IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, SICHALE, & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 98 OF 2014

BETWEEN

HON. GITOBU IMANYARA .....1ST APPELLANT

HON. NJEHU GATABAKI.....2ND APPELLANT

BEDAN MBUGUA.....3RD APPELLANT

AND

ATTORNEY GENERAL…….……..... RESPONDENT

(Appeal from part of the Judgment and decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 14th June, 2013

in

HIGH COURT CONSTITUTIONAL PETITION NO. 78 OF 2010 CONSOLIDATED WITH PETITION NOS. 80 & 81 OF 2010)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (Lenaola, J.) delivered on 14th June, 2013 in which the learned Judge awarded ***HON. GITOBU IMANYARA*** (*the 1st appellant herein*) a sum of Kshs. 15 Million, ***HON. NJEHU GATABAKI*** *(the 2nd appellant herein*) a sum of Kshs. 10 Million, and ***BEDAN MBUGUA*** *(the 3rd appellant herein)* a sum of Kshs. 7 Million for general damages arising out of breach of the appellants' fundamental rights and freedoms as enshrined under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the Repealed Constitution by agents of the State of Kenya on various occasions and in different circumstances.

The appellants' respective petitions before the High Court were premised on several Constitutional grounds and averments contained therein. The petitions were supported by the appellants' respective affidavits sworn on different dates. Several averments in their affidavits which were relevant to the petitions before the High Court were essentially the same as the grounds on the bodies of the petitions. We consider it important to set out in summary the narratives of the violations as we can discern from the

record of this appeal.

By a Constitutional Petition dated 16th November, 2010, the 1st appellant stated that the genesis of his persecution by the State agents and more particularly the Kenya Police and the Special Branch started in the year 1982 when he was directed by the Registrar of the High Court to take up the defence of one Paul Nakwale Ekai who was charged with the murder of one Joy Adamson at the High Court in Nyeri. That during one of the appearances and in the course of representing the accused, the trial Judge, Hon. Mr. Justice Mathew Guy Muli, now deceased, ordered for his arrest and was only released after the intervention of then Court Prosecutor, Senior State Counsel Evan Gicheru who later became the Chief Justice of the Republic of Kenya.

That sometime in the year 1982 after the failed coup attempt in Kenya, he accepted to defend scores of Air Force personnel who were implicated and charged either with treason or mutiny for the coup attempt to overthrow the government of the former President Daniel Arap Moi. During the ensuing court martial, the former president coerced him by sending a message through the appellant's late father, Lt. Col. Joseph Imanyara to ask him to withdraw from representing the accused military officers, failure to which the appellant would be subjected to the same treatment as the mutineers and be prosecuted for subversion and treason. The appellant declined this overture telling his father that as an advocate he owed a duty to represent his clients without fear or favour. The Government thereafter maliciously published a forged document where the 1st appellant was accused of being part of a military coup plan which if successful, he was to serve as the Attorney General in the military government.

This was followed by a malicious scheme orchestrated and directed by Hon. Mathew Guy Muli who had become the Attorney General to have him arrested and charged with the offense of stealing by agent notwithstanding that there was no criminal complaint against the appellant in regards to one unpaid client's cheque. He was later convicted for five years without any option of fine and sent to serve his sentence at Kamiti Maximum Security Prison where he was locked in solitary confinement at the notorious E Block with insane prisoners. While serving the sentence, he was denied the basic rights enjoyed by other prisoners such as visits from family members, medical care, and access to legal counsel, contrary to the Prison Act and Regulations.

He averred that following his conviction, he was struck off the Roll of Advocates at the instigation and direction of the Attorney General, Mathew Guy Muli. His family was also evicted from the family residence at Ngumo Estate by the mortgagor the Housing Finance Company at the direction of the Attorney General.

He complained that during his imprisonment at Kamiti Maximum Security Prison, he was severely traumatized and he developed Post Traumatic Stress Disorder which was not properly diagnosed until the year 2010.

On or about 4th July 1990 and following his release from prison, he was arrested from his house at Ngumo Estate by a gang of unidentified men, thrown into the trunk of a Peugeot 504 Station Wagon and driven to Nairobi Area Police Station where he was locked up until 3am. He was then transferred into a Volks Wagen Kombi and made to lie on the floor behind the driver’s seat while blind folded. For the next three hours the officers who were in the vehicle severely tortured him by trampling on his body, assaulting him with rubber clubs on his genitalia and around his ankles. As a result of the beatings, he lost his sense of hearing and could not walk. He was later transferred to the basement of Nyayo House and put in a waterlogged underground cell for ten days. During his lock up in the waterlogged cells, his health deteriorated so much that his chest and ears were blocked and his toe nails fell off due to infection and swellings.

He was then moved to the 22nd floor where he was paraded naked before heavily armed masked state security agents who ordered him to read a document effecting his detention under the Preservation of Public Security Act. He was thereafter transferred to Naivasha Maximum Security Prison where he was treated with expired antibiotics and held in detention without trial until on or about 22nd July 1990 when

he was charged with sedition.

He further stated that on or about September 1990, as a publisher of Nairobi Law Monthly, he was arrested and detained at various police stations in Nairobi and Nakuru. This was followed by a police raid of his offices at Tumaini House where the police destroyed all his computers and clients' files. This led to the loss of his clients which affected his business income as he was unable to pay rent. Thereafter he was sued by his one word for being unable to pay rent and other law suits were commenced by National Bank of Kenya and Deposit Protection Fund and National Council of Churches for failure to honor his credit repayment obligations.

In March 1991, he resumed publication and was again arrested and locked up at the Jomo Kenyatta International Airport Police Station for many days for allegedly tearing a Kenyan currency note bearing the picture of the first president, His Excellency Mzee Jomo Kenyatta. He was later charged with the offence of sedition, denied bail and transferred to Kamiti Security Maximum prison where he was once again held in solitary confinement at E Block with insane and mentally ill prisoners. At the prison, his health deteriorated so rapidly that he collapsed in the cell and was then transferred whilst unconscious to Kenyatta National Hospital where he was chained to a hospital bed for the next three and half months while under treatment. He suffered severe chest and head injuries and had to be flown to London by Amnesty International for further treatment. As a result, the 1st appellant contends that he remains under permanent medication on account of the injuries sustained while under the custody of State agencies.

Finally, he concluded that as a result of the enumerated gross violations, his fundamental rights such as the unlawful arrests, illegal charges, malicious prosecutions, imprisonments, police harassments, torture and physical assaults by the Kenya Police officers, Prison Warders and other Government Servants, Agents, employees and state institutions, he suffered psychological torture, Post Traumatic Stress Disorder, asthmatic bouts, loss of income, loss of right to professional practice and loss of participation in politics.

For the foregoing reasons, the 1st appellant's contention is that his fundamental rights and freedoms of liberty, freedom from inhumane treatment, deprivation of property, arbitrary search and entry, fair hearing and freedom of movement were all violated in the most wanton manner for which he sought the following orders:

> ***1. That there be a Declaration that the Petitioner's fundamental rights and freedoms under*** *Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)* ***of the*** *Constitution 2010* ***Similar provisions were provided under*** *Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)* ***of the repealed Constitution of Kenya have been and were contravened and grossly violated by the Police Officers, Kenyan Government servants, agents, employees and institutions, on various dates at various police cells, Kamiti Maximum Prison, Mbagathi Prison and Manyani Maximum Prison.***
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> ***2. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the Constitution and in particular to full indemnity from the Government arising out of suits filed against the Petitioner by the National Bank of Kenya, the Deposit Protection Fund on behalf of Euro Bank and the National Council of Churches of Kenya and for such damages and/or order.***
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> ***3. General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya 2010 (previously under Section 84(2) of the Repealed Constitution) for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants.***
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> ***4. A Declaration that the conduct of the then Attorney General Matthew Guy Muli at his trial and conviction on account of alleged theft by agent was a mistrial amounting to a gross miscarriage of justice and an order quashing the same and restoring the Petitioner's record.***

5. Any further orders, writs, directions as this Honourable Court may consider appropriate..

The 2nd appellant in his petition dated 22nd November, 2010 pleaded that the genesis of his constitutional violations was in November, 1990 when he was harassed, assaulted and forcibly arrested by a contingent of heavily armed police men who confiscated 50,000 copies of an issue of the "FINANCE" Magazine from "the Standard" printers in Industrial area featuring an "Open Letter" by the late opposition leader Jaramogi Oginga Odinga to former President Daniel Arap Moi where the former was demanding for restoration of multi-party democracy in Kenya. He was thereafter placed under heavy surveillance by the Special Branch, the police and other State security agencies. His phones were continuously tapped, his movements and those of his family members were monitored and restricted. His family members were traumatized by the intimidations and threats posed by the security agencies. Friends and associates also deserted them as a result of the intimidations and fear of reprisal from the police.

He further pleaded that sometime in 1991, the former President Daniel arap Moi made a public pronouncement at the Eldoret Agricultural Society of Kenya for him to be arrested by the police and prosecuted for undermining Moi's regime through the publication of the "FINANCE" news magazine. Between 1991 and 1997 he lost his livelihood and income on several occasions when police officers raided "FINANCE" printers and impounded copies of various issues of the news magazine all totaling 950,000 copies ready for sale at Ksh. 100.00, each, amounting to total loss of income during this period to the sum of Ksh. 95,000,000 (Kenya Shillings Ninety Five Million). The printing press was raided and destroyed every time by the police. As a result of the persecution, the appellant was rendered a destitute, his home in Lavington, Nairobi and a prime property in Githunguru town was auctioned by Kenya Commercial Bank and the National Bank of Kenya respectively for failure to service his loans with the banks. The Government also crippled his livelihood by ordering its ministries, departments and agents to cancel and cease any advertisement in the news magazine terming it as "Enemy of the State." The Magazine thus lost its main source of revenue when the private sector also followed the Government directive for fear of punitive reprisal on the part of the Government.

He further pleaded that between the year 1990 and 2002, he was unlawfully arrested and held incommunicado in various police cells and remand prisons. A total of eighteen seditious and incitement to violence cases were preferred against him culminating into a murder case.

In his affidavit evidence, he deponed that his health was adversely affected as a result of the numerous police harassment, arrests, court cases, numerous threats to his life, frequent raids of his offices and those of printers of "FINANCE" news magazine followed by the destruction of office equipment. The loss of income, uncertainty, and worries about his family led to acute anxiety and mental stress. That on 14th May, 1996, as Member of Parliament for Githunguri Constituency, he was arrested and blindfolded by heavily armed Police Flying Squad driven to various police stations within Nairobi before being arraigned in court with a tramp up charge of capital offence of murdering the late Police Superintendent, Benard Kahumbi. He was then confined incommunicado in a mosquito ridden dark cell at the Railways Police Station for over one week and denied bedding materials, having to stand, sit and sleep on a cold concrete floor. He was also denied medical attention, water and food. This led to loss of memory and fits of head pains. As a result, the 2nd appellant was admitted to Nairobi Hospital for one month where he was diagnosed with primary hypertension and post traumatic headaches. He stated that his health has been permanently damaged and he lives under medication, that the cost of permanent medication and of hospitalization in local and foreign hospitals runs into hundreds of millions of shillings.

He claimed that he was a victim of State sponsored violence and more specifically that on 8th August, 1993 in an attempt to murder him, the security agents and police officers numbering about thirty people disguised as Maasai warriors and armed with bows and arrows, whips, Somali swords, clubs and pistols invaded the "FINANCE" offices in Afro House and viciously attacked and injured several staff members. He escaped the attack because he had miraculously left the offices a few minutes earlier. The State sponsored attackers burnt to ashes the computers, files, camera reader artworks, printers and magazines and took away Kshs. 500,000/= in cash. This attempt on his life was despite the fact that he had complained in writing to the Commissioner of Police as well as requesting security from a nearby police station due to information he had received of an impending attempt on his life.

By the reasons afore stated, the 2nd appellant pleaded that his fundamental rights and freedoms of liberty, freedom from inhumane treatment, deprivation of property, arbitrary search and entry, fair hearing and freedom of movement were all violated in the most wanton manner for which he sought in so far as is relevant the following orders:

> ***1. That there be a Declaration that the Petitioner's fundamental rights and freedoms under*** *Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)****.Similar provisions were provided under*** *Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)* ***of the repealed Constitution of Kenya have been and were contravened and grossly violated by the Police, CID Officers, N.S.I.S(formerly special branch) prison warder and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison and, Kamiti Maximum Prison.***
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> ***2. A declaration that the petitioner is entitled to the payment of damages and compensation of 950,000 copies of Finance directly impounded by the Kenya Police and CID officers amounting to Kshs 95,000,000/= in addition to damages and compensation for the gross violations and contraventions of his constitutional rights and freedoms under the aforementioned provisions of the Constitution.***
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> ***3. General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, 2010(previously section 84(2) of the repealed Constitution for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants...***

The 3rd appellant in his affidavit evidence stated that his persecution by State agents began when as an Editor in Chief of "BEYOND MAGAZINE", he published an article critical of the infamous system of voting known as *"mlolongo"*. The article was critical of the political dictatorship by the retired President Daniel Arap Moi and exposed the massive rigging by the use of *"mlolongo"*system of voting used in the 1988 general elections where candidates with shorter queues were declared the winners. That as a consequence, the magazine was banned on March 14th 1988 rendering him jobless, and as a result, his house was auctioned and he was forced to sell his family property to cater for his children's schooling and food.

He narrated that on one occasion his house and offices were arbitrarily searched and personal effects confiscated by police officers. On this occasion, he was taken to several police stations by the government agents and eventually locked up in a room where he was interrogated for over 10 hours without legal representation. He was later jailed for 27 months at Kamiti Maximum Security prison where he was held in Block E with insane prisoners. He was also subjected to hard labor and corporal punishment despite the fact that such punishment was not part of his sentence. He was forced to crush stones into ballast in the open and under hot sun, the beddings supplied to him such as mattress, blanket and rags for clothing were infested with lice. He was at one time served with beans and maize mixed with pieces of broken glass forcing him to go on a hunger strike. He contended that he was denied bail pending appeal until Mr. Justice Frank Shields quashed his jail term due to pressure from the International Community.

In 1994, he was again arraigned in court on contempt charges for publishing an article in the "PEOPLE DAILY" critical of a Judgment of the Court of Appeal which had dismissed an application for the registration of the University lecturers Welfare Association. During the trial, his right to a fair hearing and trial was infringed when he was given only two hours for adjournment to procure his counsel who had travelled outside the country for emergency medical attention. As a result of the contempt proceedings, he was later detained at Kamiti Maximum Prison, Mbagathi Prison and later transferred to Manyani Maximum Prison where he was again held in solitary confinement in a tiny room with bright light around the clock. He was again subjected to hard labor and corporal punishment despite the sentences having not been meted on him by the trial court. He was occasionally stripped nude and tortured.

Upon his release from prison, he was rendered jobless for over 10 years. He suffered from psychological nightmares, trauma, loneliness and suffered stigma due to rejection and desertion by friends due to his

perceived security risk. He developed ulcers and was diagnosed with amoeba and constant headaches which he suffers to-date. As a result, his marriage broke down and his wife successfully filed for divorce and his two children dropped out of school due to lack of school fees.

That by reasons of matters afore stated, the 3rd appellant's contention is that his fundamental rights and freedoms of liberty, freedom from inhumane treatment, deprivation of property, arbitrary search and entry, fair hearing and freedom of movement were all violated in the most wanton manner for which he sought in so far is relevant the following orders:

> ***1.That there be a Declaration that the Petitioner's fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)****.Similar provisions were provided under* ***Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1),*** *80(1) and 81(1)* ***of the repealed Constitution of Kenya have been and were contravened and grossly violated by the Police officers, prison warders and other Kenyan Government servants, agents, employees and institutions, on various dates at police cells in Kamiti Maximum Prison, Mbagathi Prison and Manyani Maximum Prison.***
>
> ***2. A declaration that the petitioner is entitled to the payment of damages and compensation for the gross violations and contraventions of his constitutional rights and freedoms under the aforementioned provisions of the Constitution.***
>
> ***3. General damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, 2010(previously section 84(2) of the repealed Constitution for the unconstitutional conduct of the Government of Kenya, and its agents and/or servants...***

In opposition to the three petitions, the respondent filed Grounds of Opposition dated the 23rd of June, 2011 and submissions dated the 20th of December, 2012. Since the issues raised in the three petitions were essentially the same, they were consolidated for purposes of hearing and a consent order was entered between the parties in which it was agreed that liability was not contested by the respondent save for any lawful convictions which issues would be left for adjudication by the High Court. It was also agreed by the parties that the petition would be prosecuted and adjudicated by way of written submissions, evidence and authorities submitted by the parties, all which were considered by the learned Judge.

Having so stated, and since liability was expressly admitted by the respondent, (save for any lawful conviction which was to be adjudicated by the court) the learned Judge then proceeded to deal with the damages for the admitted violations of the appellants fundamental rights and freedoms under **Article 23(3)** of the **Constitution 2010** and in his final judgment issued a declaration in respect of each of the appellant that: (1) the Petitioner's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution 2010** and under **Sections 72(1), 72(2), 72(3), 72(5),74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya at material times had been and were repeatedly contravened and grossly violated by the Police and Criminal Investigation Department Officers, National Security Intelligence Service (formerly Special Branch), and other Kenyan Government servants, agents, employees and institutions, on numerous dates at various police stations in Nairobi City and surrounding towns, in Nairobi Industrial Area Remand Prison, Police Cells and Kamiti Maximum Prison; Secondly, he further gave orders awarding Kshs. 15 Million, Kshs. 10 Million and Kshs. 7 Million to the 1st appellant, 2nd appellant and 3rd appellant respectively for general damages suffered as a result of the constitutional right violations by the State agents.

It is that judgment that provoked this joint appeal. The appellants preferred their appeal on seven (7) grounds. The appeal was argued before us on the 14th December, 2015 by learned Senior Counsel ***Mr. P.K Muite*** on behalf of the appellants while ***Mr. Kepha Onyiso*** appeared for the respondent.

Mr. Muite for the appellants commenced his submission by stating that the central issues in this appeal is the inadequate compensation of damages for the injuries and losses suffered by the appellants and the failure by the learned Judge to set aside the criminal conviction of the 1st appellant especially when liability was admitted by the respondent. He stated that there is nothing more serious than a criminal

conviction of an advocate and that because the respondent opted to admit liability and did not challenge the issue before the trial court, it was proper for this court to set aside the criminal conviction of the 1st appellant so that the 1st appellant's honor and dignity can be restored. Counsel submitted that the criminal conviction was procured through unconstitutional means and hence should be set aside. For this proposition, counsel relied on the case of **Major General Peter M. Kariuki v Attorney General-** Civil Appeal No. 79 of 2012 whose criminal conviction and sentence by a Court Martial was quashed by this court due to gross violations of his constitutional rights by the Moi regime.

On the second broad ground of appeal relating to award of damages, Mr. Muite submitted that an award of KShs. 15,000,000/=,Kshs. 10,000,000/= and Kshs. 7,000,000/= to the appellants respectively as general damages was manifestly low for the kind of violations the appellants had suffered, so as to warrant the interference of this Court. Learned counsel contended that the learned trial judge had made an erroneous estimation of the damages because he had been influenced by wrong considerations. Counsel urged us to take judicial notice of the financial summary of losses for each of the appellants as contained in the report by KPMG a reputable audit firm. In his view, the assessment by KPMG for quantum of damages to be total sums of Kshs.146,603,604.15, Kshs.799,515,675.59 and Kshs.137, 300,203.54/= for the appellants respectively was a fair damages simpliciter. Finally, Mr. Muite called in aid ***Article 159*** of the Constitution to persuade us to embrace and apply substantive justice in the interest of justice to the appellants.

On his part, Mr. Onyiso for the respondent in opposing the appeal submitted that the learned trial judge had arrived at the correct conclusion, both in terms of the law and the quantum of damages, which he urged us not to disturb. Counsel submitted that the learned judge rightfully considered the evidence placed before him, the limited public resources and the burden to the innocent tax payers if such atrocious sums were awarded to the appellants as prayed in their petitions.

Counsel submitted that the reliefs sought by the appellants for constitutional violations are against the State which are within the public law remedies and therefore should be distinguished from the private or personal remedies in tort. He argued that in such cases, it is the state which bears the responsibility for such violations and not the individual who committed the atrocities. In furtherance of this position, counsel argued that damages awarded under public law for the violations of constitutional rights of individuals by state should not be punitive but should suffice to only vindicate the petitioners.

Mr Onyiso further discredited the KPMG audit report as a sham, fictitious and one tainted with financial exaggerations. Counsel argued that of all the businesses listed by the appellants, none was making any profit, in fact, in his view, that the Companies alleged to have incurred losses have distinct legal personalities and financial interest from those of the individual appellants, so that if there were any losses then it would be for the companies as separate legal entities and not the appellants. In support of this argument, Counsel citied the famous authority on this point in **Salmon v. Salmon [1895-9] ALL ER 33.**

In any event, Mr. Onyiso contended that if there were any financial losses suffered by the companies or through the loss of properties as alleged by the appellants, then such losses would be in the category of special damages which must be specifically pleaded and proved. In this case the appellants failed to do so. For the foregoing reasons, Counsel urged us to dismiss the appeal.

This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 allowances in this respect. See **Selle and Another v Associated Motor Boat Company Limited and others** [1968] EA 123 and **Williamson Diamonds Ltd. V. Brown** [1970] E.A.L.

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in **Peters –vs- Sunday Post Ltd [**1958] EA 424. In its own words: -

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."***

Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in **Rook v Rairrie** [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in **Butt v. Khan** [1981] KLR 349 when it held as per Law, J.A that:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia** (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."***

And in **Gicheru V Morton and Another (2005) 2 KLR 333** this Court stated:

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

See also **Major General Peter M. Kariuki v Attorney General-** Civil Appeal No. 79 of 2012.

The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal.

We have considered this appeal in terms of the Judgment of the trial court, the record of proceedings, the submissions by the learned counsel both written and oral, as well as the authorities placed before us. In our view, the appellants main complaint is that the respective awards of KShs.15 Million, Kshs.10 Million and Kshs. 7 Million granted by the High court were grossly inadequate and manifestly low, and the failure by the learned Judge to set aside the criminal conviction of the 1st appellant.

Although, as we have stated, the appellant raised seven (7) grounds, we believe this appeal turns only on two issues for our determination:

> *1) Whether the learned Judge applied wrong principles in law and abused the exercise of his discretion in award of damages to the appellants?*

2) Whether the learned Judge erred in law by failure to set aside the criminal conviction of the 1st appellant?

We shall consider the first issue together with authorities and counsel's submissions in light of the evidence which was given at the trial before the High Court as outlined at the beginning of this judgment. The challenge, in our view is not whether we should interfere with a discretionary award of damages by a trial judge but what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State. It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.

In arriving at the quantum for award of general damages, the learned Judge considered various similar cases where different amounts for damages have been awarded by our domestic courts for violations of constitutional rights. Among the said decisions are the cases of **Rumba Kinuthia & 6 Others vs. The Attorney General** Nairobi HC Misc. App. No.1408 of 2004**, Harun Thungu Wakaba & 20 Others vs. The Attorney General** HC Misc.appl. No.1411 of 2004.

On the question of the award of exemplary damages, the learned Judge shared the thoughts of Majanja J in the case of **Benedict Munene Kariuki & 14 Others vs. The Attorney General** Petition Number 722 of 2009 (2011) eKLR and held that:

> ***[55.] This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya's Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-payer. Further i note that the Petitioners were not labouring for the "Second Liberation" in order to get monetary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognized.***

It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of **Siewchand Ramanoop v The AG of T&T,** PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

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

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. *(emphasisours)**. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.*** (emphasis ours)

In the **Tamara Merson v Drexel Cartwright** and **Ag (Bahamas) Privy Council Appeal No. 61 of 2003** the Privy Council held that in some cases, a suitable *declaration* may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in ***Merson*** (supra) in which, after citing a passage from ***Ramanoop*** (supra) including the paragraphs set out above, stated thus:

"[[18]. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

Taking que from the above decisions, the Privy Council in **Alphie Subiah v The Attorney General of Trinidad and Tobago** Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that:

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as

compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

The position of the Privy Council is in no way altered by the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others -** [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"…The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995**, unreported**)**, where the Court held that:

"It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable… Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, 2003 SCC 62 to include, a remedy that will :

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is *"appropriate and just"*according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future

infringements.The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.

We now proceed to the issue of damages for losses suffered by the appellants companies or associated business interests where the learned Judge pronounced himself thus:

> **"[61]*In that regard, on Mr. Imanyara's liabilities, National Bank of Kenya, Deposit Protection Fund and the National Council of Churches of Kenya were never involved in the present proceedings. They are the ones to whom monies are owed and to make orders that may well affect their claims without affording them a chance to be heard would amount to an unconstitutional act and I decline to follow that route. In any event, the details of the liabilities are so scanty that I would not reach a fair decision based on the material before me. I would for example expect to know how the liabilities were incurred and the nexus between the present proceedings and those liabilities.***
>
> **[63]. *On issue No.(iii), while noting the admitted liability on the part of the Respondents, I am certain that the allegations that 950,000 copies of "Finance Magazine" were destroyed, may well be exaggerated. But that is not the worrisome issue; Njehu Gatabaki instituted the present proceedings on his own behalf and while he had interests in "Finance Magazine", in fact the magazine was published by and was the property of Finance Institute Ltd with or without Productions and Communications Ltd and Wanjega Enterprises Ltd having similar interests. None of those legal entities has sued for the alleged losses and it is not enough that Njehu Gatabaki may have an association with them."***

The learned Judge further concluded that:

> **"[65] *In any event, a separate claim by the correct legal entity should be made in that regard and proper evidence to prove the loss. I am unable to decide on the issue for the above reasons.."***

From the above findings, we have no hesitation but to agree with submissions by Mr. Onyiso and we reiterate that it is settled law that a company is a separate legal entity from its owners and has a right to sue and be sued as a separate and distinct personality. It is a principle enunciated in the age old case of ***Salomon*** (supra), the law does not allow the shareholder of a company to bring an action for losses and damages suffered by the company. The proper plaintiff in an action arising out of losses and damages suffered by the company is the company itself.

In this case, and as rightly put by the learned Judge, the Nairobi Law Monthly Magazine associated with the 1st appellant, the Finance Magazine associated with the 2nd appellant and both the Beyond Magazine and People Magazine associated with the 3rd appellant are separate legal entities capable of bringing a law suit for the losses alleged to have been suffered. For the same reasons, the 1st appellant has no legal capacity to claim for losses or damages allegedly suffered by the National Bank of Kenya, Deposit Protection Fund and National Council of Churches who were his creditors.

In the case of **Sultan Hasham Lalji & 2 Others v. Ahmed Hasham Lalji & 4 Others** Civil Appeal No. 3 of 2003, this court while relying on the primordial case of ***Foss v Harbottle*** (1843) 67 ER 189 for the proposition that in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself, this court held that:

> ***"As a general rule and subject only to specific well established exceptions, due to its separate legal personality, the law does not permit shareholders to bring an action on behalf of the company in which they hold shares. If the duty to be enforced is one owed to the company, then the primary remedy for its enforcement is an action by the company itself against those in***

default.

.....

"…Normally, therefore, the company itself is the proper plaintiff, and the only proper plaintiff, in an action arising out of a dispute within the company...

.....

"…This justification remains true today in several jurisdictions, including Kenya, where due reverence is paid to the "proper plaintiff" principle and other aspects of the rule in Foss V. Harbottle."

This court recently had an occasion to deal with a similar situation in **Daniel Toroitich Moi v. Mwangi Muriithi-** Civil Appeal No. 240 of 2011where it held that

"...We have no doubt that the Companies Act provides that a shareholder has property in the shares that entitles him/her to vote at meetings, elect officers/directors and the rest. But a shareholder has no ownership or right to the properties held by the company – a legal entity, separate and distinct from its shareholders. (see Salmon vs Salmon [1895-9] AII ER 33). The 1st respondent fell in such a category. He could thus not sue or petition about loss of properties of limited liability companies where he allegedly held shares. But he could sue claiming that his property in the form of shares had been put to risk..."

We are also tasked to determine whether the appellants by preponderance of evidence discharged their burden of proof on claims for damages. ***Section 3*** of the ***Evidence Act (Cap 80)*** defines evidence as denoting:

"… the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."

In these proceedings and particularly the 2nd appellant claims for losses amounting to Ksh. 95,000,000/= due to the seizures of almost 950,000 copies of the Finance Magazine. However the only evidence produced in support of quantum of damages is the a copy of the Daily Nation newspaper coverage. Clearly, therefore, the primary documents that the appellants rely on are newspaper articles.

In **Wamwere vs The A.G** and **Randu Nzau Ruwa & 2 Others –vs- Internal Security Minister &Another [**2012] eKLR; If we may borrow the words of the court in the ***Ruwa*** case, with tremendous respect to the appellants, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the 2nd appellant to demonstrate losses he suffered. In any event as we have stated elsewhere in this judgment that even if the Magazines were confiscated thereby occasioning any losses, the 2nd appellant had no *locus standi* to bring a cause of action for the said losses.

The fact that the respondent admitted liability *ab initio* does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see ***Mwangi Muriithi (supra)*** and **Mumbi M'Nabea v. David Wachira Civil Appeal No. 299 of 2012**.

In **Romauld James v. AGT** [2010]UKPC Lord Kerr at paragraph 13 cited a passage from the judgment

of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:

> ***[28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."***

Further, in regards to the financial losses incurred by the appellants associated businesses and properties, Mr. Onyiso submitted, and correctly so, that these are special damages which should not only be specifically pleaded but also strictly proved. That is the general law and authorities on it are legion. (See **Sande v Kenya Co-operative Creameries Ltd** LLR No. 314 ***(CAK) (Case No. 154 of 1992 (Court of Appeal of Kenya);*** **P.A. Okelo & M.M. Nsereko t/a Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others** [2012] eKLR***;*** and **Bank Of Baroda (Kenya) Limited v Timwood Products Ltd** -Civil Appeal 132 of 2001

In **Bangue Indosuez vs DJ Lowe and company Ltd** [2006] 2KLR 208 this Court held inter alia that;

> ***"It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves."***

The appellants in this case did not specifically plead and prove the damages from the losses they allegedly suffered. This could have been done by proof of receipts, bank statements or any invoices to show the liquidated losses incurred as a result of their Constitutional violations. In this case, we find the particulars lacking.

Having restated that the assessment of damages is a discretionary relief, we cannot also fault the learned Judge for failure to award exemplary and aggravated damages on the grounds of heavy burden to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations. We find support in the recent decision of the **Supreme Court of Canada in Vancouver (City) *v.* Ward**, 2010 SCC 27, [2010] 2 S.C.R. 28 where the Court while considering a colossal award for a Constitutional violation and Sec 24 of the Canadian Charter, held that:

> ***"… In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests…***

Similarly, in the case of **Dandy *(supra)*** the court held that:

> ***"...The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

In the end, we have considered the comparative jurisprudence in this area and the recent decisions of this Court and find no justification to interfere with the learned Judge's exercise of discretion in assessing the damages awarded to the appellants based on the evidence placed before him. We would however point out that even though the learned Judge did not distinguish between public law remedies and private law remedies, he however proceeded correctly and applied the general principles for award of monetary damages in arriving at his decision.

It is not in doubt and we cannot deny the inhuman treatment, physical and mental torture, and losses suffered by the appellants in the hands of State agents. In no way can we down play the gory violations of the appellants' dignity and liberty suffered in the climate of fear and terror created by the Government. However as a court of law we are constrained to apply the law based on the evidence presented before the Court. We are therefore disinclined to interfere with the learned judge's discretion in the award of damages to the appellants.

We now turn to the last task of determining whether the learned Judge misapplied the law by failure to set aside the criminal conviction of the 1st appellant. We point out that the respondent did not however address us on this issue either in his written submissions or during the hearing of this appeal and neither did the appellants raise the issue in their submission filed by Kounah & Company Advocates on 23rd September, 2014. In court, Mr. Muite for the appellants urged us to find that there is nothing more serious than the conviction of an Advocate. In asking for the setting aside of the 1st appellant's conviction, he relied on the authority of **Peter M. Kariuki vs Attorney General Civil Appeal No. 79 of 2012.**

In refusing to set aside the 1st appellant's conviction, the learned judge relied on Section 72 of the Repealed Constitution and said as follows at paragraph 58 of his judgment.

> ***58.*** *Section 72(1) (a)* ***of the*** *Repealed Constitution* ***while protecting freedom to personal liberty also provided that such liberty is not protected in a case involving the "... execution of the sentence or order of a Court, … in respect of a Criminal Case of which he has been convicted."***
>
> ***Another exception is found in S****ection 72(1)(b)* ***which is with respect to the "... execution of the order of the High Court or the Court of Appeal punishing … for contempt of that Court or tribunal."***
>
> ***The Petitioners in many instances were incarcerated upon being charged with some criminal offence and in the case of Bedan Mbugua, once, upon being cited by the Court of appeal for contempt. I am unable to circumvent the Constitution and without more than the statements made by the Petitioners, and by a stroke of my pen, I cannot declare those convictions to be unconstitutional. I say so also because it is admitted by the Petitioners that in some instances, the criminal convictions and sentences were actually overturned (wholly or partly) on appeal.***

The upshot of the above is that the learned judge declined to set aside the conviction of the 1st appellant as the same was an order of the court in a criminal conviction.

On our part, we have reviewed the record and hasten to add that the 1st appellant's prayer for setting aside his conviction is encapsulated in ground No. 7 of his Memorandum of Appeal. He stated:

> ***"7. The learned judge having found as a fact that the Attorney General had acted unconstitutionally erred in not setting aside the conviction of the first appellant."***

Suffice to state that the then Attorney General was accused of ***"personally"*** supervising the 1st appellant's prosecution and trial in that he ***"… intimidated and/or compromised the trial magistrate into convicting and sentencing him to five years imprisonment without an option of time."***

As can be discerned from the record, the 1st appellant filed an appeal arising from the said conviction and sentence and in paragraph 14 of the affidavit dated 16th November, 2010 in support of petition he

deponed that:

> ***"The Attorney General Mathew Guy Muli subsequently so brazenly interfered with the appeal process and the appeal court despite finding that the petitioner had actually made good the unpaid cheque nevertheless only reduced the sentence to three years imprisonment and upheld the Attorney General's insistence that the conviction remain so as to deny the petitioner any possible future employment in the public service."***

However, the particulars and extent of the interference in the trial court and in the appeal court was not explained and the record is completely silent on this and as pointed above it is not lost to us that this ground of appeal was directed at the Attorney-General and not at the trial court nor the 1st appellate court.

It is also our view that the case of **Peter M. Kariuki vs Attorney General** (supra) wherein the appellant's conviction was set aside is distinguishable from the appeal before us. In the case of **Peter M. Kariuki vs Attorney General**, the appellant's complaint was that he did not receive a fair trial for the reasons that he was denied an adjournment to enable him prepare for his case; that his application to recall a prosecution witness and to call his witness was denied and he did not receive an impartial trial. In the appeal before us, and as stated above the 1st appellant's grievances were directed at the Attorney General and not the trial court and/or the 1st appellate court. The record is completely silent on how the 1st appellant's trial and subsequent appeal was an unfair trial, either in the trial court and/or in the 1st appellate court.

It is for these reasons that we dismiss the 1st appellant's ground of appeal seeking to set aside his conviction.

The upshot of the above is that the appellants' appeals are hereby dismissed.

Given the unique circumstances of this case, we direct that each party shall bear their own costs.

Dated and delivered at Nairobi this 19th day of May, 2016.

ALNASHIR VISRAM

……....

JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR