender *viva voce* evidence on behalf of other plaintiffs was correct - the appellant faults the court's direction to have a few claimants tender *viva voce* evidence on behalf of other plaintiffs. Each claimant was however to individually file affidavits and witness statements.

242. This court has analyzed the position with regards to affidavit evidence before in *Daniel Kibet Mutai & 9 others v Attorney General* (*supra*) thus:

> "
>
> "(34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?
>
> …
>
> (36) It is evident that the learned Judge treated oral evidence (which in this case was not available), as superior to affidavit evidence and thereby dismissed the appellants' affidavits as bare allegations. With due respect, the learned Judge failed to appreciate that what is sworn under oath is not a simple matter but a serious issue, for which a deponent can be charged with perjury if it turns out that the deponent has lied under oath. In other words, the consequences are the same as that for a witness who testifies orally and perjures himself by lying on oath. In our view, affidavit evidence is legally admissible evidence in a court of law. It occupies the same place as any other evidence that is admissible in a court of law.
>
> …
>
> Affidavit evidence is provided for on the same pedestal as oral evidence, and that the learned Judge had the discretion to direct that the hearing of the petition proceeds by way of oral evidence if he deemed it necessary to do so. The parties sought to proceed by way of affidavit evidence, and the learned Judge having not exercised the discretion to direct the parties to proceed by way of oral evidence, or to call any of the deponents of the affidavits for cross-examination, he had no reason to disparage the affidavit evidence."
>
> We agree wholesomely with the above position.

243. We further note that Rule 20 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, in force at the time of the hearing of the appellant's

petition, provides for affidavit evidence on the same pedestal as oral evidence. Rule 20(3) & (4) grants the court, either upon application or on its own motion, discretion to direct that the hearing of a claim for violation of Constitutional rights proceeds either by affidavit or oral evidence.

244. In light of the foregoing principles, we observe that this suit had 284 plaintiffs. Hearing each claimant on *viva voce* evidence would have taken an inordinately long time to conclude the matter and would not have been prudent use of judicial resources. The rules allowed for a trial based on pure affidavit evidence. However, the court in its discretion allowed *viva voce* evidence from selected respondents.

245. We note that Githinji, J. (as he then was) gave direction that the respondents select 8 witnesses to tender *viva voce* evidence and the rest be filed through affidavits and witness statements. Infact, on 2nd November, 2012, a Mr. Fedha for the appellant had proposed that the trial proceeds by affidavits, which he correctly noted was within the rules of the court. In compliance with directions of the court, the plaintiffs called 8 witnesses and closed their case.

246. We take the view that the trial court correctly exercised its discretion to require 8 claimants to tender *viva voce* evidence on behalf of the other respondents. The discretion was well within the powers granted by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules). Having the 284 claimants testify orally was impractical in this case. Furthermore, the question of whether a claimant tendered oral or affidavit evidence made no difference since each holds equal weight as noted above. We, therefore, find no reason to fault the exercise of the discretion by the trial court.

247. On the question whether the plaintiffs/claimants discharged their burden of proof up to the required standard - the appellant contends that the respondents did not adduce sufficient evidence to precipitate a finding that the claimants suffered unlawful arrest & imprisonment, torture, inhuman and degrading treatment, unfair trial and servitude. In other words, they did not discharge their burden of proof.

248. A claimant can only succeed if they discharge their evidential burden of proof. It is trite law that whoever alleges must prove. Section 107 of the *Evidence Act* stipulates this in the following terms:

> " 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

249. Further, section 108 of the *Evidence Act* provides that:

> " Section 108 the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 thereof declares that "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

250. Further, the burden of proof must be discharged to the requisite standard. Black's Law Dictionary defines standard of proof as "[t]he degree or level of proof demanded in a specific case in order for a party to succeed." (*Black's Law Dictionary* (9th Ed, 2009) 1535). In other words, it is the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist. In civil cases,

the standard of proof is on a balance of probabilities. Lord Denning in *Miller v Minister of Pensions* [1942] 2 ALL ER 372 aptly summarized it as follows:

> "The ......(standard of proof).....is well settled. It must carry a reasonable degree of probability...... If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not."
>
> ...
>
> "Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, ... the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

251. Further, the Supreme Court of Kenya in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) recently affirmed that:

> (66) The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities, bearing in mind that such claims are by nature civil causes. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.
>
> ...
>
> The petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred.

252. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR the Supreme Court had held thus:

> "(47) It is a timeless rule of the common law tradition ¾ (sic) Kenya's juristic heritage ¾ (sic) and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of which the court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.
>
> (48) The petitioners' case is set around the constitutional right of freedom from discrimination (*Constitution of Kenya, 2010*, article 27). It is already the standpoint of this court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which

the rights-claim in the instant case, founded upon racial discrimination, is to be seen."

253. We, therefore, adopt and rely on the Supreme Court decisions that a constitutional claim is by nature a civil cause and the appropriate standard of proof in such claims is on a balance of probabilities.

254. In the instant appeal, it is our view that the respondents were under a duty to place before the court sufficient material to establish and to authenticate that indeed their fundamental rights and freedoms were violated. It is only upon discharging this duty that the burden would shift to the appellant to rebut the allegations.

255. In *Mary Nyambura Kangara alias Mary Nyambura Paul v Paul Ogari Mayaka* [2023] eKLR, the Supreme Court held that:

> (63) Uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute.

256. In *Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & another* [2013] [eKLR] where the High Court (Lenaola, J.) (as he then was) stated:

> " 7. The above being the position as regards the facts before me, I have no choice but to believe them as tendered and I say so and in agreement with the decision in *Rev. Lawford Ndege Imunde v Republic* JR Petition No 693 of 2008 where the learned Judge stated as follows: 'the facts of this case are set out in the petition and affidavit in support of the petition. These facts are not controverted by the respondent. The effect of this is that I must take the facts set out as true and correct so that the only task before me is to consider whether they constitute a violation of the petitioner's rights and if so what relief I should grant."

257. However, we hasten to add that in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) the Supreme Court noted that the fact that evidence is uncontroverted does not automatically discharge the onus of proof on the claimant thus:

> " (69) It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*, SC Petition No 12 of 2019; [2020] eKLR."

(a) On the question whether violation of the respondents' right not to be subjected to torture and other cruel and degrading treatment was proved section 74(1) of the Repealed Constitution provided as follows:

> " "No person shall be subject to torture or to inhuman or degrading punishment or other treatment."

258. Further, section 86(4) of the former Constitution limited the rights of members in the disciplined forces as follows:

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

259. By the plain reading of section 86(4) of the former Constitution, it allowed derogation of rights and fundamental freedoms for members of the Armed Forces, except the rights protected under sections 71, 73 and 74 of the former Constitution. Section 71 protected the right to life, section 73 prohibited slavery and forced labour while section 74 prohibited torture, cruel and inhuman treatment. It is therefore clear that a claim of torture which was contrary to section 74(1) was triable in respect to members of the Armed Forces.

260. The Supreme Court in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) defined the 'essential elements' of torture as a) the infliction of severe mental or physical pain or suffering; and b) for a specific purpose, such as gaining information, punishment or intimidation. It also defined "inhuman or degrading punishment or treatment" as intentional or deliberate exposure of individuals to conditions which amount to or result in mental and physical ill-treatment, which does not have to be inflicted for a specific purpose.

261. On this issue, we begin our consideration from the premise of uncontested historical facts. The 1982 coup received widespread press coverage nationally and internationally. The treatment of soldiers in the coup aftermath is well documented.

262. This court takes judicial notice of the fact that there were numerous reports of torture of suspects and detention without trial of suspected dissidents and coup plotters in the ensuing crackdown and suppression of mutiny.

263. We now move on to consider whether the respondents have proved on a balance of probabilities that they were part of the Kenya Air Force and that they were subjected to torture, inhuman and degrading treatment during the crackdown that happened during the coup aftermath.

264. We cite with approval the holding of the High Court by the late Onguto, J. in *Stephen Gaitho Njihia & 5 others v Attorney General* (*supra*) that:

> " 69. I also hold the view that the Respondents would not be prejudiced as most of the background facts are not in controversy. It is not a controversy that there was an attempted coup in August 1982. It is also not in controversy that the Petitioners were all service-men and that they were all dismissed following their arrest, detention and court martial appearance in certain cases. The August 1982 coup attempt was one of its kind in Kenya. The treatment meted out to both civilians and servicemen is generally well documented. It is for each individual to zero-in his case and be specific, but claims arising from the August 1982 ought to be accepted on a case by case basis."

265. We find that from the respondents' detailed evidence in their pleadings, affidavits and oral evidence that upon their arrest by Kenya Army and police officers, they were subjected to standardized torture and ill- treatment taking the following forms:

1. They were severely beaten up;
2. stripped naked and transported to custody while naked;
3. On arrival in the detention facilities they were again brutally beaten up and detained totally incommunicado;
4. They were held in solitary confinement in waterlogged cells or in overcrowded cells with fulltime noisy insane prisoners or totally dark or permanently lit cells; and
5. They were frequently moved from one detention facility to another while naked and subjected to endless interrogations, physical and mental assaults and coerced to confess to planning the failed coup.

266. It is clear in our minds that the acts that the respondents were subjected to upon arrest by army officers in various barracks was in violation of their right to protection from torture and other inhuman-treatment.

267. We have painstakingly reviewed the record of the proceedings and note that the respondents' evidence of torture and other inhuman treatment was not displaced during cross-examination. The appellant did not call any witness(es) to challenge the respondents' claim of torture and other inhuman-treatment.

268. Consequently, weighing the evidence adduced before the trial court, we come to the conclusion that the respondents proved their subjection to torture and other inhuman treatment to the requisite standard.

269. The respondents claimed that they were subjected to torture in the various civilian prisons they claimed to have been locked in. Article 1(1) of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (which Kenya ratified on 26th June, 1987) defines torture thus:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

270. Similarly, article 7(2)(e) of the Rome *Statute of the International Criminal Court* defines torture thus:

> "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."

271. Finally, the High Court of Kenya, (JG Nyamu) (as he then was) citing various authorities, defined torture and inhuman treatment in *Republic v Minister for Home Affairs and others ex parte Sitamze* [2008] eKLR thus:

> "Torture means 'infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to illicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest It is a deliberate inhuman treatment causing very serious and cruel suffering. "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."

272. We note that poor prison conditions, although deplorable, do not by themselves amount to torture. Such conditions are suffered in common with the other inmates. The appellant has not demonstrated that the harsh prison conditions were peculiar to them as compared to other inmates in the civilian prisons they were locked in. We find no justification for isolating the appellants' case and paying them separately for their pain, while not compensating the other inmates incarcerated together with them.

273. The High Court in *Koigi Wamwere v Attorney General* [2015] eKLR, took judicial notice of past deplorable conditions in Kenyan prisons. It held that the conditions by themselves fall short of the definition of torture thus:

> "Weighed against the definition of torture set out above, I must, regretfully, find that there were no acts of torture as recognized in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya...... To find that the poor prison conditions amount to torture which entitles the petitioner to compensation would open the door for similar claims by all who have passed through Kenya's prison system."

274. In the ensuing appeal, this court held in *Koigi Wamwere v Attorney General* [2012] eKLR, thus:

> "On our own consideration of the matters complained of, we come to the unhesitating conclusion that the ascription of the term torture to them was a subjective and loose stretching of the term, which, though conversationally and informally understandable, does not bear fealty to the technical legal definition of torture........We take the view, as did the learned judge, that whereas prison conditions as picture-squarely described by the appellant left a lot to be desired and cried out for reform, the treatment suffered by the appellant in common with the other inmates, whether in detention or in prison, did not amount to torture as legally defined."

275. Nonetheless the treatment that the respondents detail in their averments, to wit, beatings, being locked up naked in dark, waterlogged cells and solitary confinement and at times with insane prisoners are personal and have nothing to do with general conditions obtaining in prisons then. These fall squarely in the definition of torture.

276. Consequently, weighing the above authorities and evidence adduced before the trial court, we agree that the learned Judge did not err in finding that the respondents proved their subjection to torture and other inhuman treatment to the requisite standard.

277. Nonetheless, the indiscriminate beatings, being locked up naked in dark, waterlogged cells and solitary confinement and at times with insane prisoners are personal and have nothing to do with general conditions obtaining in prisons.

278. On the lack of medical evidence, courts have distinguished the necessity for medical reports in personal injury claims from claims of torture and ill- treatment.

279. The Supreme Court in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) noted:

> "[90] However, 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*."

280. This court in *Daniel Kibet Mutai & 9 others v Attorney General* (*supra*) addressed itself to the matter thus:

> "While it is true that the appellants did not have medical documents to substantiate their allegations that they were mistreated and suffered injuries, it must be appreciated that they had no opportunity to get such medical reports as most of them were incarcerated for a long time and only released long after the events that they were complaining about. Moreover, much of the torture and inhuman treatment that they alleged they suffered such as being stripped naked and kept in solitary confinement in water logged cells for days; being kept in a permanently overcrowded cell without proper ventilation and with a permanent pungent foul odour and with lights on day and night; and being subjected to incessant interrogation; being held incommunicado without access to treatment, visits or access to any person; were all psychological and mental torture that may not necessarily leave any telltale signs.
>
> ...
>
> (45) In any case the issue of medical evidence was of more relevance in the assessment of damages rather than in assessing the credibility of the appellant's evidence."

281. We further cite with approval the holding of the High Court on this matter thus:

> "48. In the instant petition the petitioners though they gave evidence and did not produce medical reports exhibiting effects of torture and ill-treatment, the absence of medical evidence does not in itself defeat, the Petitioners' claims; in light of their elaborate sworn evidence of brutalities meted on them and the debilitating conditions of detention which was not factually or specifically rebutted by the respondents."

282. Okwengu J. (as she then was) in *Harun Thungu Wakaba v Attorney General* [2010] eKLR stated:

> "(37) It will be noted that none of the plaintiffs provided any medical evidence in support of the allegation that they were tortured or injured. While the medical evidence would have provided appropriate corroboration to the plaintiffs' allegations, the absence of the medical evidence is not critical, particularly because the plaintiffs' affidavits were not controverted. Therefore, the question is whether the various acts to which each of the plaintiff was subjected to, as deponed to in the respective affidavits qualify to be torture or inhuman or degrading treatment within the meaning of the definition provided in Article 1 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*."

283. In *David Gitau Njau & 9 others v Attorney General* (*supra*), Lenaola, J. (as he then was) held thus (paragraph 45):

> "(45) ... I also find notwithstanding that none of the petitioners produced any documents or medical evidence in support of the allegation that they were detained for 8 months, tortured or injured in the hands of the respondents. It is true that medical evidence would have corroborated the petitioners evidence and would have been enough to establish the petitioners' allegations, but, to my mind, the absence of such evidence is not fatal because of what I have said above; that their averments of facts were not specifically or in any way contradicted by the respondent."

See also *Jennifer Muthoni Muthoni Njoroge & 10 others v Attorney General* [2012] eKLR.

284. The appellant's witness, RW1 confirmed in his testimony that all the Kenya Air Force soldiers including the respondents were arrested, confined at Kamiti and Naivasha Maximum Prisons. That some were sent to various prisons and others were released and had their employment terminated without payment of any benefits and/or pension.

285. In the circumstances, and based on our findings above, we find and hold that the respondents proved to the requisite standard that they were subjected to torture, cruel and degrading treatment.

286. On the question whether violation of the respondents' right not to be arbitrarily deprived of personal liberty under section 72 of the *Repealed Constitution* was proved - the claimants alleged that they were detained for 8 months from August 1982 to March 1983 without trial - This court has repeatedly held that even though section 86(2) of *Repealed Constitution* excluded members of disciplined forces from protection under section 72 on personal liberty and section 77 with regard to fair trial, sections 72 and 48 of the *Armed Forces Act* protected the right not to be held unduly without being subjected to trial, and indeed made it an offence for a person who is under a duty to do so to fail to take steps for the trial of the arrested person. See *Gerald Juma Gichohi & 9 others v Attorney General* [2015] eKLR.

287. This court held in *Albanus Mwasia Mutua v Republic* [2006] eKLR, that where an accused person is not arraigned in court within 24 hours of his arrest, the burden of proving that the person arrested has been brought before a court as soon as is reasonably practicable, rests upon any person alleging that the provisions of the section have been complied with.

288. The issue of unjustified lengthy pre-arraignment detentions has also been addressed in: *Ann Njogu & 5 others v Republic* [2007] eKLR and *Paul Mwangi Murunga v Republic* [2010] eKLR

289. This Court in *Julius Kamau Mbugua v Republic* [2010] eKLR held that:

> "A violation of the rights under section 72(3) (b) entitled the accused person to damages under section 72(6). All the applicants in this case were detained before charge for periods ranging from 2-7 months. No explanation has been given for the detention, and I therefore find and hold that the applicants' rights under section 72(3) were violated and that they are entitled to damages."

290. The appellant did not provide any valid answer or explanation as to why the respondents were kept in custody for up to 8 months without being charged in any court of law or through a Court Martial. The appellant therefore breached its own law and it is for that reason that we find that the respondents' right to liberty was violated.

291. This court has established that section 77 of the *Repealed Constitution* protected rights in the course of a trial and not outside it in the case of *Julius Kamau Mbugua v Republic* (*supra*) as follows:

> "43. In contrast, the right to a trial within a reasonable time guaranteed by section 77(2) is trial- related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the trial to ensure that the right to speedy trial is observed."

We are guided by that holding.

292. In conclusion on this matter, we find that the acts to which the respondents were subjected of being kept hungry and denied sleep for several days, being physically assaulted by being kicked, whipped and burned with cigarettes, pricked with pins, hose piped and being held nakedin water-logged cells, were all cruel and degrading treatment and therefore a violation of section 74(1) of the *Repealed Constitution*.

293. We are also satisfied that the respondents established on a balance of probability that their rights to personal liberty under section 72 was violated when they were held at various civilian prisons for more than 24 hours contrary to section 72(3)(b). The facts deponed to by the respondents, provided a sufficient base for their claim regarding the infringement of their rights under *the Constitution*.

294. On damages, this court pronounced itself on the principles for setting aside or interfering with the award of damages in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & Anor.* (No 2) [1985] eKLR thus:

> "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 that 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."

295. This court buttressed the position adopted earlier by Law, J.A in *Butt v Khan* [1981] KLR 349, when he stated that:

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge

proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

296. The Supreme Court of Kenya and this court have established the rationale of awarding of damages for constitutional violations under *the Constitution*. In *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) the Supreme Court affirmed that:

> (91) Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the court to vindicate and affirm the importance of the violated rights."

297. The Supreme Court cited with approval the Canadian Supreme Court decision in *City of Vancouver v Ward* [2010] 2 SCR 28 which stated that:

> " individual compensation; vindication, in the sense of addressing harm to 'society as a whole'; and deterrence, in the sense of 'influencing government behaviour in order to secure state compliance with the Charter in the future', which would promote 'good governance'
>
> ....
>
> > " "... the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."

298. Similarly, this court in *Gitobu Imanyara & 2 others v Attorney General* (*supra*) expressed itself as follows:

> "Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is 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. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

See: *Southern Engineering Company Ltd v Mutia* [1985] eKLR;

Kenfro Africa Ltd t/a Meru Express Services v Lubia & another (No 2) [1985] eKLR and Gicheru v Morton & another (2005) 2 KLR 333.

299. This Court in *Peter N. Kariuki v Attorney General* (*supra*) stated as follows:

> "On the purpose of awards of damages, the Supreme Court of Uganda in Cuossens v Attorney General [1991] EA 40, noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money and that is the best that a court can do in the circumstances."

300. *Attorney General v Ramanpoop* [2005] 4 LRC held that:

> "An award of compensation will go some distance towards vindicating 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, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. "

301. In *Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa* [2004] eKLR, the High Court, (Maraga, J.)-(as he then was) reiterated the principles for award of aggravated damages thus:

> "Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief - Rookes v Barnard [1964] 1 A.ER 367. However, where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter The matters the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court should consider whether or not the defendant acted with malevolence or spite or behaved in a high-handed malicious, insulting or aggressive manner. The court may also consider the defendant's conduct upto to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the defendant's acts will have worsened the plaintiff's damage by injuring his feelings of dignity and pride that may also be considered in awarding aggravated damages Aggravated damages are therefore compensatory in nature."

302. This court in *Gitobu Imanyara & 2 others v Attorney General* (*supra*) stated as follows:

> "Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political

environment and the positive steps taken by the government in dealing with human right violations."

303. The Supreme Court of Kenya in *Monica Wangu Wamwere & 6 others v Attorney General* (*supra*) emphasized on the need to grant all victims of historical injustices equal protection and equal benefit of the law without discrimination by treating them equally and affording an equal opportunity for redress.

304. In this regard, we review awards of damages made in previous court decisions on violations of fundamental rights and freedoms from torture or inhuman and degrading treatment for claims filed by ex-service officers of the Kenya Air Force in the table below.

Case	Date of judgment	Quantum of Damages
Peter Ngari Kagume & 7 others v Attorney General [2009] eKLR	30th January, 2009	Nil
Noah Kibet Sigilai v Attorney General [2014] eKLR	30th May 2014	Kshs 600,000.
Dominic Arony Amolo v Attorney General [2003] eKLR	1st August, 2003	Kshs 2.5 million
Peter M. Kariuki v Attorney General [2014] eKLR	21st March, 2014	Kshs 7 million I court enhanced to Kshs15 Million by CoA
David Gitau Njau & 9 others v Attorney General [2013] eKLR	1st November, 2013	Kshs 5.5 million
Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another [2021] eKLR	4th January, 2021	Between Kshs 5 to 8 million
James Mwangi Wanyoike & 9 others v Attorney General [2012] eKLR	15th February, 2012	Between Kshs 2 to 3 million
Gerald Juma Gichohi & 9 others v Attorney General [2015] eKLR	19th August, 2016	Between Kshs 850,000 to 3.5 million
Stephen Gaitho Njihia & 5 others v Attorney General [2016] eKLR	19th August, 2016	Kshs 2 million
Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another [2017] eKLR	7 July 2017	Kshs 10 Million
Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & another [2013] eKLR	1st November, 2013	Kshs 5 Million

Peter Tonny Wambua & 17 others v Attorney General [2017] eKLR	26th July, 2017	Between Kshs 850,000 to 6.1 million
Estate Of Cpt Kariuki Kingaru Murebu (Dcd) & 8 others v Attorney General [2014] eKLR	22nd October, 2014	Kshs 8 million
Preston Kariuki Taiti & 9 others v Chief of the Kenya Defence Forces & another [2021] eKLR	22nd September, 2021	Between Kshs 1.8 to 3 million
Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR	21st May, 2019	Between Kshs 4 to 5.5 million
Joel Benard Lekukuton & 4 others v Attorney Geneal [2017] eKLR	14th November, 2017	Kshs 2.5 million
Jacob Ntubiri Japhet & 8 others v Attorney General [2016] eKLR	7th October, 2016	Between Kshs 900,000 to 3.1 million
John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR	4th May, 2018	Kshs 7 million

305. The respondents pleaded for full retirement benefits, and terminal benefits. The learned Judge, after finding that the respondents had proved their case to the required standard, directed the appellant to disclose the amount owed to each respondent, failing which he would use what the respondents presented as their dues. The appellant failed to produce the schedule of the dues as directed by the learned Judge. The learned Judge pronounced his judgment on quantum by considering the schedule presented by the respondents as to what the appellant owed them as full retirement benefits and/or terminal benefits.

306. The appellant had the opportunity to present their dues schedule to the court to be considered. The fact that they failed to do so cannot be used as a ground of an appeal herein. We do not think that the amount awarded by the learned Judge was based on the wrong principle or was inordinately too high to invite this court to interfere with the same. Accordingly, we see no reason to interfere with the same and uphold the trial court's awards as granted.

307. In the result, we find that this appeal has no merit and dismiss it. The order that commends itself to us is that each party will bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

JAMILA MOHAMMED

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR