



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, KIAGE & MURGOR, J.J.A.)

CIVIL APPEAL NO. 190 OF 2017

BETWEEN

PRISCILLA MWARA KIMANI.....1ST APPELLANT

LUCY WATURI KIMANI.....2ND APPELLANT

ESTHER GATHONI GICIMU.....3RD APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(An appeal against the judgment and decree of the High Court at Nairobi (I. Lenaola, J.) (as he then was) dated 15th April 2016

in

H.C.C. Petition No. 197 of 2013)

JUDGMENT OF THE COURT

The events of the infamous Freedom Corner in 1992 are etched in the history of Kenya, as the day that a group of women made their way into a section of Uhuru Park christened Freedom Corner to peacefully agitate for the release of 53 political detainees, under the then Moi Regime, who were being held for various politically instigated accusations. These women staged a hunger strike for days in order to press for the release of their incarcerated sons. Among them were the appellants who agitated for the release of their son and brother James Gitau Mwaura who was in detention.

It was the appellants' case that on 3rd March, 1992 while conducting a peaceful demonstration at Uhuru Park, they were inhumanely and brutally battered by police and General Service Unit (GSU) Officers with boots, batons, slaps, rubber whips, kicks and blows all over their bodies, all while they were unarmed and peaceful hence the attack was uncalled for. Further, that on the same day at around 9.45pm while still at freedom corner in a tent fasting they were arrested by over 100 police and GSU officers, bundled into a police vehicle and taken to their respective rural homes in Kiambu County. They stayed in their rural homes for five days and went back to Nairobi and began a peaceful campaign and hunger strike afresh at the All Saints Cathedral Church vowing that the brutal officers could as well kill them in solidarity rather than give up their cause. They claimed that they were hosted and camped in the bunker at the All Saints Cathedral from 4th March, 1992 to 19th January, 1993 when all the political prisoners were released; that all this time, the officers continued to attack them while at the Cathedral and inflicted various injuries on them.

As a result of these atrocities, they were outraged and filed a constitutional petition before the High Court alleging that their fundamental rights and freedoms under **Articles 25 (a) and 29 (a), (c) (d) and (f)** of the Constitution were contravened and grossly violated by Police officers, General Service Unit Officers and other Kenyan Government servants, agents, employees and institutions on diverse dates and times from 3rd March 1992 up to 19th January, 1993. The appellants sought the following reliefs: a declaration that their fundamental rights and freedoms were contravened and grossly violated by the police and GSU officers on diverse dates and times between 3rd March, 1992 and 19th January, 1993; a declaration that they were entitled to the payment of general damages, exemplary and moral damages and compensation for the said violations under **Article 23 (3)** of the Constitution; general damages, exemplary and moral damages for torture for each appellant and; costs.

The respondent refuted the aforesaid claims on the basis that they are misconceived, unsubstantiated, and bad in law. In response it was

argued that the claims failed to meet the threshold of the definition of torture pursuant to **Section 74** of the Repealed Constitution as well as under the 1984 Convention Against Torture; that the cause of action took place 20 years before filing of the petition hence prejudicial to the respondent and; that the evidence relied on by the appellants of old newspaper articles was inadmissible.

This matter was placed before Lenaola, J (as he then was) who heard and determined the petition. In the learned Judge's decision there were two substantive issues for determination; whether there has been a violation of the appellants' constitutional rights; and if so, the remedies available to them.

However, before determining these key issues, the learned Judge addressed his mind to the preliminary issue of limitation raised by the respondent. On this preliminary question, the learned Judge took cognizance of the fact that upon the promulgation of the Constitution 2010, there has been an unprecedented number of suits filed alleging violations of constitutional rights and fundamental freedoms by earlier governing regimes in Kenya. The learned Judge further observed that this was not the first time the courts have been faced with such a question of limitation of time regarding such suits where violations have occurred over 20 years ago. The learned Judge relied on the cases of **Joan Akinyi Kabasellah and 2 Others vs. Attorney General, Petition No. 41 of 2014**; **Ochieng' Kenneth K'Ogutu vs. Kenyatta University and 2 Others, High Court Petition No. 306 of 2012**; **Joseph Migere Onoo vs. Attorney General, Petition No. 424 of 2013** to come to the conclusion that: there is no limitation of time for filing claims alleging violation of constitutional rights and fundamental freedoms; that each case must be examined and gauged on its own merits and the question whether the delay is inordinate is therefore left to the discretion of the court which is to examine each case on its merits; that courts must consider the justification of any such delay.

Having so found, the learned Judge proceeded to consider the justification of delay by the appellants. Citing the cases of **Gerald Gichohi and 9 Others vs. Attorney General Petition No. 487 of 2012**; **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited vs. Governor Central Bank of Kenya and 2 Others, Miscellaneous Civil Application 1759 of 2004**; **Charles Gachathi Mboko vs. Attorney General, Civil Case No. 833 of 2009 (O.S.)** and; **Smith vs. Clay [1767] Eng R 55**, as authority, the learned Judge expressed himself as follows:

“48. I will repeat what I have stated in other Petitions arising from the events at Freedom corner in 1992 that it is now no longer a matter of debate that since 2002 after the change of political regime in Kenya, hundreds of claims have been filed by genuine victims of historical injustices. The Kenyan Judiciary, admitting its role in shutting out such claims in the past, and in the spirit of transitional justice, opened its doors, relaxed its application of strict rules of evidence and granted appropriate reliefs under both the Repealed Constitution and the Constitution, 2010. One of the rules evidently relaxed was that of limitation of time. By this judgment, I have stated that whereas limitation of time may not be strictly applied, Parties coming to Court ten (10) year after the opening up of the floodgates of justice must explain themselves and it would therefore be very difficult for this Court to accept at face value claims filed after 2012 without clear and justifiable explanations for the delay.

49. Apparent and increasing abuse of the Court process by parties intent on making money from the State relating to incidents that happened twenty or thirty years ago without proper explanations for the delay in instituting the claims may in fact attract sanction from this Court. Genuine claims will and must however continue receiving the attention of the Courts for years to come but frivolous claims based on real events but with no proof of violations of constitutional rights will be frowned upon. The present Petition falls in the latter category and must be dismissed.”

Naturally, aggrieved by this decision the appellants have lodged this appeal on 16 grounds consolidated into 4 issues in their submissions as follows: whether the affidavit and oral evidence of brutal attack on unarmed appellants by the Kenyan government police officers and GSU officers at the freedom corner on 3rd March 1992 and All Saints Cathedral between 5th March 19th January 1993 was torture or not; whether the learned Judge ought to have been guided by similar precedents which decided that there was torture and violation of human rights of 8 mothers at freedom corner and their supporters; whether there was any constitutional or statutory limitation to file petitions filed on human rights violations or fundamental rights and; whether the appellants were entitled to the five (5) prayers in their petition.

On the first issue, it was the appellant's submission that through their affidavit evidence deposed on 17th April, 2013 and oral evidence in court which was not rebutted; that this evidence was primary evidence as they were eye witnesses and gave personal accounts of how they were tortured; that their reliance on the Society magazine was secondary evidence. In this regard the appellant's faulted the learned Judge for giving weight to the contents of the Society magazine as opposed to the other evidence of their eye witness account. Further, the appellant's explained their delay by submitting that before the torture cases were determined by the new judiciary, they had no faith in the old judiciary.

On whether the learned Judge ought to have been guided by similar precedents, the appellant submitted that the human rights struggle between 28th February 1992 and 3rd March 1993 was a historical fact whereby 8 mothers of political prisoners embarked on a peaceful campaign at freedom corner after which they handed a petition to the government through the Attorney General for release of their sons; that among the 8 women was the 1st appellant; that this case is similar to the case of **Milkah Wanjiku Kinuthia & 2 Others vs. Attorney General, Nrb Petition No. 281 of 2011, 282 of 201, 337 of 2011 and 338 of 2011** whereby Lenaola, J (as he then was) ruled that the three petitioners' rights were violated by the government and proceeded to award Kshs.2.25 million to the petitioners; that the learned Judge contradicted himself by stating that there was evidence that the appellants were at freedom corner and at all saints cathedral on the material days yet found that they were not tortured.

On the question of constitutional limitation, it was posited that both the Constitution 2010 and the repealed constitution do not limit the time for filing a constitutional reference and human rights cases founded on violation of fundamental rights and freedoms; that this has also been the finding in various decisions of the High Court and this Court.

On the quantum of damages it was contended that affidavit evidence is the most probative especially where the same has not been rebutted by either a replying affidavit or any oral evidence, since the allegations have not been rebutted they are entitled to the five prayers in their petition; that the learned Judge was availed a recent decision by this Court in **Koigi Wa Wamwere vs. The Attorney General**, Civil Appeal No. 86 of 2013, where general damages for torture were enhanced from Kshs. 2.5 million to Kshs. 12 million. It was therefore their submission that in awarding the quantum of damages, the High Court ought to have been guided by this latest Court of Appeal decision and

award KShs. 5 million to each appellant which in their view is both adequate and reasonable under the circumstances. For the aforementioned reasons the appellants urged that their appeal be allowed.

The respondent opposed the appeal. It was its contested that when a party alleges torture, the expectation of the law is four-fold that: there must be evidence of severity of pain as per the provisions of **Article 1** of the Convention Against Torture; there must an intent in reckless indifference to the possibility of causing pain and suffering; acts that do not cause extreme pain and suffering to an ordinary person are normally outside the definition of torture and; the act of torture must involve a public official. It was the respondent's submission that the appellants did not prove any of the aforementioned conditions which they were required to prove on a balance of probabilities by dint of the Evidence Act.

It was submitted that the appellants misinterpreted the learned Judge's finding on limitation and their allegation that the Judge found that the appellants had no right to institute their petition after 22 years was erroneous; that the learned Judge was very categorical in stating that no limitation can be imposed in matters where violation of rights have been alleged thus the memorandum of appeal is misleading. The respondent submitted that blame has been apportioned to the learned Judge on grounds that he did not understand the level of proof needed to find that torture was committed against the appellants. To refute this claims the respondent submitted that **section 107** of the Evidence Act is clear that he who alleges must prove; that the allegations of the appellants were controverted by the respondent and as such it was incumbent upon the appellants to prove on a balance of probabilities that the allegations were true. See: ***Lt. Col. Peter Ngari Kagume & Others vs. Attorney General***, Constitutional Petition 128 of 2006; that there was no evidence presented by anyone including fellow demonstrators to corroborate their allegations that they were indeed tortured. The respondent agrees with the finding by the learned Judge that the appellant's failed to make out a case for violations of their rights and that their claims were driven by financial gain and not genuine redress to the alleged violations.

Lastly, it was the respondent's submission that newspaper cuttings are not authoritative sources of information and evidence in law and therefore cannot be relied upon by the court. See: ***Tesco Corporation Ltd. vs. Bank of Baroda (K) Ltd.***, Civil Case No. 182 of 2007, where it was held that newspaper articles are not covered under the provisions of **section 35** of the Evidence Act. In view of the foregoing it was urged that the appeal be dismissed as it is misinformed, misconceived and lacks merit.

Having considered the record, the submissions by the respective parties, the authorities cited and the law, the issue for determination is whether the learned Judge properly exercised his powers in dismissing the appellants' petition.

This is a first appeal. In the case of ***Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates Civil Appeal No. 161 of 1999***, this Court stated as follows regarding the duty of first appellate court:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind 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.”

In the case of ***Ephantus Mwangi and Geoffrey Ngugi Ngatia vs. Duncan Mwangi Wambugu [1982]-88 1KLR 278***, the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or its demonstrated that the Judge acted on wrong principles or that no reasonable tribunal would have reached that conclusion.

Further, in the case of ***Mbogo & Another vs. Shah*** (1968) EA 93 at 96, it was stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion.

A close scrutiny of the judgment, shows that the learned judge having considered the record and the submissions by the respective parties, framed two issues for determination whether there has been a violation of the appellants' constitutional rights; and if so the remedies available to them.

Prior to the determination of these issues, the learned Judge addressed his mind to the preliminary issue of limitation of the petition raised by the respondent which had to be determined before tackling the substantive issues raised in the petition. In our view the issue of limitation is jurisdictional and should be determined at the first instance. See: ***Leisure Lodges Limited vs. Amirali Shariff, Civil Appeal No. 192 of 2015*** where this Court stated:

“It has long been laid firmly that limitation is a jurisdictional issue and therefore can be raised at any stage of the proceedings. This Court in the case of Kenya Ports Authority vs. Modern Holdings [E.A] Limited, Civil Appeal No. 108 of 2016, succinctly summarized the principles governing jurisdiction of a court as follows

“Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by

law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See *The Owners of the Motor Vessel Lilian 'S' vs. Caltex Kenya Limited (1989) KLR 1.*

The learned Judge in dispensing with the issue of limitation first noted the plethora of petitions filed in the High Court under the new Constitutional dispensation alleging violations of constitutional rights and fundamental freedoms by earlier governing regimes in Kenya. The learned Judge proceeded to make the following observations relying on case law: that the delay in filing such claims was occasioned by the politically repressive climate that was then prevailing citing the case of ***Ochieng Kenneth K'Ogutu vs. Kenyatta University & 2 Others***, High Court Petition No. 306 of 2012; that the courts have been confronted with the question of limitation and gave examples of cases where it was held that there is no limitation for filing proceedings to enforce fundamental rights the learned Judge in that regard referred to the following decisions citing the case of ***Joan Akinyi Kabasellah & 2 Others vs. Attorney General***, Petition No. 41 of 2014; that this delay should be justified and not be prejudicial to the respondents citing the case of ***Joseph Migere Onoo vs. Attorney General***, Petition No. 424 of 2013. The learned Judge was minded of the fact that the constitutional spirit is premised on the dictates of transitional justice in order to redress the legacies of massive human rights abuses however this could not be a *carte blanche* for raising stale claims after a number of years without a justification for the delay. Applying these principles to the circumstances of the case the learned Judge came to the conclusion that no justification was given pertaining to the inordinate delay in presenting the petition whereas the violations occurred over 21 years ago. As a result, the learned Judge agreed with the respondent that the delay in the circumstances is prejudicial. The learned Judge also relied on the case of ***Charles Gachathi Mboko vs. Attorney General***, Civil Case No. 833 of 2009 (O.S) whereby the court warned against the dangers of allowing claims brought long after the fact without explanation. Bearing all these principles in mind the learned Judge expressed himself as follows:

“36. In a nutshell, I must state that length of delay is not the issue per se but acceptability of the explanation proffered by a party is also an important consideration. The doctrine of laches is based on the maxim that “Equity aids the vigilant and not those who slumber on their rights” and “Delay defeats equity” and whereas there are cases in other jurisdictions as alleged by the Petitioners pertaining to violations of rights by old regimes such as the Nazis among others, I must remind the Petitioners that each case alleging violation of constitutional rights and fundamental freedoms must be determined on its own merits and in its own circumstances. A blanket acceptance of old and stale claims cannot advance the fair administration of justice.

37. In the present case, I am aware, and it was so pleaded, that the Petitioners are the mother and sisters respectively of their advocate, Gitau Mwaura Esq. whose release they were agitating for in 1992. It is also common knowledge that he instituted his own claim against the State many years ago and it is difficult to understand why he did not institute his mother’s and his siblings claim at the same time. The present claim was therefore made for less than genuine reasons and I so find.”

The appellants in this regard, fault the learned Judge in their memorandum of appeal as follows:

“4. The learned Judge erred in law and in fact in finding that the 3 Appellants had no right to institute their Petitions for violation of the fundamental Right from torture, inhuman and degrading treatment after 20-22 years whereas violations of fundamental Rights have no time limitations under the repealed Constitution and The Constitution of Kenya, 2010 or under the local Human Rights Law and International Human Rights Law”

In our opinion this ground of appeal is a misinterpretation of the learned Judge’s finding. The trial court did find that indeed there was no limitation to filing proceedings to enforce fundamental rights however, the learned Judge emphasized and maintained that the delay should be justified and not prejudicial to the respondent. We are inclined to agree with the respondent that this ground of appeal is misleading. Further, on this issue of limitation, it has not been demonstrated to this Court, that the learned Judge in exercising his discretion applied the law in a manner that is clearly wrong because he either misdirected himself or acted on matters which he ought not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. This ground must therefore fail as we see no basis to interfere with the discretion of the trial court.

The learned Judge having established that the appellants were guilty of laches and that the claim was instituted for less than genuine reasons, the learned Judge would have stopped there but in the interest of justice, the trial court proceeded to determine the substantive issues in dispute.

On the proof of the allegations of torture, the trial court observed that save for the affidavit evidence and oral testimony, the appellants placed substantive reliance on a newspaper articles. Relying on the provisions of **sections 107 and 109** of the Evidence Act and the case of ***China WuYi and Co. Ltd. vs. Samson K Metto***, Civil Appeal No. 181 of 2009 where it was maintained that “he who alleges a fact must prove”, the learned Judge placed the responsibility on the appellants to prove their case which finding was proper.

This leads us to the question; did the appellants discharge their burden? The issue of violation of constitutional rights could not be proven based on mere allegations. The appellants had a burden to prove that they were tortured and as a result it led to their suffering either physically or mentally.

Under **Article 1** of The United Nations Convention against Torture and other Cruel and Inhuman or Degrading Treatment, the term ‘torture’ is defined as:

“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.” (Emphasis Ours)

The Ugandan case of ***Salvatori Abuki and Another vs. Attorney General*** Constitutional Case No. 2 of 1997(1997) UGCC 5, a five-

judge bench expressed itself as follows on what constitutes inhuman treatment:

“What is “inhuman”? There is no judicial (sic) definition of that word. The shorter Oxford English Dictionary definition of the word “inhuman” includes not having the qualities proper or natural to human being, destitute of natural kindness or pity, brutal unfeeling. Because of the difficulties in ascertaining the exact meaning of the word, courts in other jurisdictions have resorted to illustrate the meaning by referring to some kinds or modes of punishments which were historically prohibited in England for being inhuman or cruel. They included the use of racks, thumbscrew, stretching limbs etc. Use of rack was also practiced in some parts of Uganda to punish witches or Witch-Doctors (Night Dancers). The common feature in this punishment is the causing of severe pains and suffering to the victim either physically or mentally.” (Emphasis Ours)

From the foregoing, the question we ask ourselves is whether the appellants proved that they were subjected to severe pain and suffering either physically or mentally? A perusal of the record shows the respective supporting affidavits of the appellant’s dated 15th April, 2013 where they have narrated the series of events that took place on the material dates and documented how their rights were violated. In their petition they state that:

“The three (3) Petitioners and fellow mothers, sympathizers, relatives and friends were attacked by over 100 Kenya Police Officers and G.S.U with tear gases, batons and guns while unarmed which left the three (3) Petitioners, fellow mothers, men and women badly injured and some like the late Prof. Wangari Mathai (God rest her soul in eternal peace) were taken to various Hospitals unconscious ...”.

The proceedings before the High Court show that the appellants were the only witnesses for the petitioners. From their testimonies, it is evident that: the 1st appellant (PW1) claims she was injured in the eyes but did not go to hospital for fear of arrest, she conceded that she was **not arrested** but rather **fled** the cathedral. In the same testimony she contradicts herself by saying that she was **not taken to her home after arrest** and states that she was not taken to any police station; the 2nd appellant (PW2) testified that she was at freedom corner with her mother (PW1), brothers and her aunt (PW3). She claims to have been injured but she did not go to hospital and that she has no medical reports for any psychological torture. She stated that she was arrested and taken home; the 3rd appellant (PW3) also states that she was at freedom corner and that she was arrested and taken to Muthaiga Police station before being taken to Ting’ang’a and told never to return to Nairobi. She had no records of her arrest and no medical records.

Apart from their affidavit evidence and oral testimonies, the appellants relied on articles by the Society Magazine titled “**State Tyranny**”. Surprisingly, the appellants claim that there were at freedom corner together with many other women whom they did not call to testify to corroborate their evidence. Equally, all the appellants claim to have been tortured and physically injured yet they did not go to hospital and have no medical records. They also have no evidence of being at any police station and some like the 1st appellant testified that she was not arrested but rather she fled the cathedral. Some of the other mothers who the appellants claim to have been together with, for example, Milka Wanjiku Kinuthia filed a similar petition being ***Milkah Wanjiku Kinuthia & 2 Others vs. Attorney General, Nrb Petition No. 281 of 2011, 282 of 201, 337 of 2011 and 338 of 2011*** which was successful. If indeed the appellants were together with Milkah as claimed, they should have called her to testify and corroborate their evidence. Clearly, the appellants failed to give evidence of torture that had an effect on them either physically or mentally thus the threshold constituting torture was not achieved. The learned Judge was correct to find that no evidence corroborated the appellants’ assertions that they were tortured and that perhaps medical records would have sufficed. No such evidence was tendered by the appellants.

The appellants’ reliance on the Society Magazine article was found to be inadmissible by virtue of **section 35** of the Evidence Act and the findings in the cases of ***Tesco Corporation Ltd. vs. Bank of Baroda (K) Ltd., Civil Case No. 182 of 2007*** where it was held that newspaper reports are not covered under the provisions of **section 35** of the Evidence Act and ***Kituo Cha Sheria & Another vs. Central Bank of Kenya and 8 Others***, Petition No. 191 of 2011 consolidated with 292 of 2011, where it was held that media articles, taken alone, are of no probative value and do not show any effort was made by the petitioners to demonstrate violation of the Constitution by the respondents.

It is worth noting that the learned Judge unlike this Court, had the first hand opportunity of seeing and hearing the witnesses and to take note of their demeanor. The learned Judge observed the casual manner in which they made their allegations of torture which he opined if factual would have had catastrophic effects on their physical well-being. He proceeded to express himself as follows:

“46. Interestingly however, in their oral evidence and during cross-examination, the Petitioners admitted that they did not seek any medical attention despite the aforesaid attacks by over 100 officers for a continuous period of about ten months. They instead referred to people like the late Prof. Wangari Maathai who were injured and taken to hospital. This in itself raises a lot of questions in regard to their assertions. I saw them in Court and I am convinced that those assertions were less than candid if read with their Petition.”

Having found that the appellant’s had not made out a case for violation of their rights as alleged as they failed to provide proof or torture to the required standard the learned Judge dismissed their claim as follows:

“49. Apparent and increasing abuse of the Court process by parties intent on making money from the State relating to incidents that happened twenty or thirty years ago without proper explanations for the delay in instituting the claims may in fact attract sanction from this Court. Genuine claims will and must however continue receiving the attention of the Courts for years to come but frivolous claims based on real events but with no proof of violations of constitutional rights will be frowned upon. The present Petition falls in the latter category and must be dismissed.”

From the foregoing, it is evident that the learned Judge properly addressed his mind to the burden of proof required and properly made reference to **sections 107 and 109** of the Evidence Act which read as follows:

“107. Burden of proof

(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.

...

109. Proof of particular fact

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.”

The appellant’s evidence of reliance on the newspaper article was also correctly found to be inadmissible based on the cases of **Tesco** (supra) and **Kituo Cha Sheria** (supra). Having dismissed this evidence and failure by the appellant’s to corroborate both their affidavit and oral evidence the appellant’s failed to discharge their burden of proof and as a result were not entitled to the prayers sought in the petition. The learned Judge could not have been guided by similar precedents as contended by the appellants as each case is unique and determined on its own merits; in the other successful petitions arising out of the Freedom Corner incident the parties there discharged the burden of proof and substantiated their claims to the required standard as such were entitled to the reliefs sought unlike in the current circumstances.

Unquestionably, the learned Judge properly discharged the exercise of his discretion which cannot be faulted and there is no need for this Court to interfere with the findings of the learned Judge as he arrived at the correct conclusion.

In light of the foregoing, we find no merit in the appeal. It is accordingly dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 6th day of August, 2019.

.....

M. WARSAME

JUDGE OF APPEAL

.....

P. O. KIAGE

JUDGE OF APPEAL

.....

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR