IN THE COURT OF APEAL

AT NAIROBI

CORAM: KIAGE, M'INOTI & MOHAMMED JJ.A.

CIVIL APPEAL NO. 79 OF 2012

BETWEEN

PETER M. KARIUKI …….... APPELLANT

AND

ATTORNEY GENERAL ….…. RESPONDENT

(Appeal from the judgment and decree of the High Court of

Kenya at Nairobi (Musinga, J) dated 26th October, 2011

in

H.C.C.C. NO. 403 OF 2006)

****

JUDGMENT OF THE COURT

This appeal is an aftermath of an infamous event in the history of Kenya; an event that happened some thirty two [32] years ago and is aptly described by the historian, *Charles Hornsby*, as Kenya's *"first true coup attempt"*. (*See Charles Hornsby, Kenya: A History since Independence, I. B. Tauris, 2012*).

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

The appellant, *PETER MWAGIRU KARIUKI* was the Commander of the Kenya Air Force at the material time. At the time of the mutiny, he was at his farm in Timau, a few Kilometers from Nanyuki. He had enlisted in the Air Force soon after independence and had received his commission as an officer in September, 1965. He rose through the ranks and by 14th May, 1981, he was a Major General when he was appointed the Commander of the Kenya Air Force, by the then President of the Republic of Kenya.

After the mutiny by his soldiers had been quelled, the appellant was soon thereafter arrested and confined for some time at Kamiti Maximum Security Prison, Nairobi. Subsequently he was transferred to Naivasha Maximum Security Prison where he was held in solitary confinement for 147 days.

On 10th January, 1983, the appellant appeared before a court martial and was charged with the offences of; (1) failing to prevent a mutiny contrary to *section 26(a) of the Armed Forces Act, cap 199 Laws of Kenya* (now repealed), and (2) failing to suppress a mutiny, contrary to the same provision. The court martial was presided over by Major General Lenges, with F. E. Aragon, then a Senior Resident magistrate, as the Judge Advocate. On 18th January,

1983, the court martial convicted the appellant of the two offences and sentenced him to four years imprisonment, the sentences to run concurrently. In addition, he was dismissed from the Kenya Armed Forces and stripped of his rank, benefits, medals and decorations.

For reasons that are not readily apparent to us, the appellant did not challenge the verdict of the court martial in the High Court as he was entitled to do under *section 115 of the repealed Act*. He, therefore, served his full sentence, after the Commissioner of Prisons - in a rather unilateral and summary manner - declared that the appellant would not be considered for any remission of his sentence. Matters rested there until some twenty three [23] years later when, on 21st July, 2006, the appellant filed a petition in the High Court alleging violation of his constitutional rights and freedoms, regarding his arrest and trial before the court martial. He prayed for the following declarations, orders and reliefs under the former Constitution:

(1) A declaration that:

(a) his right to the security of person and the protection of law guaranteed under Section 70(a) of the Constitution was breached and a miscarriage of justice had occurred thereby making his trial a nullity;

(b) his right guaranteed under Section 72(5) of the Constitution to be released either unconditionally or upon reasonable conditions if not tried within a reasonable period was breached;

(c) his right guaranteed under Section 74(1) of the Constitution not to be subjected to torture or to inhuman or degrading treatment was breached;

(d) his right guaranteed under Section 77(1) (c) of the Constitution to be given adequate time and facilities for the preparation of his defence was breached;

(e) his right guaranteed under Section 77(1) (d) of the Constitution to be permitted to defend himself before the court was breached;

(f) his right guaranteed under Section 77(9) of the Constitution to a fair hearing by an independent and impartial court was breached;

(g) his right guaranteed under Section 82(2) not to be afforded different treatment from that afforded to other prisoners at Kamiti Maximum Security Prison was breached;

(h) he was entitled to restoration of his rank, benefits, honours and decorations; and

(i) he was entitled to damages as redress in respect of each of his rights that were breached.

(2) An order:

(a) consequential to the above declarations quantifying the amount of damages in respect of each and every one of the declarations given;

(b) restoring his rank of Major General in the Kenya Air Force together with all attained benefits, honours and decorations; and

(c) for costs, interest and further or other orders as the court shall deem just.

The petition was heard by Musinga, J *(as he then was)* who in a considered judgment dated 26th October, 2011, held that the appellant's rights under *sections 70(a), 72(5), 74(1), 77(1) (c) and 82(2) of the former Constitution* had been breached and by reason thereof, the appellant was entitled to damages, which he assessed at a global award of KShs.7 million. The appellant was also awarded the costs of the petition. Regarding the prayers for restoration of the appellant's rank, attained benefits, honours and declarations, the learned judge held that since the appellant had not appealed against his conviction by the court martial to the High Court as he was entitled to do, he was presumed to have been satisfied with the conviction and sentence and therefore, the learned judge lacked jurisdiction to question or interfere with the conviction.

Aggrieved by that judgment, the appellant lodged this appeal in which he raised the following 7 grounds of appeal.

1. The learned judge erred in law in failing to award damages under each provision of the Constitution he found to have been breached in relation to the appellant and hence gave an award that was manifestly low in the circumstances;

2. The learned judge failed to appreciate that even though he was not sitting on appeal from a decision of the court martial, he nevertheless had jurisdiction to make a finding that the appellant was entitled to an award for damages in relation to the breach of section 77 (9) of the Constitution then in force;

3. The learned judge misdirected himself in holding that "notwithstanding all the above allegations the petitioner did not prefer an appeal against his conviction and the aforesaid sentence", in that failure to appeal if at all did not prejudice the appellant's constitutionally guaranteed right to move the High Court for redress under section 84 of the Constitution as it then existed;

4. The award of Kshs 7,000,000/= was manifestly inadequate redress Given the gravity of the breaches of fundamental rights guaranteed under the Constitution as set out in the appellant's petition before the learned judge;

5. The learned judge erred in holding that the appellant was not entitled to restoration of his rank, benefits honors and declarations;

6. The learned judge erred in holding that the violation of the appellant's constitutional rights did not render his trial a nullity;

7. The learned judge erred in law and in fact in coming to the conclusion that the appellant was entitled to only Kshs 7,000,000/= contrary to the evidence, the law and submissions argued before him.

It is patently clear to us this appeal raises only two main issues. The first is whether, notwithstanding the appellant's failure to appeal the decision of the court martial, his conviction and sentence were unlawful, null and void by reason of violation of the constitutional guarantees pertaining to a fair trial. The second issue is whether the learned trial judge made such a manifestly low award of general damages as to justify our interference with his exercise of discretion.

Before us, Mr Paul Muite, learned Senior Counsel, and Mr Gitobu Imanyara, learned counsel appeared for the appellant, while Mr Waigi Kamau, learned Principal State Counsel appeared for the respondent. Prior to their oral submissions, both the appellant and the respondent filed written submissions dated 29th August, 2013 and 6th December, 2013 respectively.

Regarding the first broad ground of appeal, Mr Muite submitted that the trial court had found as a fact

that several of the rights and fundamental freedoms guaranteed to the appellant by the former Constitution were violated. Among the violated rights, counsel asserted, were three guarantees relating to a fair trial which he enumerated as follows. The first was the appellant's right to a fair trial by an independent and impartial court within a reasonable time, guaranteed by *section 77(1) and (9)*. The second was the right guaranteed by *section 77(2) (e)* to the appellant, to obtain the attendance of any witness to testify on his behalf or to be cross examined, on the same conditions as those applying to the prosecution. The last violated guarantee was the right of the appellant to adequate time and facilities for the preparation of his defence, guaranteed by *section 77(2) (c).*

Developing the argument further, learned Senior Counsel submitted that having found that the appellant's above listed rights relating to a criminal trial had been violated, the learned judge erred by failing, *ex debito justitiae*, to declare the appellant's trial a nullity. It was contended that was the only appropriate or adequate remedy available under the then Constitution and that an award of damages alone could not suffice. The decision of the Court of

Appeal of Uganda in *MATSIKO V UGANDA, (1999) 1 EA 184* in which it was held that a violation of an appellant's constitutional rights during the trial constituted a mistrial, was relied upon to press the point that a mistrial has the same meaning as miscarriage of justice.

Mr Muite further submitted that by declining to declare the court martial trial a nullity on the ground that the appellant had not appealed against his conviction, the learned trial judge had compounded the errors by misapprehending the substance and import of *section 84(1) of the former Constitution* which allowed the appellant to seek redress for violation of his rights *without prejudice* to any other action or remedy lawfully available to him. The jurisdiction under *section 84*, counsel contended, was a special jurisdiction for enforcement of fundamental rights. The fact, therefore, that the appellant had other remedies, such as the right of appeal, available to him, counsel continued, did not preclude the appellant from challenging the legality of his trial on the basis that it was a blatant violation of his constitutional rights. In support of that proposition, the appellant relied on the following three

decisions, namely, the judgment of this Court in *GITHUNGURI V REPUBLIC, (1986) KLR, 18*; the decision of the Supreme Court of Uganda in *NAKACHWA V ATTORNEY GENERAL (2002) EA 495* and the judgment of the High Court of Kenya in *DOMINICIAN ARONY AMOLLO V ATTORNEY GENERAL, MISC. APPLN. NO. 494 OF 2003 (unreported)*.

Lastly, learned counsel faulted the trial court for misapprehending, misinterpreting and misapplying the judgement of this Court in *JULIUS KAMAU*

MBUGUA V REPUBLIC, CR.A. NO 50 OF 2008. In learned counsel's view, that decision did not lay down a rule of general application that violation of the constitutional rights of an accused person does not render his subsequent trial a nullity. Instead, counsel submitted, the judgment is authority for the proposition that violation of the accused person's right to be brought to court within the time stipulated by the Constitution does not *per se* render his trial a nullity. Where, however, the violations of the constitutional rights are such as to render a fair trial impossible, counsel contended, that decision and subsequent decisions to the same effect, have limited application. In Mr Muite's view, *Julius Kamau Mbugua V Republic, (supra)*, was easily distinguishable from the present case.

On the second broad ground of appeal relating to award of damages, Mr Muite submitted that an award of KShs.7,000,000/= general damages was manifestly low for the kind of violations the appellant had suffered, so as to warrant the interference of this Court. Learned counsel contended further that the learned trial judge had made an erroneous estimation of the damages because he had been influenced by a wrong consideration, namely that the appellant's failure to appeal his conviction meant that he had accepted the finding of guilt by the court martial. Relying on *MARIGA V MUSILA, (1984) KLR 251* and *KEMFRO AFRICA LTD V LUBIA, (1987) KLR 30*, counsel urged that although an appellate court is slow to interfere with an award of damages by the trial court, this appeal was an appropriate case for interference.

Finally we were urged to award KShs.495,500,000/= as damages for unlawful confinement of the appellant because that is the award that was commensurate with his rank of Major General and adequate enough for both his pre-trial detention and post-trial imprisonment, adding up to 1,982 days.

The judgment of the High Court in *DOMINIC ARONY AMOLO V ATTORNEY GENERAL* was used to justify a rather mathematical formula of calculating damages for violation of a constitutional right, at the rate of KShs.250,000/= per day. For good measure learned counsel also invoked the judgement of the Industrial Court in *MAJOR (RTD) EZRA IMAANA LAIBUTA V ATTORNEY GENERAL & 4 OTHERS, PETITION NO. 13 OF 2013 (unreported)* in which petitioner, whose commission had been terminated following a trial which the court found to have been in violation of his constitutional rights, was awarded general damages of KShs.7,000,000/= in November, 2013.

Regarding the violation of the other constitutional rights and freedoms of the appellant which were found to have been proven, we were asked to award a sum of KShs.200,000,000/= on the submission that the courts of Kenya have never shied away from awarding hefty damages in commercial disputes and there was no reason why a similar approach should not be taken in award of damages for violation of fundamental rights and freedoms.

Mr Muite concluded by asking us to also award the appellant his salary arrears of KShs.22,965,460 being his basic salary and allowances from 1983 to 2006, as well as an order for restoration of the appellant's rank, benefits, honours and decorations, costs and interest.

Mr Waigi Kamau, 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. Regarding the first broad ground of appeal, Mr Kamau submitted that it was trite that all matters which could have been addressed by the trial court or by the High Court on appeal cannot be re-opened for further examination pursuant to a petition for enforcement of fundamental rights. For that proposition, learned counsel relied on the decision of this Court in *METHODIST CHURCH IN KENYA REGISTERED TRUSTEES & ANOTHER V REV. JEREMIAH MUKU & ANOTHER, CA NO. 233 OF 2008 (unreported).*

It was Mr Kamau's further contention that no judgment or order of a competent court, even if it is wrong and results in the imprisonment of a person, can be said to be in violation of the rights and freedoms guaranteed by the Constitution, and that the remedy available to a person aggrieved by such a judgment or order is to appeal against it. Learned counsel sought to support that view by invoking *section 72(1) of the former Constitution* which, in his view, provided exceptions when personal liberty could be lawfully abridged, including in execution of an order of a court.

Learned counsel next invoked the judgment of this court in *JULIUS*

KAMAU MBUGUA V REPUBLIC, (supra), and contended that violation of anaccused person's constitutional rights does not render his trial a nullity. The remedy available to such an accused person, he argued, lies in a claim for damages.

Regarding the ground of appeal relating to damages, Mr Kamau submitted that *section 82 of the former Constitution* had limited the constitutional rights and freedoms of members of the armed forces, like the appellant, and precluded them from alleging violation of their constitutional rights except the rights guaranteed by *sections 71 (protection of the right to life), 73 (protection from slavery and forced labour),* and *74 (protection from inhuman treatment).*

In counsel's view, based on the appellant's pleadings, the alleged violation of *section 74 of the former Constitution* was the only violation that the trial court was competent to consider.

On the quantum of damages, learned counsel relied on *MBOGO & ANOTHER V SHAH, (1968) EA 93* and submitted that award of damages entails exercise of judicial discretion. Consequently, counsel continued, an appellate court will not ordinarily interfere with the exercise of discretion by the trial judge

unless it is shown that the trial judge misdirected himself in some matter and as a result arrived at a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion, thereby occasioning an injustice. In counsel's view, no basis had been established to warrant interfering with the quantum of damages awarded by the trial judge.

Mr Kamau concluded by urging us to find that even the award by the trial judge was excessive because, the appellant had been awarded declarations which by dint of *section 82 of the former Constitution*, he was not entitled to.

We have carefully considered the judgment of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, as well as the authorities from different jurisdictions that were presented to us. We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *NGUI V REPUBLIC, (1984) KLR 729* and *SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported).*

At page 49 of the judgment, the learned judge concluded that five of the appellant's constitutional rights were violated and issued declarations in the following terms:

***"The court hereby makes the following declarations**:*

*(a) That the petitio**ner?s [appellant?s]** right to the security of his person and the protection of the law guaranteed under section 70(a) of the Constitution was breached;*

*(b) **That the petitioner?s right guaranteed under** section 72(5) of the Constitution to be released either unconditionally or upon reasonable conditions if not tried within a reasonable period was breached;*

*(c) **That the petitioner?s right guaranteed under** section 74(1) of the Constitution not to be subjected to torture or to inhuman or degrading treatment was breached;*

*(d) **That the petitioner?s right guaranteed under** section 77(1)(c) of the constitution to be given adequate time and facilities for the preparation of his defence was breached;*

*(e) **That the petitioner?s right guaranteed under** section 82(2) not to be afforded different treatment from that afforded to other prisoners at Kamiti Maximum Security Prison was breached;*

*(f) That the petitioner is entitled to damages as redress in respect of each of the above constitutional rights that were breached in **relation to him."***

As we have already noted, the appellant had also alleged that his right guaranteed by *section 77(1) and (9) of the Constitution* to a fair hearing within a reasonable period by an independent and impartial court was violated. In respect of that complaint, the learned judge held that had he been considering an appeal from the court martial, which he was not, he would have found in favour of appellant that his right to a fair hearing by an independent and impartial court was violated. Then the learned judge delivered himself as follows:

"These among others, are issues that would have** weighed heavily in my mind if I was considering an **appeal against the petitioner?s conviction. But** because I am not sitting as an appellate judge, the decision by the court martial to convict the petitioner cannot be disturbed. However, that cannot bar the court from considering the allegations of violation **of the petitioner?s** constitutional rights and freedoms during his trial and subsequent imprisonment since the petitioner did n**ot seek to challenge the trial courts findings."

It appears to us that the learned judge had concluded that the issues that the appellant was raising relating to a fair trial were issues that he could only raise in an appeal against the decision of the court martial. This is because thereafter, the learned judge confined himself to a consideration of the violation of the five rights of the appellant's which we have referred to above, and found the same to have been violated.

We shall first consider the evidence that was before the trial court in support of the appellant's allegation that he was denied a fair trial by the court martial, to enable us estimate whether overall the violation impacted on the fairness of the trial. That evidence speaks out loudly for itself.

The first issue relates to the appellant's application for adjournment to enable him prepare his defence. When the appellant was arraigned before the court martial on Tuesday, 11th January, 1983, he had just been brought to Nairobi from Naivasha Maximum Security Prison where he had been detained for a period of 147 days. For the period he was in prison at Naivasha, he was kept in solitary confinement and was not allowed any visitors or contact with a lawyer.

The first thing the appellant's advocate did when the appellant appeared before the court martial on 11th January, 1983, was to apply for an adjournment to enable him to take proper instructions from the appellant. The advocate explained to the court martial that he had been given the charges against the appellant, the extract of evidence and statements the previous Friday. He had managed to meet the appellant for the first time in Naivasha the next day, on Saturday afternoon and subsequently for two hours at Kamiti Maximum Prison, the day before the convening of the court martial.

The advocate further informed the court martial that granted the serious charges facing the appellant, the advocate's inability, on account of the short notice, to meet and interview the appellant's witnesses and the advocate's duty to the appellant and to the court martial, he needed more than just a weekend to prepare the appellant's defence. The advocate requested for adjournment for the rest of the week to enable him prepare adequately for the trial, so that the trial could commence the following Monday.

The application was opposed by the prosecutor who argued that *Rule 24 (4) of the Rules of Procedure* required the appellant to be furnished with the abstract of evidence *"at least 24 hours"* before commencement of the trial. In the case before the court martial, he argued, the appellant had been furnished with the documents about five [5] days before the trial and that the appellant had *"all the opportunity in the world"* to prepare for his defence.

The court martial rejected the application peremptorily, with the following six [6] word sentence: ***"The application is refused, Mr. Muite."***

Section 77(2) (c) of the former Constitution guaranteed every person charged with a criminal offence "*adequate time and facilities***"** for the preparation of his defence. In addition *Rule 24 of the Armed Forces Rules of Procedure* made under the *Armed Forces Act* provided as follows:

"*24. (1) An accused who has been remanded for trial by court martial may be represented by counsel and shall be afforded a <u>proper</u> <u>opportunity</u> for preparing his defence and <u>allowed proper communication with his</u> <u>defending officer or counsel and with his</u> <u>witnesses</u>.**" (Emphasis added).*

Finally, *section 84 of the Armed Forces Act* empowered the court martial, during the trial, to adjourn from time to time and from place to place as the interests of justice required.

What constitutes adequate time and facilities or proper opportunity for preparation of a defence will certainly depend on the circumstances of each case, so that what may suffice as adequate time for an accused person who is out on bail or bond may not amount to much for an accused person who has been in solitary confinement, without access to an advocate or visitors for a long period before trial.

In *<u>SAVANNAH DEVELOPMENT COMPANY LTD V MERCHANTILE COMPANY LTD</u>, CA NO. 120 of 1992*, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an

adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs.

The Supreme Court of Uganda, in *FAMOUS CYCLE AGENCIES LTD & OTHERS V MASUKHALAL RAMJI KARIA, (1995) Kampala Law Reports 100,* was of the same mind when it stated that granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready.

Also in *LOLWE AGENCIES LTD V MIDLAND EMPORIUM LTD, HCCC NO 25 OF 1998 (KSM),* the High Court appropriately stated that, although the granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.

While bearing in mind that whether to grant an adjournment or not is discretionary and appellate courts are loath to readily question the exercise of discretion by the trial court, nevertheless it must never be forgotten that the right to an adjournment to enable a party to adequately prepare his or her case in a criminal trial is underpinned by no less an instrument than the Constitution. The authorities cited above relate to exercise of discretion to grant or refuse an adjournment in a civil dispute. We are of the opinion that although the same principles are relevant in respect of applications for adjournments of criminal trials, nevertheless because of the constitutional basis of that right and the potential impact on a citizen's liberty, the court is obliged to be more circumspect in rejecting an application for adjournment and to specifically consider whether denial of such a right guaranteed by the Constitution would result in miscarriage of justice.

Before the court martial was an accused person who had been held incommunicado, without access to a lawyer for well over 147 days. He had less than ten hours in total, and in a prison setting, to instruct his lawyer and prepare his defence. In his application for adjournment, he was requesting for just three working days to prepare for the hearing. The prosecution's objection founded on *rule 24(4) of the Rules of Procedure* ignored the fact that the twenty four [24] hours within which the accused person should be served with the relevant documents is the *"minimum"* and the rules do not preclude or prohibit service of the documents on the accused person for a longer period if the circumstances so demand.

In rejecting the application for adjournment, the court martial did not give any reasons why the adjournment had to be denied. Having placed before the court martial the reasons that in his opinion justified the adjournment, the appellant was entitled to be given reasons why the application could not be granted. The court martial came across as a body epitomizing caprice and hell bent on making very arbitrary decisions, which it could not justify.

If granting or rejecting an application for adjournment entails a discretion which must be exercised judiciously, then it is simply consistent with reasonable exercise of discretion to expect that reasons will be given why the discretion has been exercised in one way or the other. This is even more compelling when a party has placed before the court the reasons why it should exercise the discretion in his favour. To make a judicial decision and fail to explain the reasons for the decision, smacks of arbitrary and capricious exercise of discretion. Such oracular fiat has no place within a rational system of justice.

In denying the appellant's application for adjournment, the court martial

also did not address its mind to the critical question whether denial of the adjournment would occasion a miscarriage of justice. In *JOB OBANDA V*

STAGE COACH INTERNATIONAL SERVICES LTD & ANOTHER, *CA NO. 6 OF 2001*, this Court was emphatic that where, among others, a judge fails to apply his mind to the question whether a miscarriage of justice might be occasioned to a party who is refused an adjournment, that would constitute sufficient basis upon which an appellate court would be entitled to interfere with the exercise of the discretion.

On the facts before us, we would agree with the trial judge, without any hesitation, that the appellant's right to adequate time and facilities to prepare for his defence was blatantly violated.

The second issue relates to the appellant's application for summons to a witness that he wanted to cross examine or to testify on his behalf. On this issue again, the manner in which the court martial trashed the appellant's application left a lot to be desired. The record shows that the prosecution closed its case on Thursday, 13th January, 1983. Immediately the judge advocate explained to the appellant the three options he had in presenting his defence and specifically informed him that he was entitled to call any number of witnesses that he wished. The appellant elected to give sworn evidence and to call witnesses.

After the 5th defence witness had testified, the appellant applied to the court martial to summon General Jackson Mulinge, the then Chief of General Staff, as a defence witness. Simply put, the basis for the request for summons to General Mulinge was that, contrary to what was alleged in the charge sheet that the appellant had failed to prevent and suppress a mutiny, upon learning of the alleged intended coup attempt against the Government of Kenya, the appellant had passed the information to General Mulinge on 14th July 1982. General Mulinge then decided that the information be passed on to the Military Intelligence as well as the Special Branch for full investigations under his own co-ordination. The appellant considered the General to be a very crucial witness to his defence because, if the General were to confirm that two weeks prior to the coup attempt, the appellant had passed on to him the information on the alleged coup, and that the General had himself taken charge of investigations into the allegations, then at least the charge of failing to prevent a mutiny would be seriously undermined.

The court martial ultimately declined to summon General Mulinge. Once again, the record does not disclose any cogent reason given by the court martial to justify refusal to summon a witness who the appellant contended was critical to his defence, and who he was entitled to call both under the former Constitution and the court martial rules of procedure. All that is apparent is the sustained effort by the judge advocate – *cajoling here, haranguing there* - to dissuade the defence from summoning a witness it so desperately wished to call.

The learned trial judge concluded, very properly in our view, that the denial of the opportunity to call General Mulinge as a witness had occasioned a miscarriage of justice. The judge expressed himself as follows:

"I would agree with the petitioner that General *Mulinge would have been a crucial witness, either for the prosecution or the defence. However, he was the convening (officer) of the court martial. That notwithstanding, I think the refusal by the (court martial) to have General Mulinge testify occasioned a miscarriage of justice and this dented the* ***strength of the petitioner?s defence****. Section 70 of the repealed Constitution of Kenya guaranteed the petitioner protection of the law and in the aforesaid circumstances, I think the trial court* ***compromised the petitioner?s protection of the law*** *in its determination to save the Chief of General Staff perceived embarrassment in the event he was* ***to testify."***

Regarding the denial of the appellant the right to call his witness, we would also like to echo the words Mr Justice Lokeshwar Singh Panta, of the

Supreme Court of India in *MRS. KALYANI BASKAR V MRS. M. S.*

SAMPOORNAM, *Criminal Appeal 1293 of 2006,* where he stated*:*

"*The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right.*

Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them.

The last issue relates to the independence and impartiality of the court martial. *Section 77(1) and (9) of the former Constitution* guaranteed the appellant a fair trial by an independent and impartial court within a reasonable time. We shall advert to two issues, which, in our view, would strongly suggest to any reasonable person that the court martial which tried the appellant lacked independence and impartiality.

The first issue relates to the appellant's application for General Mulinge to be summoned as a witness, which we have considered above. Events leading to the refusal of the court martial to summon General Mulinge leave no doubt in our minds that the court martial allowed its decision to be dictated, or at the very least to be strongly influenced by a person who was not a member of the court martial. According to the order convening the court martial, the presiding officer was Major General J. L. Lenges. The members were Brigadier C. O. Mkungusi, Brigadier D. R. C. Tonje, Lt. Col. A. R. Khan and Lt. Col. K. F. K. Muhimdi. Senior Resident magistrate, F. E. Aragon was the judge advocate, whilst Major J. O. Mbewa was the prosecuting officer. Lastly, Col Z.K. Thirimu was the defending officer. It is important to note that the rules of procedure required those members to be appointed by name.

As is readily apparent, the Attorney General was not a member of the court martial. Nevertheless, when the appellant applied to call General Mulinge as a witness, the then Attorney General, Mathew Guy Muli personally appeared before the court martial and addressed it, stating categorically:

"General Mulinge will not be called. He will not be embarrassed. He will not give evidence."

From the rules, the basis of the Attorney General's audience before the court martial is not readily apparent. Even assuming that the Attorney General, as the chief legal adviser of the Government had audience before the court martial, that did not warrant the kind of intervention that he made and it does not surprise us that the appellant perceives his denial of the right to call General Mulinge as a witness as decision made by the Attorney General, and by extension, by the Government rather than by the court martial. It appears that the possibility of embarrassing the General was allowed, without much reflection, to override and trump and trample over the appellant's constitutional right to have the General summoned as a witness. Yet under *section 99(2) of the Armed Forces Act*, the court martial had the power to sit in a closed court which would have addressed the concerns regarding the testimony of the General.

In *ZAHIRA HABIBULLAH SHEIKH & ANOTHER V STATE OF GUJARAT*

& OTHERS, Criminal Appeal 446-449 of 2004, Justice Arijit Pasayat of the

Supreme Court of India underlined the importance of a fair trial in the following terms:

"Courts administering criminal justice cannot turn *a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted.***"**

The second issue relates to the role of Mr Aragon, the judge advocate, in the court martial. Under *Rule 78(2) of the Rules of Procedure*, the role of the judge advocate was to advise the court martial on any question of law or procedure relating to the charge or the trial. The heavy duty on the judge advocate to

ensure that the trial was fair was underlined by *section 78(7)* which provided as follows:

"The judge advoc**ate shall have equally with the presiding officer the duty of ensuring that the accused does not suffer any disadvantage in consequence of his position as such, or his ignorance, or his incapacity to examine or cross- examine witnesses or to make his own evidence **clear and intelligible, or otherwise."

In our view, this duty is not any less onerous merely because the accused person has retained counsel. We believe the reason why *section 78(2) of the Act* expressly provided that the judge advocate was responsible for the proper discharge of his duties to the Chief Justice, was to emphasize that he was not beholden to the court martial or any of the parties before it, but that his singular duty was to the cause of justice and the rule of law.

The record of the court martial proceedings as pertains to the role of the judge advocate is equally telling. When the appellant's critical application for adjournment was being made and determined, there is no record of the assistance that the judge advocate gave to the court martial to help it resolve the weighty constitutional and legal issue. Regarding the application to summon General Mulinge, the role assumed by the judge advocate per the record was to actively dissuade or obstruct the summons.

The record, subsequently, is full of interjections and interruptions of witnesses by the judge advocate which paint a picture of a hyperactive participant rather than a calm and impartial legal adviser. The exchanges between the appellant's advocate and the judge advocate, to the exclusion of the prosecutor, paint a picture of a judge advocate who had descended into the proverbial dust of conflict and was deeply mired in the dispute, ending up with a clouded vision. Snide questions and remarks attributed to him such as asking the appellant: ***"General, what sort of officers were you commanding? As far as am concerned these were civilians in uniform"***, do not readily paint a picture of an impartial officer in quest for the truth and nothing but the truth. Justice and its attainment appear to have been the least of his concerns.

There were several instances, a few of which we highlight, when the defence counsel would put a question to a witness, but rather than overrule the question or give the witness an opportunity to answer, the judge advocate would, in lieu of the witness, step in and supply the answer himself. Two such incidents at pages 163 and 227 respectively, went thus:

***"**Defence Counsel:*

And my instructions are that you did not at any time suggest to Major General Kariuki that he should not go to Nairobi but ring from 1 KR.

Judge Advocate:

*You can take it that he will deny it.**"***

"Defence Counsel:

You told my learned friend that Special Branch is more competent than MIC in carrying out this kind of investigations. Are there other types of investigations which you consider that MIC would be more competent in?

Judge Advocate:

*No intelligence officer will ever admit that a civilian force is more competent.**"***

Another incident involved the prosecutor and his witness:

Prosecutor:

Yes, you were going to say you were told the Reasons why this group wanted to overthrow the government. What reasons did Sgt Ogidi give you?...

Judge Advocate:

Do we need to know those imaginary complaints?

A few pages later, even the prosecutor himself could not stand the interventions of the judge advocate, and is recorded complaining as follows:

"*Prosecutor:*

Your Honour, I would suggest that I be allowed to conduct the prosecution independently, otherwise we will end up into difficulties for which no one ***will be held responsible except me."***

At page 269 of the record, an even more interesting exchange between the defence counsel and the judge advocate took place thus:

"*Judge Advocate:*

The way the Special Branch operates would be detrimental to public security to disclose in court.

Defence Counsel:

In camera, Sir?

Judge Advocate:

Even in camera."

The record shows that the judge advocate interjected 59 times when the nine prosecution witnesses testified, and 176 times during the evidence of the appellant's six witnesses. The majority of those interjections had nothing to do with advising on legal or procedural points. In highlighting those interjections, we are not concerned about the quantitative aspect, though it cannot be completely ignored. Rather, the concern is that the record shows that for the greater part of the proceedings, the judge advocate literally took over from the prosecuting counsel, subjecting witnesses to near hostile cross examination. At page 343, for example, the appellant's advocate was forced to request the court martial to reign in the judge advocate by restricting his interventions so as to allow the prosecuting counsel to discharge his duty. That was the same judge advocate who, on page 282 of the record of proceedings, is recorded saying, ***"I am not a member of the court. I merely advise."***

Rule 53(1) of the rules of procedure allowed the judge advocate to put questions to a witness. However, having carefully reviewed the record of the proceedings, we are satisfied that the judge advocate abdicated his role as an impartial and neutral legal adviser to the court martial, compromised his legal duty to ensure that the appellant did not suffer any prejudice, and ended up as a partisan and disruptive influence in the proceedings. He contributed sizeably to rendering the appellant's trial a signal travesty of justice.

We are satisfied that the cumulative effect of the violation of the appellant's right to sufficient time to conduct his defence, the refusal to summon General Mulinge, who the appellant wished to call as a witness, and the general conduct of the judge advocate, was to compromise beyond salvage the appellant's constitutional right to a fair trial. Before we leave this issue, we

again quote Mr Justice Arijit Pasayat in *ZAHIRA HABIBULLAH SHEIKH & ANOTHER VS STATE OF GUJARAT & OTHERS, (supra)* in view of what really transpired at the appellant's court martial.

"Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

"8 (1 4.) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

(a) to hear and determine an application made by a person in pursuance of subsection (1);

The next issue that we shall consider is whether, having failed to appeal the decision of the court martial, the appellant was precluded from alleging in his petition that the court martial had violated his constitutional right to a fair trial by an impartial and independent court. The pertinent part of *Section 84 of the former Constitution*, which the appellant had invoked, provided as follows:

(b) …and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

(3) …"

Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154*, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal. By that decision which held sway for a number of years, a party was forced to elect between invoking *section 84 of the Constitution*, or any other remedy that was available to him. Yet the words of *section 84* were clear enough that the remedy available under the provision was ***"without prejudice"*** to any other remedies that the applicant might have.

Interpreting a provision similar to *section 84(1) in the Constitution of Trinidad and Tobago* in *MAHARAJ V ATTORNEY GENERAL, (1978) 2 All ER 670*, the Privy Council, at page 678 stated that:

"The right to apply to the High Court for redress conferred by section 6(1) is expressed to be without prejudice to any other action with respect to the same matter, which is lawfully available. The clear intention is to create a new remedy whether there was already some other existing remedy or not".

See also *OLIVE CASEY JAUNDOO V ATTORNEY GENERAL OF GUYANA, (1971)*

AC, 972 and *RAMLOGAN V THE MAYOR, ALDERMEN AND BURGESSES OF SAN FERNANDO, (1986) LRC 377).*

Way back in 1962, the Supreme Court of India in *KHARAK SINGH V STATE OF UTTAH PRADESH (1963) AIR 1295*, while interpreting *Art 32 of the Constitution of India*, which guarantees the right to access the Supreme Court for the purpose of enforcement of guaranteed rights, resoundingly rejected the argument that the right to access the Supreme Court was dependent on whether the applicant had or did not have other remedies. Justice Ayyangar Rajagopala speaking for the Court expressed himself forcefully as follows:

"*It is wholly erroneous to assume that before the jurisdiction of this Court under Art. 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this court that by State action the fundamental right of a petitioner under Art. 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in that behalf.****"***

The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*. In *HARUN THUNGU WAKABA V ATTORNEY GENERAL, HC MIS APP No. 34* of 1992 *(Unreported),* the High Court repudiated *ANARITA KARIMI NJERU* in the following terms:

"We would as such interpret the words in issue ***[„without prejudice?]*** *as meaning "without dismissing or detracting from" any action which may still be available to the person. In our view therefore the statement only saves the future rights which a person may have but does not specifically bar any person from seeking redress thereunder if such a person had availed himself of any other action previously. The fact that previous actions are not mentioned by the section does not in our view by implication bar such person from coming to this Court. With due respect to the learned judges who decided the Anarita case, we feel that the interpretation given to the words "without prejudice to any other action" was too restrictive."*

Subsequently, the same court affirmed that view in *KAMLESHMAN SUKHLAL DAMJI PATTNI & ANOTHER V REPUBLIC, HC Misc App No 322 of 1999,(unreported)* when it held that an applicant who had any other remedy available to him was not precluded from seeking redress under *section 84(1) of the Constitution* and that *section 84(1)* was intended to provide an applicant with quick and summary procedure independent of any other remedy available to him for enforcement of contravened fundamental rights and freedoms.

In light of the above consistent decisions, we are, with respect, unable to agree with the learned judge that because the appellant had the right of appeal available to him, which he had not utilized, he was precluded from alleging that the court martial had violated his constitutional rights. The issues raised by the appellant were not issues reserved only for consideration in an appeal; they could legitimately and legally be raised and addressed in a petition for redress of violated constitutional rights, such as was before the learned judge, independent of any other remedy that the appellant had.

It is for that reason that the decision of this Court in *METHODIST CHURCH IN KENYA REGISTERED TRUSTEES & ANOTHER V REV. JEREMIAH MUKU & ANOTHER, CA NO. 233 OF 2008 (supra)* is easily distinguishable from the present appeal. On the particular facts of that case, both the High Court and this Court found that the appellant's petition under *section 84(1)* was frivolous and an abuse of the process of court. That conclusion was based on the fact that the preliminary decree which the appellant alleged had breached his constitutional rights had been validly issued by a competent court; the appellant had attempted to appeal against that decree; he had made several applications to review the same; and had also challenged the same by way of a counter-claim, the hearing of which was still pending before the High Court. This Court concluded that the petition was no

more than an illegitimate collateral attack on the preliminary decree.

The decision in *METHODIST CHURCH IN KENYA REGISTERED TRUSTEES (supra)* is quite consistent with the decision of the Privy Council in *HARRIKSON V ATTORNEY GENERAL OF TRINIDAD AND TOBAGO, (1980) AC 265*, where the Council identified one obvious limit to applications such as those under the former *section 84(1)* in the following terms:

"...** the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom".**

The recent judgment of this Court rendered on 7th February, 2014 in *LT. COL. ROBERT TOM MARTINS KIBISU V REPUBLIC, CA NO. 259 OF 2012, (unreported)*, equally illustrates another instance of illegitimate use of a constitutional petition, to re-open issues that had been conclusively heard and determined by a court of competent jurisdiction. In that appeal, this Court upheld a refusal of the High Court to entertain a petition alleging violations of fundamental rights by a court martial, because those same issues had been raised in an appeal to the High Court, which had heard and determined the same on merit.

In the present appeal, we find that by no means can the issues raised by the appellant be described as frivolous, vexatious or an abuse of the process of the court. In addition, we find that unlike In *METHODIST CHURCH IN KENYA REGISTERED TRUSTEES, (supra)* and in *LT. COL. ROBERT TOM MARTINS KIBISU, (supra)*, the appellant had not raised the issues he was raising in the petition before any other court; that those issues had not been heard and determined on merit; and that the issues remained and were live for adjudication.

Much time was taken by counsel on both sides canvassing the true tenor and import of the judgment of this Court in *JULIUS KAMAU MBUGUA VS REPUBLIC, (supra).* The respondent contended that the judgment stands for the proposition that violation of an accused person's constitutional rights does not render a trial a nullity but that the remedy available to such person is a claim for damages. Agreeing with that submission, the learned judge delivered himself as follows:

"…several years after deciding the** Albanus Mwasia Mutua appeal, the same court varied the aforesaid jurisprudence in the case of Julius Kamau Mbugua v Republic, Criminal Appeal No. 50 of 2008 which was decided on 8th October, 2010. After reviewing several local and foreign decisions on this constitutional issue, the Court of Appeal came to **the conclusion that violation of an accused?s** constitutional right does not render the trial a **nullity. The accused?s remedy in such** circumstances lies in a claim for compensation by **way of damages…

*In view of the decision in Julius Kamau Mbugua v Republic (supra) I find and hold that the violation of **the prisoner?s constitutional rights did not render his trial a nullity."***

We are unable to agree that *JULIUS KAMAU MBUGUA VS REPUBLIC*

(supra) stands for the overly broad and wide application that the learned judge gave it. This Court was very conscious that the violation it was addressing in

JULIUS KAMAU MBUGUA, (supra) was the delay in bringing the accused person to court within the period stipulated by the Constitution. At page 5 of the judgment, the Court defined the central issue it was considering, in the following terms:

***"**Although the appellant complained in the petition that his right of protection against inhuman treatment, his right of freedom of movement and right to fair trial within a reasonable time had been*

*violated, the petition was principally based on the violation of his right to personal liberty under Section 72 (3). His specific complaint was that he was unlawfully kept in police custody for 107 days before he was charged in court, which according to him, was a gross violation of his rights under Section 72 (1) and Section 72 (3) and sought a discharge, among other reliefs. To be fair to the appellant, he also complained that such detention was a gross violation of his right under Section 77 (1) – that is a right to a fair trial within a reasonable time. Nonetheless, the petition was prosecuted on the basis of violation of the right to personal liberty and the decisions of the court cited in support of the petition also related to breach of right to personal liberty and not to breach of right to a fair trial within a reasonable time. The numerous grounds of appeal relied on in essence relate to unlawfulness of the detention and the failure by the trial judge to follow the relevant decisions of various courts on the effect of such unlawful detention on the trial or conviction. Indeed, Mr. Ngunjiri, learned counsel for the appellant argued all the grounds of appeal together saying: „They relate to the issue whether the holding of the accused was unlawful and w**hether the dela y was inordinate? ”** . (Emphasis added).*

At page 28, the Court left absolutely no doubt that its central focus in *JULIUS KAMAU MBUGUA (supra)* was the narrow question of the effect of violation of the right to trial within a reasonable time. This is plainly obvious from the following words:

"*The following broad principles emerge from the consideration of the Commonwealth and international jurisprudence on the right to a trial within a reasonable time which we will endeavour to restate thus**…"*** (Emphasis added).

The final conclusion at page 35 of the judgment removed all lingering doubt, if there was still any, on the proposition that the judgment stands for:

"*Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.**"*** (Emphasis added).

The Court was very alive to the fact that there may be cases where violations of constitutional rights create trial-related prejudice which may require much more than award of damages to remedy. That is clearly what the Court had in mind when it states at page 33 as follows:

"However, the trial court can take cognizance of *such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.**"*** (Emphasis added).

The learned trial judge found that the appellant's right to liberty was violated for which he awarded damages. There certainly will be cases where the violations alleged and proven are best remedied by an award of damages. Considerations of public interest, the demands of justice and proportionality would justify such an approach. However, where the proven violations are so egregious as to go to the very root of a fair trial, an award of damages alone will not suffice as a proper and fitting remedy for purposes of securing protection of the law. This appeal is one such case.

We have found that the violations of the appellant's constitutional rights went far beyond his right to liberty and fundamentally implicated his right to a fair trial. Those violations cannot be appropriately

remedied by an award of damages alone. A conviction founded on such palpable and glaring violation of the right to a fair trial ought not to be allowed to stand. A conviction arrived at on the back of egregious violations of the magnitude and scale we have found in this appeal, is in addition, a danger not only to the appellant, but to society itself. This is particularly the case when the violations are committed by a court created by law and enjoined to uphold the rule of law.

Before we address ourselves to the question of damages, we shall quickly dispose of two other arguments that Mr Kamau presented on behalf of the respondent in opposing the appeal. The first was that a judgment of a competent court cannot constitute a violation of the rights of a person who is tried by such a court, even if the judgment leads to imprisonment. The remedy open to such a person is an appeal to a higher court to quash the decision in question. *S. 72 (1) (a) of the former Constitution* was cited in support of that proposition.

Section 72(1) (a) merely provided that execution of a sentence or order of a court following conviction of a criminal offence does not constitute violation of the right to personal liberty. It is in this context that the Privy Council, in

MAHARAJ V ATTORNEY GENERAL, (NO 2) (1979) AC 385, stated as follows at

page 399:

"In** the first place no human right or fundamental freedom recognized by Chapter 1 of the Constitution is contravened by a judgement or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even **where the error has resulted in a person?s serving a** sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is **infallible but to one that is fair."

The principle behind the above passage in *MAHARAJ V ATTORNEY OF TRINIDAD & TOBAGO* is that a wrong or erroneous judgement or order by a court arrived at within the confines of the prescribed procedures and guaranteed rights, does not constitute a violation of guaranteed rights. It is really no more than what we call in legal parlance *"to err"*. The remedy for such errors is an appeal or an application for review or revision as the case may be. Such decisions were deemed by *s.72 (1) (a) not* to constitute violations of the right to liberty, where they resulted in imprisonment of an accused person.

That principle, with respect, cannot be so readily extended to shield trials that are replete with violations of constitutional guarantees to a fair trial. The effect of such violations is to vitiate the trial to such an extent that it amounts to no trial. In our respectful view, *section 72(1) (a)* was never meant to protect

such flawed trials. Indeed, even in *MAHARAJ V ATTORNEY GENERAL, (supra),*

the Privy Council accepted that errors in procedure that are capable of constituting infringements of protected rights are not covered. Nor are errors that amount to a failure to observe one of the rules of natural justice.

The second issue relates to Mr Kamau's submission that under the former Constitution, the constitutional rights in respect of which members of the armed forces could seek redress were limited to protection of the right to life *(S. 71),* protection from slavery and forced labour *(S. 73)* and protection from inhuman treatment *(S. 74*). In Mr Kamau's view, the appellant could not allege violation of any other constitutional rights and the trial court had erred in entertaining his complaints relating to those other rights.

Although Mr Kamau purported to base that argument on the provisions of *section 82(2) of the former Constitution,* that provision did not support the argument as it related to protection from discrimination. The relevant provision was *section 86(2)* which related to interpretation and savings. The section provided:

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

We do not understand the above provision to deny members of the armed forces all rights under that Constitution save those guaranteed under *sections*

71, 73 and 74. Rather, as was the approach in the former Constitution, this was one of the claw back provisions that allowed legislation to derogate from the guaranteed rights. We must emphasize that under that provision, the derogation from constitutional rights had to be pursuant to a law.

It was incumbent upon the respondent to identify a law that, for example, allowed in relation to the appellant, derogation from the right to adequate time and facilities for conduct of his defence, the right to call witnesses, or the right to a fair trial by an impartial and independent court. The same case applies to the other rights that the trial court found to have been violated in relation to the appellant. No such law allowing derogation was cited and we believe that there was none. As we have demonstrated, contrary to the suggestion implicit in the respondent's submission, the provisions of the Armed Forces Act relating to courts martial did not entail blanket derogation from guaranteed constitutional rights. Instead those provisions closely mirrored the principles and values of the Bill of Rights in the Constitution. We find the argument totally bereft of merit.

In any event, we would have dismissed the argument because the respondent did not file a cross-appeal against the judgment of the trial court. It is only on the basis of a cross-appeal that Mr Kamau would have been able to challenge the judgment on the grounds that it had awarded damages in respect of violations that under the former Constitution were not deemed to be violations.

Turning to the ground of appeal relating to damages, it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions. *See*

KIGARAGARI V AGRIPINA MAYA AYA, (1985) KLR 273 and *SOUTHERN*

ENGINEERING CO LTD V MUTIA, (1986-1989 EA 541). Moreover, the principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In *KEMFRO AFRICA LTD V LUBIA &*

ANOTHER, (No. 2) 1987 KLR 30, Kneller JA identified the principles as follows:

"The principles t*o 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 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 wholly erroneous estimate of the damage****."***

Later in *JOHNSON EVAN GICHERU V ANDREW MORTON & ANOTHER*,

CA NO. 314 OF 2000, this Court reiterated the same principles in the following words:

"I*t is trite that this court will be disinclined to disturb the findings 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 small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.****"***

(See also *BUTT VS KHAN, (1981) KLR 349* and *STANDARD LTD VS*

KAGIA T/A KAGIA & COMPANY ADVOCATES, (2010) 2 KLR 55).

On the purpose of awards of damages, the Supreme Court of Uganda in

CUOSSENS V ATTORNEY GENERAL, (1999)1 EA 40, noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.

The learned trial judge awarded the appellant a global sum of KShs.7,000,000/= as damages for the violation of his constitutional rights which he found to have been proved. We have already concluded that the learned judge misdirected himself when he declined to issue declarations relating to the violation of the appellant's right to a fair trial on the grounds that the appellant had failed to appeal against his conviction by the court martial. By reason of the misdirection, the learned judge made an erroneous estimate on the damages and we find that we are justified in interfering with the award.

For his part the appellant claims damages of KShs.200,000,000/= for the violation of his constitutional rights and a further KShs.495,500,000/= for solitary confinement for a period of 1,982 days. The judicial authority that was

relied upon on quantum was *MAJOR (RTD) EZRA IMAANA LAIBUTA V*

ATTORNEY GENERAL & 4 OTHERS, (supra) a decision of the Industrial Court rendered on 29th November, 2013, in which a former army Major was awarded KShs.7,000,000/= as general damages for pain and suffering. We were asked to bear in mind that the retired Major was several ranks below the appellant and that the appellant ought to be awarded more on account of his high rank in the armed forces.

In *MAJOR (RTD) EZRA IMAANA LAIBUTA*, no comparable decision was

cited to justify the award. We do not know also whether that decision is the subject of appeal to this Court. Beyond that decision, no other authority was cited to justify the combined claim of KShs.695,500,000/=, the bulk of which, as we have already noted, is based on a mathematical formula of KShs.250,000/= damages for each day of confinement. The venerable Madan, JA *(as he then was),* aptly captured the difficulties that confront a judge in assessment of

general damages in the context of personal injuries claims as follows in *UGENYA*

BUS SERVICE V GACHIKI, (1976-1985) EA 575, at page *579:*

"G*eneral damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can.***"**

The challenge, in our view is not limited to assessment of damages in personal injuries claims alone; it extends to all assessment of general damages that are essentially at large. In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of

damages should not be excessive. See *JABANE V OLENJA, (1986) KLR 1.*

In *MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986*

(unreported) Madan, JA again, aptly observed that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. In the same judgment, he addressed an argument similar to the one before us, tying the quantum of damages to an appellant's station in life:

"It is not always altogether logical that general** damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of **persons."

Without in any way downplaying the gory violations that the appellant suffered, we find the quantum of damages claimed to be extravagant and exaggerated. We do not agree with the invitation by the appellant to seek mathematical precision in the award of damages. At any rate, the sum of kshs 250,000 per day is altogether fanciful. We would accordingly award the appellant a global sum of KShs.15,000,000/= as general damages for violation of his constitutional rights, including in particular the violation of his right to a fair trial by an independent and impartial court.

Having found that the appellant's trial was vitiated by the violations that attended it as detailed in this judgment, we would allow the appeal and quash the appellant's conviction by the court martial. We would also allow the appellant's claim for KShs.22,965,460/= being his salary arrears and allowances, the tabulation of which the respondent has not challenged. We would also direct that the appellant's rank, benefits, honours and decorations be restored forthwith.

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.

In his submissions before us, the appellant attempted to justify the delay in lodging his claim by arguing that the judiciary in the past was co-towing to the Executive and therefore he did not expect the High Court to stand up to the court martial. We do not wish to speculate what could or could not have happened if the appellant had filed an appeal or a constitutional petition promptly. What is clear to us is that many Kenyans who lodged claims alleging that their constitutional rights had been violated by the State or its functionaries did get declarations and remedies in their favour. Some of the judgments relating to those cases include *MARETE V ATTORNEY GENERAL (1987) KLR 690,* KIHORO *V ATTORNEY GENERAL, CA NO. 151 OF 1988, HARUN THUNGU WAKABA V ATTORNEY GENERAL, (supra) and OLEL V ATTORNEY GENERAL, HCCC NO. 366 OF 1995 (KSM).*

Award of interest is in the discretion of the Court, which discretion must be exercised judiciously. See *KENINDIA ASSURANCE CO LTD V ALPHA KNITS LTD & ANOTHER, (2003) 2 EA 512* and *OMEGA ENTERPRISES KENYA LTD V ELDORET SIRIKWA HOTEL LTD & OTHERS, CA NO. 235 OF 2001,*

(Unreported). It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See *METAL BOX CO LTD V CURRYS LTD, (1988) 1 ALL ER 341* and the decision of this Court in *MUMIAS SUGAR CO LTD V NALINKUMAR M SHAH, CA NO. 21 OF 2011, (MSA), (unreported).* Due to the appellant's own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.

Ultimately, we allow the appellant's appeal on the following terms:

(1) The appellant is awarded KShs.15,000,000/- as damages for violation of his constitutional rights;

*(2) **The appellant's conviction and sentence by the court** martial is hereby quashed;*

(3) The appellant is awarded KShs.22,965,460.00 being his salary arrears and allowances;

*(4) **The appellant's rank, benefits, honours and decorations** are hereby restored; and*

(5) The appellant is awarded costs both in the High Court and in this Court.

It is so ordered.

Dated and delivered at Nairobi this 21st day of March, 2014.

P. O. KIAGE

……..

JUDGE OF APPEAL

K. M'INOTI

……...

JUDGE OF APPEAL

J. MOHAMMED

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

wg