IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 95 OF 2016

BETWEEN

DANIEL KIBET MUTAI..1ST APPELLANT

STEPHEN MALOBA VODEMBEKE...................................2ND APPELLANT

JOSEPH ATZIAYA AMUDABI...3RD APPELLANT

AGGREY NDEDA MUKALANI...4TH APPELLANT

WILSON ARAP TOWETT..5TH APPELLANT

SIMON KIPTOO TALAM...6TH APPELLANT

MOSES KIBITOK YEGO...7TH APPELLANT

ELIUD KIPKORIR SANG..8TH APPELLANT

JOHN CHERUIYOT SUMEI..9TH APPELLANT

JOHN KIRWA BIRGEN..10TH APPELLANT

AND

ATTORNEY GENERAL..RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret,

***(Kimondo, J.) Dated 30th September, 2015 in* High Court Petition No. 12 of 2012)**

JUDGMENT OF J. MOHAMMED, J.A

This appeal originates from one of the many cases that have arisen from the attempted coup that took place in Kenya in August 1982. The background to the appeal and the submissions made by the parties have been well captured in the judgment of Okwengu, JA that I have had the opportunity to read in draft. I entirely concur with the judgment of Okwengu, JA.

The appellants' action was lodged on 2nd October, 2012. The appellants have not given any explanation at all for the delay in bringing their action. As was stated by this Court in **Wellington NziokaKioko vs. Attorney General [2018] eKLR,** although there is no time limit in respect of constitutional petitions,and such a petition would ordinarily not be defeated by the doctrine of laches. However, an unexplained delay of almost 30 years in bringing the action, makes it impracticable for the court to properly administer justice and renders the action an abuse of the court process. For this reason I would uphold the dismissal of the appellants' suit.

The orders shall be as proposed by Okwengu, JA.

JUDGMENT OF OKWENGU, JA.

[1] On 1st August, 1982, Kenya woke up to news of a coup attempt to overthrow the Government of the Republic of Kenya, then led by President Daniel Arap Moi. The coup attempt was initiated by members of the then Kenya Air Armed Force. The coup attempt failed following the intervention of the Kenya Army Armed Forces who quelled the coup and matters reverted back to normal. Following the attempted coup, the appellants who were all serving as officers of the Kenya Air Force (KAF) at the material time, were arrested, detained, arraigned and charged before a Court Martial; and then all dismissed from the Kenya Air Force.

[2] The appellants were each 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 on 2nd October, 2012 before the High Court by way of a constitutional petition seeking the following declarations:

> (i) A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the petitioners upon being taken into custody, the cruelties, violence, brutalities and the extreme, cruel, inhuman and degrading conditions that the petitioners were subjected to in the various military, police, and civilian prisons custody constituted breaches of fundamental rights and freedoms of the petitioners as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by sections 70(a) and 74(1) of the former Constitution (now Articles 27(1),(2), 28 and 29(a), (c), (d),(f) of the Constitution of Kenya, 2010.
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> (ii) A declaration that the pre-arraignment *incommunicado* detention of the respective petitioners of 2 ½ to 8 ½ months in military, police and civilian police custody, the period of imprisonment for which conviction and sentence was quashed on appeal and the period of deprived remission o sentence constituted periods of arbitrary, unlawful and illegal detention and violation of the fundamental rights of the petitioners as to human dignity, personal liberty, freedom from cruel, inhuman and degrading treatment and/or punishment and the protection of law including right to a fair trial guaranteed by sections 70(a), 72(1)&(3),74(1) and 77 of the former Constitution (now Articles 27(1)&(2), 29(a), 49(1)(f) and 50(2) of the Constitution of Kenya, 2010).
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> (iii) General, exemplary, aggravated and punitive damages consequential to the declarations of violations of the fundamental rights and freedoms of the petitioners in prayers (i) and(ii) above as shall be assessed by Court.

[3] Each appellant swore an affidavit in support of the claim. Daniel Kibet Mutai (1st appellant), deposed that he was enlisted in the Kenya Air Force on 12th September 1979. After his training, he was posted to the Kenya Air Force base at Nanyuki until April 1982 when he was transferred to Kenya Air Force Eastleigh Base. On the date of the failed coup, he was woken up, ordered to dress up in Full Scale Marching Orders (FSMO), informed that the government had been overthrown by the military, and was then issued with a rifle and ammunition. Together with Simon Kiptoo Tallam (6th appellant) and other soldiers, they were dropped at the General Post Office and ordered to guard it. While at the post office, he met Moses Kibitok Yego (7th appellant) and none of them was aware of what was happening but noted that there appeared to be no order of command. The 1st, 6th and 7th appellants they decided to escape to Nakuru. At Gilgil, the car they were travelling in was intercepted by Kenya Army Officers. They were arrested and later confined at Naivasha Maximum Prison. After 2 ½ months, the 1st appellant was transferred to Kamiti Maximum Prison, then taken before a court martial and charged with the offence of mutiny. He deponed that the military counsel assigned to him advised him to plead guilty, which he did, and he was sentenced to 16 years imprisonment. His sentence was reviewed by the Military Review Board to 4 ½ years imprisonment. His appeal to the High Court against his conviction and sentence by the court martial was successful and he was freed from prison after having been in prison for 2 years and 5 months. The 1st appellant swore that during the period between his arrest and being charged at the court martial, his rights were violated as he was subjected to physical and mental torture and suffered serious physical injuries. That while in detention he was held in complete incommunicado with no access to anyone. Ultimately, he was unfairly dismissed from the Kenya Air Force.

[4] Stephen Maloba Vodembeke (2nd appellant) swore in his affidavit that he was enlisted with the Kenya Air Force on 2nd September, 1977 and rose to the rank of corporal. At the time of the failed coup, he was stationed at the KAF base at Eastleigh. On the material date, he was at his house in Dandora when he heard from the radio that the Government had been overthrown. Following the announcement, he rushed to the base where he was ordered to arm himself and be in full uniform, which he did. He was ordered to remain at the airbase and await further orders from his seniors. With no orders forthcoming, he remained at the base until around 3.00 p.m when officers from the Kenya Army arrived, and ordered him and other officers to surrender. He was disarmed, stripped half naked and detained at Kamiti Maximum Prison for seven days in inhumane conditions. He was transferred to Naivasha Maximum Security Prison where he was detained for 3 months until 2nd November, 1982 when he was presented before a Court martial and charged with the offence of mutiny. On the advise of a military counsel, he pleaded guilty, and he was sentenced to 17 years imprisonment. A military review board reviewed his sentence to 12 years and later to 7 years. He appealed to the High Court which further reduced his sentence to 6 years imprisonment. Although his remission was never formally denied he was deprived of 8 months 2 days remission and illegally held in custody until his release on 20th July, 1987. He added that during his detention his rights were violated as he was held incommunicado and was subjected to physical and mental torture thus occasioning him serious physical injuries. Ultimately, the 2nd appellant was dismissed from the Air Force.

[5] Joseph Atziaya Amudabi (3rd appellant), swore that he was enlisted in the Kenya Air Force in February 1976 and was posted to the Kenya Air Base at Nanyuki and later KAF base at Eastleigh. On the date of the failed coup, he was woken up by screams from soldiers ordering everyone to dress up in FMSO. He later heard over the radio that the coup had been subdued. Thereafter officers from the Kenya Army invaded the base, and marched the 3rd appellant and his colleagues from the Air Force base into a truck. They were taken to Kamiti Maximum Prison where the 3rd appellant was beaten and sustained injuries. He was held in filthy conditions for two weeks. Thereafter he was transferred to Naivasha Maximum Prison, where he was locked up in solitary confinement and held in inhumane conditions for seven months after which he was transferred to Kamiti Maximum Prison then taken to Kenya Army Kahawa Barracks where he was told that he was dismissed from the Kenya Air Force. He was dropped at the Railways Stage, given fare of Kshs. 70/- to travel to his hometown and told never to be seen around a military base again. He asserted that he was unlawfully dismissed from the force; and that he was unlawfully detained for 7 months and 24 days during which period he was physically injured and held incommunicado with no access to anyone.

[6] Aggrey Ndenda Mukalani (4th appellant), deposed that he was enlisted with the Kenya Air Force on 12th September, 1979. On the day of the failed coup, he had travelled to Eldoret to visit a cousin and only learnt of the coup from the radio, where he also heard an announcement asking all personnel from KAF to report to the nearest military base or police station; that two days later, he travelled back to the KAF base where he surrendered to Kenya Army soldiers who proceeded to physically beat and assault him. He was detained at the guardroom at the base where he was kept without any food for 8 days. Later he was transferred to Kamiti Maximum Prison where he was held under deplorable conditions. One month later, he was transferred to Naivasha Maximum Prison where he was physically assaulted and held in solitary confinement until 13th March 1983 when he was released from prison. Later he was dismissed from employment. He concluded that he was detained for 7 months and 12 days during which period he was held incommunicado, physically assaulted and ultimately dismissed.

[7] Wilson Arap Towett (5th appellant), also deponed in his affidavit that he was enlisted with the Kenya Air Force in 1975 and posted to the Kenya Air Force base at Eastleigh. On the date of the failed coup, he was woken up by soldiers who stormed into their singles living quarters at the base, ordered him to arm himself and informed him that the Government had been overthrown. Together with others he was ordered to await further orders from their seniors, only to later learn that the coup had failed when Kenya Army soldiers stormed into the base. He quickly changed into civilian clothes, and hid in some bushes until the next day when he decided to travel to Nanyuki. He was however stopped at a roadblock along Kiganjo, Nyeri where he was arrested by soldiers from the Kenya Army and locked in a make shift cell at KAF Nanyuki until late October 1982 when he was transferred to Naivasha Maximum Security Prison. He was locked up in deplorable conditions and physically assaulted. Later he was transferred to Kamiti Maximum Security Prison where he was detained for a night and then taken to a court martial where he testified against Senior Private Injeni Injeremani. He remained detained at Kamiti Maximum Prison until 4th March, 1983 when he was released from prison, driven to Kahawa Barracks and informed that he was dismissed from the Air Force. He was dropped at the Railways stage and given Kshs. 70/- as his bus fare home. He swore that he was unlawfully detained for 7 months and 4 days during which period he was held incommunicado and denied medical attention for the injuries inflicted on him.

[8] The 6th appellant also deponed that he was enlisted in the Kenya Air Force on 7th February, 1979 and was on the material day stationed at Ground Air Defence Unit (GADU) at Kenya Army Embakasi. On 31st July, 1982, he spent the night at KAF Eastleigh as he was to go to Forces Memorial Hospital the next day for treatment. On the day of the failed coup, he was woken up by shouts from soldiers who ordered that they dress in FSMO. He then rushed to the armory where he was informed that the Government had been overthrown. He was dropped at the City Centre where he met the 1st appellant and together, they were ordered to stand guard at the General Post Office (GPO) and await further orders. Later he met the 7th appellant and when it became apparent that there was no structure of command, they decided to proceed to Nakuru. They were stopped at a road block at Gilgil, where they were arrested by Kenya Army personnel, and locked up at the Jomo Kenyatta Artillery Barracks. He was detained at the artillery for two days under deplorable conditions without any food. He was later transferred to Lanet Barracks where he was detained for another three days and subjected to beatings. He was later transferred to Naivasha Maximum Prison where he was beaten up and put in solitary confinement for two and a half months. He was later transferred to Kamiti Maximum Prison, then charged before the Court Martial with the offence of mutiny to which he pleaded guilty upon persuasion by the military counsel. He was sentenced to 16 years imprisonment and sent to Kodiaga Prison and later transferred to Naivasha Maximum Prison. He appealed against his sentence at the High Court but was only released on 27th October, 1984 after he agreed to testify against one Lieutenant Ndege. Later he was dismissed from the Air Force. He concluded by deponing that he was detained for 87 days during which period he was held incommunicado with no access to anyone and did not receive any treatment for his injuries.

[9] The 7th appellant also swore *inter alia* that he was enlisted in the Kenya Armed Forces in August 1981 and after his training, was posted to the Kenya Army 5th Air Calvary Battalion at Embakasi where he worked until the date of the failed coup. On the fateful date at around midnight, he was awoken by sounds of gun shots and soldiers ordering them to dress in full scale uniform and to rush to the armory. He did so and was issued with a rifle and ammunition and was informed that the Government had been overthrown. He deponed that he was deployed in the City Centre where he met the 1st appellant and the 6th appellant. Upon realizing that there was no clear chain of command, they boarded a bus at Westlands with a view to traveling to Nakuru. However, they were stopped at a road block at Kiganjo where they were arrested by Kenya Army Officers who disarmed them, beat them and took them to the Kenya Army Jomo Kenyatta Artillery Barracks Gilgil. He was locked up at the guard room for two days without any food and forced to sleep on the cold floor with no beddings. Later he was transferred to Lanet Barracks and taken to Naivasha Maximum Prison where he stayed in solitary confinement in deplorable conditions for two weeks. After 2½ months he was transferred to Kamiti Maximum Prison then taken to the Court Martial and charged with the offence of mutiny. On the advise of the military counsel, he pleaded guilty to the charge and was sentenced to 4 years imprisonment. He was sent to Kodiaga Maximum Prison and later Naivasha Maximum Prison where he served his full term until his release on 25th October, 1986. He was denied remission of his sentence which he was entitled to under the Prisons Act. As a result, he was unlawfully detained for 16 months and 25 days as he should have been released by the end of June 1985 if granted remission. The 7th appellant concluded that he was unlawfully dismissed from the KAF after serving his sentence and that he was unlawfully detained for 86 days when he was denied medical attention for the injuries suffered during his incarceration.

[10] Eliud Kipkorir Sang (8th appellant) also swore *inter alia* that at the time of the failed coup, he was employed by KAF and deployed at the Ground Air Force Defence Unit (GADU) at Kenya Army Barracks at Embakasi. Like the other appellants he was also on the date of the failed coup woken up at midnight by sounds of gunshots and ordered to dress in Full Scale Marching Orders (FSMO). He learnt that the Government had been overthrown and was issued with a rifle and ammunition. Later in the day, he was arrested together with other officers of KAF by officers from the Kenya Army. He was taken to Kahawa Barracks and detained there for three days during which he was beaten, left half naked and locked up in a waterlogged guard room. He was then transferred to Kamiti Maximum Prison and later Naivasha Maximum prison where he remained until 29th September, 1982 when he was transferred back to Kamiti Maximum Prison and later taken to Kahawa Barracks. He was arraigned before a court martial and was charged with mutiny. He was sentenced to 8 years imprisonment. A military review board reviewed his sentence and reduced it to 3 years imprisonment. He was not accorded any remission of sentence and served the entire 3 years until his release on 30th September, 1985. He asserted that he was unlawfully detained for 60 days and given no medical help for injuries afflicted, nor was he allowed access to family or friends, and after his release from jail he was unfairly dismissed from the air force.

[11] John Cheruiyot Sumei, (9th appellant), also swore in his affidavit that he was enlisted in the Kenya Air Force on 7th February, 1979 and was posted to KAF Eastleigh Base, Nairobi. On the date of the coup, he was woken up by a soldier dressed in Full Scale Marching Orders

who was ordering everyone to dress up and arm themselves. He proceeded to the armory, where he learnt that the Government had been overthrown. He remained at the base until members of the Kenya Army attacked the KAF base and ordered them to surrender. He was detained at the KAF Base guard room which was overcrowded. He remained in detention where he was beaten and left half naked with no access to health care. He was later transferred to Kamiti Maximum Prison where he was again exposed to physical beatings, and after two weeks transferred to Naivasha Maximum Prison where he was detained in solitary confinement in inhumane conditions. Later he was transferred to Naivasha Maximum Prison. On 28th September 1982 he was arraigned before a Court Martial and charged with mutiny. He pleaded guilty to the offence and was sentenced to 10 years imprisonment. He was escorted to Kodiaga Prison where he served his sentence until 1983 when a military review was done and his jail term reduced to 10 years imprisonment. He was eventually released from prison on 27th August 1985. The 9th appellant swore that he served his prison term of one and a half years in inhumane conditions; that he was detained for 59 days during which period he suffered physical assault; that he was held incommunicado with no access to medical care; and that finally, he was unfairly dismissed.

[12] John Kirwa Bigen (10th appellant), deponed in his affidavit that he was enlisted with the Kenya Air Force on 7th February, 1979 and posted to the Aircraft Engineering Squadron at KAF headquarters in Eastleigh Nairobi. Like the 9th appellant he was woken up by gunshots and a soldier dressed in Full Scale Marching Orders ordering everyone to dress up and arm themselves. He remained at the base until around 3.00 p.m when the base was attacked by Kenya Army officers after which he surrendered. He was detained in the guard room where he was stripped naked and physically assaulted. He stayed at the guard room for 17 days in an overcrowded room and was later detained at Kamiti Maximum Prison for three weeks after which he was transferred to Naivasha Maximum Security Prison where he was held in deplorable conditions. He was later transferred to Kamiti Maximum Prison and on 27th September, 1982, he was escorted before a Court Martial and charged with the offence of mutiny. On advise of the senior military counsel, he pleaded guilty to the charge of mutiny and was sentenced to 10 years imprisonment. A military review board reviewed his sentence and reduced it to three years after which he was released in 1985. He was then dismissed from the force. The 10th appellant added that he was detained for a period of 55 days during which time he was denied medical attention for the injuries suffered and he was held incommunicado with no access to family.

[13] The petition was opposed by the respondent through grounds of opposition in which the respondent maintained that the petition and its supporting affidavits were defective and a waste of time; that the petition was filed in bad faith and failed to meet the conditions of Article 22 of the Constitution; that the appellants were guilty of laches as the events occurred in 1982; that the appellants failed to explain the inordinate delay of 30 years hence were not deserving of equitable remedies; that the Department of Defence was justified under the Armed Forces Act Cap 199 Laws of Kenya to take reasonable disciplinary measures against inndisciplined members of the force; and that the allegations by the appellants are unsubstantiated, false and mere hearsay and a ploy to hoodwink the court into sympathizing with them.

[14] At the hearing of the petition, both parties did not call any oral evidence but opted to have the petition disposed of through written submissions that were duly filed and exchanged. Having considered the petition, its supporting affidavits along with the submissions of both parties, the learned Judge (*Kimondo, J*) found that there had been undue laches as the appellants' claim was brought after inordinate delay, and that no explanation was given for the delay. Further, that the appellants failed to adduce concrete and tangible evidence to prove any of their allegations of violation of their fundamental rights not to be tortured or deprived of personal liberty, nor did they offer any factual or evidential evidence that could form the basis for an award of damages. Consequently, the learned Judge dismissed the petition and ordered each party to bear their own costs.

[15] The appellants who were aggrieved with the judgment have now filed this appeal in which they have listed nine grounds of appeal. In brief the appellants faulted the trial judge for erring in law and fact:

> **(i) in finding that the appellants claim on violation of fundamental rights against torture and ill- treatment were defeated by laches when no factual basis/and or prejudice had been laid by the respondents;**
>
> **(ii) in fixing a limitation period for filing the petition for violation of human rights;**
>
> **(iii) in finding that the appellants did not lead any evidence in court despite their being detailed averments in their affidavits in support of the petition;**
>
> **(iv) in holding that the appellants affidavits were bare allegations and did not amount to sufficient evidence;**
>
> **(v) in holding that the appellants claims of violations of their fundamental rights and freedoms were not admitted despite the respondent not filing any replying affidavit or adducing oral evidence in rebuttal of the claim**
>
> **(vi)in elevating the grounds of opposition filed by the respondent to factual evidence capable of rebutting the evidence in the affidavits filed by the appellants**
>
> **(vii) in holding that the appellants as members of the disciplined forces could not maintain an action for liability and compensation in damages for violation of their fundamental rights and freedoms**
>
> **(viii) in holding that the deprivation of the appellant's right of remission was at the absolute discretion of the Commissioner of Prisons and could be denied without cause or a hearing**
>
> **(ix) in failing to accord the appellants a fair and impartial trial**

[16] In support of the appeal, the appellants relied on written submissions and supporting bundle of authorities that had been filed by their advocates Mbugua Mureithi & Co. The appellants submitted that the learned Judge erred in rejecting their claims on the ground that it was defeated by laches, when there is no limitation period for filing of petitions to enforce fundamental rights and freedoms; that the learned

Judge erred in finding that the appellants were guilty of laches; that the learned Judge's insistence on an explanation for the delay in the filing of the petition was uncalled for as the same could only arise if the respondent had alleged and demonstrated that they suffered prejudice due to the delay in filing the petition; that the respondent also did not file a replying affidavit demonstrating the prejudice suffered; that the learned Judge erred in arbitrarily purporting to fix a limitation of 12 years without any statutory provision in support of the same. In support of these submission the appellants relied on the Court of Appeal decision in **Peter.M. Kariuki –vs- Attorney General [2014] eKLR** in which a claim lodged after 23 years was allowed, was relied upon.

[17] Further, the appellants submitted that the learned Judge erred in dismissing the petition on grounds of laches without considering the public interest in the petition, which intended to correct a historical injustice, and to secure the future of the country as a human rights respecting nation; that unlike private individuals for whom limitation of actions is a good safeguard against loss of memory, death of witnesses and loss of documents, the same cannot be asserted by the Government and public bodies as they have institutional memories in archives that hold its old documents; that the courts while handling petitions relating to human rights violations have accepted generic broad based explanations for late filing of the petitions relating to the status of governance in our country, such as the fear of the authoritarian Moi regime, alleged emasculation of the judiciary and its inaction during the Moi regime, and enhanced protection of human rights in the 2010 Constitution; and that consequently it was open for the courts to take judicial notice of these reasons, as reasons for delay in seeking redress for historical injustices. The case of **Gerald Juma Gichohi & 9 Others –vs- Attorney General [2015] eKLR** was relied upon.

[18] The appellants argued that an affidavit is evidence on oath; that *Rules 12, 13, 18 and 19 of* ***the Constitution (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 ('the Gicheru Rules*'**) provided for hearing of constitutional petitions by affidavits and submissions, without necessarily calling oral evidence; that averments in an affidavit can only be rebutted by a replying affidavit or oral evidence which was not done by the respondent; and that the learned Judge was in error in finding that the respondent's grounds of appeal contested the petition and hence there was no admission of the claims by the respondent. The appellants further faulted the learned Judge in finding that the appellants failed to prove the claim of unconstitutional pretrial detention as no documents were produced in support of this claim, yet the averments in the appellants' affidavits detailed their arrests, detention and dates of arraignment. In addition, that once the appellants had established an inordinately long pretrial detention (as they had through their affidavits), under section 72(3)(b) of the repealed Constitution and under sections 48 and 72 of the Armed Forces Act CAP 199 (repealed), the burden was on the State to justify the pretrial detention and to prove that the appellants were brought before a court as soon as reasonably practical; that instead the learned Judge erred by shifting this burden of proof to the appellants. The appellants were of the view that as the learned Judge accepted that the appellants had been arrested and charged, the respondent had the onus to discharge the appellants' complaint that they were arraigned outside the constitutional and legal limits.

[19] The appellants further faulted the learned Judge, for exhibiting bias in selectively picking averments made by the appellants in their affidavits, which he deemed to be valid evidence and common grounds by finding that the appellants were indeed servicemen subject to the repealed Armed Forces Act; that the appellants were arraigned before the Court Martial and charged with activities leading to the failed coup; and concluding without any evidence from the respondent that the appellants participated in the failed coup and were therefore not entitled to damages.

[20] The appellants maintained that they had set out detailed narrative in their affidavits describing the inhumane and degrading treatment, torture, and cruelty that they suffered; that what they were exposed to was within the meaning of torture as provided for under Article 1 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and applied in the High Court cases of **Harun Thungu Wakaba –vs Attorney General [2010] eKLR,** and **Denish Gumbe Osire –vs- Cabinet Secretary, Ministry of Defence & Another [2017]eKLR;** and that the unchallenged narrative was sufficient proof of violation of their fundamental right not to be subjected to torture, cruelty or inhumane treatment.

[21] Finally, on the issue of remission, the appellants submitted that the 2nd, 7th, 8th and 9th appellants were denied their statutory right to remission of sentence without notice or a hearing, that this was breach of the fundamental right to personal liberty and provided a cause of action and right to remedy for unlawful detention; that Section 46(2) of the Prisons Act and Rules 95(1), 96 and 97 expressly provide for the right of a prisoner to remission of sentence; and the learned Judge was therefore wrong in holding that remission of sentence was at the absolute discretion of the Commissioner of Prisons and that its denial did not amount to unlawful detention. The appellants therefore urged the Court to allow the appeal, set aside the judgment of the High Court; enter judgment in favour of the appellants and assess the damages payable to them taking note that the amount of Kshs. Two Million proposed by the learned Judge for each appellant was too low.

[22] The respondent filed written submissions with supporting bundle of authorities. In the submissions the respondent identified five issues from the 9 grounds of appeal that were raised in the appellants' memorandum of appeal. These were: the unexplained delay and laches in filing the constitutional petition vis-à-vis the right to a fair trial; the burden of proof in constitutional petitions: whether it shifted to the respondent; question of locus standi: whether Chapter V of the repealed Constitution was available; the right to remission is it absolute of discretionary; and what compensation would be awardable had the claim been proven?

[23] In regard to the issue of unexplained delay and laches, the respondent submitted that the appellants misconstrued the holding of the learned Judge, and failed to appreciate that the learned Judge rightly held that there is no limitation of time on filing a petition claiming violation of human rights under the Constitution, but that in the absence of cogent explanation for the delay it was proper to conclude that the delay was unreasonable; that the learned Judge found that there was undue laches in presenting the appellants' petition as the appellants failed to give a proper explanation for the delay in bringing their action; and that in any case the learned Judge did not dismiss the petition because of undue laches but because it was devoid of merit.

[24] In addition, the respondent submitted that the learned Judge did not attempt to fix a limitation period in constitutional petitions, but rather determined the effect of unexplained delay in bringing the petition, on the principle of fair trial, that is, whether the same occasioned prejudice to the respondent and whether this had any effect on fair trial. The respondent argued that no explanation was offered either in the petition or the appellants' affidavits for the delay of 30 years; that in view of existing judicial determinations made during the revered Moi regime, the explanations offered in the appellants' submissions were unconvincing and self-defeating; that the appellants did not prove that they attempted to petition the violations but were threatened or in any other way forced to rescind their move; that the delay in bringing the claim not only defeated justice but occasioned prejudice to the respondent as it robbed it of its inherent right to fair trial and denied the

respondent a chance to rebut the allegations or test the credibility of the allegations made by the appellants; and that the delay rendered the appellants petition a mere abuse of the due process.

[25] On the issue whether the burden of proof in constitutional petitions shifted to the respondent, the respondent maintained that under sections 107,109, and 110 of the Evidence Act. the duty to prove the alleged violations of the appellants' rights rested on the appellants; that the appellants did not present any evidence that could make the burden of proof to shift to the respondent or warrant a rebuttal by the respondent; that constitutional petitions being *sui generic* in nature, and given the seriousness of the appellants' allegations, proof on balance of probability was not sufficient; and, that without any tangible evidence in support of the appellants' allegations, the learned Judge could not make a finding in their favour.

[26] The respondent maintained that the fact that they had filed grounds of opposition without any replying affidavits was not an admission of the allegations in the petition, nor did it shift the burden of proof to the respondents; that the court remained with its role of assessing the credibility of allegations, and without medical records or independent and verifiable evidence to show that the appellants were tortured, or treated cruelly or treated in an inhumane and degrading way, the learned Judge was right in coming to the conclusion that the appellants had failed to discharge the onus of proof on their claims.

[27] On the question of locus standi and whether Chapter V of the repealed Constitution was available, the respondent submitted that the learned Judge was right in observing that the appellants who were members of the disciplined force could not benefit from their acts of indiscipline as this was prohibited under the previous Constitution and the Armed Forces Act (repealed); that being members of the disciplined force the appellants were specifically excluded from invoking provisions of Chapter V of the former Constitution; that the appellants having been arrested as a result of a failed coup, they were inevitably, liable to disciplinary proceedings under the repealed Armed Forces Act; that the appellants could not purport to challenge disciplinary proceedings meted to them due to something they did and for which they pleaded guilty to charges of mutiny; and that the limitation of the appellants' rights was justifiable in an open and democratic society.

[28] On the alleged unfair dismissal from service, the respondent submitted that the appellants having pleaded guilty, and having been convicted and sentenced by the court martial, it properly exercised powers under section 102(6) of the Armed Forces Act to dismiss them; that issues relating to disciplinary proceedings were not constitutional issues but an employer employee dispute that lay squarely in the Employment and Labour Relations Court (formerly Industrial Court) under Article 162 of the Constitution; and that claims relating to false imprisonment and assault were squarely within the jurisdiction of the Magistrate's Court and were subject to limitation period under the Public Authorities Limitation Act.

[29] On the issue of remission, it was submitted that the right to remission is not absolute, that it should be earned; that eligibility to remission is a matter of discretion of the Commissioner of Prisons; that there was no evidence that the Commissioner of Prisons did not properly exercise his discretion; that in any case the affected appellants did not merit remission due to national security, public order, and public interest, and that denial of such a right does not amount to breach of liberty. The respondent concluded that the appellants were not entitled to any damages and asked the Court to dismiss the appeal.

[30] As this is a first appeal, it is the duty of this Court to analyze and re-assess the evidence on record and reach its own conclusions in the matter. We reiterate what this Court stated in ***Selle -vs- Associated Motor Boat Co*., *[1968] EA 123*, that**:

> "***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 vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

[31] As the hearing of the petition did not proceed by way of oral evidence, but through affidavit evidence and submissions, this Court is in the same position as the High Court, to the extent that just like the High Court it did not have the advantage of seeing and assessing the demeanour of the witnesses. That leaves us with the obligation of reconsidering the affidavit evidence, the rival submissions made by the parties, and the law, in order to draw our own conclusions. At the outset we find it common ground that although the respondent was served with affidavits sworn by each appellant in support of the petition, the respondent did not file any affidavit in reply, but only filed grounds of opposition to the petition. A pertinent legal issue therefore arises as to what is the effect of the respondent's failure to file a replying affidavit? This is a question that has previously been addressed by the High Court severally. Two examples will suffice.

[32] In **Phillip Tirop Kitur v Attorney General [2018] eKLR,**

Mativo J dealt with a similar situation in which the petitioner a former university student sued for violation of his fundamental rights and swore an affidavit in support of his petition, averring that he was arrested, subjected to torture, inhuman and degrading treatment, charged, convicted for sedition, and sentenced to a term of imprisonment without proper due process being followed. In response to the petition as in the present appeal, the Attorney -General only filed grounds of opposition, but did not file any replying affidavit or call any oral evidence. The High Court accepted the affidavit evidence, and ruled that in the absence of a replying affidavit or oral evidence from the Attorney General, the petitioner's evidence stood unchallenged. The High Court awarded the petitioner Kshs 6,000,000. In addition, the High Court rejected the Attorney General's contention that the delay in filing the petition, had caused it prejudice, ruling that in the absence of a replying affidavit or oral evidence, the court had no facts upon which it could make such a finding.

[33] Similarly, in the case of **Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR** Odero, J addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated:

> ***"As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014 and ELIUD NYAUMA OMWOYO & 2 OTHERS –Vs KENYATTA UNIVERSITY). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."***

[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?

[35] We reproduce here below an extract of the judgment showing how the learned judge dealt with the issue of the affidavit evidence:

> ***"26. No oral testimony was led in this matter. When the learned counsel for the petitioners and the learned state counsel appeared before my predecessor on 8th April 2014, they informed the court they would rely on the depositions and grounds of oppositions. They agreed to proceed by way of written submissions. When the learned counsels appeared before me on the 1th June 2015 they reiterated their position and sought judgment.***
>
> ***27.What are before the court are thus bare allegations by the petitioners. True, the respondent did not file a replying affidavit. But the respondent contested the claim by the grounds of opposition dated 7th April 2014. So much so that there is no admission of the claim. It is a principle tenet of the law of evidence that he who alleges must prove. See sections 107(1) and 109 of the Evidence Act. The petitioners failed to adduce concrete or tangible evidence to prove any of the grave allegations made against the State. In Margaret Wanjiru Ndirangu and 4 others v Attorney-General Nairobi, High Court Petition 210 of 2013 [2015] eKLR the court observed orbiter-***
>
> *'This court will not tire reminding the victims of historical injustices such as petitioners that this is a court of law and it operates within the parameters of the law and nothing else. It is not enough for them to come to court and make serious allegations against the state and the violations meted upon them and fail to substantiate them with evidence.'* **"**

[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.

[37] Furthermore, at the time of the hearing of the appellant's petition the procedure for hearing of constitutional petitions for violation of Fundamental Rights and Freedoms was provided under the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.*** Rule 20 of these rules provided for hearing of such petitions as follows:

> **(1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—**
>
> **(a) affidavits;**
>
> **(b) written submissions; or**
>
> **(c) oral evidence.**
>
> **(2) The Court may limit the time for oral submissions by the parties.**
>
> **(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.**
>
> **(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.**

[38] It is evident from the above that 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.

[39] In effect although the respondent disputed the appellants' claim, the facts alleged in support of the claim were not disputed. In this regard the appellants' case was distinguishable from the case of ***Margaret Wanjiru Ndirangu and 4 others v Attorney-General Nairobi,*** (supra) that was relied upon by the trial Judge, and in which a replying affidavit sworn by a deputy director in the Kenya Police Service was

filed denying the allegations that were made in the affidavits sworn in support of the petitions. In the appeal before us not only was no replying affidavit sworn, but the respondent to some extent pleaded justification. This means that the respondent was asserting that assuming that the facts were as alleged they were justified in the actions taken. We come to the conclusion that the appellants' affidavits not having been challenged by the respondent, the facts averred were essentially admitted. The learned Judge erred in rejecting the affidavit evidence as they formed an appropriate basis for the claim.

[40] In his judgment the learned Judge stated that:

> ***"the respondent contested the claim by the grounds of opposition dated 7th April 2014. So much so that there is no admission of the claim. It is a principle tenet of the law of evidence that he who alleges must prove. See sections 107(1) and 109 of the Evidence Act"***

[41] First, the learned Judge failed to distinguish 'admission of the claim' from 'admission of the facts alleged in support of the claim'. The respondent did not file any replying affidavit challenging the facts that were alleged. However, the respondent filed grounds of opposition maintaining that it was not liable to the appellants basically on grounds of law, to wit that the petition was incurably defective; that it does not rise to the threshold of a constitutional petition as envisaged by Article 22 of the Constitution; that there has been undue laches running into thirty years; that the Department of Defence was entitled under the Armed Forces Act to take certain disciplinary measures; and that the petitioners were subjected to due process.

[42] It is true that the burden of proof was on the appellants to prove the facts which they asserted. In an effort to do this the appellants in their supporting affidavit deposed to facts which showed how they were arrested immediately after the attempted coup; the treatment that they were subjected to after they were arrested; the places where they were detained; how each was treated during pre-trial detention; and the trial and sentence at the Court Martial. Although there were no annexures or other evidence in support of the appellants' alleged arrest, torture or even incarceration at the prison (except for the 1st appellant who annexed newspaper articles of his conviction and sentence for the charge of mutiny, and a subsequent appeal), the fact of the appellants being officers of the Kenya Airforce, their arrest and imprisonment for mutiny as a result of the attempted coup, was not denied. The learned Judge had therefore no reason to question the appellants' affidavit evidence as they laid an appropriate basis for the appellant's claim.

[43] As regards the weight or probative value of the factual evidence, that was averred in the affidavits, and whether the evidence is sufficient to prove the appellants' claims, the appellants swore to what they personally suffered and experienced, and therefore their averments in the affidavits are direct evidence of what transpired. 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.

[44] Furthermore, the standard of proof was one of a balance of probability, and the High Court could not treat the proceedings relating to the appellant's petition differently merely because the respondent is the State. Much as appreciate that there is an element of public interest in the litigation as payment of any damages will come from the public coffers, fundamental rights and freedoms are sacrosanct and the court has a high responsibility of protecting these rights. The respondent having made a conscious and deliberate decision not to respond to or challenge the appellants' affidavit evidence, the learned Judge could not become the respondents' advocates by questioning evidence that had not been challenged. In effect that would amount to applying a higher standard of proof than that of a balance of probability.

[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. As regards the similarity of the facts averred in the affidavits, this cannot be read against the appellants. After all they were all being held for more or less the same reasons, and being subjected to interrogation by officers of the Kenya Army who were no doubt using similar tactics to break their resistance. The similarity reinforces and provides consistency in the conduct of the Kenya Army officials in the way they dealt with the Kenya Airforce officers whom they deemed to be insurgents. It would be unreasonable to expect that the appellants would know the names of the officers who subjected them to torture. As far as they were concerned the officers were officers of the Kenya Army, and it was not denied that they were arrested and detained. That was sufficient for the purpose of their petition.

[46] The most pertinent issue in regard to the appellants' claim, is whether there was undue laches in the filing of the petition, and if so whether this vitiates the appellants' claim. The appellants' affidavits are clear, that the appellants' cause of action arose in 1982 when they were arrested immediately after the attempted coup. The cause of action continued with their detention, court martial, imprisonment and finally dismissal from service. Also, it is evident from the affidavits that the first appellants to be released from prison were the 3rd 4th and 5th appellants, who were released in March 1983, and the last appellant to be released was 2nd appellant who was released on 20th July 1987. Going by these dates, the petition which was filed in October 2012 was filed between 29 and 25 years after the cause of action had arisen. The issue is whether there was undue delay in filing of the petition, and if so, what is the effect of the undue delay on the appellants' petition?

[47] Again this is an issue that has been addressed by the High Court and we are in agreement with the approach taken by the High Court (*Mativo, J*) in addressing a similar issue in **Edward Akong'o Oyugi & 2 others v Attorney General** **[2019] eKLR** in which the learned Judge 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.

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.

[48] Unlike the petitioners in the above quoted case, who provided explanation for the delay in filing their petition, the appellants herein did not give any reasons in their affidavits, for the delay in filing their petition. Instead, an attempt was made by the appellants' advocate to explain the delay in the written submissions. But of course, written submissions are mere arguments postulated by counsel, which cannot pass for proven facts. Moreover, assuming that we were to take judicial notice of the fact that the appellants could not bring their claim during President Moi's regime, there is no explanation given as to why the claim was not filed immediately after the impugned President Moi left power after the 2002 elections.

[49] In **Peter M. Kariuki v Attorney General** (supra), the Court in addressing a delay of 23 years in bringing a claim similar to that of the appellants stated as follows:

We have already adverted to the fact that the appellant filed his constitutional petition some twenty three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.

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.

[50] In **Wellington Nzioka Kioko v Attorney General [2018] eKLR,** this Court considered this issue and concluded as follows:

"On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, She considered several persuasive decisions of the High Court for instance Wamahiu Kihoro Wambugu vs A.G .Petition No. 468 of 2014; Mugo Theuri vs. A.G, Ochieng' Kenneth Kogutu vs Kenyatta University and 2 others, High Court Petition No. 306 of 2012, and several others. 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 plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that"

………..

In this case we agree with the learned Judge that no plausible reason was given for the inordinate delay. The reasons given for

not filing the petition with promptitude were that he was poor, he did not have parents, and that his family depended on him. Those in our view are not plausible reasons. The appellant could have gone to court and applied to file the claim as a pauper. There is no evidence that he tried to pursue that route. Could it be that the appellant had not suffered and only decided to lodge the claim because others had done so and they had been compensated" We cite with approval the following finding by Majaja J in James Kanyita Nderitu vs A.G and Another, Petition No. 180 of 2011.

"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 it 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."

We agree with the learned Judge that the delay of 30 years was not explained and on that point alone, we hold that the appellants claim was properly dismissed.

[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. To this extent this case is also distinguishable from **Harun Thungu Wakaba v Attorney General** (supra), and **Gerald Juma Gichohi & 9 others** (supra) in which as in **Edward Akong'o Oyugi & 2 others v Attorney General** (supra), the delay was explained.

[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.

[53] On the issue of remission, the learned Judge stated as follows:

"50. The claim that the 2nd, 7th, 8th and 9th petitioners were denied their rights to remission is on a legal quicksand. Under the repealed Constitution and the relevant provisions of the Prisons Act, the right to a remission was neither absolute nor automatic. It had to be earned by each prisoner. It was also subject to the discretion of the prison authorities. I am not satisfied that failure to grant a remission amounted to a violation of the petitioners' rights of liberty in this case, I am fortified in that finding by the holding of Lenaola J in Gerald *Juma Cichohi & 9 Others v Attorney General* Nairobi, High Court Petition 587 of 2012 [2015] eKLR. The learned Judge held-

'The repealed Constitution did not provide for right to remission in execution of sentences authorized by law and in pursuant [sic] to a court order. Secondly, remission is not absolute and as can be seen from the provisions of sections 46 of the Prisons Act, it is not absolute nor is it automatic. It is subject to a prisoner's industry and good character and is also at the discretion of the Commissioner for Prisons and may be denied if it is in interests of public security or public order to do so. Thirdly, as explained by the petitioners in their written submissions, execution of sentence of a court of law is governed by the Prisons Act and that being so, refusal to grant a remission would actually not amount to a violation of right to liberty. However, I do not believe that lack of being given remission would actually amount to unlawful detention therefore a deprivation of right to liberty.'"

[54] In order to appreciate section 46 of the Prisons' Act we reproduce the section hereunder:

(1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall —

(i) any remission granted result in the release of a prisoner until he has served one calendar month;

(ii) any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

(2) For the purpose of giving effect to the provisions of subsection (1), each prisoner on admission shall be credited with the full amount for remission to which he would be entitled at the end of his sentence if he lost no remission of sentence.

(3) A prisoner may lose remission as a result of its forfeiture for an offence against prison discipline, and shall not earn any remission in respect of any period—

(a) spent in hospital through his own fault; or

(b) while undergoing confinement as a punishment in a separate cell.

(4) A prisoner may be deprived of remission —

(a) where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner;

(b) where the Cabinet Secretary for the time being responsible for internal security considers that it is in the interests of public security or public order.

(5) Notwithstanding the provisions of subsection (1) of this section, the Commissioner may grant a further remission on the grounds of exceptional merit, permanent ill-health or other special ground.

[55] Our understanding of section 46 (1) is that except for prisoners sentenced to life imprisonment, or sentenced under section 296(1) or sentenced under the president's pleasure all convicted prisoners may by industry and good conduct earn remission of their term of imprisonment, as section 46(2) indicates that each prisoner is to be credited upon admission with full amount of remission that he would be entitled to if he did not lose any remission of sentence. Subsection 3 and 4 lists the circumstances in which a prisoner may lose or be deprived of the remission.

[56] Therefore, the use of the word "may" in 46(1) does not connote a discretion to give or not to give remission, but the fact that remission is not absolute as it may be lost in certain circumstances. The 2nd appellant, 7th appellant, and 8th appellant swore that they were not given any remission and each served their full term of imprisonment. The reason why the appellants lost their remission was a matter that was specially within the knowledge of the Prisons Department. In the absence of a replying affidavit from the respondent, there was no justification given for the denial of the remission. Remission was a legal right that the 2nd 7th and 8th appellants were entitled to enjoy, and contrary to the finding of the learned Judge the denial meant that the appellants were unlawfully deprived of their freedom.

[57] On the issue of dismissal, the learned Judge rendered himself as follows:

> ***"48. Under section 102(6) of the repealed Armed Forces Act, which was the relevant statute, a conviction and sentence of imprisonment by the Court Martial would result in a dismissal from the force. See Peter Kagume v Attorney General, High Court, Nairobi, Petition 128 of 2006 [2009] eKLR. None of the petitioners has produced cogent evidence relating to their discharge to show that there was a transgression of the Act.***

[58] We are in agreement that section 102(6) was applicable for the 1st appellant, 2nd appellant, 6th appellant, 7th appellant, 8th appellant, 9th appellant and 10th appellant who were all convicted by the Court Martial for the offence of mutiny. Their dismissal was the logical and legal consequence of their conviction. For this reason, we agree with the learned Judge that the action for unfair dismissal was not maintainable in regard to the 1st, 2nd, 6th, 7th, 8th 9th and 10th appellants. As for the 3rd, 4th and 5th appellants they were not convicted of any offence under the Armed Forces Act nor did the respondent demonstrate that they committed any act that warranted their dismissal from the service. Each of them claimed not to have been involved in the mutiny, and the fact that they were released without being charged with any offence vindicates them. In the circumstances their dismissal has not been shown to have been justified under section 102 of the Repealed Armed Forces Act. However the appellants did not seek any relief for this in their petition. Moreover, their claim for unfair dismissal is an independent claim that ought to have been pursed under the Employment Act.

[59] In the memorandum of appeal the appellants raised an issue as to whether members of the disciplined forces can maintain an action for violation of fundamental rights and freedoms. The following extract from the judgment of the learned Judge reflects the view the judge learned took:

> ***"45. At the beginning, I laid out two important contexts surrounding this claim: that the petitioners were members of the disciplined forces; and they participated in an illegal enterprise to overthrow the constitutional order. Even assuming they were following orders, the orders were unlawful. Majority of the petitioners pleaded guilty to charges of mutiny or participating in the insurrection. Quite apart from the dearth of concrete evidence to support their claims, it would be a travesty of justice to reward them in the circumstances with damages. Fundamentally, there is no factual or evidential basis for an award of damages.***
>
> ***46. This petition must be distinguished from the circumstances obtaining in Koigi Wamwere v Attorney General, Court of Appeal, Nairobi, Civil Appeal 86 of 2013 [2015] eKLR; or the case of Margaret Wanjiru Ndirangu & 4 Others v Attorney General Nairobi, High Court Petition 210 of 2013 [2015] eKLR; or the civilians held in unlawful detention; or, in the infamous Nyayo House dungeons. Those were civilians agitating for civil rights or constitutional change. They did not in the majority of cases take up arms against the State.***

[60] From the above it is clear that the learned Judge did not draw a distinction between the appellants who were tried and convicted for the offence of mutiny, and those appellants who were detained for several months and subsequently released without being charged. The learned Judge noted that there was dearth of evidence to support the allegations that the appellants were held for long periods before being arraigned in court. The learned Judge did not take into account the affidavit evidence that was availed by each appellant explaining how each was subjected to physical and mental torture, and the periods that they were held. As already stated elsewhere in this judgment the affidavit evidence was not controverted.

[61] Under Article 25(a) of the Constitution, freedom from torture and cruel, inhuman or degrading treatment or punishment is a fundamental right that cannot be limited. This means that the fact that the appellants were members of the disciplined forces did not preclude them from enjoying this right. The actions of being physically and mentally tortured through brutal beatings, denial of food for days and solitary confinements were all acts of torture and degrading treatment intended to demoralize, demean and weaken the appellants in order to breakdown their resistance.

[62] Much as we do not doubt that the appellants suffered the alleged treatment, the appellants had the obligation to avail evidence in proving

the extent of the injury they suffered from the physical and mental torture that each of them experienced. This was necessary for purposes of helping the court in assessing the damages that should be awarded. In the absence of such evidence the Court could only award a nominal amount, and we would agree with the learned Judge that a global amount of Kshs.2 million would have sufficed as damages to each appellant for violation of their fundamental rights in regard to human dignity, protection against torture, cruel, inhuman and or degrading punishment during their arrest and pre-arraignment detention following the attempted coup.

[63] Finally, on the issue whether the appellants were accorded a fair and impartial trial during their arraignment before the court martial, we find that without copies of proceedings of the court martial the evidence placed before us is insufficient to come to the conclusion that the appellants were denied a right to fair trial. We would therefore uphold the dismissal of the appellants' claim in this regard.

[64] I come to the conclusion that for reasons that I have stated the appellants' action for violation of their fundamental rights could not succeed. Accordingly, I would dismiss the appeal. In the circumstances of this case I do not find it appropriate to make any orders as to costs. As Mohammed, JA is in agreement the appeal is dismissed with no orders as to costs.

Those shall be the orders of the Court.

This judgment has been delivered in accordance with **Rule 32(3)** of the Court Rules as Judge Waki has since retired from service.

Dated and Delivered at Eldoret this 28th day of November, 2019.

J. MOHAMMED

JUDGE OF APPEAL

HANNAH OKWENGU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.