IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE, & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 96 of 2013

BETWEEN

JAMES KANYIITA NDERITU.....APPELLANT

AND

THE ATTORNEY GENERAL.....1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2nd RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya at Nairobi (Majanja J.) dated 25th March 2013

in

Constitutional Petition No. 180 of 2011)

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JUDGMENT OF THE COURT

1. The appellant, ***James Kanyiita Nderitu,*** filed a constitutional petition against the respondents claiming violation of his freedoms and fundamental rights under ***Chapter V*** of the old Constitution and contrary to ***Articles 25 (a) & (c), 28, 31, 40, 47, 49, 50 and 51*** of the 2010 Constitution**.** More particularly, the appellant averred that his right to fair trial, freedom from torture, cruel, inhuman and degrading treatment as well as his right to privacy, protection of private property and fair administrative action were violated.

2. This Court has time and again underscored the place of fundamental rights and freedoms in the constitutional design. For instance, in **Attorney General vs. Kituo cha Sheria & 7 others** ***[2017] eKLR*** this Court expressed itself as follows:

> **"The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."**

3. The facts relevant to the claims in the Petition are that on or about 28th May 1985, the appellant was arrested and detained for three weeks and his business and family premises were searched; he was threatened, humiliated and psychologically tortured and eventually charged with 31 counts of obtaining money by false pretenses contrary to ***Section 313*** of the Penal Code in **Nairobi Chief Magistrates CR. Case No. 1716 of 1985**. He was convicted and on appeal, the conviction was quashed on 30th April 1992 in **HC Criminal Appeal No. 539 of 1988**. The appellant contends that between 1985 when he was arrested and 1992 when his conviction was quashed, he underwent mental agony, torture, loss and damage to his person, his character, reputation, business, income and social standing.

4. The appellant contends that the entire process from his arrest, detention, threats, intimidation and humiliation was cruel and inhuman treatment and constituted a gross violation of his fundamental rights and freedoms. He contends that his arraignment for trial and conviction before the Magistrate's Court violated his right to fair trial and such violation was confirmed by the High Court which quashed his conviction.

5. In his petition, the appellant prayed for a declaratory order that his arrest, detention, search, threats, charge and consequent prosecution

was in violation of his fundamental rights and freedoms contrary to ***Articles 25 (a) & (c), 28, 31, 40, 47, 49, 50 and 51*** of the 2010 Constitution and hitherto enshrined in ***Chapter V*** of the old Constitution. He also prayed for exemplary and general damages.

6. The respondents denied violating any of the fundamental rights and freedoms of the appellant as alleged in the petition. The 1st respondent, ***The Attorney General***, filed Grounds of Opposition *to wit* the petition was incompetent and a gross abuse of the court process; the rights claimed are not absolute but are subject to limitation; there was no violation of the constitution or constitutional rights of the appellant as averred in the Petition.

7. The 2nd respondent, ***Director of Public Prosecution***, also filed Grounds of Opposition citing mis-joinder of parties. It is contended the facts in support of the petition were concluded under the old Constitution when the 2nd respondent had not been established, and hence the 2nd respondent is *functus officio* and is wrongly joined in the petition. The 2nd respondent urged at all material times, the power to prosecute under the old Constitution was vested upon the Attorney General, the 1st respondent, who is the correct party to answer the petition.

8. The 2nd respondent further urged that the petition had been filed after an inordinate delay of 26 years and some of the officers allegedly involved could not be found and institutions mentioned were non-existent and as such, the 2nd respondent was prejudiced. The 2nd respondent restated it should be expunged from the instant proceedings on account of mis-joinder.

9. Upon hearing the parties, the trial court declined to remove and expunge the 2nd respondent from the petition. However, the court dismissed the appellant's petition in its entirety. In dismissing the petition, the judge expressed himself as follows:

> ***"52. I have scrutinized the petition and the petitioner's affidavits and there is no explanation as to why he had to wait twenty-six years to file this petition if the petitioner chose to pursue his claim through a normal action in tort, such a claim would have been time bared at least within three years. Taking the evidence as a whole, I am in agreement with the respondents that the period of twenty-six years, in the circumstances of this case, is an inordinately long time for the petitioner to have sat on his rights and then sprung up to assert violations of the Bill of Rights. I also find that the respondents defence would be prejudiced by the lapse of time"***

10. In declining to remove the 2nd respondent from the petition on ground of mis-joinder, the learned thus judge expressed himself:

> ***"24. But in this case, the corresponding office that discharged the roles of the present office of DPP is that of the Attorney General then established under Section 26 of the former Constitution. To my mind, the liabilities then vesting in the corresponding functions then carried on by the office of the Attorney General would necessarily be carried over in the new proceedings until establishment of the office of DPP. The facts relating to this case took place prior to the establishment of the office of DPP as an independent office under Article 157.***
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> ***25. In order to do justice in the case, I do not think that any prejudice would be suffered by maintaining the 2nd respondent as a party to these proceedings, as the office of the DPP is now responsible for the matters that are subject of challenge under the Constitution…. In my view, the petitioner should not be prejudiced in any way in prosecuting this case that straddles two legal regimes."***

11. Aggrieved by the dismissal of the petition, the appellant has proffered the instant appeal citing the following abridged grounds in his memorandum of appeal.

> *(i)* The *judge erred in dismissing the petition against overwhelming weight of evidence in relation to the arrest, detention, search, threats, cruel, humiliating treatment and subsequent charge and prosecution of the appellant.*
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> *(ii) The judge erred in holding delay defeats a claim for infringement of constitutional rights and freedoms; the judge failed to appreciate the circumstances which prevented the appellant from ventilating his claims due to the political nature of his arrest and prosecution; the judge failed to observe the doctrine of stare decisis and ignored judicial decisions that hold there is no limitation period for filing a constitutional petition.*
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> *(iii) The judge erred by removing himself from the plane of judicial arbiter and became partisan in canvassing the case for the respondents.*
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> *(iv) The judge erred in holding the appellant should have ventilated his grievances in the criminal proceedings when it is clear and evident that in the said criminal proceedings, all attempts made by the appellant to ventilate his rights were inter alia denied and thwarted with threats and mis-procedure.*
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> *(v) The judge failed to appreciate that the arrest and detention of the appellant for 24 days without being charged in court and being denied food, access to family or advocate and movement from one police station to another amount to torture.*
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> *(vi) The judge failed to appreciate that the High Court in quashing the appellant's conviction stated that the trial before the magistrate's court was an abuse of court process violating the appellant's constitutional rights and any remedy could only be given by a constitutional court of which in the instant matter the learned judge failed to consider and award compensation.*
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> *(vii) The learned judge failed to appreciate the clear evidence given by police officers both at the criminal and civil proceedings to the effect that the appellant's arrest, detention, search and confiscation of property was without lawful or justifiable basis but*

merely out of pressure from undisclosed higher authorities thus rendering the process a complete abuse of the prosecutorial powers of the respondents under Section 26 of the old Constitution.

(viii) The judge erred in evaluation of the entire evidence on record.

12. At the hearing of this appeal, learned counsel Mr. T. O. K'opere appeared for the appellant. Despite service of the hearing notice, both respondents did not appear.

13. The appellant filed written submissions and adopted the same including authorities as cited therein. In the written submissions, counsel recalled the background facts that led to the appellant's claims in the petition. Counsel emphasized that the facts as narrated by the appellant leading to his arrest, detention and subsequent prosecution were neither challenged nor controverted by the respondents. On joinder and mis-joinder, the appellant takes no issue with the trial court's finding on joinder of the Attorney General and the Director of Public Prosecution (DPP).

14. On the substantive merits of the appeal, counsel submitted the critical issue is the ambivalent and inconsistent finding by the trial court that there was no violation of the appellant's rights and fundamental freedoms as alleged or at all. On factual basis, it was submitted the main complaint in the petition was gross violation of fundamental rights and freedoms where the appellant was detained at different police stations for three weeks (24 days) and subjected to prosecution and a trial process which was quashed and held to be an abuse of prosecutorial powers. Counsel submitted the absence of any rebuttal or challenge to the facts as pleaded means the trial court erred in consideration and evaluation of the evidence on record.

15. More specifically, the appellant identifies five alleged violations of his fundamental rights and freedoms as follows:

(a) Detention for 24 days from 28th May 1985 to 21st June 1985 without being arraigned in a court of law.

(b) Arbitrary search at his home, office and business premises and confiscation of documents including his passport and air flying license.

(c) Inhuman and degrading treatment by being paraded in the banking hall in hand-cuffs before his bankers, business associates and customs officers.

(d) Failure to be informed of the reasons for his arrest and detention.

(e) Being dragged through a sham criminal process which the High Court quashed and termed the trial an abuse of court process in HC CR. Appeal No. 539 of 1988.

16. On delay in filing the constitutional petition, the appellant faulted the trial judge for holding the delay between 30th April 1992 when the appellant's conviction was quashed and 3rd October 2011 when the petition was filed was inordinate and unexplained. Counsel submitted that the judge erred in finding the claims in the petition were defeated despite the High Court and this Court in various judicial decisions having stated that claims for infringement and violation of constitutional rights and freedoms have no time limitation. In this context, counsel submitted that the judge ignored the doctrine of *stare decisis.*

17. On failure to comprehensively and properly evaluate the evidence on record, the appellant urged the trial court did not appreciate the testimony of ***Ms. Valerie Onyango*** from the State Law Office who testified that the Attorney General was not consulted prior to arrest and prosecution of the appellant; there is evidence on record demonstrating and proving the arrest and detention of the appellant was instigated from elsewhere and thus the High Court in the criminal appeal properly held the prosecution was political and abuse of court process. In this matter, the judge erred in totally ignoring issues of arrest, detention, confiscation of documents and freezing of the appellant's accounts.

18. Counsel faulted the trial judge for identifying various violations of the appellant's fundamental rights and then failing to grant any remedy contrary to the well-known principle that there can be no wrong without a remedy *(Ubijuse Ibi Remedium).* In this context, it was submitted the judge erred and failed to give effect to the provisions of ***Article 23 (3) (e)*** of the Constitution and erred in declining to award compensation where a right had been violated by a state agency.

19. The appellant faulted the judge for placing heavy reliance on pleadings in **HCCC 761 of 1985** by the appellant's companies which was a claim against Standard Chartered Bank in relation to bank accounts run in the name of the appellant's companies and breach of bank-customer confidentiality. It was submitted the claims in **HCCC No. 761 of 1985** have nothing to do with violation of the appellant's fundamental rights and freedoms. In concluding his submissions, the appellant urged the learned judge failed to appreciate the definition of torture under the **1966 International Covenant on Civil and Political Rights** which definition includes denial of food, access to family, arbitrary search, and indiscriminate movement from one police station to another.

20. Overall, the appellant contends that the judge erred and disregarded the totality of the evidence presented in the petition and further erred in focusing more on the time frame from the date of charge in 1985 to the date of filing the petition in October 2011 being a period of 26 years.

21. We have considered the written submissions filed by the appellant and the authorities cited therein. We have also analyzed and appreciated the reasoning and *ratio decidendi* of judgment of the trial court.

22. As this is a first appeal, we have gone through the entire record, carefully considered the submission by counsel and given due attention to the authorities, both local and foreign, cited. We have done so cognizant that we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. (**Selle vs. Associated Motor Boat Co. Ltd. [1968] EA 123**; **Abdul Hameed Saif vs. Ali Mohammed Sholan [1955] 22 EACA 270).**

23. Upfront we note the appellant does not contest the finding by the trial judge on the issue of joinder of the Director of Public Prosecution in the petition. Accordingly, we affirm the finding and holding by the trial court that the 2nd respondent is properly enjoined in these proceedings.

24. We next consider the issue of laches and delay in filing the petition before the trial court. The *ratio decidendi* of the judgment of the trial court is grounded on delay and doctrine of laches. The judge in dismissing the petition held there was no explanation as to why the appellant had to wait twenty-six years to file the petition and the period of twenty-six years, in the circumstances of this case, is an inordinately long time for the appellant to have sat on his rights.

25. In ordinary civil suits, when delay is established, unless it is well explained, it is deemed to be inexcusable. (See **Ivita vs. Kyumbu [1984] KLR 441**). However, we are enjoined by Article 159 of the Constitution to do substantial *justice* to the parties. We remain alive to the need for proportionate justice. (See **Harit Sheth Advocate vs. Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR**, **Stephen Boro Gitiha v Family Finance Bank & 3 others.** ***Nairobi, Court of*** **Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR).**

26. We are cognizant in matters relating to enforcement of the Bill of Rights, there will be many situations in which the conduct which gives rise to the infringement of a right will not be an instantaneous act but a course of conduct. Were it otherwise, a claimant would be placed in the difficult position of having to bring a human rights claim within a limitation period of what might be a protracted period of violation of rights without knowing the outcome which might be very material to the claim. In the case of **Kiluwa Limited & Another vs. Commission of Lands & 3 Others [2015] eKLR** it was stated:

> **"…there is no statutory period prescribed for commencement of the petitions either under Article 22 or 258 of the constitution. The grant of these reliefs or remedies are consequently not subject to any statute or period of limitation either under the Limitation of Actions Act (Cap 22 laws of Kenya) or the Law Reform Act… I therefore reject argument by Counsel for the 3rd and 4th respondents subjecting the reliefs in judicial review granted in a constitutional petition to any period of limitation."**

27. In the instant matter, the trial court observed that there has been a delay of 26 years since the cause of action arose. The appellant contends that the trial judge ignored the explanations for delay as stated in the supporting affidavit where it is deposed the subsisting political situation and political forces that instigated the arrest and prosecution of the appellant prevented him from lodging the petition at an earlier period. In dismissing the explanation for delay, the judge expressed himself as follows:

> ***47. The petitioner has held his grievance about his arrest and detention since 1985. These facts were known to him throughout the trial and appeal from conviction. I also note that during the time the petitioner was fighting criminal proceedings, he was also pursuing litigation through his companies in Intercom Services Limited, Interstate Communications and Services Ltd.; Swiftair (K) Ltd; Kenya Continental Hotel Ltd. and James Kanyiita Nderitu -v- Standard Chartered Bank Kenya Limited Nairobi HCCC No.761 of 1985……***
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> ***49. Considering the deposition filed on behalf of the respondents….it is clear because of the lapse of time; the respondents have been denied the opportunity to clearly put forward evidence or justify reasons for the pre-trial detention in terms of Section 72 (3) of the Constitution. The Police Standing Orders, 7th Edition (2009) entitle the respondent to destroy certain record from time to time and the Occurrence Book which contains the primary evidence of arrest and related documents would ordinarily be destroyed after five years. The Police Service is not expected to keep records in perpetuity."***

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

29. We are alive to the decision of this Court in **Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012**, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in **Kamlesh Mansuklal Damji Pattni & Another vs. Republic** ***2013]*** **eKLR** where it was noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. (See **Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341.**

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

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

The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary."

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

"While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution."

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

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

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

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

35. A constitutional petition, or for that matter judicial review proceedings, is not meant to circumvent the law on limitation of actions. Consequently, constitutional petitions filed in delay alleging violation of the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of delay. In **Josephat Ndirangu vs. Henkel Chemicals (EA) Ltd [2013] eKLR**, the trial court correctly held that litigants should not avoid the provisions of an Act by going behind statute and seeking to rely directly on constitutional provisions. The primary legislation should not be circumvented. In **Peter Lubale Lubullellah vs. Teachers Service Commission, Petition No.145 of 2016** on the issue of circumvention of the primary legislation it was aptly stated as follows:

"To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007." (Emphasis supplied)

36. In this matter, the appellant could well have instituted a claim for malicious prosecution and an action for defamation for loss of character and reputation as alleged in the claims in the Petition. It is trite that such an action for malicious prosecution or defamation would be met by the limitation period. In principle, the legal issue in our mind is whether a party should be allowed to circumvent the limitation periods in a statute by instituting a constitutional petition alleging violation of the Bill of Rights. In the absence of satisfactory explanation, we are of the considered view that a constitutional petition should not be used to circumvent a primary legislation or main cause of action. Consequently, we see no good reason to interfere with the holding by the judge that the appellant's claims in the petition was defeated by inordinate delay.

37. On the substantive merits of the appeal, we consider if the trial judge failed to properly evaluate the entire evidence on record. The appellant has urged that the judge did not go through all the material on record; that the judgment was rushed, biased, full of contradictions and inconsistencies. At the centre of the appellant's contestation is the submission that all the facts stated in the petition were neither controverted nor rebutted; the fact of his arrest, detention, charge and prosecution and eventual quashing of his conviction prove violation of the rights and freedoms of the appellant especially the right to fair trial.

38. We are minded to review some judicial decisions relevant to the facts disclosed in the petition. In **Moses Tengeya Omweno vs. Commissioner of Police & another [2018] eKLR**, where the applicant had been arrested, detained and extradited without due process being followed, this Court upheld the trial courts finding that the appellant's rights had been violated. The East African Court of Justice in **Samuel Mukira Mohochi vs. Attorney General of Uganda, EACJ Reference No. 5 of 2011**expressed detention is indeed deprivation of liberty and when it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity. In **Vitu Limited vs.The Chief Magistrate Nairobi & two Others**, **H.C. Misc. Criminal Application No. 475 of 2004:** the police had conducted a search at the petitioner's premises without a warrant. The trial court held the search to be unlawful and unconstitutional. The Court expressed itself thus:

> **"I am therefore constrained to agree with Counsel for the petitioners that the respondents' justification of their actions is, in the circumstances, unsustainable. Their acts in carrying out the raid on the petitioners'' premises had no lawful justification. It remains to consider whether their acts violated any of the rights of the petitioners guaranteed under the Constitution……**
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> **I therefore do find and hold that the respondents violated the petitioners' rights under section 76 of the former constitution."**

39. In the instant matter, the trial court correctly stated the appellant's case is founded on allegations of breach of his rights from the time of arrest, investigation, incarceration and trial before the magistrate's court. At paragraph 28 of its judgment, the court holds confiscation of the appellant's business and personal documents made him unable to prepare a proper defence and this was violation of ***Section 77 (c)*** of the old Constitution. Despite this finding, the court held the issue was not taken up at the trial. Likewise, the court at paragraph 29 of its judgment held that contestations on defective charge sheet, denial of legal services or not being afforded a fair hearing are matters that violated ***Section 77 (b)*** and ***(d)*** of the old Constitution that ought to have been raised before the trial court. In dismissing the claims on these violation of fundamental rights, the learned judge in relevant excerpts at paragraphs ***35, 37*** and ***39*** of the judgment expressed himself as follows:

> ***"My conclusion therefore is that all trial related matters which were dealt with or could have been dealt with either by the trial court or the High Court exercising its appellate jurisdiction cannot be open for further examination through a petition filed to enforce fundamental rights and freedoms. I decline to entertain such an inquiry….. The violations of rights within the trial merged with the judgment of the High Court which quashed the conviction…. I have scrutinized the pleadings and depositions filed by the petitioner and I do not think they disclose any torture, cruel or inhuman treatment in the manner contemplated by the Constitution.***

40. In arriving at its decision, the judge quoted excerpts from the Privy Council as adopted and applied in the **Methodist Church in Kenya Registered Trustees & another vs. Jeremiah Muku & another CA Civil Appeal No. 233 of 2008** where this Court observed:

> **"It is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review." The quotation the Court of Appeal referred to was in the case of Maharaj -v- Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385, 399 where the Privy Council held that,**
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> **"In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kind is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event…"**

41. Central to the learned judge's decision is the dicta by the Privy Council that "no human right or fundamental freedom ….is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment." The appellant has not demonstrated to us by local or comparative judicial decisions that this statement is an erroneous statement or principle of law.

42. We are aware that various cases whose facts are in tandem and comparable to the facts in this case have been decided and grounded on the tort of malicious prosecution or defamation which is not the case in this matter. For example, in **James Kanga Kiiru vs. Joseph Mwamburi, Summy Huko and The Attorney General, Nairobi Ca. No. 171 of 2000;** the appellant was alleged to be involved in poaching activities. He was arrested on October l987. He was detained for 14 days at Garsen and Hola police stations while being investigated. He was charged and acquitted. The High Court dismissed the claim for damages resulting from the arrest and prosecution because the arrest and prosecution complained of were based on a reasonable suspicion that a criminal offence had been committed and were lawfully carried out by the officers entrusted with maintenance of law and order. On appeal, on the issue of unlawful detention this Court expressed that when a constable has taken into custody a person reasonably suspected of an offence he can do what is reasonable to investigate the matter and to see whether the suspicion is supported or not by further residence. He can take the suspect to his house or place of work to see if he can get important evidence or confirm the suspects alibi. So long as full measures are taken reasonably they are an important adjunct to the administration of justice and there can be no false imprisonment. On malicious prosecution, this Court held that to prosecute a person is not prima facie tortuous but to do so dishonestly or unreasonably is malicious prosecution which differs from wrongful arrest and detention in that the onus of proving that the prosecutor did not act honestly or reasonably was on the person prosecuted.

43. Comparatively, in the Uganda case of **Katewegga vs. The Attorney General (1973) E.A. 287** the accused was discharged on 13th March l970 and a suit presented on 18th February l971. It was held the discharge was on 13th March l970 and by filing Plaint on 11.2.71 it was deemed time barred. In another Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993** it was expressed that**:**

> **"The plaintiff suffered injury to his reputation. He testified that the news of his appearance in court was published in a newspaper whose circulation is believed to be generally wide. He spent a period of over four months appearing in court on charges, which were hardly investigated by the defendant's servants. He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence…There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages…A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible".**

44. The fact the appellant never instituted his claims based on these torts make all the cases founded on malicious prosecution upon acquittal to be irrelevant in this matter.

45. A ground urged by the appellant in this matter is that the trial court erred in failing to appreciate the meaning of torture as defined in international law. There is a specific convention for the suppression of torture namely: **The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** which Kenya ratified on 26th June 1987. But even if Kenya had not ratified the Convention against Torture, it would still have been bound to proscribe torture within its territory under customary international law. The absolute ban on torture is a principle of *jus cogens* and is a peremptory norm of international law binding independent of treaty, convention or covenant. In this matter, we do not get any sense that the learned judge failed to appreciate the gravity of the allegations of torture. At paragraph 39 of its judgment the judge stated upon scrutiny of the pleadings and depositions filed, he did not think they disclosed any torture, cruel or inhuman treatment. On his part, the appellant contends this finding is not supported by the evidence on record because the High Court in quashing the appellant's conviction made a finding that the trial process was an abuse of court process and the rights of the appellant had been infringed.

46. We have considered the submission by the appellant on the issue. As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal time frame.

47. We take this opportunity to comment on the case of **Koigi Wamwere vs. Attorney General [2015] eKLR,** in which this Court considered the application of the Convention against Torture and award of damages as compensation for violation of fundamental rights and freedoms more particularly the right to fair trial. This Court expressed itself thus:

> **"We now turn to the appellant's grievance that the learned judge erred by not awarding damages for the violation of the appellant's rights in Nakuru Criminal Case No. 2273 of 1993. It was the appellant's contention that the charges preferred in that case on which he was convicted by the trial court but acquitted on appeal in 1997 were fabricated for political reasons and he was thus entitled to compensatory general damages. Further, his rights are alleged to have been violated by reason of legal and constitutional irregularities inimical to a fair trial as set out in** Section 77(1) and (2) **of the old Constitution.**
>
> **The learned judge took the view that the judicial system was properly functional at the time as evidenced by the fact that the appellant was able to file and successfully argue an appeal from his conviction which the High Court quashed and set aside the sentence. She therefore held that had the appellant genuine complaints as to the prosecution which he termed malicious, he ought to have filed a suit for appropriate redress. The learned judge was quick to add that the success of a criminal appeal does not, in and of itself, mean that the trial in which the successful criminal appellant was tried and convicted was *ipso facto* malicious or improper.**
>
> **We have anxiously perused and considered the learned judge's reasoning on the question of the alleged violation of the appellant's rights within the context of Nakuru Criminal Case No. 2273 of 1993. We are unable to agree that the learned judge misdirected herself, applied wrong principles, considered extraneous matters or failed to take into account relevant matters and thus arrived at a decision that was so plainly wrong as to invite our interference. We are not satisfied that the complaints raised before the learned judge with regard to the motivations that impelled the institution of the charges against the appellant are such as bring his case outside of the general purview of the tort of malicious prosecution, if at all, and are therefore unable to accept as valid the criticism leveled against the judge for concluding as she did.** (Emphasis supplied)

48. Guided by the dicta of this Court in **Koigi Wamwere vs. Attorney General [2015] eKLR**, we are not satisfied that in this matter, the complaints raised before the learned judge with regard to the motivations that impelled the institution of the charges against the appellant are such as to fault the findings of the trial court and to accept as valid the criticism leveled against the judge that he was biased.

49. In totality, our analysis and re-consideration of the evidence on record lead us to conclude the appellant has not satisfied us the trial judge erred in finding there was unexplained and inordinate delay in filing the petition before the trial court. This appeal has no merit and is hereby dismissed with no order as to costs.

Delivered and delivered at Nairobi this 8th day of February, 2019

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR