SURVIVING AFTER TORTURE

A CASE DIGEST ON THE STRUGGLE FOR JUSTICE BY TORTURE SURVIVORS IN KENYA

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ACRONYMS

CAT	International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CID	Criminal Investigations Department
DC	District Commissioner
DCIO	Divisional Criminal Investigation Officer
DSI	Directorate of State Intelligence
EALR	East African Law Reports
FEM	February Eighteenth Movement
FERA	February Eighteenth Revolutionary Army
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ-Kenya	Kenya Section of the International Commission of Jurists
IMLU	Independent Medico-Legal Unit
JJA	Judges of Appeal
J	Judge
KANU	Kenya African National Union
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KPU	Kenya Peoples Union
MP	Member of Parliament
NSIS	National Security and Intelligence Services
OMCT	World Organization Against Torture
PCIO	Provincial Criminal Investigation Officer
TJRC	Truth Justice and Reconciliation Commission
UDHR	Universal Declaration of Human Rights

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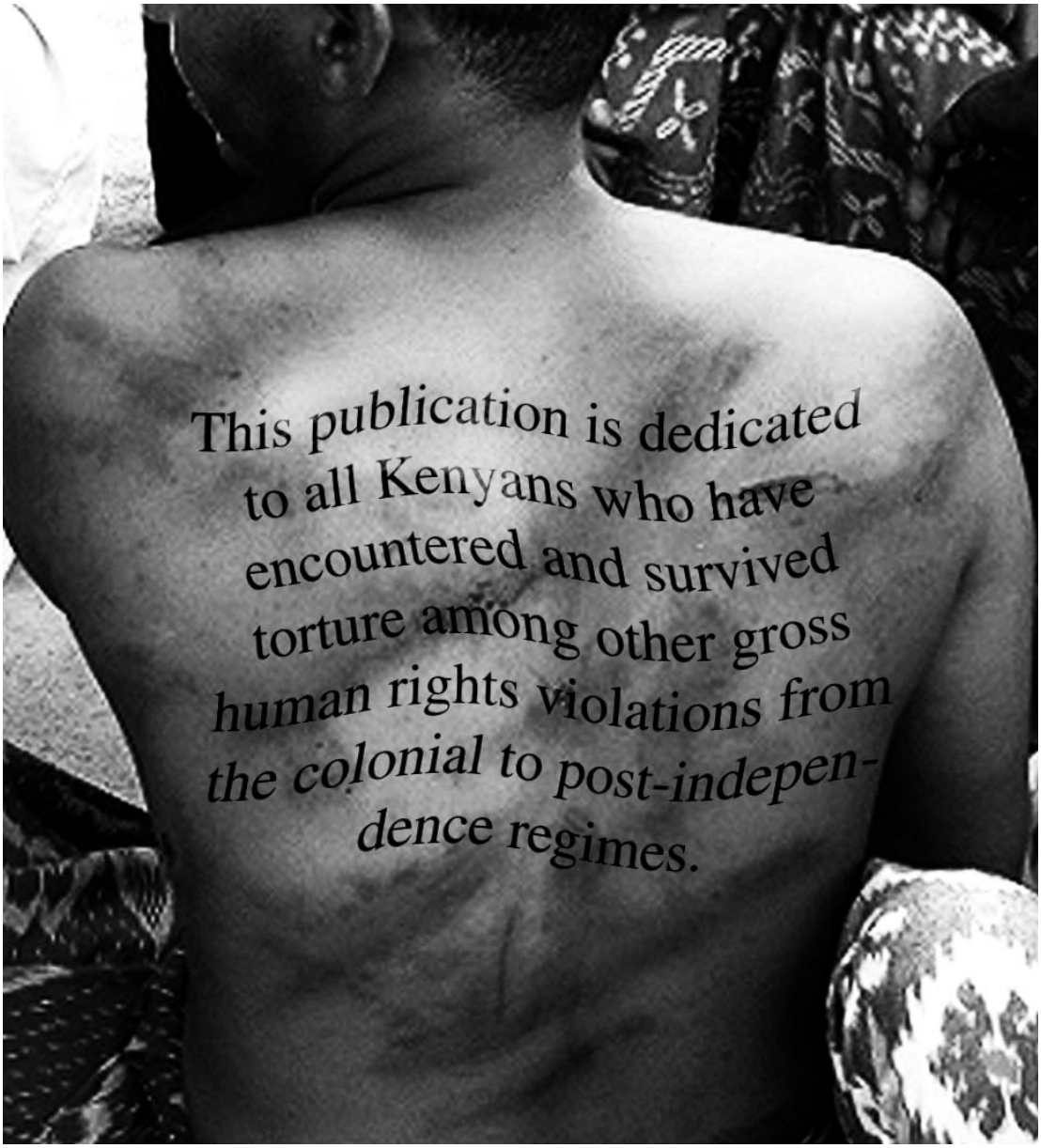

INTRODUCTION

Torture as defined in this Toolkit has been one of the major causes and manifestations of human rights violations in the society, since time immemorial. In Kenya, torture has been one of the major epitomes of impunity, stretching from the colonial era and finding its way into all the regimes after independence. All along, survivors of torture in Kenya have found ways of seeking truth, justice, reforms and reparations via the different tools and strategies of engagement. This publication, *SURVIVING AFTER TORTURE: A CASE DIGEST ON THE STRUGGLE FOR JUSTICE BY TORTURE SURVIVORS IN KENYA* presents a detailed review of how the victims of torture engaged courts with a view to pursuing justice and promoting human rights. It also captures other related cases and incidents of torture experienced at the national and international levels.

Chapter One, *Overview of Torture in Kenya,* traces torture from the colonial regime through the post-independence regimes under Presidents Jomo Kenyatta, Daniel arap Moi and the current Mwai Kibaki. It shows how successive colonial and post colonial regimes made torture a weapon of choice and encouraged a vicious cycle of impunity which culminated in major human rights violations from 1960s to date. It comes out clear that it was the systemic torture condoned and practiced by the colonial and Kenyatta regimes that the Moi and Kibaki regimes managed to perfect as an instrument for political manoeuvring and managing political resistance.

Chapter Two *The Judiciary in the Determination of Torture Cases,* constitutes the first part of the main body of this publication. The chapter traces the various approaches that victims of the Nyayo House Torture Chambers have used to pursue justice through the Judiciary since the late 1980s to date. It also specifies how civil actions have, over time, been instituted in court through plaints, originating summons, originating notice of motion and petitions.

Chapter Three on *Presentation of the Selected Court Cases* constitutes the second part of the main body of this digest by providing the details and outcomes of the six selected cases; that is Joseph Kamonye Manje vs Republic; Wanyiri Kihoro vs The Attorney General; David Mbewa Ndede vs Republic; Dr Odhiambo Olel vs The Attorney General; Dominic Arony Amolo vs The Attorney General; and Rumba Kinuthia and 6 others vs The Attorney General; in that order. Each case is analysed within the framework of the case overview, facts of the case, Court of Appeal decision and rationale, among others.

Chapter Four, *A Review of Other National and International Torture Cases* analyses other relevant cases within Kenya and without. It especially seeks to establish how the issues emerging from the previous chapter compare and contrast with other developments and cases at the regional and international levels either at the same time, or at different times, between 1980s to date.

Chapter Five mainly highlights *Prognosis and Recommendations.* From the four chapters, it emerges that torture is used as a weapon of repression. It is therefore imperative that reforms that are currently on-going within the judiciary and other related institutions of administration of justice be carried out with speed so as to leave no stone unturned.

EXECUTIVE SUMMARY

The torture cases in this digest are divided between criminal appeals and civil cases. The former refer to appeals from decisions obtained in cases where the accused persons were arrested, charged and convicted for certain crimes under circumstances that violated their fundamental rights and freedoms. The civil cases, on the other hand, exemplify instances where survivors of torture have sued the government for breach of their human rights and freedoms by one or more of its agencies.[1] In the latter cases, survivors sought both compensation and a declaration that their rights had been violated. **This *CASE DIGEST* captures six out of the many other cases which were instituted beginning 1987 to 2004[2].**

The main human rights violations captured in this *CASE DIGEST*, involve situations where the State, through the police, arbitrarily arrested suspects without warrants of arrest, searched their offices and homes, blind folded them and whisked them away to illegal underground cells. In these cells, that were cold, dark, and sometimes water-logged, those arrested would be stripped naked and sprayed with pressurised water. They were denied food, water, beddings and opportunities to sleep. Furthermore, they were held incommunicado – prevented from either communicating with their families or seeking legal representation.

The suspects were also subjected to heinous acts of physical torture that included severe beatings with pieces of timber, whips and broken legs of chairs, and being burnt with lit cigarettes butts — all in a bid to intimidate, threaten and extract false confessions. Cases are reported of instances where political prisoners were held in solitary confinement or together with mentally challenged inmates in segregated prison blocks. Some of the victims were arbitrarily detained without trial while others were arraigned before the Chief Magistrate's Court at the Nairobi Law Courts (now known as the Central Division) outside normal court hours. These violations not only led to grievous bodily harm but to emotional, psychological and social distress as well. The survivors of these events also suffered professional and career disruptions, with most losing their jobs and livelihoods.

The aforementioned violations contradicts such international human rights laws as the Universal Declaration on Human Rights(UDHR); African Chater on Peoples Rights (ACHPR); International Covenant on Civil and Political Rights(ICCPR); International Covenant on Economic, Social and Cultural Rights(ICESCR); and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These treaties proscribe torture, cruel, inhuman and degrading treatment or punishment from both the civil and political rights; and economic, social and cultural rights perspectives[3].

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1. However, there are some civil cases that do not require action against government e.g. defamation suits.
2. For details on other cases see Appendix 2.
3. See for instance: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment(CAT) Resolution 39/46 adopted by the General Assembly on 10 December, 1984; International Covenant on Civil and Political Rights(ICCPR) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March, 1976, in accordance with Article 49; International Covenant on Economic, Social and Cultural Rights(ICESCR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966, **entry into force** 3 January 1976, in accordance with article 27. See also Article 5 of the Universal Declaration of Human Rights(UDHR). The UDHR) is a declaration adopted by the United Nations General Assembly (10 December, 1948, at Palais de Chaillot, Paris).

Other contemporary international laws that can inform the above violations and ongoing litigations *are Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law* and *Serious Violations of International Humanitarian Law.* Indeed Article (VII) of these principles and guidelines provides that victims' right to remedies include the right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. According to Article (IX), the remedies must also be appropriate and proportionate to the gravity of the violation and the circumstances of each case for restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition[4].

At the national level, these violations were undertaken in blatant contravention of sections 70, 71, 72, 74, 76, 77, 79, 80 and 81 of the Constitution of Kenya which contain such respective safeguards as fundamental rights and freedoms; protection of the right to life; protection of the right to personal liberty; protection from inhuman treatment or degrading punishment or other treatment; protection against arbitrary search or entry; secure protection of the law; protection of the freedoms of expression; assembly, association and movement. Also critical and affronted are sections 83 and 84 of the Constitution which enshrines the provisions for justice through the *derogation from fundamental rights and freedom* (especially to those detained) and *enforcement of protective provisions.* Indeed Section 81(1) provides that:

> **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. [FN: 6 of 1992, s. 10, 9 of 1997, s. 10.]**

As much as the constitution prohibits torture and provides redress clauses, there exists no legal, policy and institutional framework to ensure substantive protection and promotion of the same[5]. It is on this basis that torture has persisted in Kenya for many years, while many of the cases filed in court during the period in question (1987-2004) were thrown out on technical grounds. Plaints, originating summons, originating notice of motion and petitions have since been the key processes for survivors to institute civil actions against the state.

In isolated cases, however, some survivors had their rights safeguarded, convictions withdrawn and reparations awarded. The rulings of these cases set progressive precedents which are still upheld during the trial of, or advocacy around, similar or related cases at national and international levels. A major milestone of such judgements at the national level is exemplified in the case of the **Republic vs Amos Karuga Karatu** (In the High Court of Kenya at Nyeri, High Court Criminal Case No. 12 of 2006), where the sitting judge Makhandia J held that:

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4. dopted and proclaimed by General Assembly resolution 60/147 of 16 December, 2005
5. This is contrary to Article 2 of CAT which provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

> **We are no longer in the 1980's where the fundamental rights of the citizens were trampled upon by the police. The courts of law (then) could not stand up to challenge such conduct. As the court of appeal said recently, the courts (in those days) chose to see no evil and hear no evil giving rise to the infamous Nyayo House torture chambers...It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the Judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the Judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person.**

At the international level, the ruling by the Supreme Court of Israel on Torture of Terrorist Suspects raised the bar on torture in regards to interrogating suspects of terrorism and the so called physical interrogation methods when the court held that:

> **...neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual General Security Service (GSS) investigator – like any police officer – does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.**

The *CASE DIGEST* provides recommendations which can inform the on-going and future legal and political interventions against torture, or cruel, inhuman, degrading treatment or punishment among other human rights violations.

CHAPTER 1

Some implements of Torture

OVERVIEW OF TORTURE IN KENYA

INTRODUCTION

For the purposes of this publication, we have adopted the definition of the term 'torture' from the International Convention Against Torture (CAT), which defines it as:

> **Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act him or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such a pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions[6].**

Torture is proscribed within the above mentioned and other international laws because it amounts to gross violation of human rights. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Within the customary international law, states are duty bound to the respect of their human rights among other obligations regardless of whether they consent. Thus: 'Customary international law is binding on a nation. It is evidenced by a generally accepted state practice and *opinio juris*, accepted as law'[7].

In Kenya, torture has often been used as a means of coercing confessions or to punish and intimidate individuals who, in the context of this publication, are usually advocates for progressive change in the nation's political dynamics. In the *Mission to Repres*s (1998), the Kenya Human Rights Commission (KHRC) posits that torture often begins at the moment of arrest, effected on many occasions without a warrant of arrest and in breach of established, laid down procedures.[8] From the colonial to the post-independence regimes torture has been inflicted on political activists and other perceived enemies of the ruling authoritarian regime.. Torture is thus used as a tool to silence dissidents and repress political opposition. According to a report by IMLU,

> **Torture is manifested in four main ways in Kenya: torture of political dissenters (this scenario has changed (slightly)during the current government, torture while in confinement, which is the most common, torture against weak and/or disadvantaged groups and ethnic/land clashes. To an extent the above parameters are artificial in the sense that they are so intertwined that the occurrence of one does not preclude the other**[9].

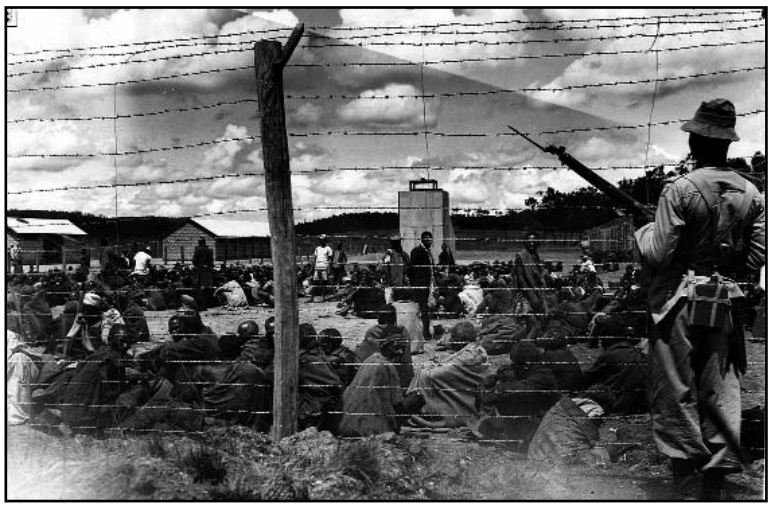
6. Article 1 of the CAT.
7. According to the International Justice Project; http://www.internationaljusticeproject.org/juvJusCogens.cfm visited on January 29, 2010; 6:00pm.
8. Kenya Human Rights Commission, Mission to Repress; Torture, Illegal Detentions and Extra-Judicial Killings by the Kenyan Police. Nairobi: KHRC, 1998, pp 6-7.
9. IMLU, 'Understanding Torture in Kenya: An Empirical Assessment', A Report by the Independent Medico-Legal Unit. IMLU, August 2007, p 2.

1.2 TORTURE DURING THE COLONIAL ERA (1895-1963).

Torture is a violation of human rights that is deeply entrenched and systemic in the society, spreading from one regime to the next. The colonial regime ruled Kenya using repressive systems which perfected torture as a tool for dispossession of citizens and suppression of political resistance. On dispossession, from 1902, the colonial government put in place legal and policy measures which denied the Africans the enjoyment of their land rights, job opportunities among other means of livelihoods. It is on this premise that Anderson described the situation of Africans in Nairobi in the 1930s and 1940s as 'squalid, crowded and reeking of poverty'[10].

Moreover, the resistance against white rule from the early to later years of colonialism was met with brutal force, torture and repression. The initial resistance by Africans and Asians saw leaders and their supporters get arrested, detained, tortured, deported and/or killed. In 1885, when British colonials began building the Uganda Railway through the Nandi area, Koitalel Arap Samoei (an Orkoiyot-supreme chief of the Nandi community) led an eleven-year resistance movement against the railway construction. Sources review that:

> **On October 19, 1905, he was invited by British Col Richard Meinertzhagen under the guise of negotiating a truce, and was instead murdered along with his companion. His son, Barsirian Arap Manyei (born 1882), was the Nandi leader from 1919 until 1922 when he was detained by the British. Barsirian was not released until 1964, making him the longest-serving political prisoner in Kenyan history.[11]**



British concentration camps in Kenya were brutal places where officers meted out unspeakable abuses to detainees

Elsewhere, Mekatilili wa Menza, a woman leader, who led the Giriama people in a rebellion against the British Colonial administration and policies actively in 1913 - 1914 was captured by the British and exiled to Kisii. Harry Thuku,

10. Anderson David, Histories of the Hanged, Britain's Dirty War in Kenya and the End of Empire, Weidenfeld and Nicolson, 2005, p 35.
11. See for details: http://en.wikipedia.org/wiki/Orkoiyot.

the leader of the Young Kikuyu Association opposing the colonial rule, was arrested in 1922 and deported to the coastal town of Kismayu. Of his supporters 23 were killed and 27 wounded in the first violent urban political protest in Kenya. Deportation and detention was a torturous encounter for it denied the survivors their liberties, exposed them to new and hard conditions, and occasioned physical and emotional distress, inhuman and degrading treatment and punishment.

In the decade leading to the granting of Kenya's independence in 1963, the British government waged a more aggressive war against freedom fighters, especially those who were suspected to be involved with the organization generally known as the 'Mau Mau'. During the war that stretched from 1952 to 1960, the Colonial Government detained without trial hundreds of thousands of Mau Mau suspects. There is a wealth of evidence to demonstrate that those detained under the colonial emergency rules were subjected to egregious violations of human rights.

Mau Mau fighters in court

The KHRC has collected a number of statements from survivors for reparations suit against the British government. On 22 October, 2009, Leigh Day & Co, solicitors, acting on behalf of the Kenya Human Rights Commission and the Mau Mau War Veterans Association served the British Government with Particulars of Claim on behalf of five Kenyans, detailing the evidence of the severe torture they sustained at the hands of British officials in the 1950s and 1960s. In addition, the British Government was served with a substantial volume of supporting documentary evidence gathered from the national archives in London and Nairobi. The documents demonstrate the British Government's knowledge of, and authorization of, torture of Kenyans during the Kenyan Emergency. A selection of the documentation has been attached to the particulars of claim for your perusal.

The claimants allege that they were assaulted and tortured for a number of years during the brutal repression of the Kenyan independence movement by the British Colonial Government in the 1950s and early 1960s. The five claimants are veterans of the Mau Mau movement and the Kenyan African Union. They are men and women from different Kenyan communities who are representative of the wider community of thousands of Kenyans who were detained and tortured during the fight for independence. They have each suffered unspeakable injuries, including castrations and severe sexual assaults. These claims are test cases and it is anticipated that, if successful, they will result in community reparations for the wider group of Kenyan torture victims.

However, above all else the claimants are seeking an official apology for the torture that they and so many others were subjected to. Ndiku Mutua, one of the five claimants, said:

> **After 50 years it is time for justice. I was castrated and tortured whilst I was detained by British prison guards. I was robbed of my dignity and of a family and those scars have never healed. This wrong must be recognized, I and many others deserve an apology and justice at long last.**

In recent years, following detailed archival research by historians, it has become clear that far from being the acts of a few rogue soldiers, the torture and inhuman and degrading treatment of Kenyans during this period was systemic and resulted from policies which were sanctioned at the highest levels of the British Government by the then Colonial Secretary. The documents served on the Government include:

i) Detailed accounts of the torture suffered by the five Kenyan claimants, including castrations and severe sexual abuse
ii) Memorandums and letters between the then Secretary of State for the Colonies to the Governor of Kenya authorising the use of systematic violence and 'violent shocks' on detainees
iii) Cabinet minutes authorising the large scale detention of 'pas sive supporters' of the Mau Mau and the approval of forced labour despite appreciating that this would be likely to breach international law
iv) Evidence of widespread interference by the British Colonial Administration in criminal investigations into allegations of abuse and torture of Africans
v) Evidence of persistent detailed reports of the use of wide spread and systematic violence by the then security forces in Kenya which were sent to London and resolutely ignored.

Martyn Day, Senior Partner at Leigh Day & Co, said on the day the Particulars of Claim were issued:

> **This is an opportunity for the British Government to come to terms with the past and apologise to our clients and the Kenyan people for this grave historic wrong. Unless this happens, the sense of injustice arising out of Britain's brutal repression of the Kenyan independence movement will continue to burden Kenyans for generations to come[12].**

12. For details about this, see Kenya Human Rights Commission , the Mau Mau War Veterans Associations and Leigh Day and Co. Solicitors' 'Particulars of Claims to The Foreign and Commonwealth Office in UK, 2009' and Kenya Human Rights Commission , the Mau Mau War Veterans Associations and Leigh Day and Co. Solicitors' Press Statement on 'Kenyan Mau Mau Veterans Serve Evidence of Torture on the British Government-9th September, 2009'. See also Anderson David ibid; and Elkins Caroline, Imperial Reckoning: *The Untold Story of Britain's Gulag in Kenya*:Henry Holt/ Jonathan Cape, 2005.

1.3 TORTURE AND RESPONSES BY THE POST INDEPENDENCE REGIMES (1963-2009)

a) TORTURE DURING THE KENYATTA REGIME (1963-1978)

The post colonial regime under President Jomo Kenyatta was equally involved in using torture as a tool for suppressing dissent. Violation of the right to liberty, right to participation, freedom of association and expression provided the basis for arbitrary arrests and detentions and subsequent exposure to degrading treatment. The first major violation was the brutal suppression of the Northern Frontier District (NFD) from secession during the so called 'shifta[13]' wars of the 1960s. At the same time was the banning of the opposition party, Kenya Peoples Union (KPU), and having its leaders detained in 1969. A statement by Juvenalis Benedict Aoko below will suffice to indicate how this crackdown led to torture.

Background

i) I, Juvenalis Benedict Aoko was born on the 7 October, 1936 in Kwanio Village, Kothuidha sub-location, East Kaynyada Location, Homa bay District, holder of I D No. 8181507

ii) I was educated at a missionary school under strict and disciplined Mill Hill Missionary Fathers in the then South Nyanza District

iii) I worked with the then East African Railways and Harbours Administration with effect from 7 June, 1956, to the point of imprison ment on the 8 June, 1971, exempting the period in detention in accor dance with detention laws.

Detention without trial

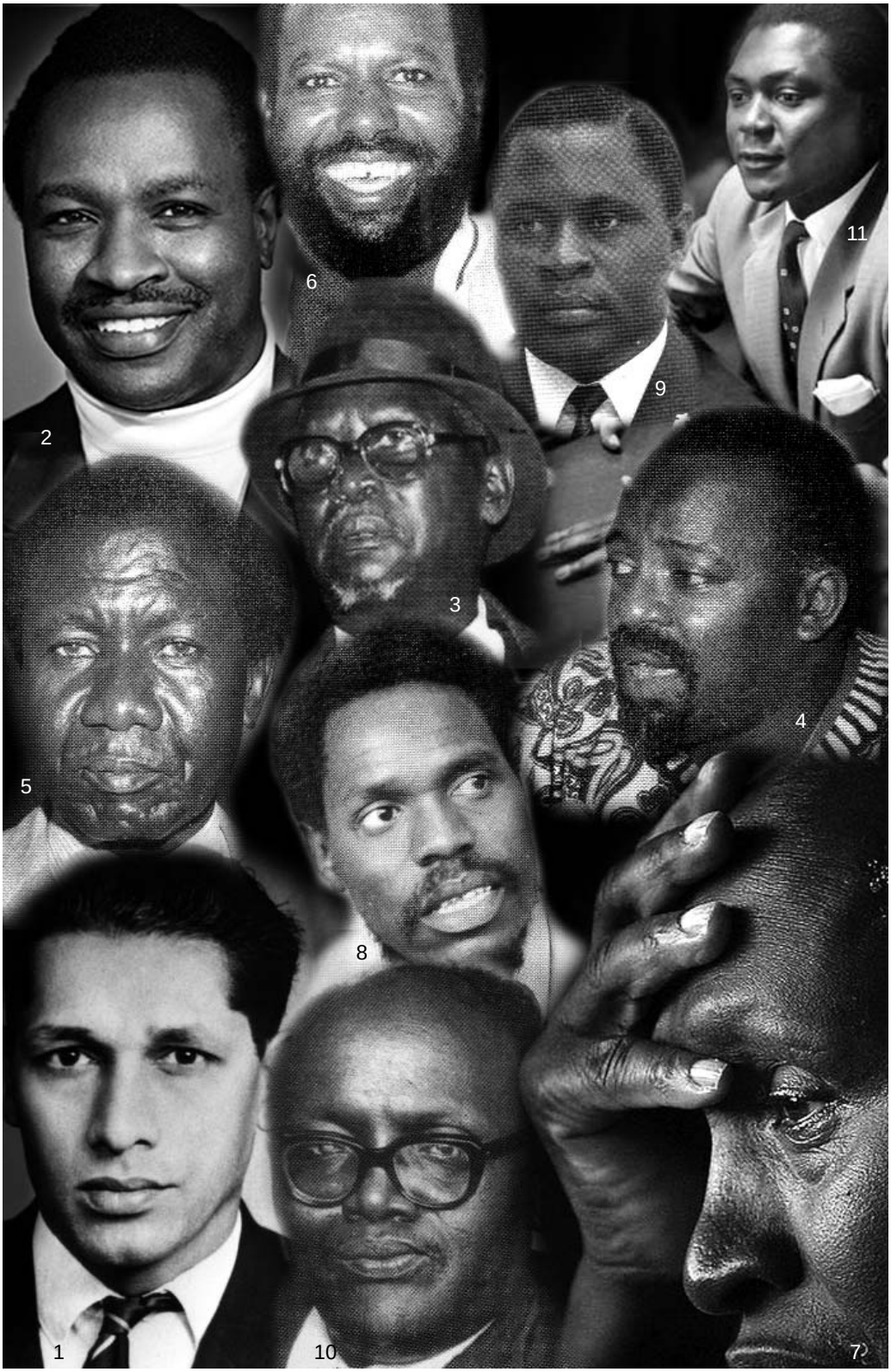
iv) I was first arrested in Dar-es-Salaam Tanzania on the 3 April, 1971, detained without trial till extradited to Kenya on 19 April, 1971

v) I was handed over to the Kenyan Special Branch at Namanga on the Tanzania-Kenya border at 7.00pm same date 19 April, 1971

vi) Five (5) days later while in police custody at various police stations under the watchful eyes of the Special Branch Police, I was formally served with a Detention Order by Superintendent Mumbo of Kenya Police. The Detention Order was duly signed by Daniel arap Moi - then Vice President and Minister for Home affairs after harsh interrogation by the Special Branch Police Officers including the then, Director of Intelligence of the Carpet House

vii) After the detention order, I was flown (together with others) in a police aircraft to Shimo la Tewa Prison; by law a detainee was required to appear to a Tribunal presided over a High Court judge for the purpose of taking pleas of the detainee already serving detention order. The appearance before such a High Court judge was stipulated to be with

13. Coined from the word 'shift' for after Kenya's independence in 1963, the NFD, currently North Eastern province and the adjacent districts which includes Lamu, Isiolo, Tana River and Marsabit, wanted to break way and join Somalia for the residents felt their interests were not addressed by the post-independence government.



1. Pio Gama Pinto: Assassinated 1965
2. J M Kariuki: Detained 1953: Assassinated 1975
3. Jaramogi Oginga Odinga: Detained 1969, 1982
4. Dennis Okumu: Detained 1966
5. Luke Obok: Detained 1969
6. George Anyona: Detained 1977 and 1982
7. Ngugi wa Thiongo: Detained 1978
8. Koigi wa Wamwere: Detained 1975 and 1982
9. Joseph Martin Shikuku: Detained 1975
10. Jean Marie Seroney: Detained 1975
11. Tom Mboya: Assassinated in 1969

in six months of detention. Treatment conditions were very harsh being under twenty-three and half hours a day under lock and key in the cells.

We were only allowed to bask in the sun for fifteen minutes daily depending on the weather of the day. After appearance before the judge, we were then brought back to Kamiti Prison either to the isolation block or segregation block. Similar treatment was meted out in Shimo la Tewa. During detention term, we were all kept in total 'incommunicado'.

Harsh and hurried trial

On the 31May, 1971, we were hurriedly arraigned before a court magistrate with quick proceedings followed by harsh sentences without the advantage of an advocate duly instructed by the detainees.

Prison conditions

viii) While still serving a detention order of unspecified term I was handed an eight year prison sentence virtually under the same detention order.
ix) There were no family visits.
x) Medical attention was rare and restricted.
xi) Excruciating and harsh prison labour of crushing ballast from boulders from 6.00am to 6.00pm with only one-hour lunch break daily from Monday to Friday. We toiled and toiled up to 1.00pm on Saturdays. Other prison punishments were meted out as and when ordered by the commandant e.g. penal diet as prescribed by the officer incharge.
xii) Treatment in the cells of the segregation block in Nairobi was irregular and required clearance from 'above.'

On release was another nightmare:

xiii) There was no way of finding a job which was officially denied to such persons?
xiv) Though in June 1980 parliament had passed a motion seeking to reha bilitation all those who had suffered under the previous regime, those in power refused its implementation
xv) I was denied all my dues by my previous employers including the peri od under detention which I believe would be considered under the law
xvi) The stigma was unbearable even from friends under the fear of reprisal

A separate statement taken from his wife, Elizabeth Akelo Aoko indicates the devastating effects Juvenalis' incarceration and torture has had to his family to date.

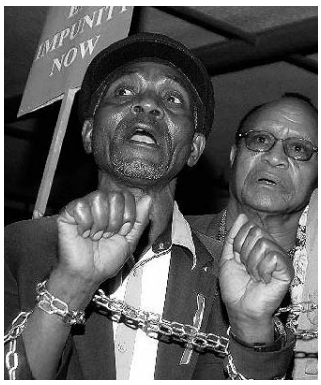
There was also the crackdown on then radical populist MPs which saw Jean Marie Seroney, Joseph Martin Shikuku and later George Moseti Anyona carted off to detention, and the politically motivated criminal conviction of the former Nakuru MP, Mark Mwithaga.[14] This was followed by the targeting of independent minded academicians and student leaders such as Ngugi wa Thiong'o among others up to the time President Kenyatta passed on in 1978.

14. Ajulu, Rok, 'DEBATES: Thinking through the Crisis of Democratization in Kenya, a Response to Adar and Murunga' in African Sociological Review. Vol. 4 (2), 2000, pp 135-136.Nyayoism, though packaged as a political philosophy to give

b) TORTURE DURING THE MOI REGIME (1978-2002)

i) TARGETTING PRO-DEMOCRACY AND HUMAN RIGHTS ADVOCATES

The Moi regime that was in power from 1978-2002 adopted *Nyayoism*'[15] (foot steps) and persisted in the spirit of its predecessor. However, it was after the failed coup attempt of 1 August 1982 that the Moi government took a hard line stance on anyone who it considered to be working against its continued hold on governance. Using the state security apparatus at its disposal, the Moi regime strove to silence by extreme measures any political opponents[16] and proceeded to repress its perceived antagonists through arbitrary arrests, lengthy detentions and torture.



Gitari Muraguri and Kimunya Kamuna (both former Nyayo Hse Survivors) at the former Nyayo Torture Cells on 16 February, 2006

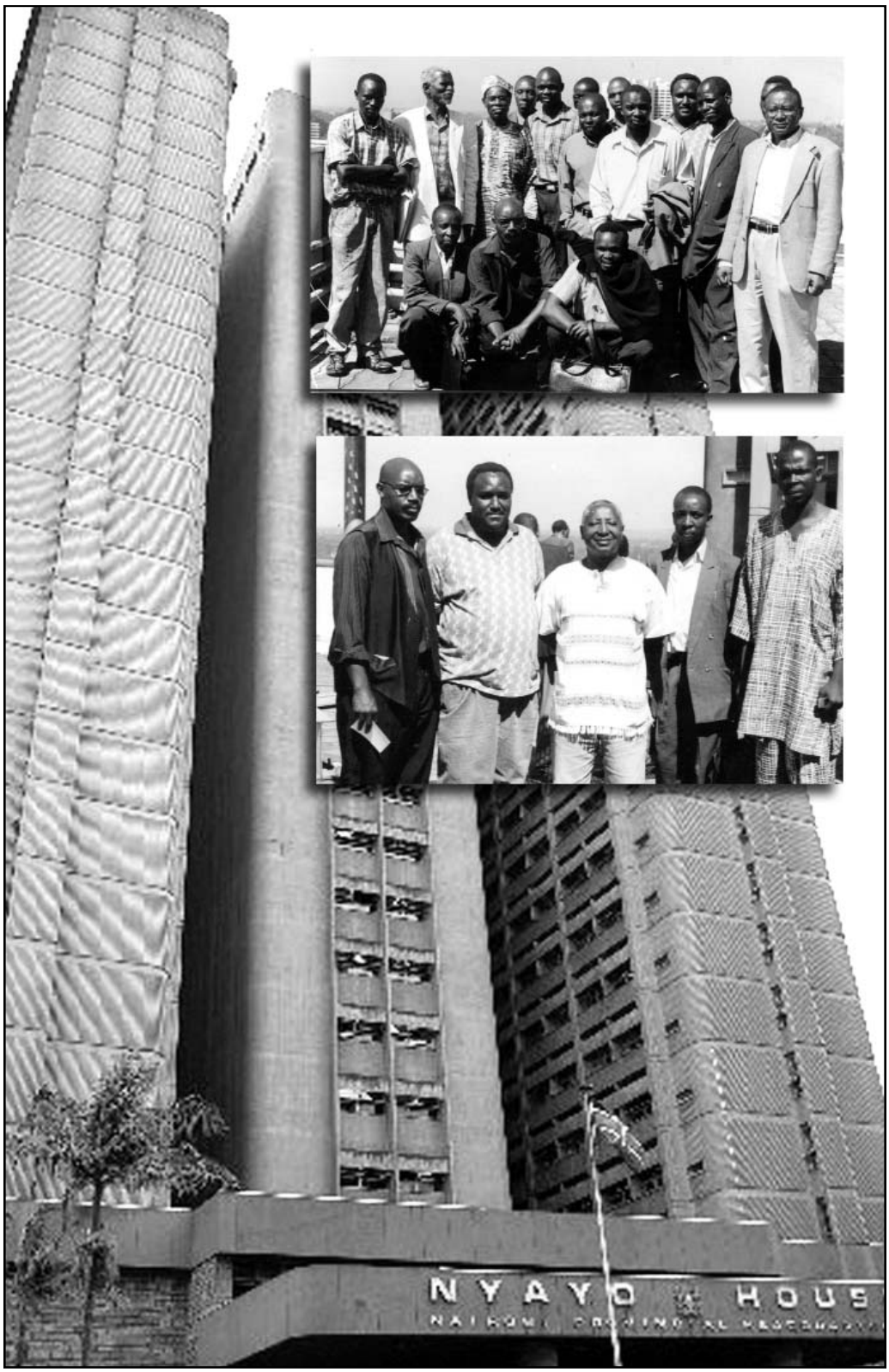
According to a KHRC report, critics of the Moi-KANU regime mostly students, academicians and civilians would be arrested, tortured in different places and then taken to court to answer charges of being members of an outlawed organization, Mwakenya.

> **In virtually all the Mwakenya-related trials, convictions were based on the accused person's own confession....All the accused bore signs of recent torture, but anyone who claimed he was tortured risked more torture. When the issue of torture arose in court, the magistrates always absolved the government[17].**

Though these incidents took place throughout the country, it is Nyayo House that stands out as the centre-stage for some of the most atrocious incidents of state sanctioned torture by the Moi regime. Most of those targeted were initially detained and interrogated at the Turkoman Carpet House (then an operational base for intelligence operatives that were monitoring the Nairobi University) and Nyati House,[18] and finally at the Nyayo House when the state of the art torture facilities were operationalised.

Nyayo House is, as it was then, the Headquarters of the Provincial Administration for Nairobi and also houses the Immigration Department, among other government offices. In the early 1980s torture chambers were constructed in the basement of this 24 storey government building situated in the heart of the city of Nairobi, at the junction of Uhuru Highway and Kenyatta Avenue[19]. The architecture of the heavily fortified dark cells reveals that they were specifically designed as torture chambers. Behind the 20 foot electronically controlled steel gate the tiny cell doors were fitted with rubber seals to prevent water leakage so that prisoners could be held ankle- deep in water and in complete darkness. There was a control room complete with electric switches and vents to pump cold, hot or dusty air into the cells, to control cell temperature and light intensity.

15. Nyayoism, though packaged as a political philosophy to give the false impression of following the footsteps of his predecessor, was actually a political gimmick under the patronage of then President Moi to blackmail and cow Kenyans to loyalty and subservience.
16. KHRC (1994) and KHRC (1998) op cit.
17. Kenya Human Rights Commission. Independent Without Freedom: The Legitimization of Repressive Laws and Practices in Kenya. Nairobi: KHRC, 1994, p 27.
18. Turkoman Carpets and Nyati Houses, located at the junction of Muindi Mbingu Street and University way; and along Loita Street, respectively. Other suspects were held at Kamiti and Naivasha Maximum Prisons, Nakuru Provincial and Railway Police Stations, among others.
19. See map in Appendix 1.



Background: The infamous Nyayo House where torture took place in the basement. The torture facility were opened to the public after the NARC election in 2002 and finally closed down.
Inset: Some of the Torture victims while visiting the torture facility after it was opened in February 2003. The pictures were taken on the roof top of Nyayo House.

The interrogations were held on the 24th floor of the building and seemed to follow similar patterns. A new detainee/suspect was retrieved from the underground cell blindfolded and transported in a private lift to the 24th floor where the panel of senior special branch officers was waiting to subject him/her to illegal, cruel and dehumanizing treatment.[20]

The interrogators would usually order male and female suspects to strip naked and perform strenuous physical exercises. This would often be followed up by acts of grievous physical assaults that included severe beatings with broken pieces of furniture, whips, tyres and straps. It also included the searing of suspects with lit cigarettes and pricking their fingers just underneath their nails with pins, amongst other torture techniques. The detainees were thereafter blindfolded and taken back to the basement where they were confined incommunicado and alone in the dark waterlogged cells for weeks and even months with little food or drinking water.

During President Moi's 24 years rule, thousands of innocent Kenyans among them political activists, students, businessmen and academicians were arbitrarily arrested for their alleged involvement in: the 1982 coup attempt, the *Mwakenya* organisation[21] and the *February Eighteenth Movement* (FEM)[22] among others. *Mwakenya* is an acronym for *Muungano wa Wazalendo wa Kukomboa Kenya* (Union of Nationalists for the Liberation of Kenya), alleged to be a clandestine socialist opposition organization. It is alleged to have started off as the December Twelfth Movement. After the failed coup attempt in 1982, the movement split, with an offshoot becoming Mwakenya around 1984. Most of those arraigned in court for suspicion of being involved in the organization were charged for possession of such 'seditious' publications as *Pambana* (Struggle), *Mpatanishi* (Unifier) and *Mzalendo* (Nationalist).

It is in the aforementioned holding places that those arrested would be tortured for weeks in order to extract confessions to trumped-up charges. These confessions would then form the basis upon which these detainees were tried, convicted and sentenced to serve lengthy prison terms in highly dubious court trials. Many were brutally murdered and their deaths fabricated as suicides by the then Special Branch while many more disappeared never to be traced. Of those who survived, a large number has since passed away. Most of those left continue to endure great physical and psychological torture.

ii) MASSACRES AND TORTURES

Torture was also applied during the massacres executed to suppress the marginalized communities to compliance. Critical to these are the Bagalla, Malkamari, Garissa Gubay, Bulla Kartasi, Marsabit, Isiolo, Wagalla, and the latest Turbi (Isiolo) and Elwak massacres in Mandera district. In the 1960s, there was the Kisumu massacres and in 2009 the Mathira and Isiolo mas-

20. Special Branch was formally created in 1952 and operated under the commissioner of police. It acted as a secret intelligence unit for the colonial government during the insurgence of the Mau Mau uprising. In 1963 Special Branch was made independent from the police force. Special Branch operations were formalized through a Presidential charter in 1969, which defined its roles and functions. In 1986, the Special Branch was transformed into the Directorate of Security Intelligence (DSI) through a Presidential charter. However, structures and organization of the Special Branch were retained. It was later transformed to the National Security Intelligence Service (NSIS).
NSIS was created in January 1999 with the enactment of the National Security Intelligence Service Act, 1998. The Service is a government agency dedicated to the protection of the national security interests of Kenya and safeguarding its citizens. Its main objective is to identify and report on threats to the security of the State. See NSIS Historical Background in http://www.nsis.go.ke/about.php.

21. For details, see Friedrich Ebert Stiftung and Citizens for Justice: We Lived to Tell: The Nyayo House Story. Nairobi: FES/CfJ, 2003. See also the judgment of Mbaluto, J in the case of Dr Odhiambo Olel vs Republic.

22. For details see KHRC (1988) op cit pp39- 43.

sacres.The Wagalla massacre which took place at the Wajir Airstrip in 1984 is one of the most heinous and torturous operations of the Moi regime.

According to S Abdi Sheikh**,** the operation covered all of Wajir District including Tarbaj, Leheley, Wajir-Bor and Khorof Harar. The target community was the Degodia but it is believed a number of Somalis of other extraction were caught up in cases of mistaken identity. The operation targeted male members of the clan above 12 years of age but women were raped, houses were burnt and property was looted in every locality where the operation took place. The men rounded up were subjected to torture in an effort to force them to confess to owning a rifle. Some died of their wounds before they reached Wagalla Airstrip. Those who reached the airstrip were sorted into sub-clans and up to 30 members of Jebrail sub-clan were burnt alive in an orgy of unprecedented violence. Their clothes were piled on top of them, petrol or some other highly flammable chemical was sprinkled on the clothes, and a bonfire whose fuel was human flesh was lit.

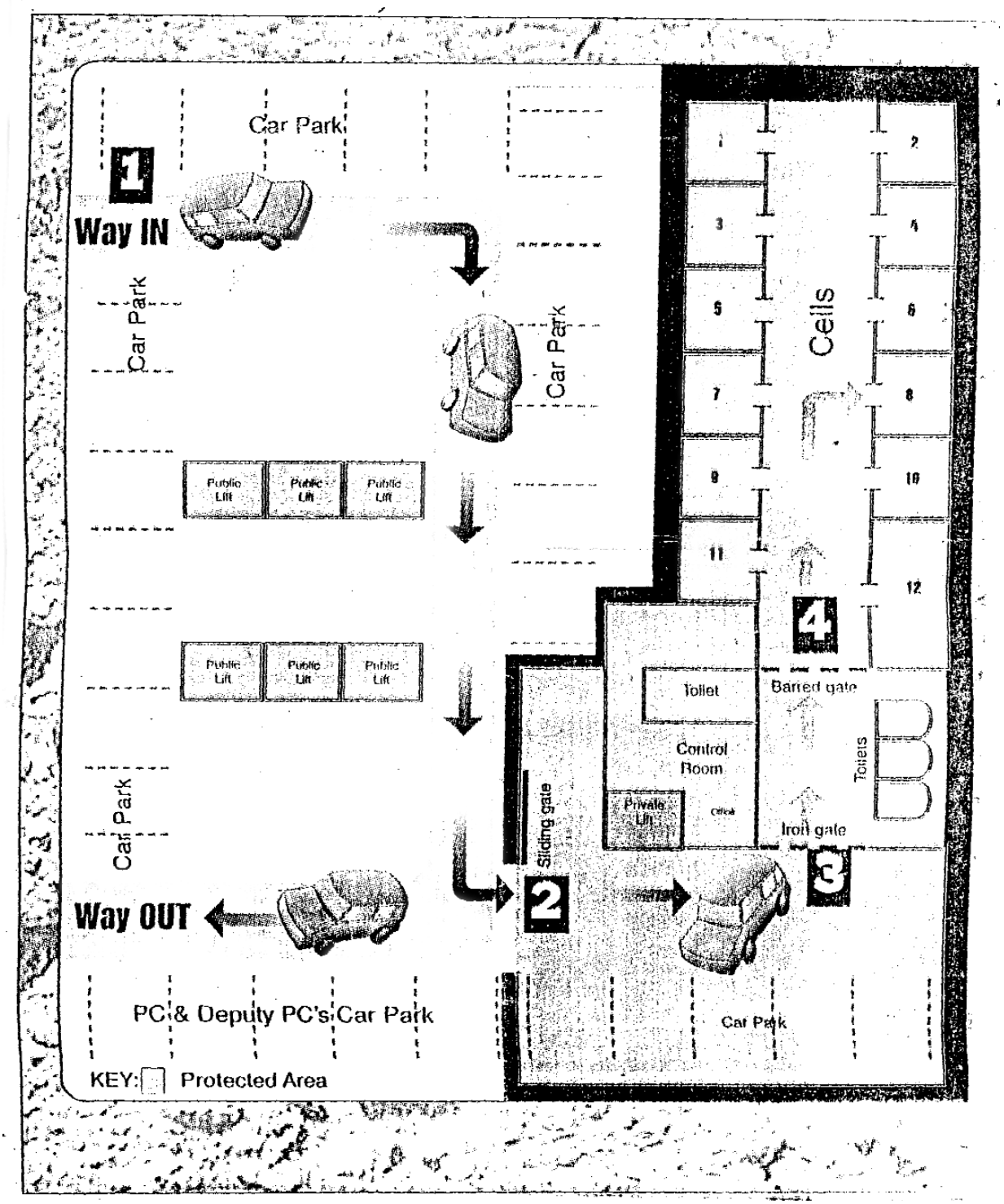
Abdi Sheikh adds that detainees watched as their colleagues were roasted alive. The rest of the men were forced to strip naked and told to squat in the hot sun – those who resisted were shot. The late Ahmed Khalif reported that the detainees were held at the airstrip for five days; that they were denied food and water; and that during this period those who tried to pray were shot. In those five days, more than 1000 people starved to death, shot for questioning the orders of the forces, or died at the hands of gangs which were allowed into the airstrip at night to carry out revenge against those whom they held a grudge. On the fifth day the remaining men bolted, broke the barbed wire fence and ran for their lives. The military opened fire and hundreds were shot — many in the back — and killed. The stampede helped most escape into the bushes where they received needed help from nomads in the bushes. It was an escape that should have come in the first couple of days before so many were murdered, but without it the Degodia people would have been wiped off the map.

The military found itself amid thousands of dead and injured men. The plan had gone awry: men had escaped and told others what happened. The military attempted a massive cover-up that involved piling the dead and injured into lorries and dumping them in the bushes; many bodies were also disposed of by fire and acid. A rescue attempt by the current Minister for Northern Kenya and Arid Lands, Mohamed Ibrahim Elmi, Catholic nun Annalena Tonelli, businessman Noor Unug and others saved many people who were ferried into various parts of Wajir district by the armed forces[23]. The families affected have, in partnership with the Truth Be Told Network (TBT), sought national legal interventions to no avail and therefore resolved to take the matter to the African Court for Human and Peoples Rights.

iii) THE MITHONGE CLUSTER OF TORTURE VICTIMS

These cases involve a group of poor and innocent villagers who became victims of State perpetrated torture as a result of political differences between their then Member of Parliament, Njenga Mungai, on one hand and the then powerful Nakuru Branch Kenya African National Union (KANU) Chairperson Kariuki

23. The Wagalla massacre story as narrated by S Abdi Sheikh in 'The Wagalla Massacre: what really happened?' available in http://xudayi.wordpress.com/2009/12/13/the-wagalla-massacre-what-really-happened/. S Abdi Sheikh is the author of 'Blood on the Runway: The Wagalla Massacre of 1984'.



1 A vehicle carrying a blindfolded prisoner, makes its way into the basement.

3 The blindfolded prisoner is removed from the car and dragged past an iron gate into the holding cell area.

An illustrated map to the infamous Nyayo House Torture Chambers, Nairobi, Kenya

Chotara and former President Moi on the other hand. The villagers were arrested between 16 August, 1986, and 23 of the same month and taken to Nakuru Police Station where they were accused by the Criminal Investigation Department (CID) officers of engaging in oath taking activities with an intention of overthrowing the government of the then President Daniel arap Moi.

Between 23 August, 1986, and 3 September, 1986, the villagers were brutally beaten and tortured in an attempt to force them to confess to having participated in taking the unlawful oath in question. Inevitably, the villagers, who knew nothing of the said oath, were released to return to their homes in the Mithonge area of Elburgon Town, Nakuru District. The Village has since been razed to the ground.

Statements have since been made by the torture survivors themselves or by their next of kin, for those victims who have since passed away, to whom the facts were narrated and who witnessed the devastating effects that the torture took on the lives of their loved ones. These include:

i) Mary Wambui Njunge

On 16 August, 1986, Mary Njunge was arrested and taken to the CID headquarters in Nakuru for questioning. She was later released and left for home. However, on 23 August, 1986, Mary Njunge was re-arrested at her home in Mistri, Elburgon at around 2:00am and taken to the Nakuru Police Station. There, she was accused of taking an unlawful oath with the aim of overthrowing the Government. She was gagged, blindfolded and taken to a room where she was mercilessly tortured. Her torturers, the same Police officers who had arrested her, beat her with clubs, rods, electric wires, blows and kicks as she lay helpless on the ground. For 9 days she was continually tortured while she was stark naked.

On 3 September, 1986, Mary was taken before the Magistrates court to answer to charges of unlawful oath taking contrary to Section61 (b) of the Penal Code. She denied the charges and was thereafter taken back to the remand cell where she was held for 14 days.

On 17 September, 1986, she was again taken to the court, but this time the charges against her were dismissed. She was thereafter released and taken to the office of the then Provincial Commissioner (P C), Yusuf Haji, where she was instructed to go home and forget about what had happened as it was merely a result of political differences between the then Molo Member of Parliament and the then President Daniel T arap Moi.

Since that day Mary Njunge has been unable to provide for herself due to the various health complications she developed as a result of the torture. She was rendered incapable of walking long distances as a result of the injuries to her foot, her hands are weak and at times she is unable to get out of bed. She has also taken a variety of drugs to address her physical infirmity but they have proved to be largely ineffective.

ii) James Gathu Kahwai:

The late James Kahwai was arrested at Elburgon on 23 August, 1986, and detained at the Provincial CID offices at Nakuru for eight days where he was ruthlessly tortured. During the torture, James Kahwai was transported to various places like Lake Nakuru National Park where he was tied to a tree head down and severely beaten. On another occasion he was driven to Menengai Crater where he was left overnight without food or water, tied to a tree after receiving a thorough beating.

All this was done to get him to confess that he had taken an oath to overthrow the Government, which offence was unknown to him at the time of his torture. At the CID headquarters in Nakuru, James Kahwai was beaten with whips, cables, clubs, kicks aimed at his ribs, a part of his sex organ was mutilated using pliers which was used as an instrument of torture. The police also used rods and canes to beat the underside of his feet. They did this while having him tied to the ceiling with his head facing down. James was clubbed on all his joints rendering him unable to walk for several days. The beatings were done regularly by different officers at different times as though in shifts.

On the 7th day of confinement, James was informed that he had been arrested for the offence of taking an unlawful oath, more specifically, an oath of 'multi-party-ism'. And on 3 September, 1986, he was taken to the Magistrates Court at Nakuru and charged with the same offence. He denied the charges and was taken into the remand cell. Later, the case was referred to the Provincial Commissioner (P C) of Rift Valley Province who withdrew the case and had Kahwai released. However, the P C warned Kahwai not to go to hospital or file a complaint, or get a P3 form at any police station or congregate with the others he had been charged with as the police there would be watching.

Since that day, James Kahwai has complained of several physical complications which he attributes to the cruel and inhuman treatment he received at the hands of the police. He is missing parts of his sex organ and is generally in a poor state of health. He asserts that he suffers pains in his bladder, emits blood when he coughs and experiences rib pains when he bends. He suffers severe head aches and his feet and joints also ache when he walks.

iii) Joseph Muchiri Kinyanjui

On 16 August, 1986, at around 2:00pm, Joseph Kinyanjui was confronted by police officers at his home. The Police officers questioned him as to his identity, insisting that he was one John Nderitu. Mr Kinyanjui identified himself by way of identity card insisting that he was not the John Nderitu that they claimed him to be. Nevertheless, he was taken by the police officers to the Nakuru Head Office of CID where he and others were detained for three days. They were then released without being given any justification or reason for their detention.

On 23 August, 1986, Joseph Kinyanjui was re-arrested and taken to the Central Police Station where he was interrogated over his alleged participation in the John Njenga Mungai oath. He alleges he was slapped, tied up and beat-

en repeatedly for failing to answer the questions asked by the police as they would have preferred. This continued through to 2 September, 1986. On 3rd of that month, Kinyanjui, together with others, was taken to court where they were charged with taking an unlawful oath contrary to Section 61 (b) of the Penal Code, Cap 63. Mr Kinyanjui along with the others denied knowing about the same oath consequent to which they were remanded for 14 days.

On 17 September, 1986, Joseph Kinyanjui and the others were brought before court a second time and later released under the authority of the State owing to the fact that the President had acquitted the said John Njenga Mungai. Kinyanjui and the others were taken to the CID office and thereafter to the office of the P C of Rift Valley where they were instructed to go home and warned not to ask any questions.

iv) Hannah Ngendo Njoroge

On 23 August, 1986, at around 2:00am, Hannah Ngendo Njoroge was arrested from her home in Mistri Village (a village that housed about 1000 families, and was later demolished and the families relocated to Kasarani estate in Elburgon) and taken to Nakuru Police Station, where she was accused of taking an illegal oath. Hannah Njoroge denied the accusations and was shortly thereafter sent home.

Four days later, she, along with others, was re-arrested at around 2:00a.m. and was again taken to Nakuru Police Station. The following day, she was blindfolded and was taken from her cell to another room where she was tortured by heavy built men. Hannah alleged that her hands were twisted and her bare feet were beaten using wires. The men using wires, tied both her hands and legs and beat her for about an hour until she fell unconscious. The same men carried her back to her cell and left her there.

Hannah Njoroge, along with 7 others, was charged and convicted in the Chief Magistrate's court with illegal oath taking contrary to Section 61 (b) of the Penal Code and fined Kshs. 400 or 1 month imprisonment in default.

Before her arrest, Hannah Njoroge traded in hides, skins and sheep wool to make a living. However, she has since been unable to continue her trade due to the physical infirmities she developed as a result of the torture. She alleges that she is unable to walk as her feet keep peeling off; she experiences frequent pains on her feet as a result of the beatings using wires; her hands have become weak and cannot do any meaningful work; she has persistent chest pains and high blood pressure; she is now constantly on medication.

v) Macharia Nyuthe

On 16 August, 1986, at around 2:00a.m., police arrived at Macharia's house and ordered him to accompany them to the Nakuru Police Station as he had a case to answer. He was detained there for 3 days and released on the 19th of the same month. However, he was re-arrested 5 days later on 23 August, 1986.

Throughout his stay in police custody, Macharia Nyuthe was tortured on sus-

picion of having been involved in illegal oath taking with the aim of overthrowing the Government. He was stripped naked, tied-up and tortured with live electric wires on the head and foot.

On 3 September, 1986, Macharia along with others, was taken to court and after denying the charges made against them, were sent back to the remand cells where they stayed for 14 days. On 17 September, 1986, Macharia Nyuthe, and those he had been charged with, was taken to Shamba House where they were released under the command of the area P C at the time, Yusuf Haji. Macharia Nyuthe died on March 1990 due to severe internal bleeding of the head, leaving behind a wife and 5 children.

vi) Anne Nyambura Mwangi

On 23 August, 1986, Ann Mwangi was arrested from here home in Mithonge village in Elburgon late in the night and taken to the Nakuru Police Station. She was accused of illegal oath taking in a case to over throw the Government. While at the station, she was tortured in an attempt to get her to confess to the charges. They bound her hands and feet with a rope and beat her on her back and bare feet. Her hair was forcefully pulled out, which hair she was then forced to swallow. These were but a few of the many other tortures she endured while in police custody.

On 3 September, 1986, Anne was released. Because of the physical tortures she had endured at the police station, she suffered great physical pain. Her legs were swollen and her back hurt, However, she was warned not to go to the hospital, and therefore was unable to get medical treatment for the physical tortures she had endured at the police station. She was finally taken to hospital after her condition worsened but she was not treated as she could not raise the money for the treatment.

However she was able to raise money for getting an X-ray done. The X-ray revealed, amongst other things, that her spinal cord had been damaged. She continued to suffer from these ailments until her demise.

vii) George Gathike Mwangi

On 23 August, 1986, George Mwangi was arrested by police officers in the middle of the night at his house in Elburgon. Mwangi was taken to the Nakuru Police Station and accused of illegal oath taking with the aim of overthrowing the Government. For 9 days, George Mwangi was tortured and beaten particularly on his knees, chest and the soles of his bare feet.

On 3 September, 1986, he and the others were taken before the Magistrates court and charged with illegal oath taking contrary to Section 61 (b) of the Penal Code. After they denied the charges they were taken back to the remand cells and held for 14 days. Mr. Mwangi and the others were released after the then president Daniel arap Moi ordered that they be released. They were taken to the office of the then P C, Yusuf Haji, who told them to forget what had happened at the police station and not to go to the hospital.

As a result of the beatings, George Mwangi has difficulty in walking long distances or performing heavy tasks in his work and has to be constantly on medication.

viii) Susan Muthoni Ndungu

On 16 August, 1986, Susan Ndungu was arrested and taken to the CID headquarters in Nakuru. She was detained until 19 August, 1986, when she was released. However, she was re-arrested on 23 August, 1986, at Mistri Village in Elburgon town and taken to Nakuru Central Police Station. The next day, she was blindfolded, gagged and beaten with clubs, electricity wires, kicks and blows.

On 3 September, 1986, Susan Ndungu was brought before the Chief Magistrate's court and charged with taking an unlawful oath contrary to Section 61 (b) of the Penal Code. She denied the charges and was, thereafter, remanded for 14 days until 17 September, when she was set free.

As a result of the torture, Susan, a single mother, has been unable to perform any meaningful work due to the physical injury she suffers. She is now constantly on medication.

ix) Daudi Mwangi Wamai

On 23 August, 1986, Daudi Wamai was arrested at his home in Mistri, Elburgon and taken to the Central Police Station. There, he was accused of taking an unlawful oath with the goal of overthrowing the Government. While in custody, Wamai was tortured and beaten with clubs, rods, blows and kicks. Furthermore, he was whipped on his back and the soles of his feet while his hands and feet were tied down. After these beating they removed his teeth.

On 3 September, 1986, Daudi Wamai was brought before the Magistrate's Court and charged with unlawful oath taking contrary to Section 61 (b) of the Penal Code. He denied the charges and was taken back to the remand cell where he was held for 14 days. On 17 September, 1986, Wamai was released with no reason or justification for his arrest. Since then, he has been unable to work on his farm and has lived like a pauper due to the physical infirmities caused by the torture.

x) *Monicah Waithira Macharia*

On 16 August, 1986, Monicah Macharia was arrested at Mithonge Village in Elburgon Township and taken to the Nakuru Police Station where she was interrogated on suspicion of having taken an unlawful oath to overthrow the Government. She was released on 19 August of that year but was later re-arrested and taken to the Nakuru Central Police Station where she was accused of taking the unlawful oath.

When she denied the accusation, she was assaulted and soon thereafter tortured by the arresting police officers. She was beaten on her bare feet, back and legs with clubs and electric wires, kicked and slapped.

On 4 September, 1986, Monicah Macharia, along with 7 others, was taken to court and charged with taking an unlawful oath contrary to Section 61 (b) of the Penal Code. Upon denying the charges she was taken to remand prison and held for 14 days after which she and the others were released. Upon confirming their releases from the court Monicah and the others were taken to the then P C, Yusuf Haji, who told them that their arrests, and charges was just a result political differences between the then Member of Parliament for Molo, Mr John Njenga Mungai and the then President Daniel T arap Moi.

Since then Monicah Macharia sometimes vomits blood, has constant back aches, has difficulty walking and in doing her menial chores. She attributes these consistent physical infirmities to her torture at Nakuru Police Station which have made her life very difficult.

xi) Susan M Njambi

Susan Njambi was first arrested on 16 August, 1986, at around midnight by Police officers from Nakuru and taken to the Nakuru Central Police Station where she was interrogated for 3 days. She was released but later re-arrested on 23 August, 1986, at her home in Mistri Village in Elburgon.

She was accused of taking an illegal oath which she denied. The next day she was blind folded and taken to another room with her hands tied. There, she was beaten with clubs, canes and lashes while being hung by her feet from the ceiling. The torture and beatings continued for 9 days until 3 September, 1986, when Susan Njambi was taken to the Magistrate's Court in Nakuru and charged with taking an unlawful oath contrary to section 61 (b) of the Penal Code.

After denying the charges she was taken to remand prison and held there for 14 days. She was released and, together with others with whom she had been charged, taken to the then P C of Rift Valley, Yusuf Haji, who told them not to seek revenge or mediation.

Since that day Susan Njambi has suffered abdominal pain because of the kicks she received to the abdomen which injured her urethral canal. After visits to various hospitals and clinics and taking numerous medications, Susan ultimately succumbed to her injuries from the torture and passed away.

xii) Susan Waruiru

On 16 August, 1986, Susan Waruiru was arrested from her home in the village of Mithonge, Elburgon Township, by police officers from Nakuru at around 2:30a.m. After 3 days of interrogation she was released without charge. However, on 23 August, 1986, she was re-arrested and taken back to Nakuru Police Station and accused of taking an unlawful oath to overthrow the Government. While under arrest she was tortured and beaten savagely by police officers. She was gagged, beaten on the soles of her bare feet, stomped on her knees and whipped on her back and neck as she lay on the floor.

She was consistently tortured and beaten for 9 days after which she was brought before the Magistrate's Court on 3 September, 1986, to answer to the charge of taking an unlawful oath contrary to Section 61 (b) of the Penal Code. After denying the charges Susan Waruiru was taken to the remand cells and detained there for 14 days.

On 17 September, 1986, she was released and has since endured tremendous physical pain in nearly every part of her body as a result of the torture. She consistently visits the hospitals due to incessant head and neck pains and, on occasion, suffers dizzy spells and memory loss.

xiii) Eunice Njeri Ngige

On 23 August, 1986, Eunice Ngige was arrested at her home in the village of Mithonge, Elburgon at around 2:00a.m. by policemen from Nakuru. She, along with others from the same village, was taken to Nakuru Police Station and accused of taking an unlawful oath. When she denied the accusations she was assaulted with slaps and soon thereafter tortured in an attempt to get her to admit to the accusations.

For 9 days Eunice was beaten with clubs and electric wires. On 3 September, 1986, she was taken to court and charged with taking an unlawful oath contrary to Section 61(b) of the Penal Code. She denied the charges and was thereafter taken to the remand cell where she was held until 17 September, 1986, when she was released.

While in remand Eunice Ngige lost most of her hearing and since her release, she has had great difficulty walking, and is now dependant on her children to take her to the toilet or move her out of the house to bask in the sun.

xiv) Peris Wamuhu Mwangi

Peris Mwangi was arrested on 23 August, 1986, at her home in Mithonge Village, Elburgon Township at around 2:00 a.m. by police officers from Nakuru. She was taken to Nakuru Police Station where she was accused of taking an unlawful oath with the aim of destabilizing the then Government. She denied the accusations and was released without being charged. Four days later, she was re- arrested at around 2:00 am and taken back to the same police station.

The following day she was blindfolded and taken to another room where she was beaten and tortured. She was slapped and kicked by heavy built men and her arms were brutally twisted. A sharp object was used to prick her all over the body, especially her ears, between her fingernails and her thighs. She was also whipped repeatedly on the back of her legs.

For several days she and others she had been arrested with were subjected to humiliation by her tormentors by being stripped naked, whipped and being knocked against the wall to the point of losing consciousness. All this was done to get them to admit that they had taken an illegal oath. She was not allowed to see any members of her family while in custody.

On 3 September, 1986, Peris Mwangi was taken to court, charged and convicted with taking an unlawful oath contrary to Section 61 (b) of the Penal Code. She was later released but by then had suffered irreparable physical damage. Her hearing was damaged. She suffered bouts of high blood pressure and mental fits. She moves in and out of hospital from time to time in search of medical attention. Her physical injuries resulted in her inability to work and thus she was reduced to a beggar in order to meet her family's upkeep. Eunice finally succumbed to her injuries and passed away on 16 January, 1992, leaving behind several children.

iv) Other patterns of torture outside Kenya: The South African Experience

a) Torture at the John Vorster Square

After the 1966 Johannesburg train station bombing, Vorster (then the Prime Minister) agitated for and passed the Terrorism Act (No. 83 of 1967). Section 6 of the Act allowed for anyone suspected of involvement in terrorism — which was very broadly defined as anything that might 'endanger the maintenance of law and order'— to be detained for an indefinite period without trial on the authority of a senior police officer. Since there was no requirement to release information on who was being held, people subject to the Act tended to disappear.

John Vorster became Prime Minister of South Africa in 1966 after the previous Prime Minister, Hendrik Verwoerd, was assassinated by a coloured parliamentary messenger earlier that year. In 1968 John Vorster Square police station was opened as an expensive new 'state-of-the-art' modern police station which housed all major divisions of the police under one roof. It became the Headquarters of the Witwatersrand (i.e. a term that refers to the greater Johannesburg Metropolitan area) police and one of the major operation bases for the South Africa Bureau of State Security (BOSS).

John Vorster Square quickly acquired a reputation for brutality and torture. It became the primary location for detention and interrogation in Witwatersrand. Between 1960 and 1990, over 80,000 South Africans had been detained there, including women, children and youth under the age of 18 years. Between 1970 and 1990, 8 people, all of whom were being held under detention regulations, died in John Vorster Square.

The State security agencies under the administration of John Vorster and, thereafter, under P W Botha had naturally taken advantage of the lengthy detention powers and the relentless drive of the state administration to perpetuate white domination of non-white South Africans, and to perpetrate torture as a means of interrogation.

By the Truth and Reconciliation Commission report, 75 deaths in detention were officially recorded. The Commission in Volume 6, Section 5, Chapter 2, and Paragraph 42 of the report stated that;

> **A number of human rights bodies made representations to the State about the treatment of detainees and persons in custody. In April**

1982, the Detainees Parents Support Committee met with the Minister of Law and Order and the Minister of Justice to submit a dossier that included seventy-six statements alleging torture. The dossier named ninety-five individuals as perpetrators and covered the period 1978 to 1982. The ninety-five individuals were all members of the Security Branch and came from eighteen different branch offices. Of the eighteen offices detailed, John Vorster Square, Protea police station and the office in Sanlam building in Port Elizabeth headed the list.

The internal security infrastructure of the State at that time (i.e. the Security Branch of the BOSS) was the principle instrument through which the State implemented its hard-line tactics on the opponents of the Apartheid regime.

b) The Khulumani's[24] Reparations Case in South Africa

While other 'apartheid lawsuits' sought 'open-ended' redress for all South Africans born in the country between 1948 and 1994, the Khulumani lawsuit, rather, seeks limited individual, tailored relief for identified victims from private actors - those foreign multinational corporations which violated international law and were involved in colluding with the apartheid state's security apparatus. With the support of these corporations, the apartheid government committed extra-judicial killings, torture, sexual assault, prolonged arbitrary detention, and multiple crimes against humanity.

The Khulumani lawsuit is highly significant in terms of international human rights law, in particular in the advance of international customary law and the creation of a world of greater social fairness. That is why it is lodged in New York, a city that houses both global corporations and the United Nations. It is a vital test case to ensure that any person anywhere in the world who is violated by a government or a multinational business would have access to redress.

The Khulumani suit was filed in November 2002 in a District Court of New York against certain corporations and banks on the basis that they have aided and abetted the Apartheid government in enabling the said government to commit acts of gross human rights violations. These corporations and banks are from the following countries - Switzerland, Germany, The Netherlands, the United Kingdom, France and the United States of America. They operated in the field of providing:

- arms and ammunition to the apartheid government
- fuel to the police and military forces
- transportation to the police and military forces
- military technology to the apartheid government
- financing to the apartheid government to obtain the above goods.

The Khulumani Support Group's reparations case under the Alien Tort Claims Act of the USA, along with the other 'apartheid' cases, was thrown out on September 29, 2004, by a conservative New York judge. He found that there was no violation of the law in commercial links with South Africa - an action

24. Khulumani means 'speaking out' in isiZulu.

that has drawn criticism from the South African Human Rights Commission. Amongst the cases thrown out was the troublesome case initiated by Ed Fagan, in which he had demanded that the South African Government and companies should pay into a $20 billion 'humanitarian fund'.[25]

So far, the developments in the case have been that in a major judgement of the District Court on 8 April, 2009, the judge ordered the companies in question to open up their books for discovery purposes. Subsequent to this judgement, the companies appealed to the Second Circuit Court of Appeal for an urgent interdict (i.e. injunction) to stop the discovery process. They were granted a temporary stay of discovery. Judgment remains reserved in the case at this point with a hearing scheduled for 11 January, 2010.

25. For more details on this case visit http://www.khulumani.net/ny-lawsuit/222-lawsuit-overview.html and http://www.globalpolicy.org/component/content/article/163/28122.html.

c) TORTURE DURING THE KIBAKI REGIME (2003- TO DATE)

Kibaki's government has been equally involved in torture of political activists, alleged terrorists and militias or criminal gangs. The case of *Anne Njogu and others* cited elsewhere in this *CASE DIGEST* is one of the latest indicators of the crackdown on political activists under very torturous, inhuman and degrading treatments and punishments. There has been widespread accusation against the police for use of torture on Mungiki suspects in Nairobi, its environs and Central Province[26]. Moreover, the Kenyan military and police have been accused of torturing the Saboat Land Defence Force, a suspected militia in Mt Elgon in 2008. The synopsis below from a report by IMLU[27] (April 2008) provides insights into how the Kibaki regime has perfected torture during the government's operations in Mt. Elgon.

Police rough up a member of the Sabaot Defence Force

Arrests

The torture survivors were arrested from as early as 6:00am to as late as 4:00pm. The arrests were effected by police officers and military officers in uniform, some of who were known to the survivors. However, when military officers were asked to identify themselves the officers declined to do so and turned violent. The arrests took the form of various degrees of physical violence but in some cases police officers deceived the survivors to accompany them to a place where they would be given a card showing that they were not members of the Sabaot Lands Defence Force; in which case they willingly complied. Many arrests took place at houses of survivors some of which military officers violently broke into as early as 6:00am when the survivors were still asleep. Others took place while survivors were in their farms, at shopping centres, market places, schools and public service vehicles and bus stops.

They were arrested at Cheptais, Bungosi, Kapsiku, Sansa, Burkenwo, Meriko, Chesikaki, Kamarang, Kihii Village and Mayanja areas in Mt Elgon area. Those arrested from public service vehicles were singled out on account of their tribes as implicated by their identity cards and branded as escapees from Mt Elgon region. All arrests were characterized by an element of ambush by the military officers and surprise on the part of the torture survivors and applied to all males in the areas targeted with no distinction whatsoever. Some survivors arrested far from Mt Elgon area were first detained at Police stations before they were transferred to Kapkota using police vehicles. All the survivors were eventually transferred to Kapkota using trucks, land rovers and canters belonging to the military or police department. Kapkoto Military Camp was located on a field allegedly belonging to Kapkoto Primary School where they found a large number of military officers with their commanders (i.e. senior officers). Here they were all asked to strip naked before being subjected to the most severe forms of torture.

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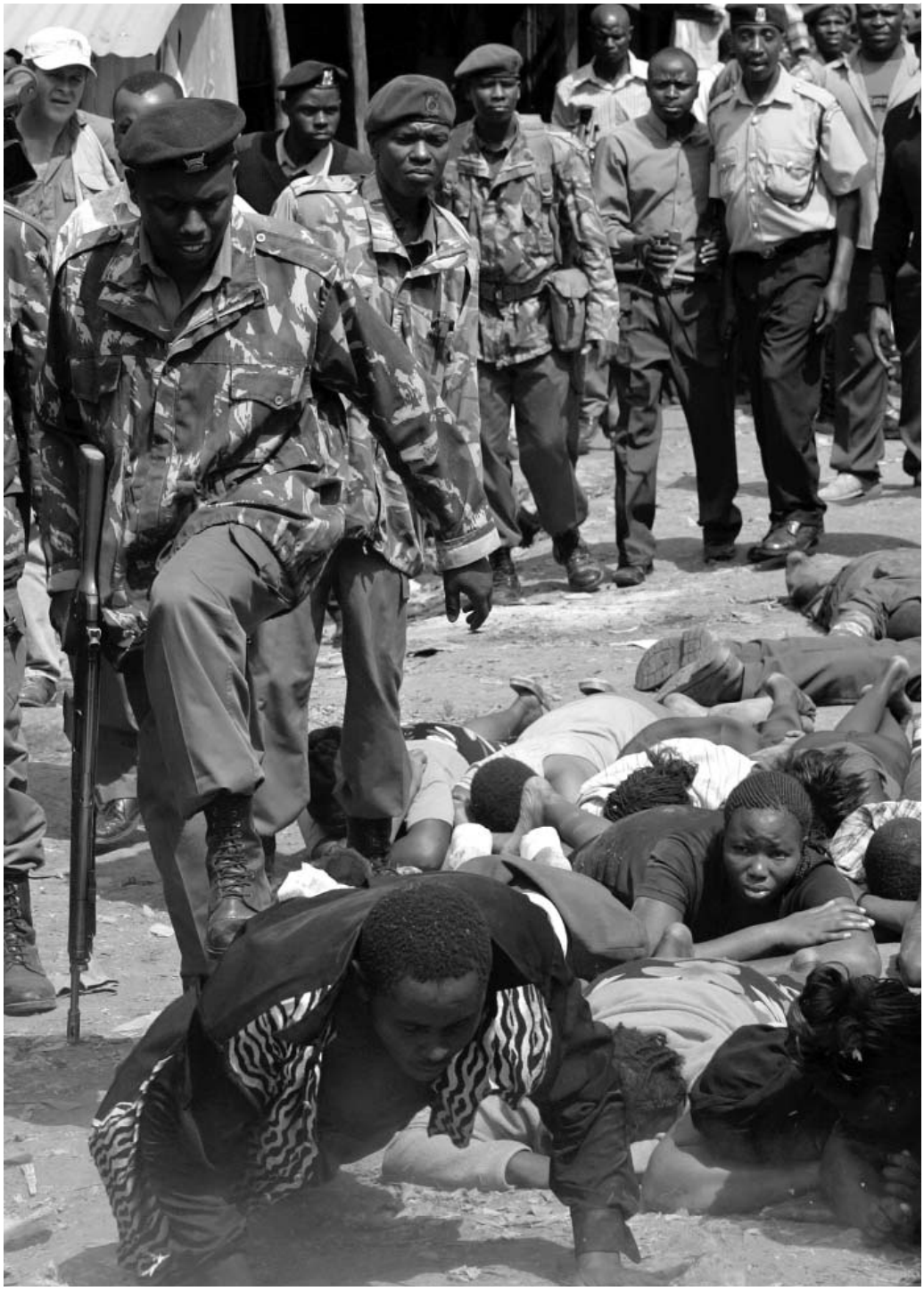
26. For details, see the Kenya National Commission on Human Rights (KNCHR). 'The Cry of Blood: Report on Extra Judicial Killings and Disappearances', Nairobi: KNCHR, September 2008. Phillip Alston, 'Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions', Geneva: Human Rights Council, 2009. See also the Daily Nation, 'Accusations Fly over Torture'. Nairobi, 21 April, 2008.

27. See IMLU, 'Preliminary Report of Medico-Legal Investigation of Torture by the Military at Mt Elgon-'Operation Okoa Maisha(Rescue Life)'-April 2008', accessible in http://www.imlu.org/images/documents/mt%20elgon%20%20investigations-imlu%20report.pdf'.



Security forces round up people in a slum in search of the Mungiki committing Human Rights abuses in the process

A suspected member of the Mungiki is confronted by members of the public

Perpetrators and places of torture

Virtually all the survivors were tortured by military officers but a few reported to having been also tortured by police officers from the Kenya Police Service, Administration Police and General Service Unit at the point of arrest or while being transferred to police stations or law courts. All the survivors identified Kapkota Military Camp as the main place where torture took place.

Methods of torture

All the survivors who reached Kapkota were first beaten indiscriminately for about 2 to 3 hours without being questioned. Their pleas of innocence were completely ignored. The methods of torture employed included beatings (slaps and kicks), beatings with weapons such as gun butts, *rungus* (clubs), wires, whips and wood planks, and insertion of barrels of guns into the anus and stripping naked. Suspects were blinded and forced to *inter alia* move on knees for up to 2 hours and forced postures; open mouths into which water was poured; move prostrate on the ground with bare stomachs; move hands as if calling the rain; they were rained on for more than one hour while sleeping on their already bruised and injured backs. They were also forced to bite a fellow detainee; pull each other's genital organs and suck each other's breasts and whip every other detainee in turns. Survivors were also engaged in frog jumps and forced to carry victims who succumbed to torture and died at the military camp; sing *jeshi ni moja* (the army is one, only the Armed Forces) and also in their vernacular language while being beaten. Finally, they were denied food and forced to lie and crawl on their bellies on barbed wire rolls while military officers stepped on them. The entire duration of torture lasted between 2 hours and 6 hours during the day and in some cases went on for up to 5 days.

However, the Government of Kenya has denied these allegations of torture. The government's denial has three stages, starting with saying torture did not happen, continuing by saying that what happened was something else, and finally saying that what happened was justified for the protection of national security or some other purpose. The IMLU Report (April 2008) posits thus: 'Currently denial, passivity, and indifference exist and the government, through the minister of defence, has alleged that the torture was perpetrated by the local residents - a clear admission of acquiescence by the state in condoning torture'.[28]

Conclusion on Torture Phenomena in Kenya

In conclusion, one can deduce that if torture had not been used and condoned by the colonial and the Kenyatta governments, it would have been hard for both the Moi and Kibaki regimes to perfect the same from the 1980s to date. The use of torture, therefore, has been so deeply entrenched within the state, and particularly within the security sectors, that it has become part of the pervasive culture of impunity in Kenya. However, this has not deterred the affected persons and communities from pursuing justice in the courts. It is these court actions and their outcomes that form the basis for this *CASE DIGEST*.

28.Ibid p3

CHAPTER 2

The High Court of Kenya, Inset Newspaper cutting from the Daily Nation 21 July, 1993

THE JUDICIARY IN THE DETERMINATION OF TORTURE CASES

2.0 THE JUDICIARY IN THE DETERMINATION OF TORTURE CASES

2.1 INTRODUCTION

The court cases and decisions captured in this publication are an abridged record of sound precedent illustrating how a few judges have progressively ruled on questions regarding human rights violations under Chapter 5 of the Kenyan Constitution; and hopefully will form a basis upon which courts will continue to advance the respect for human rights in any future cases brought before them, whether of past or future violations.

In the cases cited here, the courts have not only asserted their wide powers in making declarations against violations of human rights but have also gone further to award damages for the violations as a measure of redress. This is a positive step forward that needs to be adopted, and developed toward engendering the respect for human rights in all persons, institutions and, especially, in the various organs of the state.

It is also important to note that it is the wish of the majority of the victims of state sanctioned torture at Nyayo House and elsewhere that their cases go before a court as opposed to going through the Truth, Justice and Reconciliation Commission (TJRC) process, which is, at best, lined with political hurdles and whose recommendations will only be forwarded to the Government which maintains the discretion to implement the said recommendations.

2.2 CHALLENGES

The Judiciary has undergone several challenges as far as dispensing justice to torture survivors is concerned. These include:

a) Colonial legacy*:* The legal and judicial systems that were set in place during the colonial era were not designed to uphold and protect the fundamental rights and freedoms of the colonised. These systems were inherited by the post-colonial regimes without much structural change. Since independence, the successive regimes have succeeded in weakening the judiciary by policy measures that disabled it from acting as a check and balance to the excesses of the other arms of Government. Key to this is the policy of appointing expatriate judges and acting judges, or attempting to remove the security of tenure for all judges as in 1986. The latter had to be reinstated in 1988 owing to public pressure.

Thus the immediate post-colonial judiciary was dominated by expatriate judges, magistrates and other members of staff who were mostly engaged on contract pending the availability of qualified Africans to manage this arm of government. Most of the British expatriates, who were paid by the Government, could not be said to be independent as it was inconceivable that they would impartially adjudge upon on an issue that the State (their contractual employers) had an interest in.

It is on this basis that the Centre of Law and Research International (CLARI-ON) opines thus:

> **One cannot rule out the possibility of acting judges coming up with decisions favourable to the appointing authority in a desperate attempt to secure confirmation. Acting judges, unlike confirmed judges, do not have security of tenure. Yet it is the security of tenure of a judge that allows the officer to carry on his/her duty independently without fear or favour.[29]**

For this reason, it is not surprising that the initial judges were extremely fickle in their thinking and feared to stand up to the executive arm of government. The judiciary therefore became a willing and faithful participant in all the machinations used by the Government to undermine the human rights and freedoms of Kenyan citizens whenever it was in the interest of the ruling elite to do so.

b) Executive interference: There are numerous examples of the Executive's interference with the independence of the Judiciary in post-colonial Kenya:

i) *The Attorney General.* The office of the Attorney General, which is part of the Executive, used its position in the judicial system to play to the whims and interests of the ruling elite through either failing to prosecute or entering the *nolle prosequi* order against public interest litigation.

ii) *The Public Prosecutor.* The Attorney General's office, through the Public Prosecutor, has been instrumental in facilitating the prosecution of most of the cases where there were instances of State sanctioned human rights violations, including those sited in this publication.

iii) *Partisan Judges and Magistrates.* There have been cases where judges and magistrates ignored considerations of due process or were externally influenced in their rulings. A few examples of these will suffice:

- In cases that were brought before the then Chief Magistrate H H Butch and his successor, Chief Magistrate Joseph Mango, suspects were 'tried' and convicted at odd hours, usually in the evenings.
- There was intimidation of magistrates who made progressive decisions and rulings in favour of torture suspects and against the state. For instance the case of the 'Ndeiya Six' where the six suspects, charged with breaking into the Ndeiya Chief's camp; were beaten, had their finger and toe nails removed and were forced to walk on sharp objects. Owing to the evidence of torture, Senior Principal Magistrate Onesmus Githinji acquitted the six in June 1994, and censured the police directing the police commis sioner to ensure that the culprits were punished.

> **The magistrate observed that one of the accused, David Njenga Ngugi, was so badly tortured to confess that, eight months later, he still had to walk with the help of crutches. The soles of his feet still had deep black marks with sores and swellings ...[30]**

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29. Mitullah Winnie, Odhiambo Morris and Ambani Osogo(eds), Kenya's Democratization: Gains and Losses? Appraising the Post KANU State of Affairs, Nairobi, CLARIPRESS, 2005, p 42.
30. KHRC (1998) op cit pp 44 - 45. David Njenga Ngugi was an official of the opposition Democratic Party.

Following the judgement, the magistrate was subsequently transferred to the remote Kitui District. He later quit the judiciary for private practice.

iv) *Chief Justices*. Successive chief justices of Kenya have also played a critical role in the subversion of justice in Kenya as exemplified during the tenures of Cecil Miller(1986-1989) and Allan Robin Winston Hancox(1989-1993) among others.

Whereas during Miller's tenure the government relied upon the ingenuity of the Chief Justice to initiate pro-government action, during Hancox's tenure, the government literally moved into the courts and ruled them. It was Chief Justice Hancox who was at the helm when president Moi's dictatorship was at its worst, and his service in the judiciary was part and parcel of that autocracy.[31]

It is during this time that Justice Hancox dismissed Justice Patrick O'Connor, and later Justice Derek Schofield, who had resisted the Executive's interference with an on-going court case. It was regarding the case of Peter Njenga Karanja(below) that resulted in this resignation.

v) Indecisiveness of the Magistrates on torture cases: This was exemplified in the case of Peter Njenga Karanja, who died in police custody on 28 February, 1987, after being arrested on allegations that he had been implicated in the Mwakenya subversive movement. During an inquest before the then Chief Magistrate Mango, it was established that Karanja had died of wounds which had been inflicted on him while in police custody. The Chief Magistrate in his ruling stated:

On the evidence of the suspect (the police officer who had handled the deceased) I cannot rule that no offence has been committed in so far as the treatment of the deceased had been concerned. The investigation carried out by the police was not up to the standard. It was done with some kind of fear... I also consider that it would be futile to order the arrest of anyone to be charged with anything without further investigations because if there was some kind of torture, which I tend to believe there was, it is not clear by who as Mr Opiyo (then Senior Superintendent of Police at the Nairobi area Police Headquarters in charge of interrogation of 'Mwakenya' suspects) has not been willing to tell us who the other interrogators were for what he calls reasons of state security.[32]

c) Defiance of Court Orders or Decisions. There a number of incidents whereby the Executive has either failed or delayed to implement court decisions especially in regards to compensations awarded to survivors of torture. For instance, after Rumba Kinuthia and six others were each granted a global award of Ksh. 1.5 million only (one million, five hundred thousand only) for violations captured elsewhere in this digest in 2008, they (the survivors) and civil society organizations were forced by circumstances to engage in further court and protracted political action for the monies to be released. This was done

31. See the 'Black Bar and the Role of Judiciary' in http ://www.marsgroupkenya.org/pdfs/Black_Bar_Chapter_8.pdf.
32. Edward Mureithi: 'Torture and Death in Custody: Prison Conditions are Appalling' in the Nairobi Law Monthly No. 42 (April/May 1992), pp 19-20.

ultimately in December 2009 through the intervention of the Prime Minister, Hon. Raila Odinga who himself was a political prisoner.

All these challenges decimate the independence of the judiciary in the administration of justice. According to CLARION (2005), the concept of independence of the judiciary can be looked at from two perspectives: *first*, the ability of the individual judicial officer to possess a state of mind that will make him/her impartial while exercising judicial functions, and, *second,* the collective institutional independence from other entities particularly, the executive arm of the state. Thus: 'Whereas the first perspective focuses on the individual judicial officer, the second perspective looks at the broader institutional picture paying regard to the judiciary as a institution.'[33]

Despite these challenges the Judiciary has been able to foster justice especially within the courts of appeal as will be captured later in this chapter.[34]

2.3 THE EVOLUTION OF PROCESSES OF INSTITUTING CIVIL ACTIONS AGAINST THE STATE.

From the early 1980s to date, survivors of State torture have been instituting civil actions against the government, albeit through different mechanisms of procedure which have been changing with time.

Proceedings by private individuals against the government or its agencies can only be through civil proceedings. No criminal proceedings can be instituted against the government itself even where criminal conduct is alleged. Hence, victims can only seek redress by way of civil action against the government, seeking a declaration that certain particular rights accruing to them have been violated as well as compensation for damages resulting from the violations.

The formalities by which government proceedings have been instituted have changed over time. As these processes change so do the terms by which the parties are referred to. For instance, a suit instituted by way of a plaint will invariably have the parties referred to as The Plaintiff (i.e. the complainant) and the Defendant (the one accused of violating a plaintiff's right). A suit initiated through Originating Summons will have same parties being referred to as the Applicant and the Respondent, respectively. To avoid this confusion it is important for one to understand why certain suits against the government have been instituted in different ways from others.

The main statutes that deal with the institution of suits against the government are the Government Proceedings Act (Cap 40), the Civil Procedure Act (Cap 21) and Subsidiary Legislation, at the time in force, under the Constitution of Kenya.

33. Mitullah Winnie, Odhiambo Morris and Ambani Osogo (eds), ibid, p 35.
34. For details on other cases see Appendix 2.

a) Plaint:

Initially, suits against the government were instituted by way of a **Plaint**. Order XXVII rule 2 of the Civil Procedure Act states that;

> **Except as provided by the Government Proceedings Act or by these Rules-**
> **(a)these Rules shall apply to all civil proceedings by or against the Government**
> **(b)civil proceedings by or against the Government shall take the same form as civil proceedings between subjects and shall, if no special form is applicable, take the form of a suit instituted by a plaint**.

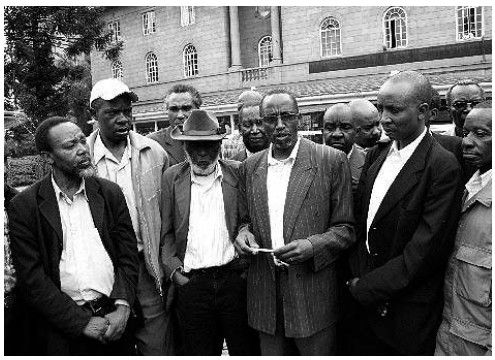
The plaints were to be served upon the Attorney General by virtue of Section 12 (1) of the Government Proceedings Act, which asserts that;

> **Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General, as the case may be.**

b) Originating Summons:

This situation pertained until 2001 when the then Chief Justice Bernard Chunga exercised his constitutional prerogative and devised new High Court procedure rules. Section 84 (6) of the Constitution of Kenya which states;

> **The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).**



Torture Survivors outside the High Court of Kenya after filing a case

The Chief Justice, by way of Legal Notice Number 133 of 2001, came up with the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006* (a.k.a. the Chunga Rules). Rule 9 provided that, a person who alleged a contravention of fundamental rights and freedoms could come directly to the High Court unless the allegation arose during the course of proceedings. Under rule 11, such applications were to be made by way of an Originating Summons and the procedure to be followed is that laid down under Order XXXVI of the Civil Procedure Rules under the Civil Procedure Act (Cap 21). These rules set out the rules that govern applications to court by way of Originating Summons. By the same rules, all applications by way of originating summons must be supported by sworn affidavits.

c) Originating Notice of Motion:

However, these rules were changed when the current Chief Justice, Evans Gicheru, repealed the 'Chunga Rules' through Legal Notice Number 6 of 2006 – *the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006* (a.k.a. the Gicheru Rules). Rule 2 of these rules set out that;

> **Unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under section 65 of the Constitution, shall do so by way of Originating Notice of Motion (hereinafter referred to as 'the Motion')**

This rule provides for the procedure to be used by subordinate courts when referring legal questions to the High Court for its determination. The jurisdiction of the High Court under Section 65 of the Constitution referenced in Rule 2 of the Gicheru Rules refers to its 'Supervisory Jurisdiction' over Subordinate courts. By this provision, parties to a proceeding in a subordinate court may refer a matter to the High Court for determination. Once the question is determined, the subordinate court must dispose of the case in accordance with that decision.

d) Petition:

Rule 11 of the same Practice rules provides that;

> **Where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged, or is apprehended, an application shall be made directly to the High Court.**

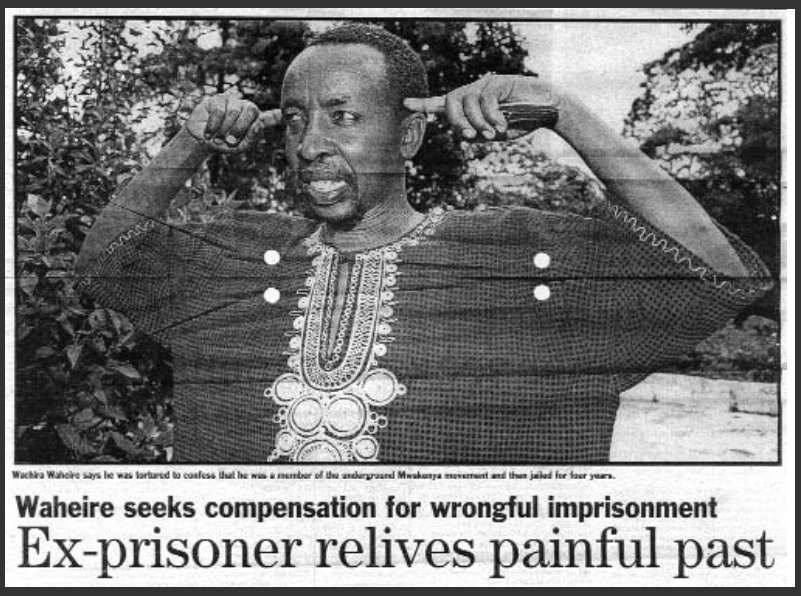
Torture Survivors view the Torture facility in the Nyayo House Chambers during an inspection tour in December 2008

Rule 12 sets out the method by which such an application is to be made when it states that 'An application under rule 11 shall be made by way of petition as set out in Form D in the Schedule to these Rules.'

Therefore, the current procedure for filing of suits against the government for violations of the fundamental rights and freedoms set out in part 5 of the Constitution is by **Petition** which, under Rule 13, must be supported by an affidavit. If, however, the issue of violation of human rights arises in a suit before a subordinate court, then the matter may be referred to the High Court by way of an **Originating Notice of Motion** which, under Rule 4, must also be supported by an affidavit.

It is noteworthy that though the different modes of instituting proceedings discussed above vary in phraseology and structure, their essence is the same. They are designed to initiate proceedings in court on the matters in question, giving particulars of the matters being complained against and the remedies being sought. They all fall under the category of originating processes that are drawn and filed by the complaining party to the proceedings. Their only major differences being how they are referred to and the manner in which they are to be drafted.

CHAPTER 3



Wachira Waheire says he was tortured to confess that he was a member of the underground Mwakenya movement and then jailed for four years.

Waheire seeks compensation for wrongful imprisonment

Ex-prisoner relives painful past

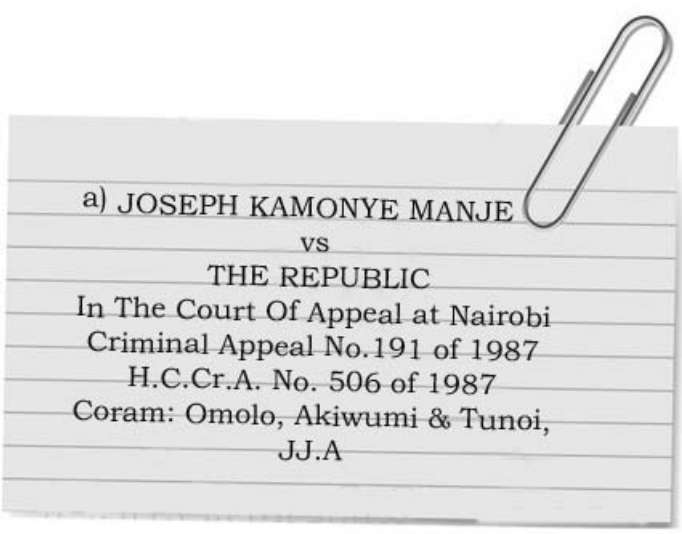
The Daily Nation, 4 June 2004

PRESENTATION OF COURT CASES

3.0 PRESENTATION OF COURT CASES

The cases laid out here are presented in chronological order beginning with the one filed earliest in time. They, therefore, appear in the following order:

- Joseph Kamonye Manje vs The Republic
- Wanyiri Kihoro vs The Attorney General
- David Mbewa Ndede vs The Republic
- Dr Odhiambo Olel vs The Republic
- Dominic Arony Amolo vs The Attorney General
- Rumba Kinuthia and 6 Others vs The Attorney General



Appeal from a conviction of the High Court of Kenya at Nairobi (Mr Justice S Amin) dated 30 June, 1987.

FACTS OF THE CASE

The appellant, Joseph Kamonje Manje, a lecturer in one of the institutions of higher learning in Nairobi was arrested in Nairobi on 12 March, 1986, and a seditious publication entitled *Mpatanishi No.15* (a publication associated with the Mwakenya group) was found to be in his possession. The appellant was arraigned before the Chief Magistrate in Nairobi, on 25 March, 1986, and charged with the offence of being in possession of a seditious publication contrary to section 57 (2) of the Penal Code. After the charge had been read to him, the appellant, who did not have representation by counsel, admitted to the charge.

The Chief Magistrate then entered a plea of guilty and called upon, the then Assistant Deputy Public Prosecutor, who was prosecuting, to outline the facts. All the facts narrated to the court by the Prosecutor were readily admitted by the appellant who was thereupon convicted as charged on his own plea of guilty. Sentencing was deferred to 2 April, 1986, so as to allow the court to obtain the appellant's records. On that date, after mitigation, the appellant who was stated to be a first offender was sentenced to 5 years imprisonment.

On 11 April, 1986, the appellant entered an appeal with the High Court against both the conviction and the sentence. The main ground of his appeal was that

his plea of guilty was not unequivocal as it was the result of torture both physical and mental meted out to him by the police during the 14 day period in which he was confined incommunicado and kept naked in a water- logged cell, without food or drink. The High Court Judge, nevertheless, upheld the conviction, only reducing the sentence.

The appellant, thereafter, appealed to the Court of Appeal on the following grounds:
1) That the learned Judge erred in law in striking out the Appellant's appeal on conviction as the plea was neither freely given nor unequivocal.

2) The learned Judge erred in law in upholding that conviction where the voluntary nature or unequivocal character of the plea was sought to be challenged.

3) That the learned Judge erred in law in not considering that exceptional circumstance existed at the time of recording the plea which went to the root of the conviction and which necessitated the plea of guilty.

4) That the learned judged erred in law in not satisfying himself that the Appellant was a free agent at the time of plea.

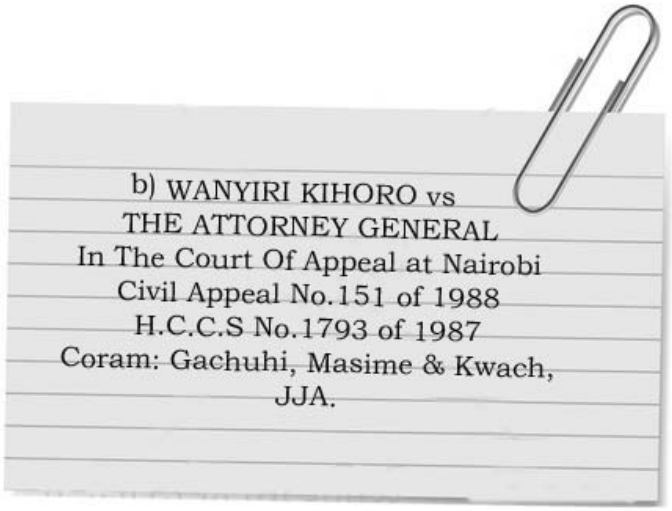
COURT DECISION
The Court of Appeal held that the plea of guilty taken in this case before the Chief Magistrate was not equivocal. Consequently, the Court of Appeal allowed the appeal, quashing the conviction and setting aside the sentence in spite of the fact that the court knew that the sentence had been served out.

RATIONALE FOR THE DECISION
In coming to this decision, the Court of Appeal considered the question of the appellant's long detention for 14 days before being taken to court by the police. The court found this delay to be unreasonable, without justification and indeed illegal, arguing that Section 36 of the Criminal Procedure Code which required the police to produce persons arrested without warrants before a subordinate court within 24 hours or as soon as practicable for less serious offences was blatantly violated, as was section 72(3) (b) of the Constitution, without any explanation being tendered to the Court.

The court also found that in determining whether or not the plea was unequivocal, the Chief Magistrate should have taken into account all the circumstances surrounding the case. In the words of Omolo JJ.A;

> **The Chief Magistrate having failed to extract an explanation from the prosecutor as to why the appellant had been held in custody beyond the period permitted by law could not expect the appellant's plea of guilty in the particular circumstances of this case to have been freely given; and, was neither voluntary nor unequivocal as the appellant was not a free agent at the time it was taken**.

The court had relied on the decisions in the cases of **David Mbewa Ndede vs The Republic** Criminal Appeal **No.1 of (1989)** and **Dr Odhiambo Olel vs The Republic** Criminal Appeal **No.54 of (1989)** in coming to its decision.[35]



Appeal from the judgement and decree of the High Court of Kenya at Nairobi (Mr Justice Rauf) dated 23 February, 1988.

CASE OVERVIEW

This was an appeal on a civil case where the appellant brought a suit against the state, seeking a declaration that his fundamental rights had been contravened and demanded aggravated compensation, on the grounds that he had suffered great pain as a result of the unlawful imprisonment, torture and assault at the hands of the police. The appellant was one of those held on the grounds of being a member of the famed 'Mwakenya' group.

FACTS OF THE CASE

The appellant, Wanyiri Kihoro, then a lawyer undergoing pupilage in a Mombasa based firm, was arrested without warrant by police in his house at Changamwe estate in Mombasa on 29/30 July, 1986. He was held at Kilindini Police Station without charge until 2 August, 1986, when he was brought by road to Nairobi, and locked up at Langata Police Station.

According to his plaint, on 3 August, 1986, he was blindfolded by police officers and taken to an underground cell at a place he did not know, where he alleged he was kept unlawfully and in breach of his fundamental rights under section 72, 74 and 81 of the Constitution of Kenya, until 10 October, 1986. He was then served with a detention order under the provisions of the Public Security (Detained and Restricted Persons) Regulations. During his detention in police custody for 74 days, the appellant alleged that he had been assaulted, tortured and subjected to inhuman and degrading treatment by police officers. He gave particulars of these allegations in paragraph 5 of his plaint, stating how;

35. The details of these cases are discussed elsewhere in the manual. Current status HCC misc application no. 34/05 (OS) is still pending in the High Court in Nairobi.

a) On 6 August, 1986, the plaintiff was unlawfully humiliated and forced to undress before a panel of police officers in plain clothes and while he was stark naked, he was severely beaten with pieces of timber and bro ken legs of chairs
b) From 6 - 8 August, 1986, the plaintiff was kept stark naked in a cell flooded with biting cold water and denied food.
c) For the three weeks between 9 August and 1 September, 1986, and on 15 and 22 September, 1986, the plaintiff was kept stark naked in a cell flooded with water and denied food.
d) During the said 74 days, the plaintiff suffered great mental and psycho logical torture. He was subjected to brutal and unnecessary physical pain, was constantly humiliated by the police officers and was denied an opportunity to sleep; his feet also got blistered due to standing for many hours in the cold water.

The respondents filed a defence on 14 September, 1987, in which the allegations of assault, torture and inhuman treatment were denied. With regard to the appellant's arrest and lengthy detention in police custody, the respondents averred that these were within the provisions of the Police Act and the Criminal Procedure Code (specifically Section 36). As for the reason for the appellant's arrest, it was said that he was arrested on suspicion of having committed a cognizable offence connected with anti-government activities namely that the appellant was an active member of 'Mwakenya' and possessed seditious literature.

The trial was held in camera and the appellant gave evidence in support of the averments contained in his plaint and called one witness. The respondent called two witnesses one of whom was a doctor who testified that the appellant had no evidence of physical injury, deformity or illness. The doctor averred that the appellant appeared to him to be physically healthy with no conclusive evidence of psychiatric illness.

The trial judge, because of the conflicting factual and medical evidence found it difficult to ascertain where the truth lay and therefore decided to raise the standard of proof above the normal **'on the balance of probabilities'** standard required in ordinary civil cases, considering that the allegations amounted to criminal conduct on the part of the police. The judge, therefore, in a reserved judgement, dismissed the appellant's claim with cost.

The appellant challenged the judgement by appealing to the Court of Appeal on eleven (11) grounds, the main ones being that;

a) the Judge misdirected himself on the standard of proof
b) the Judge erred in law in holding that section 36 of the Criminal Procedure Code justified holding the appellant in custody for 74 days prior to serving a detention order on him
c) the Judge erred in law in finding that the holding and interrogation of the appellant by the police in custody for 74 days while investigations were being carried out was reasonable within section 72(3) of the Constitution of Kenya and that the respondent had discharged his burden under sec

tion 72(3) of the Constitution to justify the detention

d) the Judge erred in ordering that the trial of the suit take place in camera and that the judgement remain secret.

COURT OF APPEAL DECISION AND RATIONALE

On the question of standard of proof, the Court of Appeal **held** that the High Court Judge was plainly wrong because this was a straightforward civil claim involving allegations of assault and torture. And it was the duty of the judge to decide on the evidence whether or not the appellant had proved his case on a balance of probabilities. To this point, Kwach JJ.A, asserted that;

> **...the appellant had established, by credible evidence, largely unchallenged, that he was kept in prolonged detention during which he was intensely and continuously interrogated. He was held virtually incommunicado for 74 days with no access to either an advocate or members of his family. In the normal course of events, he must, in these circumstances, have suffered serious mental torture. I am satisfied that the appellant established, on a balance of probabilities , that he suffered mental torture at the hands of his captors and he was entitled to judgement on that basis.**

On the question as to whether Section 36 of the criminal procedure code justified holding the appellant in custody for 74 days prior to serving a detention order on him, the court held that this section clashed with Section 72(3) (b) of the Constitution. Section 72(3) (b) states that a person who is arrested or detained;

> **Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.**

The court held that to the extent that section 36 of the Criminal Procedure Code which provided that suspects can be in police custody on suspicion of murder or treason indefinitely beyond the strict limits stipulated under section 72 (3) (b) of the Constitution before being taken to court, was null and void. Under the ordinary canons of statutory construction, where there is a conflict between a statute and a constitutional provision, the latter prevails over the former. The holding of the appellant by the police for 74 days was therefore unconstitutional and illegal unless the respondent could show that it was reasonable.

Moreover, the court further held that the respondents had also failed to show that the holding of the appellant for 74 days was reasonable. In the word of Kwach JJ.A; *'In my view, the respondent did not discharge the burden of showing that the holding of the appellant from the date of his arrest to the time of his being served with a detention order was reasonable.'* The court cited the case of **Njuguna s/o Kimani and others v Reginam** (1954) XXI EACA 316 at page 319 where it was held that;

> **The notion that the police can keep a suspect in unlawful custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English law that we find difficulty in speaking of it with restraint. It must be recognised that once a police officer has made up his mind to charge any person, it is his duty to inform that person as soon as practicable and thereafter to produce him before a Magistrate as required by section 32 or section 35 of the Criminal Procedure Code.**

Kwach JJ.A proceeded to add that;

> **The Constitution of Kenya does not permit the police, or any other law enforcement agency for that matter, to break the law in order to detect crime. And further that in the present case, the Judge quite clearly misapprehended the evidence and his findings of fact cannot, therefore, be allowed to stand. Since the appellant was held in unlawful custody, he was entitled to a declaration that his rights under section 72 and section 74 (torture) of the Constitution had been contravened and I would declare accordingly.**

This left the question of damages. The appellant sought aggravated damages[36] for contravention of his constitutional rights, and further contended that the court should make an award which also signals the court's disapproval of the conduct of the police. However the Court of Appeal held that the appellant is only entitled to compensatory damages, as the allegations of inhuman and degrading treatment had not been proved. The court also saw no need to award aggravated damages, claiming that the purpose of damages is not to punish a defendant but to afford a plaintiff a reasonable compensation for the loss or injury he has suffered. Consequently, the Court of Appeal awarded the appellant the sum of Kshs.400, 000 as compensation.

From the aforementioned, the final decision of the court was to allow the appeal, setting aside the judgement and decree of the High Court and substituting it with a declaration that the appellants' fundamental rights under section 72 and 74 (1) of the Constitution had been contravened, and to award the appellant Kshs.400, 000 in general damages, with interest at court rates from the date of judgement in the High Court until payment in full, and costs of both the suit and the appeal.

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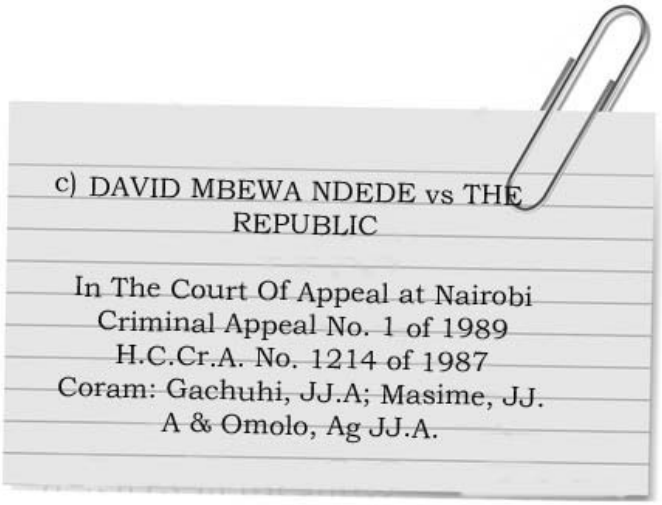
36. Aggravated damages refer to the damages awarded by a court to reflect the exceptional harm done to a plaintiff. They take account of intangible injuries such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, etc, and, by definition, will generally add to damages assessed under the general rules relating to the assessment of damages.



Appeal from the judgment of the High Court of Kenya at Nairobi (Justices Dugdale & Mbito) dated 30 October, 1987, 25 and 29 November, 1988.

FACTS OF THE CASE

The appellant, David Mbewa Ndede, was arrested without a warrant of arrest on 29 September, 1987, and charged with the offences of (1) being a member of an unlawful society contrary to Section 6(a) of the Societies Act, (Cap 108) and taking an unlawful oath contrary to Section 61(b) of the Penal Code (Cap 63).

The appellant, having been arrested without warrant on the 29 of September, was not brought to court until some 30 days later. He was unrepresented by counsel. In answer to the charges, the appellant simply answered, 'It is true'. The prosecutor gave detailed facts of the offences after the plea, but was peculiarly silent as to the fact of the appellants' lengthy and unlawful detention in police custody. The facts (of the offences) were then put to the appellant. He admitted them, stated that he understood them and that they were all correct.

Based on this admission, the appellant was convicted. It was only after the conviction was entered that the prosecution, for purposes of sentencing, stated that the appellant had been arrested on 29 September, 1987. The appellant was sentenced to 7 years in jail on the first count and 10 years jail on the second count.

The appellant appealed to the High Court through a petition filed at the court on 13 November, 1987, on 9 grounds, the 3 main grounds being that:

1) His admission to the charges (i.e. the guilty plea) was obtained as a result of torture, intimidation and threats, and was, therefore, null and void.

2) The trial court magistrate erred in law by failing to notice that it was illegal for an accused person to be held in police custody for an inordinate period of time without being taken to court. And further that being held in police custody for a period of 30 days before being brought to court was manifestly illegal and should have been considered by the magistrate before accepting the plea of guilty as unequivocal.

3) The trial magistrate erred in law and in fact in not taking into account that the appellant was being held incommunicado (i.e. being prevented from com-

municating with people) in police cells without being informed of the specific charges against him and without being allowed access to a lawyer; and that this violated his rights under Section 77(2) of the Constitution of Kenya (which provides for the rights of a person charged with a criminal offence).

The appeal was admitted to hearing in the High Court and listed for hearing before two judges. But before the hearing opened, the Deputy Public Prosecutor gave notice of a preliminary objection to the appeal on the ground that since the appellant had unequivocally pleaded guilty to the charges, he was therefore barred from appealing against the conviction by virtue of Section 348 of the Criminal Procedure Code (Cap 75 of the laws of Kenya) which provides that;

> **No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.**

Full arguments were heard on this preliminary objection and the High Court held that no appeal lay against the convictions on the two charges by reason of Section 348 of the Criminal Procedure Code and the appeals were therefore struck out. Instead, the High Court heard only the appeals raised against the sentences and those were allowed in part, with the result that the sentences were slightly reduced.

The appellant filed a further appeal with the Court of Appeal against the High Court order which struck out the appeals against the two convictions on four grounds;
1) That there was no proper lawful plea of guilty entered at trial as the plea was equivocal (i.e. was made under suspicious circumstances) and involuntary. The conviction was therefore a nullity.
2) That the appellant was unrepresented by counsel in the trial court and the Chief Magistrate therefore became a trustee in law to ensure that the appellant not only wished to admit his guilt but also to inquire into the reasons for the appellant's long period of unlawful detention or incarceration by the police, and further, to establish and satisfy himself that the appellant was before him as a free agent and not compelled to plead in any way**.**
3) That the trial court should have been satisfied by evidence of facts or law that the prosecution had justifiable reasons to overlook or violate the appellant's constitutional and other guarantees and protection in law against the complete erosion or derogation of his personal rights to liberty and legal representation by counsel (the claim being that, in this case, the prosecution hadn't so satisfied the court).
4) That Section 348 of the Criminal Procedure Code does not constitute an absolute prohibition or bar against the appellant's right of appeal. And that the court cannot in law, at whatever stage of proceedings, whether during the trial or the appeal, shrink from examining whether a plea is equivocal or unequivocal, voluntary or involuntary.

COURT DECISION
The Court of appeal allowed the appeal, setting aside the order of the High

Court striking out the appellant's appeals against the convictions. The Court of Appeal went further and quashed the convictions and ordered the appellant to be set free.

RATIONALE FOR THE DECISION

In coming to its decision, the Court of appeal concluded that Section 348 of the Criminal Procedure Code did not amount to an absolute prohibition to an appeal against a conviction obtained by means of a plea of guilty. That, though the principle underlying this section is that a plea of guilty by an accused operates as a waiver of his right to question the legality of the conviction based on the plea, it must be clear that the plea of guilty is really such a plea and that the appellant is not prevented or barred from showing that the plea was not really a plea of guilty, or did not amount to a plea of guilty. The judges relied in the case of **Adam v R** (1975) EALR 755 where the appellant's appeal was allowed on the ground that his plea of guilty was equivocal.

Gachuhi JA, in his judgment commented that:

> **In all circumstances we have set out we do not see how the learned judges of the superior court could have arrived at the conclusion that the appellant's plea of guilty was voluntary and unequivocal. From the grounds of appeal in the petition to the superior Court the issue was raised of the voluntariness of the plea. For the court to decide on the issue, it was necessary to try that issue. That could only be done by resorting to the provisions of section 358 of the Criminal Procedure Code ... (which provides in subsection 1 that); 'In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.**

Therefore, regarding the confession, **Gachuhi JA** further observed that;

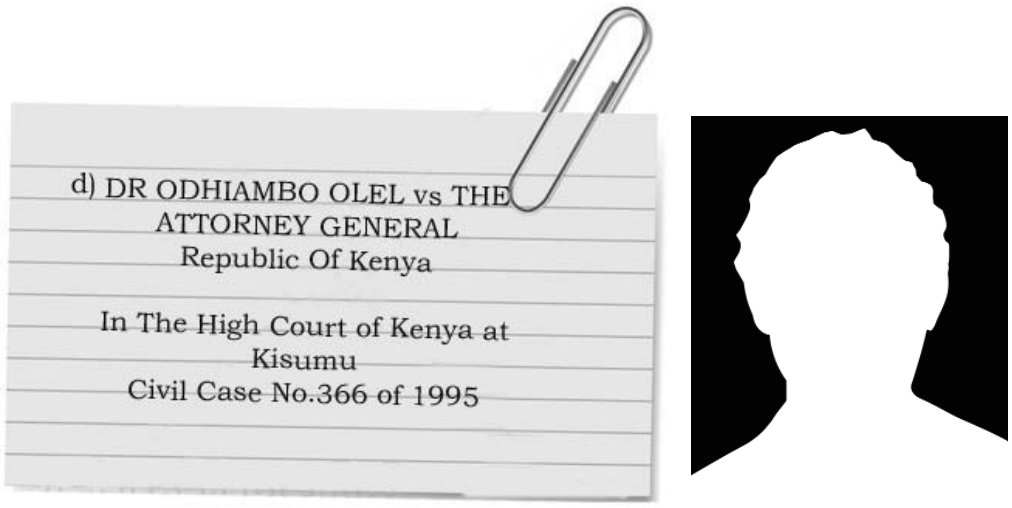
> **...where as happened in this case at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to Court from the date of arrest etc, then an explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the Court. The Court should then put that explanation to the accused and inquire of him if it affects his plea.**

The Court of Appeal held that the learned judges erred in making a finding on the issue of the voluntariness of the appellant's plea without considering any evidence on the issue and in so doing occasioned a miscarriage of justice to the appellant. They allowed the appeal and set aside the superior court's order upholding the preliminary objection to the appeal.[37]

Current Status: In 1994 David Mbewa Ndede instituted a Civil suit in Kisumu

37. On 4th July 1994, Mr. David Mbewa Ndede, through a plaint, brought a civil action against the government (see David Mbewa Ndede vs the Attorney General, Civil Suit No. 284 of 1994 in the High Court of Kenya at Kisumu) seeking, amongst other claims, compensation for malicious prosecution and for the injuries incurred as a result of the torture he had endured at the hands of the police and state agents at Nyayo House. In the judgment of sitting judge Lyangah J, the plaintiff, Mr.Ndede was awarded Kshs.600, 000/= as general damages for the unlawful arrest, unlawful detention in the police cells and the subsequent malicious prosecution, and Kshs.1, 095, 210/= as special damages, which figure was obtained from aggregating the medical expenses incurred by the plaintiff as a result of injuries or ill-health suffered due to the ill-treatment he received after he was arrested on the 29th September, 1987.

which was concluded in 1996 whith special demages award of Kshs. 1,095,210.00. The State appealed against this decision in Feb, 1999. The Appeal was allowed in June, 1999. It was heard from June, 1999 to June 2006 where the order of the court was that the appeal be marked as abated for the reason that the applicant had since died and no legal representative had been subsitutide.The mother was subsequently subsitutuded and the above principle amount which had accrued amounting to Kshs. 2,700,000/- was paid in 2009



FACTS OF THE CASE

On the 20 March, 1987, the Plaintiff, a medical doctor by profession, was lawfully working at Kisumu Municipal Offices when police officers confronted him in his office and carried out a search without a search warrant. He was afterwards arrested without being given reasons for his arrest. He was blind folded and transferred to Nairobi and taken to the notorious Nyayo House where he was held until the 6 April, 1987. On each of the 17 days and nights he was held in that dark, water flooded cell, the Plaintiff was subjected to unimaginable inhuman treatment by the said policemen. Furthermore, he was kept incommunicado and without access to medical attention, and as a result his health deteriorated.

On the 6 April, 1987, at 6:30pm, the Plaintiff was brought before a Magistrate and charged with being a member of an unlawful society contrary to section 6 (a) of the Societies Act (Chapter 108). The particulars of the offence alleged that between 1977 and 1987, the Plaintiff was a member of an unlawful society called 'Mwakenya'. When called upon to take a plea, the Plaintiff, who was unrepresented, pleaded guilty to the charge. The Chief Magistrate entered a plea of guilty, and convicted the plaintiff to 5 years imprisonment.

The Plaintiff appealed to the High Court against both the conviction and the sentence on the grounds that his plea was not unequivocal, alleging that it had been procured by torture and threats by the police. At the first hearing of the

appeal, the respondent raised a preliminary objection arguing that the appeal against conviction was incompetent and should be struck out. The High Court held that the Plaintiff, having unequivocally pleaded guilty to the charge, was barred by section 348 of the Criminal Procedure Code from challenging his conviction.

The judges rejected the appellant's allegations of torture and threats as these were not borne out by the record and were being raised for the first time on appeal, asserting that in determining the question, they could only go by the record. They went further, to agree with the respondents' preliminary objection and struck out the Plaintiff's appeal against conviction, but as regards sentence, they reduced it to 3 years because they found that in the assessment of sentence, the Chief Magistrate had taken extraneous matters into account.

COURT OF APPEAL DECISION AND RATIONALE

The Plaintiff appealed the High Court decision to the Court of Appeal, which allowed the appeal, setting aside the order of the High Court striking out the Plaintiff's appeal. The Court of Appeal went on to quash the conviction and set aside the sentence. In coming to this decision the Court of Appeal considered that the case of **David Mbewa Ndede vs Republic** Civil Appeal No.202 of 1999, where it was stated;

> **We would add that where as happened in this case at the time of the taking of plea there appears to be unusual circumstance such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused to court from the date of arrest, then an examination of the circumstance must form an integral part of the court. The court should then put that explanation to the accused and inquire of him if it affects his plea.**

In this case, the Plaintiff sued the Attorney General as a representative of the Government of the Republic of Kenya, seeking special and general damages for unlawful arrest, malicious prosecution, false imprisonment, loss and damage arising from severe physical, psychological and mental shocks.

The particulars of his claims were as follows:

a) Loss of salary: The Plaintiff indicated in his Plaint that at the time of his arrest he was a Medical Officer of Health for the Kisumu Municipal Council earning a salary of Kshs.9,690 per month, and that he was 52 years old. He claimed that he was due to retire at the age of 60 years, but the Council had dismissed him as a result of the said imprisonment and he had therefore lost 8 years income which added up to (Kshs.9,690 x 8 x 12) Kshs.930,240

b) Loss of pension: the Plaintiff also asserted that the terminal benefits to which he used to contribute and which he consequently lost amounted to Kshs.1.5 million. The court acknowledged the fact of the plaintiffs' employment, his lost earnings and pension as a result of the arrest, and awarded him these specific amounts pleaded**.**

c) Medical expenses: The Plaintiff further claimed that as a result of his severe torture and imprisonment, he developed some ailments which had persisted to

date. Dr David Olima, who had been treating the plaintiff since he left prison, testified as a witness for the Plaintiff. He claimed that his examination of the Plaintiff in 1989 revealed the following: -

i) Heart failure due to chronic chest infection
ii) Anaemia
iii) Swollen left knee joint
iv) Severe backache
v) Incontinence of urine.

Dr Olima in his evidence said that he has continued to treat Dr Olel to date, and that the Plaintiff still suffered from pain of the left chest and arthritis of the left knee joint. The Plaintiff put in as exhibits receipts for drugs he had been taking whose value came to Kshs.1,547,435, which the doctor acknowledged.

The court found that this head of special damages had been pleaded and strictly proved and therefore awarded the Plaintiff the specified amount.

d) Damages for unlawful arrest and confinement and malicious prosecution: the court stated that, for this claim to succeed, the Plaintiff must establish that:-

i) the proceedings had been instituted by the Defendant;
The court found that this had been proved by the fact of the Plaintiff's arrest and subsequent conviction for a crime.
ii) the said proceedings were terminated in favour of the Plaintiff;
The court considered the Plaintiff's acquittal sufficient demonstration that the prosecution had been determined in his favour.
iii) the Defendant acted without the reasonable or probable cause;
The Court contended that it could not be said that the police officers who arrested the Plaintiff and prosecuted him had an honest belief in the guilt of the Plaintiff in view of the amount of torture they subjected him to so as to get his admission.
iv) the Defendant acted maliciously.
The court reiterated its position above, that the Defendant's agents had no reasonable and probable cause to prosecute the Plaintiff and this was the evidence that there was malice.

After considering these facts, the judge in this case, Tanui J, concluded that;

In assessing damages which would compensate the Plaintiff, I note that the two authorities citied to me i.e. *Nairobi HCCC No.1774 of 1994 – John Kamau Ichana – vs – Paul Njiru* (which) related to the unlawful holding of the Plaintiff in custody for 24 hours. That (case, however,) did not include malicious prosecution. The facts of *Wanjiru Kihoro vs Attorney General – Civil Appeal No.151 of 1998* would appear to be (more) similar to those of this case. That case also involved a 'Mwakenya' member suspect. However, in the present case the Plaintiff was held longer while being tortured. Having considered all these facts including the authorities citied, I would award the Plaintiff Kshs. 4,500,000 under this head.

e) Exemplary damages: In considering the Plaintiff's claims for exemplary damages the court considered the case of **Obongo vs Kisumu Municipal**

Council (1971) E.A 91 where it was held that exemplary damages are appropriate in 2 classes of cases: -

i) Oppressive arbitrary and unconstitutional action of the servants of Government, and/or
ii) Conduct of a Defendant calculated to make a profit for himself which may exceed compensation payable by the Plaintiff.

The court was satisfied that in this case the conduct of the Police Officers who arrested, tortured and detained the Plaintiff for 17 days before prosecuting him in Court was very high-handed, arbitrary, oppressive and unconstitutional. Therefore the court awarded the Plaintiff exemplary damages in the amount of Kshs. 4,000,000/

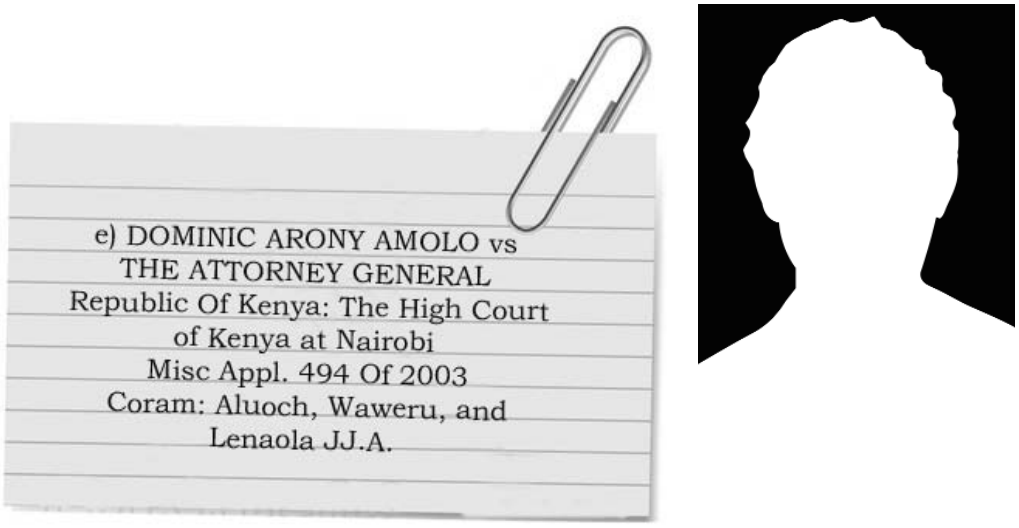
f) Costs and Interest: The court awarded the Plaintiff costs and interest at court rates from the date of delivery of the judgement.

The award of damages for the Plaintiff against the Defendant was therefore, as follows;

i)	Medical Expenses	Kshs.1,547,435.00
ii)	Loss of Salary	Kshs. 930,240.00
iii)	Loss of Pension	Kshs.1,500,000.00
iv)	General damages	
	a) Malicious Prosecution	Kshs. 4,500,000.00
(v)	Exemplary Damages	Kshs. 4,000,000.00
		Total: Kshs.12,477,675.00
		(This was paid out in 2008)

vi) Cost and interest[38]:

Dated and delivered this 23rd day of January, 2006.



38. Costs are determined after a bill of cost is filed and heard in court. Interests accrue until the final settlement is executed.

FACTS OF THE CASE

The Applicant, Dominic Arony Amolo, had served in the Kenya Air Force since 21 February, 1977. On 1 August, 1982, he, together with others, was arrested and unlawfully confined at Kamiti Maximum Security Prison until 19 October, 1982, when he was taken before a Court Martial at Langata Barracks.

In the **Court Martial Criminal Case No. 462 of 1982** the applicant was tried and convicted on charges relating to the failed Coup attempt against the Government on 1 August, 1982. He was sentenced to a term of imprisonment of 12 years and referred to Kamiti Maximum Security Prison where he was locked up in solitary confinement at 'E' Cell Block which was said to be set aside for psychiatric and/or insane prisoners.

While at the said 'E' Block, the Applicant appealed against the conviction and sentence and on 27 September, 1984, his appeal succeeded and the High Court ordered that the Applicant be re-admitted to the Kenya Air Force or be retried as is provided for in the Armed Forces Act, Cap.199 of the Laws of Kenya. However, contrary to the Order of the High Court, the Kenya Air Force and the prison authorities continued to hold the Applicant in prison at Kamiti Maximum Security Prison unlawfully until October 5, 1984, when he was removed from the cells and escorted to the main gate of Kamiti Maximum Security Prison and abandoned there.

At the gate, the Applicant was told by the prison authorities and officers from the Kenya Air Force, whom he could not identify, that he was lucky to be alive and that he would have to remain quiet for the rest of his life otherwise he would be re-arrested and shot dead. Since that day the Applicant claims that he has lived under great mental and psychological trauma and fear.
On 15 May, 2003, the Applicant filed a suit against the government by way of Originating Summons, seeking:

1) A declaration that his rights under Section 70 (a), 72, 73 (1), 74, 77(9) and 82 (2) of the Constitution of Kenya had been violated.
2) Damages for the breach of those constitutional rights and freedoms by the Government and its agents, and/ or such orders, writs or directions for the purpose of enforcing and securing the enforcement of the rights alleged to have been breached in relation to the Applicant.
3) Costs of the application.

Upon being served with the summons, the Attorney General filed a Notice of Preliminary Objection claiming, amongst other things, that the matter was time-barred under Section 4 of the Limitation of Actions Act (Cap.22) which preliminary objection was overruled by the presiding judge Hayanga, J, asserting that;

> **...Section 3 of the Constitution (of Kenya) excludes the operation of Cap 22 with regard to claims under Fundamental Rights and further that Fundamental Rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of action enunciated under the Limitation Act Cap 22.**

Then, on 17 November, 2003, the then Chief Justice directed that the matter be heard by the three-judge bench aforementioned and hearing commenced on 4 May, 2004.

At the hearing, the applicant described, in his testimony, the conditions of his confinement at the 'E Block'. He claimed that the cells were 6ft X 7ft with a single powerful electric bulb that was never put off. He had been provided with a torn blanket for beddings and torn standard prison uniform for clothing. The prisoners there were held in solitary confinement, and would only leave the cells at 5.30a.m. so as to empty the chamber pot, for 20 minutes of body exercise during the day and for meals.

He also testified that, during incarceration, he had recurring nightmares, hallucinations, and was attacked by insane prisoners during meal times, who sometimes took away his food.

The applicant also called two witnesses who had also been held in Kamiti's 'E Block'. They testified that block was where insane prisoners were held and they would shout throughout the day and night. They confirmed that the prisoners there were held in solitary confinement and were cut off from the world. And further, that that food was particularly bad as it consisted of sandy *ugali,* or sour *ugali* and badly cooked beans.

The Respondents brought one witness to counter these allegations, a Superintendent of Prisons, who had joined the Prisons Service in May 1985 and who, at the time of his evidence, was stationed at Kamiti Prison. He gave evidence to the effect that, from prison records, E Block was meant for prisoners of a higher security classification such as ex-armed Forces Personnel, escapees and potential escapees. Political Prisoners were kept in the Isolation Block and Punishment Block. He stated further that there was nothing unique about E Block but confirmed that insane prisoners were held there before being taken to Mathare Mental Hospital. He however, denied knowledge of the claim by the Applicant that he had been held in solitary confinement when in Kamiti Prison.

Counsel for the Applicant, thereafter, made submissions urging the court to find that the Applicant had proved that his Fundamental Rights as guaranteed by the Constitution had been breached and that his client's case had been proved satisfactorily. He further submitted that all the facts were undisputed and the Court was obligated to invoke Section 84(2) of the Constitution and grant redress. He noted that no answer had been given to the Applicant's claim that E Block was the abode of insane prisoners and that the Superintendent of Prisons**,** Yassin Chirchir**,** the only witness for the Respondent confirmed that this was so, although he could not have known the situation obtaining there before 1985 because he was not even in the Prisons Service.

It was also submitted that after his release on Appeal on 27 September, 1984, the Applicant was held in custody until 5 October, 1984, for no apparent reason and this constituted a gross violation of his fundamental rights. The Court

was therefore urged by the Applicant to boldly uphold the supremacy of the Constitution and through it give back to the Applicant a semblance of the life that he had lost through the breach of his constitutional rights.

The Respondents countered these submissions, arguing firstly, that the claim for damages was mistaken as damages could not be awarded even if there was breach of Fundamental Rights as the discretion given to the High Court to issue orders, writs and directions, (under Section 84 (2) of the Constitution) did not extend to granting damages. Secondly, the Respondents submitted that this was the first time that a Kenyan Constitutional Court was being asked to award damages in a Constitutional Reference while the Constitution itself made no such provision. Thirdly, the Respondents argued that with regard to the alleged breach of the Fundamental Rights, the Applicant was at all times a prisoner in lawful custody and, as such, fell within the exceptions of Section 72 of the Constitution which allows denial of certain rights while a person is lawfully held.
Regarding the holding of the Applicant for 9 days after his release on appeal, the Respondents argued that no one was to blame for that matter as it was the result of the confusion in the interpretation of the ruling of the court. The appeal judge Mbaya J, after quashing his conviction by Court Martial, had ordered for a re-trail and directed the Military Police to take him after court as he was still a member of the Armed Forces. The Respondents argued therefore that there was insufficient evidence for the court to make determinate findings on the questions posed and urged the court to dismiss the Summons as filed and presented.

COURT DECISION
The court, after considering these issues, decided in favour of the Applicant, issuing the following declarations:

1) that the continued imprisonment of the Applicant between 27 September, 1984, and 5 November, 1984, was in breach of his right to liberty contrary to Section 70 of the Constitution.
2) that the continued holding of the Applicant for 9 days at Kamiti Maximum Security Prison after the High Court had ordered his release constituted an act of servitude and slavery in breach of S. 73 of the Constitution.
3) that the holding of the Applicant in solitary confinement in E Block within Kamiti Maximum Security Prison amounted to cruel and inhuman treat ment in breach of S. 74 of the constitution.
4) that the refusal of the Kenya Air Force to reinstate the Applicant to its serv ice and refusal to pay him for services rendered during his employment amounted to cruel and inhuman treatment.

The court also awarded the Applicant damages in the sum of Kshs. 2,500,000 and costs of the suit with interest charged from the date of the judgement. In its decree the court also issued directions to the effect that, should the Applicant follow up the matter regarding the payment of his dues, a single judge should, upon proof of entitlement for services rendered to the Kenya Air Force, in his/her discretion hear and determine what amount, if at all, is payable to the Applicant in that regard.

RATIONALE FOR COURT DECISION

In coming to this decision, the court first considered the respondents' objection that the claim for damages in this suit was improper. To this the Court asserted that Section 84 (2) of the Constitution gives the High Court wide powers to grant **'redress'.** The section states that;

> **2) The High Court shall have original jurisdiction-**
> **(a) to hear and determine an application made by a person in pursuance of subsection (1);**
> **(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3),**
> **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).**

In defining redress, the High Court considered the judgment of the Court in the case of

Maharaj vs AG of Trinidad and Tobago (1979) 2 AC, 387**,** where it declared that;

> **...redress in its context has its ordinary meaning of reparation, compensation, including monetary compensation; and although the claim was not a claim in private law for damages for fort, but was a claim in Public Law for compensation, that compensation should be measured in terms of the deprivation of liberty, including consequential loss of earnings and recompense for the inconvenience and distress suffered during detention.**

Further, the Court argued that even though Section 84(1) of the Constitution did not specifically allude to damages, it could progressively interpret this section and award the damages sought, in order to further the course of justice and to protect the fundamental rights and freedoms provided for in the Constitution.

The Court agreed with the judgement in the case of **Albert Ruturi and others vs The Minister for Finance and another,** H.C. MISCAPPL.No. 908 of 2001, where the court reasoned that;

> **We must be goal-oriented i.e. vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context of our Socio-Cultural Environment, and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a Constitutional right which cannot be abrogated or abridged by brazen or subtle schemes or manoeuvres.**

Having concluded that it was competent to award damages in the suit, the High Court went on to consider the facts of the case. It found that the following facts were not in dispute, that:

1) the Applicant was a serviceman in the Kenya Air Force until the failed coup of August 1982.

2) the Applicant was sentenced for his part, if at all, in the mutiny and served the sentence at Kamiti Prison until he was ordered to be released on Appeal by Mbaya, J on 27 September, 1984.
3) it was admitted by the Respondent that the Applicant was not immediate ly released until 5 October, 1984.
4) the Applicant was not reinstated to the service of the Kenya Air Force.

The Court also considered the fact that the Respondents did not bring any proper witness to refute the Applicant's claims regarding the conditions under which he was held at Kamiti Prison, that is;
1) that he had been held at E Block which housed insane prisoners, polit ical and ex-armed forces prisoners as admitted by the Respondents' witness.
2) that he had been held in solitary confinement save for brief periods when he would go out to empty his chamber pot, for body exercise and for meals.
3) that the Applicant's cell had a single electric bulb that burnt through out, the day and night.

The Court found that it was left with little alternative but to find that the Applicant's evidence and that of his witnesses represented a true picture of the conditions at Kamiti Prison during the time of his incarceration.
Furthermore, the Court found that there was no evidence to dispute the implication that the Applicant had not been reinstated to the Air Force for any reason other than his conviction.

The Court was therefore left to ascertain whether these facts constituted a violation of the constitutional rights as claimed by the applicant. The applicant had sought various declarations from the court. However, the following are of importance;
i) A declaration that he was held in servitude in contravention of Section 73 (1) of the Constitution of Kenya during the period between 1 August, 1982, and 19 October, 1984. Section 73 (1) provides that;

No person shall be held in slavery or servitude.

The Court in coming to a conclusion on this point considered the two periods of the Applicant's incarceration; the first being from 1 August, 1982, to 27 September, 1984, when he was ordered to be released, and the second being between 27 September, 1984, and 5 October, 1984, when he was actually released.

The Court considered the first period to be irrelevant as the Applicant had, as was mentioned earlier, decided not to follow up this claim by adducing evidence to the court to support it.

With regard to the second period, the Court, having already established that the Applicant's detention during this period clearly constituted a breach of the right to liberty, considered whether it also constituted servitude or slavery.

Servitude was defined by the Court as '**the state of the person who is sub-**

jected, voluntarily or otherwise to another person as his subject' and **'slavery'** as **'the condition of a slave; that civil relation in which a man has absolute power over the life, fortune and liberty of another'.**[39] And the Applicant, having been held involuntarily at Kamiti Prison during that period, was in the complete control of and subjugated to the prison authorities unlawfully for nine days.

The Court therefore, declared that the holding of the Applicant for that period constituted a breach of his right not to be held in slavery or servitude in contravention of Section 73 of the Constitution.

ii) A declaration that the holding of the Applicant in solitary confinement in a cell block where insane prisoners were held from 19 October, 1982, until 5 October, 1984, amounted to cruel and inhuman treatment and was a breach of Section 74 of the Constitution of Kenya. The Court considered the decision of the Chief Justice of Zimbabwe in the case of **Conjwayo vs Minister of Justice, Legal and Parliamentary Affairs** (1992) (2) SA 56 and 63; where he remarked that;
...the critical issue to be resolved is whether the confinement of the applicant, in a small single cell, for a minimum of 23 ½ hours every weekday and 24 hours on Saturdays, Sundays and Public Holidays (except for half an hour each day in which he is allowed out of this cell to attend to his ablutions) without access to natural light and fresh air, and with only a limited ability to exercise his body, infringes on his fundamental right under Section 15 (1) of the Constitution not to be subjected to inhuman treatment. The court in this case went on to find that; **to deprive the Applicant access to fresh air, sunlight and the ability to exercise properly for a period of 23 ½ hours per day, by holding him in a confined space, is virtually to treat him as non-human.**

The Court also considered that the Prisons Rules as contained in the Prisons Act, (Cap 90), which provide that a prisoner of whatever kind and whatever nature is entitled to a basic standard of living which includes; adequate clothing (rule 46), bedding adequate for warmth and health (rule 47), clean clothing (rule 48), sufficient quantity of plain wholesome food (rule 49), communication with legal advisers and with other prisoners subject to restrictions (Rule 53) and regular exercise save for prisoners in close confinement (Rule 52). The presiding judge Aluoch, J commented in her ruling that **'*these provisions are not merely put to be decorative of the Prisons Act but must have a clear intention that prisoners are not treated as less than human.*'**

And further, the learned judge added that;

Human beings even those considered pariahs, retain the basic needs that all other humans are entitled to and the Rules are meant to ensure that those basic needs are provided by the State. We are unconvinced that as pertains to the Applicant, the treatment meted out to him was justified in any way under those rules.

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39. Black's Law Dictionary, 6th edition.

The court thereafter turned its attention to the issue raised over the solitary confinement and the single electric bulb that burnt for 24 hours. The court sighted part of the decision in the case of **Blanchard vs Minister of Justice, Legal and Parliamentary Affairs and Another** (2000) 1 LRC 671 at 679, where it was stated that;

> **The same complaint was raised in Le Maire vs Maas (199) 745 F. Supp. 623. The Plaintiff, a convicted murderer, serving a life sentence, objected that the twenty four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the eighth Amendment. The defendant, the Prison Superintendent, justified the constant illumination as a security measure so the disciplinary segregation unit could see into the cell. There was evidence, however, that there was need to see the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. Panner CJ (the judge in this case) held (1990) 745 F Supp 623 at 630. *'there is no legitimate penological justification for requiring the plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional.'***

On the issue of solitary confinement, the Court also sighted part of the decision in the Blanchard case where it quoted with approval the words of Hoexter JA in **Minister of Justice vs Hofmeyr** (1993) 3 SA 131 (A) at 145 where he stated as follows: -

> **...man is by nature a social animal whose well-being rests upon his association with others. Recluses who voluntarily seek exclusion are known, but they are the exception to the rule. In most people the gregarious (i.e. social) instinct is strongly implanted; and to deprive the average person with his fellows is to cause him to suffer anguish of the mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time.**

Therefore, the Court, being guided by the aforementioned decisions and finding no evidence to contradict the Applicant's claims regarding his detention in solitary confinement, considering also the factor of the insane prisoners and their mannerisms, went on to declare that the conditions to which the Applicant was subjected to at E Block, Kamiti Prison, were cruel and reduced him to a sub-human, a position contrary to the express provisions of Section 74 of the Constitution.

iii) A declaration that the failure, refusal and/or neglect of the Kenya Air Force to give the Applicant any benefits for the service he had offered the Republic while in the Kenya Air Force constituted cruel and inhuman or other

treatment and was a breach of Section 74 of the Constitution of Kenya. The Court had already found that the conduct of the Air force in refusing to reinstate the Applicant was clearly unlawful, and that the Applicant had been returned to the service of the Kenya Air Force by order of the High Court. Instead, he had been kept in unlawful custody for another nine days and unceremoniously bundled out of service without pay and compensation for the services he had rendered for over five years. The Court considered this to be cruel and inhuman treatment and issued a declaration to that effect.

iv) Damages. The Applicant's claim for damages was a novel issue for the Judges to render a decision upon. The Respondents had argued that Section 84 (2) of the Constitution did not expressly provide the court with powers to award compensation in the form of damages. However the Court adopted a progressive approach and ruled in line with the decisions of courts of other commonwealth countries whose Constitutions and Constitutional histories were similar to that of Kenya

> The court, for instance, considered part of the ruling in the case of **Maharaja vs AG of Trinidad and Tobago** (No. 2) (1979) 1 ALL E.R 387 at 406, where it was stated that; **Section 6 (**i.e. of the Constitution of Trinidad and Tobago, which mirrors Section 84 (2) of the Kenyan Constitution**)** provides**:**
>
> > **6 (1) for the removal of doubt it is hereby declared that if any person alleges that any of the provisions of the foregoing Sections or Section of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress. (2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section ... 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 the aforegoing sections....**

The Court also considered the decision by Shields, J (as he then was) in the local case of **Marete vs Republic** (1987) KLR 690 at 692, where he said that**;**

> **The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are to be found in Section 84. Both Section 74 and Section 84 are similar to the provisions of other Commonwealth Constitutions and it might be thought that the newly independent states who in their Constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.**

The court agreed with this opinion in holding that Section 84 had teeth as well, which teeth included an order for damages where necessary and which order

would be within the original jurisdiction of the High Court.
The Court also considered the rationale for awarding such damages, sighting the case of **Peters vs Marksman and Another** (2001) 1 LRC 1, (a decision from the courts in the Commonwealth nation of St Vincent and Grenadines) where it was considered that;

> **In Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms (1984) 62 Canadian Bar Rev. 517 it is said that the purpose of awarding damages in Constitutional matters should not be limited to simple compensation. Such an award, the article suggests, ought in proper cases to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the Constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.**

The court then went on to consider the question of computation of damages**.** It considered that the Applicant had raised serious issues relating to the effects of the prison conditions including hallucinations, loss of a sense of time, the effects relating to his unemployment, etc. The court was also satisfied that the Applicant had shown that his Fundamental Rights had been breached.

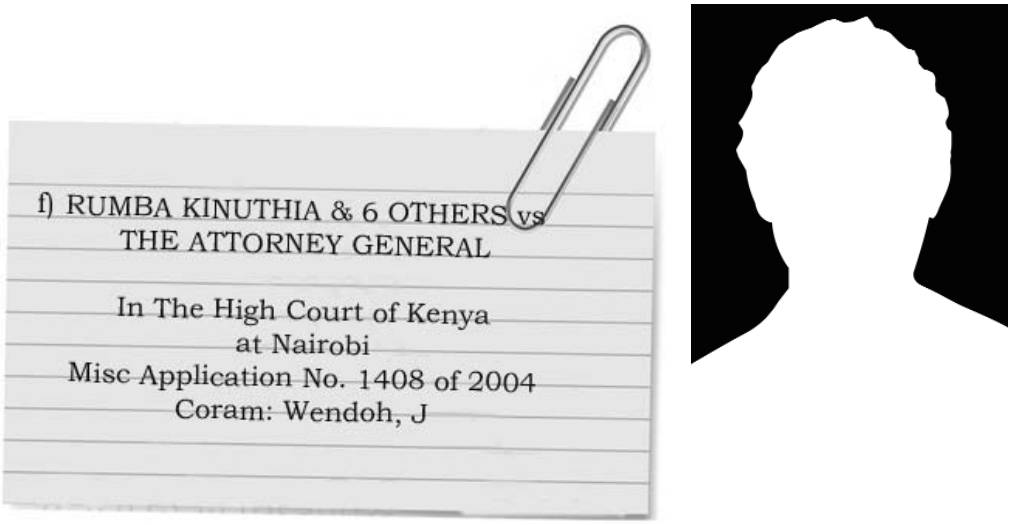
With this in mind, the Court concluded that it had two options in the way to ascertain the amount of damages to be awarded. The first method was by awarding a lump sum for all the breaches cited. This approach was considered do be more advantageous as the breaches in question happened almost within a defined period of time and within the defined area of the E Block at Kamiti Prison and further, that the breaches happened contemporaneously with each other, making it impossible to separate each of them and give a fair and reasonable award in respect of each. The court adopted this approach as compared to the second approach which would have meant awarding damages for each of the heads of breach of Fundamental Rights. It was decided that;

> **.... taking into account all matters raised herein and aware of the controversial nature of the issue before us, we have determined that in our view, an award of Kshs.2,500,000 would be a fair and reasonable award in damages in the novel situation arising from this case.**

In its conclusion of the judgement the court asserted, amongst other things that human dignity and the integrity of body and soul are not by imprisonment thereby curtailed. They should thrive within the lawful context of such imprisonment. If they are curtailed, the Courts in upholding the Fundamental Rights and Freedoms of the individual (including the prisoner, subject to law) should step in and say that the power behind those rights and resident in the Constitution should never be overthrown.

The court observed with agreement the opinion of Sheilds, J in the **Marete case** when he said;

From the plain reading of the aforesaid provisions (Section 84 (1) and (2)) it is abundantly clear that the makers of the Constitution intended that the powers of this court in the matter of preservation, protection and enforcement of Fundamental Rights are unfettered and unconditional. These provisions of the Constitution were meant to assure the people of this country to come before this court un-hesitantly and without any constraint when there has been, there is or there is likelihood of a breach of their rights enshrined in Sections 70 to 83 (inclusive) of the Constitution.



By an Originating Summons dated 29 December, 2004, the Applicant Rumba Kinuthia, sought orders and declarations from the Hon. the Attorney General, including; a declaration that the Plaintiff's fundamental rights and freedoms under Section 70, 72(3) & (5), 74 (1), 77, 78 (I), 79(1), 80 (1), 82 (3) of the Constitution have been and were contravened and grossly violated by the Police officers and other Kenya Government servants, agents, employees and institutions on 8 October, 1990, and on diverse dates thereafter.

Case Overview

This case was filed along with six other cases with similar facts i.e. all the applicants had been held and tortured at the Nyayo House basement for several days before being brought to court to answer to specific charges relating to sedition and treason.

FACTS OF THE CASE

Petitioner, Rumba Kinuthia, a human rights lawyer was arrested on 8 October, 1990, at his house in Kariobangi South Estate, Nairobi, by over 40 plain clothes policemen who, after breaking into and searching his house, carried away his books and magazines, claiming they were subversive material. He was handed over to Buru Buru Police Station, later blindfolded and taken to Nyayo House and thrown into a dark cell in the building basement. Later, he was

taken to the 29th floor of Nyayo House, where he was interrogated, forced to strip naked and assaulted with rubber and metal bars, blows and kicks.
This was repeated daily, where after interrogation he was placed in the dark cells and pressurized water (hot/cold) was sprayed on him in a bid to have him confess to involvement in anti government subversive activities. The petitioner was held as such for 14 days without food or beddings and thereafter arraigned before the Chief Magistrate's Court at the Nairobi Law Courts at an unusual time of 6.45 a.m. on 23 October, 1990. He entered a plea of not guilty and was thereafter remanded at Kamiti Maximum Prison where he was kept in solitary confinement in Block G of the prison though he was not a condemned prisoner. He was released after the Attorney General entered a *nolle prosequi* on 19 January, 1993.

On 29 December, 2004, the petitioner filed Originating Summons, and sought the following orders from the Court:
1) A declaration that the Plaintiff's fundamental rights and freedoms under Section 70, 72(3) & (5)/ 74 (1), 77, 78 (I)/ 79(1)/ 80 (1)/82 (3) of the Constitution were contravened and grossly violated by the Police officers and other Kenya Government servants/ agents/ employees and institutions on 8 October, 1990, and on diverse dates thereafter;
2) A declaration that the Plaintiff was 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;
3) General Damages/ exemplary damages and aggravated damages under S.84(2) of the Constitution of Kenya for the unconstitutional conduct by Kenyan Government servants and agents;
4) Any other orders/ costs directions as the Court considered appropriate
5) Costs of the suit, interest at court rates.

The Respondents only filed grounds of opposition in reply to the Originating Summons, as among other as follows-

1) That the application does not disclose any cause of action, and was mis conceived, incompetent, bad in law and lacked merit
2) That the application was an abuse of the court process
3) That the claim for unlawful imprisonment offended the express provisions of S.3 of the Public Authority Limitation Act
4) That for the claim of malicious prosecution to succeed there should have been proof of malice yet none had been pleaded
5) That the court had no jurisdiction to entertain the application as it was time barred
6) That the perpetrators of the alleged crimes had not been identified by the petitioner.

The Respondent did not file an affidavit in reply to the facts alleged by the Petitioner in his affidavit.

COURT DECISION
The High Court considered all the allegations of violations of the constitutional rights and freedoms made by the Plaintiff in his Originating Summons and

the supporting affidavits, and found that the Plaintiff had only managed to prove the breach of his right to protection from torture, inhuman and degrading treatment at the hands of police and Government agents at Nyayo House. The Court hence dismissed all other allegations and granted the petitioner's request for a declaration that his rights to protection from torture, inhuman and degrading treatment under Section 74 (1) of the constitution had been breached.

RATIONALE FOR THE DECISION

In coming to this conclusion the court considered whether the allegations stated in the supporting affidavits had been sufficiently proved. Wendoh J stated that;

> **In the instant case, the Respondents did not file any reply to controvert the Applicant's affidavit. However, I believe this court is obligated to look at the facts and see whether or not they constitute a breach of the Plaintiff's fundamental rights under the various sections of the Constitution that have been cited. Where the facts do not support the allegations then the orders and declarations sought would not lie.**

The court was guided by, among others, the case of **Anarita Karimi Njeru vs Republic** (1979) KLR 154, where Trevelyan and Hancox JJ at page 156 stated that;

> **We would however again stress that if a person is seeking redress from the High Court or reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.**

The judge also considered the case of **Cyprian Kubai vs Stanley Kanyonga Mwenda** HMISC 612/02, where Khamoni J said that;

> **An Applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable the paragraph and subparagraph of the Section out of 71 to 83 was allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to respond to, to enable the Respondent prepare accordingly and also to know the exact extent and nature of the case it is handling.**

With this in mind, the Court went ahead to consider each complaint made by the Applicant in his affidavit and found as follows:

1) As regards Section 70, which stipulates that;

> **Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his**

race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely life, liberty, security of the person and protection of the law....

The provisions of this Chapter shall have the effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of those rights and freedoms by any Individual does not prejudice the rights and freedoms of others or the public interest.

No specific violation has been alluded to by the Applicant under that section and indeed none can because as earlier observed, this Section sets out the protections generally and it would have to be read together with another of the Sections 71-83 under the Bill of Rights.

2) Regarding Section 72 (3) and (5) which states:

Subsection (3) A person who is arrested or detained —
(a) for the purpose of bringing him before a court in execution of the order of a court; or
(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,
and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

And,

Subsection (5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The court noted that firstly, the Applicant did not specify what sub paragraph of Section 72 (3) he was invoking (i.e. whether it was subparagraph (a) or (b) of the section), and, as noted earlier, it was necessary that the Respondent know whether the Applicant was alleging that he was arrested and detained for purposes of execution of a court order or he was arrested on suspicion of having committed an offence. Secondly, though he was later arraigned in court and

charged with an offence, the applicant did not support that allegation with evidence by exhibiting or availing records of proceedings from the Chief Magistrates court. Consequently the court could not ascertain whether the offence for which he was arrested was a bailable one and he should therefore have been released within 24 hours of detention, or was it a capital offence, such as treason, which the Applicant depones in his affidavit that he was charged with and which is punishable by death, thereby justifying the holding of the Applicant for 14 days. And as this had not been proved, the court held that claim must fail.

3) As regards Section 74 (1) which reads that;

> **(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.**

The court found that the Applicant has made various accusations against the Government officers who held him at Nyayo House. He alleged assault, being denied food, and pressurized cold and hot water being poured on him, which was inhuman and degrading. The court found that the evidence relating to the Plaintiffs incarceration at Kamiti should have been supported by evidence of the court record which was not. However, as the Respondents did not refute the Applicant's claims regarding the 14 days spent at Nyayo House, and as no records of that would be available in any event, the court held that the Applicant was entitled to a remedy under S.84 (2) for violation of his rights under S. 74 (1) of the Constitution. The court asserted that holding the Applicant in a dark cell, without food or without beddings, and being beaten and kicked around, was brutal, cruel and barbaric and amounted to both physical and psychological torture and inhuman treatment.

4) As for Section 77 of the constitution which read;

> **Subsection (1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**
> And in,
> **Subsection (9) A court or other adjudicating authority prescribed by laws for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.**

The court found that the applicant had failed to specify what subsection of S. 77 was contravened and that the Respondent could not have not known what to specifically respond to unless he was to assume. And it was the duty of the Applicant to plead with precision what right was infringed and how. As the applicant had failed to do so, the court held that this allegation must fail.

Regarding Section 79 (1) of the Constitution, that stipulates;

> **(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.**

The court observed that there were no specific pleadings by the Applicant in the Originating Summons or the Supporting Affidavits on how the said right was breached and the nature of the breach. The court found that all that was pleaded in paragraph 5 was; '**that the police officer carried copies of my books and references from my home library which they claimed were subversive even though they were legal publications and literature books.'**

This was the only evidence that the applicant was relying on to prove this claim. The court found this to be vague and not in the least demonstrative of how the applicants rights of expression were breached and the nature of the breach. **'If he held an opinion different from the Government, what opinion, was it? Even if called upon to respond the Respondent would have been at a loss. That claim must fail.' (Wendoh J)**

As for Section 80 (1) which reads;

> **S, 80 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.**

The court found totally no evidence to support this allegation.

> **How and when did the Applicant attempt to associate or assemble and he was hindered from doing so? I find that the Plaintiff has failed to support this allegation with any evidence in his pleadings. That claim must fail. (Wendoh J)**

As for the alleged breach under Section 82(2) which stipulates;

> **(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.**

The applicant argues that that his protection against discrimination has been violated. Subsection (3) goes on to define discrimination as follows;

> **(3) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or resi-**

dence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The court held that it could find no shred of evidence that the Plaintiff was accorded different treatment from another group of persons nor had he demonstrated that a certain group of persons was treated in a preferential manner to him and what the nature of the discrimination was. Was the discrimination based on sex, creed, political opinion or any of the categories listed under subsection (3)? The court asserted that as the Applicant had alleged an infringement of his right and it was upon him to adduce evidence in support thereof. Having failed to do so, the court held that this allegation was baseless as it was unsupported by any evidence and therefore had to fail.

The applicant, in his submission, was claiming Kshs.12 million as general damages, Kshs.3 million in exemplary damages, costs and interest. However, it was the Respondents contention that the Plaintiff was not entitled to damages because the claims were not supported by the Affidavit. Counsel for the applicant sought to rely on the cases of **Dominic Arony Amolo vs The Attorney General** Misc Application 494/02 and **James Njau Wambururu vs The Attorney General** where damages were awarded for each respective human rights violation under the constitution.

However, the court held that there was no basis for the award of the sum of Kshs.12 million for exemplary damages. Though the applicant states that he was an advocate of the High Court and lost earnings during the time of detention, and further that he suffered both physical and psychological trauma and even developed high blood pressure, hence the claim for the sum, the applicant did not produce any evidence in support of the said claim - no records of how much he earned per month as an advocate and what his loss may have been, no medical reports to support the claim of injuries suffered, the high blood pressure or even a report from a psychologist to assess the psychological trauma he suffered.

And further as regards exemplary damages, the court postulated that exemplary damages, being punitive in nature, are awarded in addition to actual damages where a defendant has acted recklessly, maliciously and are intended to deter or punish. Nevertheless, the court found that no basis had been laid for grant of exemplary damages and held that the same was therefore not deserved.

The above case had been filed along with 6 others which bore similar facts.
These include:
a) HCC 1409/04, where the Plaintiff, **Andrew Mwathi Ndirangu,** was allegedly arrested on 29 October, 1990, locked up in cells for 14 days before he was brought before the Chief Magistrate's court to answer to charges of treason. The Plaintiff, however, did not exhibit records of the proceedings of the Chief Magistrate's court where he was tried.

The Court considered that the facts pleaded in this case were similar as those in HCC 1408/04 (Rumba Kinuthia) and found that the Plaintiff had only proved the breach of his right to protection from torture, inhuman and degrading treatment at the hands of police and Government agents at Nyayo House and therefore, granted him a declaration that his rights under S. 74 (1) were breached, dismissing all the other allegations.

b) HCC 1410/04 (OS) where the applicant**, Njuguna Mutahi,** sued the Attorney General based on similar facts as in HCC 1408/04 save that he was arrested on 15 October, 1986, and claimed to have been detained for a month before he was charged with an offence of failing to prevent the commission of a felony. Due to intimidation, he pleaded guilty and was imprisoned for 15 months. As with the previous case, the Applicant did not bother to produce records of the proceedings before the magistrate's court where he was tried and convicted for the High Court to appreciate whether or not the trial was fair. The court thus, took into consideration all the pleadings in the Originating Summons and the affidavit in finding that the only right specifically proved to have been breached is under S. 74 of the constitution and a declaration will issue to that effect.

c) HCC 1412/04, where the Applicant**, Margaret Wangui,** was seeking similar Orders as in HCC 1408/04. Her claim was based on similar facts save that she was arrested on 8 October, 1990. She was detained at Nyayo House basement, interrogated and detained for 14 days before she was charged with misprision of treason on 27 October, 1990, to which she pleaded not guilty and was thereafter, remanded at Langata Women's prison till a *nolle prosequi* was entered on 22 November, 1990. As with the **Rumba Kinuthia** case above, only S. 74 of the Constitution had been proved to have been violated from the evidence adduced in the Applicant's Affidavit and a declaration was therefore issued to that effect.

d) HCC 384/05 where the Applicant**, Alex Okoth Ondewe**, was arrested on 30 June, 1986, detained for 21 days and charged before the Chief Magistrate, Nairobi, on 21 November, 1986. He pleaded guilty to the offence of taking an unlawful oath and was imprisoned for 4 years.

The High Court, after considering the evidence contained in his affidavit and the submissions made by Counsel for the Applicant, conceded that the Plaintiff had only managed to prove that his rights under S. 74 were violated and therefore issued a declaration to that effect.

e) HCC 385/05 where the applicant, **Naftali Karanja Wandui,** was arrested on 28 June, 1986, and detained at Nyayo House Basement for 10 days before being arraigned in front of the Chief Magistrate's Court on 7 July, 1986, where he pleaded guilty to publishing a seditious publication and was jailed for five years. The High Court, after considering the evidence adduced in the affidavit and submissions made by Counsel for the Applicant, found that he had only managed to prove that his rights under S.74 had been violated when he was detained at Nyayo House Basement, and a declaration to that affect was issued.

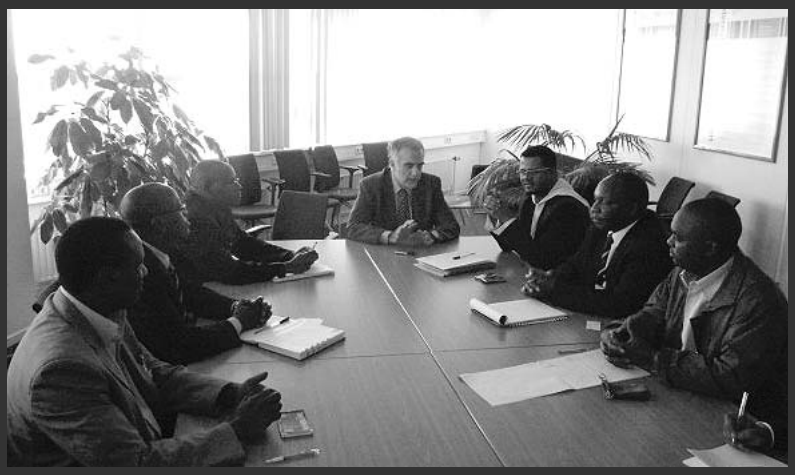
f) HCC 386/05 the Applicant, **Joseph Gichuki Karanja,** was on 30 June, 1986, arrested and detained at Nyayo House Basement till 10 July, 1986, when he was arraigned before the Chief Magistrate's Court where he pleaded guilty to possession of a seditious publication and was jailed for five years. Again, the High Court, after considering the evidence contained in the Applicant's affidavit and the submissions made by his counsel, found that he had only managed to prove that his rights under S. 74 were violated when he was detained at Nyayo House Basement and a declaration to that effect was therefore issued.

For all the above cases, the High Court, in considering the award of Damages, decided as follows;

> **Though the Plaintiffs were held for different periods of time, all of them suffered the same violation under S. 74 of the constitution and I will grant a global award of Kshs.1.5 million (One Million, Five hundred thousand only) to each Plaintiff for the said violation. The Plaintiffs will also be entitled to costs of the Originating Summons. (Wendoh J)**

These were honoured in December, 2009.

CHAPTER 4



Meeting between chief prosecutor of the International Criminal Court, L. Moreno Ocampo and the representatives from the human rights organizations from Kenya at The Hague in September 2009

REVIEW OF OTHER NATIONAL AND INTERNATIONAL TORTURE CASES

4.0 REVIEW OF OTHER NATIONAL AND INTERNATIONAL TORTURE CASES

The following are relevant cases on torture related Government decisions in Kenya and other parts of the world.

4.1 THE NATIONAL CASES

a) REPUBLIC vs AMOS KARUGA KARATU

Republic Of Kenya: In The High Court of Kenya at Nyeri
High Court Criminal Case No. 12 Of 2006
Coram: Makhandia, J.

This case, though cited, is not about politically motivated torture. However, it is strategic in that its judgement raises very fundamental Human Rights safe-guards.

FACTS OF THE CASE

The accused, Amos Karuga Karatu, was arrested on 19 January, 2006, for the offence of murder. However, he was charged over 5 months later on 9 June, 2006. He pleaded not guilty to the charge and his trial was fixed for 13 December, 2006. Eventually the trial commenced on 4 January, 2007, and between that date and 9 April, 2008, the Court heard 10 witnesses. When the Prosecution closed their case, the counsel for the accused made brief submissions arguing that the accused had no case to answer.

In his submissions, counsel alluded to the alleged violation of the accused's constitutional rights enshrined in Section 72 (3) (b) and 77 (1) of the Constitution of Kenya. Section 72 (3) (b) reads;

Any person who is arrested or detained:

a) .....

b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days, of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub-section have been complied with.

While Section 77(1) states;

If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within

a reasonable time by an independent and impartial court established by law.

Counsel for the accused contended that the accused was arrested on 19 January, 2006, but was only charged on 9 June, 2006, over 5 months later. This was a violation of the accused's constitutional rights as he ought to have been charged within 14 days upon his arrest. He was also not tried within a reasonable time. The delay according to counsel had not been sufficiently explained by the investigating officer.

Relying heavily on the cases of **Albanus Mwasia Mutua vs Republic** (2006) eKLR, **Gerald Macharia Githuku vs Republic** (2007) eKLR) **Robert Lobura Ekai vs Republic** Cr. Case No. 31 of 2006 (unreported) and **Josephat Mwangi vs Republic** Cr. Case No. 28 of 2007, Counsel for the accused urged the court to acquit the accused since no prima facie case had been made out by the prosecution.

The state counsel opted not to respond to the submissions, and relied on the evidence on record arguing that indeed a prima facie case had been established against the accused.

COURT DECISION

The court found in favour of the accused holding that the accused, having been brought to court in breach of the provisions of Section 72 (3) and 77 (1) of the Constitution, his continued prosecution is illegal and a violation of his constitutional rights. No *prima facie* case had therefore been made to warrant the accused being put on his defence. Therefore, pursuant to the provisions of Section 306(1) of the Criminal Procedure Code (which provides that the Court may submit a finding of Not Guilty if it considers, after the prosecution has rested, that no evidence against the accused has been disclosed) the court recorded a finding of not guilty against the accused with the consequence that the accused was acquitted and set free of the charge.

RATIONALE FOR THE DECISION

In coming to this decision the Court considered the witness evidence of Prosecution witness No. 10, the investigating officer in this case, who, in responding to questions put to him by the counsel for the accused, remarked that:

I arrested the accused on 19/1/06 at 11 p.m. ...we were through with investigations in 2 weeks.... I took 6 months to bring him to court because of processing the file through the DCIO (i.e. the Divisional Criminal Investigation Officer), PCIO (i.e. the Provincial Criminal Investigation Officer) and the state counsel. It is a tedious process. It is true that I acted outside the law but our hands are tied due to the procedure of processing our files.

To this assertion that the accused was held in the police cells for a period in excess of 6 months merely because the investigations file was tied up in police

procedure as it had to pass through the offices of the DCIO/ PCIO and the state counsel, the court remarked that the constitutional and fundamental rights of an accused person cannot be sacrificed at the alter of the so called police procedures.

Makhandia J stated that;

> **The law of the land has to be obeyed particularly by those entrusted to enforce it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable. I do not think that the Investigating Officer herein has been able to discharge that heavy burden in the circumstances of this case.**

The judge went further to demonstrate that;

> **We are no longer in 1980s where the fundamental rights of the citizens were trampled upon by the police. The courts of law (then) could not stand up to challenge such conduct. As the court of appeal said recently, the courts (in those days) chose to see no evil and hear no evil giving rise to the infamous Nyayo House torture chamber... It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person.**

It was therefore the position of the court that a prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation.

> **It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity (Makhandia J)**

In coming to this position the court relied on the decision of the Court of Appeal case of **Albanus Mwasia Mutua vs Republic:**

> **At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place...that an unexplained violation of a constitutional right will normally result in an acquittal,**

irrespective of the nature and strength of evidence which may be adduced in support of the charge.

It was therefore held that, the police had violated the constitutional rights of the appellant by detaining him in their custody for a whole eight months. That, apart from violating his rights under section 72 (3) (b) of the Constitution, this unlawful detention also amounted to a violation of his rights under section 77 (1) of the constitution which guarantees to him the right to a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. It was held that the appellant's appeal could succeed on that ground alone**.**

b) ANN NJOGU & 5 OTHERS vs REPUBLIC
In The High Court of Kenya at Nairobi
Criminal Division
Misc. Criminal Application No. 551 Of 2007
(In the matter of an intended appeal)

(Ann Njogu and other Human Rights advocates were arrested while attending a Civil Society activity within the precincts of Parliament. This case raises fundamental human rights issues especially violations of civil liberties which lay the ground conducive to detention and subsequent torture)

FACTS OF THE CASE
On the 31 August, 2007, the applicants were arrested and detained until 2 September, 2007, when they were brought before the Chief Magistrates court to be charged. However, no pleas were taken before the subordinate court as counsel for the applicants had already blocked the attempt to charge when, on 1 September, 2007, they moved to the High Court by way of an Originating Notice of Motion, seeking a declaration that their constitutional rights under section 72 (1) and 77(1) of the Constitution of Kenya had been violated and that their detention was therefore, illegal.

A hearing was fixed for 2 September, 2007. However, in spite of being duly served with court orders to appear for the hearing, neither the Attorney General's office nor the Commissioner of Police or any of their officers made an appearance to the hearing. Nevertheless, the court decided to proceed without them because of, among other factors, the Constitutional implications brought out in the pleadings.

The Court considered the applicants' claim that their constitutional and fundamental rights as per Section 72(3) of the Constitution had been violated in that they (the applicants) had not been produced before a court of law within 24 hours as required by the constitutional provisions.

COURT DECISION
The Court held in favour of the applicants in declaring their detention was illegal and a violation of their constitutional rights.

RATIONALE FOR THE DECISION

In coming to this decision, the Court considered the fact that the charge against the Applicants according to the charge sheet under which they were to be charged at the lower court clearly showed that the offences were not of a capital nature. Accordingly, the applicants should have been brought to court within 24 hours of their arrest or detention by virtue of Section 72 (3) of the constitution which provides that:

> **72 (3) A person who is arrested or detained —**
> **(a) for the purpose of bringing him before a court in execution of the order of a court; or**
> **(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,**
> **and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub-section have been complied with.**

Therefore, the applicants should have been brought before the Court by 12 noon, on 1/8/07 i.e. before the expiration of the 24 hours permitted by the constitution. To this, the High Court Judge, Mutungi J remarked;

> **I dare add that the Section is very clear and specific - that the applicants can only be kept in detention or the cells, for up to, 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental constitutional rights of the applicants.**

The Court agreed with the case of **Albanus Mwasia Mutua vs The Republic**, Cr. Appeal No. 120 of 2004, and High Court Criminal Case No.40 of 2007 **Republic vs James Njuguna Nyaga,** in asserting that once it has been determined that the constitutional rights of the applicants have been violated, any prosecution against any one of them on the basis of the events for which they were arrested is null and void. And it is so, and it will remain so, irrespective of the weight of the evidence that the police might have in support of their case. This is simply because such a prosecution would be based on an illegality.

Mutungi J insisted:

> **Finally, all should note that there is as yet NO known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of**

the criminal proceedings complained against. Nor is there any room for extension of the constitutionally provided for period of 24 hours. If the prosecution comes an hour after the expiry of the 24 hours, it could as well come after a year. Either way such prosecution is in violation of the rights of the arrested or detained person or persons, and it is illegal and null and void.

The Court thereby, dismissed all the charges against the Applicants, declaring their prosecution null and void by reason of their unconstitutional detention.

c) Wallace Gichere Case No. Misc Appli. 1235/ 2002[38]

(Wallace Gichere's case out of court settlement was occasioned by the failure of the official court process to accord him prompt justice).

Wallace Gichere(1955-2008) is a former photojournalist Wallace Gichere who will remembered for his great will to seek justice for harm dealt on him at the height of the country's dark years of the Moi regime, which destroyed innocent lives and careers of those who dared to speak out against it, or were associated with its opponents. Until that fateful day in 1991, Gichere was an able-bodied person with a bright career as a photojournalist with the *Kenya Times*.

Occasionally he would find pleasure in outdoor excursions and particularly mountain climbing in the company of veteran politician Kenneth Matiba. One evening of 1991, a contingent of police went to his house at Buru Buru flats to interrogate him over his links with then multi-party advocate, Kenneth Matiba, but more so over allegations that he was feeding foreign press and Amnesty International with reports on human rights abuses by the Moi regime.

The aforementioned police threw him out of the window on the fourth floor of a huge block of flats. He was paralyzed from waist down, confining him to a wheelchair. His life was to undergo a new turn, waging a prolonged legal battle to win compensation from the State for the damage inflicted on him by its agents. After a spell in a London hospital, he returned to Kenya and in 1995 filed a case seeking damages amounting to Shs.245 million as compensation for the harm he suffered. The media supported him well and so did human rights organizations, making it among the most highly publicized such cases in the Moi era.

In the meantime, his misery was compounded by the fact that his first wife and mother of two had left him while he was in hospital in London and remarried. Upon his return to Kenya, he married again but that wife too reportedly did not stay for long, and took off with a prominent politician. But he soldiered on, demanding that the State accept responsibility for what had befallen him through the High Court Miscellaneous Application 1235/ 2002.

After years of denying liability, the State, through Attorney-General (AG) Amos Wako, ceded but complained the claim was far too high and the State could not afford it. But determined to get his rights, Gichere remarkably staged a hunger strike between the Office of the President and the AG's Chambers on 7 July,

38. Abridged excerpts from http://allafrica.com/stories/200804281510.html

2003, and vowed to stay put until his claim was met. His effort attracted the attention and support from many, prompting a ministerial statement on his plight, which was given by Robinson Githae, then an assistant minister for Justice and Constitutional affairs. Hon. Githae told Parliament that the State accepted liability and would pay Sh9.5 million if Gichere would accept it. At that point, the ex-photojournalist had revised his claim to Sh76 million, which the Government considered hard to justify. And the Attorney-General had said the State was prepared to pay a figure amounting to no more than seven digits.

In 2004, the State eventually paid the Shs.9.4 million, hardly enough to settle his medical and legal bills. He later stirred a row with his lawyer over her Shs.3 million legal fees, forcing her to revise it to Shs.2.1 million, which he still considered excessive. But he was not done with the State and died as he pursued a claim that would enable him to lead the life befitting a person of his status. He may have died without winning the compensation that he sought, but Gichere has left a legacy of a fighting spirit that was not cowed by the might of State machinery. He never allowed his physical inability blur his vision of what he considered as just. His struggle for reparations is illustrative of the unrelenting zeal for justice under an out-of court settlement framework.

4.2 REGIONAL AND INTERNATIONAL EXPERIENCES.

State-backed torture has never been the exclusive domain of Kenyan history. Indeed, many countries still apply it as a viable means of policing, interrogation, even law enforcement. Acts of torture are not restricted to the overt physical assault or use of force upon one's person. They also include those acts that would dehumanise or degrade the dignity of ones personage. This has been the progressive ruling of courts within and outside this country. Examples of such decisions can be seen in the following cases.

a) THE NANCY KACHINGWE AND WELLINGTON CHIBEBE CASE

NANCY KACHINGWE, WELLINGTON CHIBEBE AND ZIMBABWE LAWYERS FOR HUMAN RIGHTS vs MINISTER OF HOME AFFAIRS AND THE COMMISSIONER OF POLICE
SUPREME COURT OF ZIMBABWE
Coram: CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA MALABA JA & GWAUNZA JA

HARARE, JUNE 17, 2004, & JULY 18, 2005.

This case is important as it illustrates how even detention under circumstances that are inhuman can constitute an act of torture.

FACTS OF THE CASE

The 1st and 2nd Applicants, Nancy Kachingwe and Wellington Chibebe, were both arrested and detained at the Highlands and Matapi Police stations, respectively – overnight in the case of the 1st Applicant, and for two days in the

case of the 2nd Applicant. Both applicants were claiming that they were detained under conditions that constituted inhuman and degrading treatment in violation of Section 15(1) of the Constitution of Zimbabwe, which provides that provides that:- ***No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.***

Kachingwe was detained by the local police at Highlands Police Station on allegations of being involved with a theft that had happened at a certain restaurant. She had initially been invited by a police officer to appear at the police station for questioning. But upon arriving at the station with her lawyer, the police officer in question decided to detain her for later interrogation.

Before being taken to the police cell, Kachingwe was led by a policewoman into another office where she was instructed to remove her shoes, her T-shirt, her jumper, her jacket and her bra. The police officer informed her that she could only have one layer of clothing in the police cell and that she therefore had to choose one item of clothing from among the T-shirt, the jumper and the jacket. She elected to wear the jumper as she thought that it was warmer than the jacket.

She was, thereafter, accompanied by the policewoman to her cell which she alleges was pitch black and stinking with the smell of human excrement which she, later observed, was emanating from a toilet bowl on a raised concrete platform, filled with faecal matter close to the brim and which did not flush. As there was no partition separating the toilet from the rest of the cell and no provisions had been made for the use of the toilet bowl in privacy, occupants of the police cell were forced to use the toilet bowl in the full view of the other occupants of the cell much to the disgust and humiliation of everyone forced to endure such indecency.

There was no toilet paper in the cell. There was no soap, no hand basin and no shower in the cell. There was no running water in the cell and no drinking water either. The holding cell had no electric light. The floor of the cell was made of concrete and was very cold especially in July when the country is in its winter months. Yet, Kachingwe and her fellow inmates were deprived of any form of footwear. She also contended that there was one small dirty torn blanket in the cell which the police expected all the inmates to share. And that night, Kachingwe asserts that she and the four other inmates that were in the cell were forced to suffer the indignity of huddling together under a single blanket in order to keep warm. She estimated that the temperature that night was in the region of 7C.

The second applicant, Chibebe, was arrested on 9 December, 2008, and was detained in police cells at Matapi Police Station. The conditions of his detention were starkly similar to those of the 1st applicant.

The Applicants therefore, came to court seeking declarations and orders relating to the inhumane conditions of their detention. Their prayers were for;
1) a declaration that the police holding cells at the police stations in

Zimbabwe are degrading and inhumane and unfit for holding criminal suspects.

2) Orders that 1st and 2nd respondent be directed to, amongst other things, take all necessary steps and measures within their power to ensure that police holding cells:
   i) are of reasonable size for the number of persons they are used to accommodating
   ii) have good ventilation and sufficient light
   iii) be equipped with a means of rest such as a fixed chair or bench
   iv) provide those in custody with a clean mattress and blankets
   v) have clean and decent flushing toilets with toilet paper in a sanitary annex in the police cell
   vi) have full sanitary provision for women who are menstruating at the time of their detention and allow those in custody an opportunity to purchase personal necessities with their own money
   vii) have clean, decent and adequate washing facilities including soap
   viii) have running drinkable water available in the cell
   ix) give wholesome food at appropriate times and allow those in custody the opportunity to purchase food and refreshments with their own money
   x) be cleaned daily and a good standard of hygiene be maintained in the police holding cells.

That the 1st and 2nd respondents pay the costs of the application.

The Respondents objected to the claims brought and the remedies sought by the Applicants on the ground, *inter alia,* that although Section 15(1) of the Constitution prohibits inhuman and degrading treatment, Kachingwe's and Chibebe's treatment did not amount to inhuman and degrading treatment as the conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person.

Members of the court visited the police holding cell in question at Highlands Police Station and found Kachingwe's claims to be irrefutable.

COURT DECISION

The court found in favour of the Applicants and made the following declarations and orders, that:-

1) The first and second applicants, that is, Kachingwe and Chibebe, were detained under conditions that constituted inhuman and degrading treatment in violation of Section 15(1) of the Constitution.
2) The conditions of detention in police cells at Highlands and Matapi Police Station were inhuman and degrading.
3) The respondents were directed to take immediate measures to ensure that the holding cells at Highlands and Matapi Police stations have toilets that are screened off from the living area, with flushing mechanisms from within the cells, wash-basins and toilet paper.
4) The first and second applicants be awarded costs but there will be no order as to costs in respect of the third applicant.

RATIONALE FOR THE DECISION

In coming to this decision the court considered the grounds of objection raised by the respondents. The respondents had contended, amongst other things that conditions of the police holding cells where the applicants were held, and prisons in general, are not required to and cannot match those of a free person. Therefore, being detained in the described conditions could not amount to inhuman and degrading treatment. And further that the obligations sought by the applicants from the respondents are dependent upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of lack of resources. The respondents argued that the relief sought was vague and unenforceable and that on that basis the application should be dismissed.

On this argument, the Court reasoned that although the relief as set out in the draft order presents the applicants with some difficulty in that the applicants have no *locus standi* to demand such relief and that no evidence was placed before the Court to justify the grant of such relief, it was not precluded from determining whether the treatment meted out on Kachingwe and Chibebe constituted degrading and inhuman treatment contrary to Section 15(1) of the Constitution

The court observed that Section 15(1) of the Constitution provides that: 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.' The presiding Judge, Chidyausiku CJ (i.e. Chief Justice) stated that;

> **I entertain no doubt that the law maker intended section 15(1) of the Constitution to protect all persons irrespective of whether or not they are imprisoned or detained in police cells. Indeed detained and imprisoned persons must have been in the forefront of the lawmaker's mind when he enacted section 15(1) of the Constitution. Incarcerated persons are particularly vulnerable and in need of such protection as they are liable, more than anyone else, to torture, inhuman and degrading treatment.**

Having come to this conclusion, the Court went on to determine whether the treatment Kachingwe and Chibebe received whilst under detention constituted a violation of their constitutional right guaranteed by Section 15(1) of the Constitution.

The Court considered the case of ***Hilaire, Constantine and Benjamin et al* vs *Trinidad and Tobago***, Inter-American Court of Human Rights Series C No 94 (21 June 2002), where the Inter-American Court of Human Rights found that the conditions under which the applicants were held were inhuman and degrading because the cells received little or no natural light, lacked sufficient ventilation, had primitive and degrading sanitation facilities, had tiny and overcrowded cells, and virtually non-existent medical facilities . The cells were so overcrowded that some of the prisoners had to sleep sitting or standing up and the inmates were confined to those conditions for long periods of at least twenty-three hours a day.

In the course of its judgment the Inter-American Court of Human Rights statd that any person deprived of his liberty has the right to be treated with dignity and the State had the responsibility and the duty to guarantee the detained person's integrity while detained. Moreover, that the State, being responsible for the detention facilities, is the guarantor of these rights of detainees.

The Court considered, among other cases, the case of ***John D Ouko vs Kenya*** 232/99 reported in the 14th Annual Activity Report: 2000 – 2001 at p 144. In this case, the complainant alleged that throughout the period of his detention he was detained in a 2 by 3 metre basement cell with a 250 watts electric bulb which was left on throughout his 10 months' detention and that he was denied bathing facilities and was subjected to both physical and mental torture. The African Commission ruled that the conditions of the complainant's detention were a violation of the complainant's right to the respect of his dignity and amounted to inhuman and degrading treatment.

The African Commission (the Judicial tribunal in this case) further ruled that the treatment and conditions of ***Ouko's*** detention ran contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly Principles 1 and 6 which provide as follows:

Principle 1: All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person
Principle 6: No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

The court concordantly, went on to find that the holding cell it inspected at Highlands Police Station, the same holding cell in which Kachingwe had been detained overnight, did not comply with elementary norms of human decency, let alone, comply with internationally accepted minimum standards. In particular, that the failure to;
(a) screen the toilet facility from the rest of the cell to enable inmates to relieve themselves in private
(b) provide a toilet flushing mechanism from within the cell
(c) to provide toilet paper
(d) to provide a wash-basin and
(e) to provide a sitting platform or bench
constituted inhuman and degrading treatment prohibited in terms of Section 15(1) of the Constitution. And that the evidence showed that Chibebe was subjected to similar treatment.

b) SUPREME COURT OF ISRAEL RULING ON TORTURE OF TERRORIST SUSPECTS

This case raises the issue of the use of torture in interrogating suspects of terrorism and the so called physical interrogation methods.

The Supreme Court of Israel, sitting as the High Court of Justice[40]

The applicants in this case were:

Applicant in H.C. 5100/94: Public Committee Against Torture in Israel

Applicant in H.C. 4054/95: The Association for Civil Rights in Israel

Applicant in H.C. 6536/95: Hat'm Abu Zayda

Applicants in H.C 5188/96: (1) Wa'al Al Kaaqua, (2) Ibrahim Abd'allah Ganimat, (3) Center for the Defence of the Individual

Applicants in H.C. 7563/97: (1) Abd Al Rahman Ismail Ganimat, (2) Public Committee Against Torture in Israel

Applicants in H.C. 7628/97: (1) Fouad Awad Quran, (2) Public Committee Against Torture in Israel

Applicant in H.C.1043/99: Issa Ali Batat

vs

The Respondents who were:

Respondents in H.C. 5100/94: (1) The State of Israel, (2). The General Security Service

Respondents in H.C. 4045/95: (1)The Prime Minister of Israel, (2). The Minister of Justice, (3) The Minister of Police (4) The Minister of the Environment (5) The Head of the General Security Service

Respondent in H.C. 6536/95 and H.C. 1043/99: The General Security Service

Respondents in H.C. 5188/96: (1) The General Security Service (2) The Prison Commander –Jerusalem

Respondents in H.C. 7563/97 and H.C. 7628/97: (1)The Minister of Defence (2) The General Security Service

Case Overview

The applications in this case were entirely concerned with the interrogation methods of the General Security Service (hereinafter, the 'GSS'). The GSS was the main State body responsible for fighting terrorism in Israel. It investigated individuals suspected of committing crimes against Israel's security. The Court in this case had to establish whether the GSS was authorized to conduct these interrogations.

The interrogations in question were conducted on the basis of directives regulating interrogation methods. These directives equally authorized investigators to apply physical means against those undergoing interrogation (for instance, shaking the suspect and the 'Shabach' position). The decision to utilize physical means in a particular instance is based

40. H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99,

on internal regulations, which requires obtaining permission from various ranks of the GSS hierarchy. The regulations themselves were approved by a special Ministerial Committee on GSS interrogations.

Among other guidelines, the Committee set forth directives pertaining to the rank authorized to allow these interrogation practices. The basis for permitting such methods is that they are deemed immediately necessary for saving human lives. The Court, therefore, also had to consider whether the sanctioning of these interrogation practices was legal.

FACTS OF THE CASE

Two of the applications were of a public nature. One of these (H.C. 5100/94) was brought by the Public Committee against Torture in Israel. They submitted that GSS investigators were not authorized to investigate those suspected of hostile terrorist activities. Moreover, they claimed that the GSS was not entitled to employ those pressure methods approved by the Commission of Inquiry's Report (which justified 'the application of non-violent psychological pressure' and the application of 'a moderate degree of physical pressure' in interrogation). The second application (hereafter 4054/95), was brought by the Association for Citizen's Rights in Israel (ACRI) who argued that the GSS should be instructed to refrain from shaking suspects during interrogations.

The five remaining applications involved specific applicants who turned to the Court individually. They each petitioned the Court to hold that the methods used against them by the GSS are illegal. These applicants were;

1) Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat (the applicants in H.C. 5188/96). They were arrested at the beginning of June 1996. They were interrogated by GSS investigators. They appealed to the Court (on 21 July, 1996) via the Center for the Defence of the Individual. Their attorney petitioned the Court for an order *nisi* (i.e. an order that is not final or absolute until the final ruling of the court where it is either rescinded or made absolute) prohibiting the use of physical force against the applicants during their interrogation. The Court granted the order. The two applicants were released from custody prior to the hearing.

2) Hat'm Abu Zayda (the applicant in H.C. 6536/96) was arrested on 21 September, 1995, and interrogated by GSS investigators. He appealed to the said Court (on 22 October, 1995) via the Center for the Defence of the Individual. His attorney complained about the interrogation methods allegedly used against his client (deprivation of sleep, shaking, beatings, and use of the 'Shabach' position). At the hearing of the application, the Court was informed that the applicant's interrogation had ended (as of 19 October, 1995). The information provided to the Court indicated that the applicant in question was subsequently convicted of undertaking terrorist activities in the military branch of the Hamas terrorist organization. He was sentenced to seventy four months in prison. The convicting Court held that the applicant both recruited and constructed the Hamas' infrastructure, for the purpose of kidnapping Israeli soldiers and carrying out terrorist attacks against security forces. It has

been argued before the court that the information provided by the applicant during the course of his interrogation led to the thwarting of an actual plan to carry out serious terrorist attacks, including the kidnapping of soldiers.

3) Abd Al Rahman Ismail Ganimat (the applicant in H.C. 7563/97) was arrested on 13 November, 1997, and interrogated by the GSS. He appealed to the Court (24 December, 1997) via the Public Committee Against Torture in Israel. He claimed to have been tortured by his investigators (through use of the 'Shabach' position, excessive tightening of handcuffs and sleep deprivation). His interrogation revealed that he was involved in numerous terrorist activities in the course of which many Israeli citizens were killed. He was instrumental in the kidnapping and murder of Israeli Defence Force (IDF) soldier, Sharon Edry. He was additionally involved in the bombing of the Cafe Appropo in Tel Aviv, in which three women were murdered and thirty people were injured. He was charged with all these crimes and convicted at trial. He was sentenced to five consecutive life sentences plus an additional twenty years of prison. Moreover, a powerful explosive device, identical to the one detonated at Cafe Appropo in Tel Aviv, was found in the applicant's village (Tzurif) subsequent to the dismantling and interrogation of the terrorist cell to which he belonged. Uncovering this explosive device thwarted an attack similar to the one at Cafe Appropo. According to GSS investigators, the applicant possessed additional crucial information which he only revealed as a result of their interrogation. And that this information was essential to the safeguarding of the state, regional security and preventing danger to human life.

4) Fouad Awad Quran (the applicant in H.C. 7628/97) was arrested on 10 December, 1997, and interrogated. He turned to the Court (on 25 December, 1997) via the Public Committee Against Torture in Israel. Before the Court, the applicant claimed that he was being deprived of sleep and was being seated in the 'Shabach' position. The Court issued an order *nisi* and held an immediate hearing of the application. During the hearing, the State informed the Court that the GSS had ceased to employ the interrogation methods alleged by the applicant. For this reason, no interim order was granted.

5) Issa Ali Batat (the applicant in H.C.1043/99) was arrested on 22 February, 1999, and interrogated by GSS investigators. He applied to the Court via the Public Committee against Torture in Israel, who argued that physical force was used against the applicant during the course of his interrogation. The Court issued an order *nisi*. At the hearing of the application, it came to the Court's attention that the applicant's interrogation had ended and that he was being detained pending trial; the indictment alleged that the applicant was involved in hostile activities, the purpose of which was to harm the area's (Judea, Samaria and the Gaza strip) security and public safety.

Initially, the GSS investigators were to present before the Court the physical means they had used in their interrogations. The State's attorneys were, however, only prepared to present them to the Court behind closed doors (in camera). The applicants' attorneys were opposed to this proposal. Thus, the State declined to so present and the information at the Court's disposal was

provided by the applicants and was not tested in each individual application. Even so, the State's position was not to deny the use of these interrogation methods. It even offered explanations regarding the rationale justifying the use of one interrogation method or another. This provided the Court with a picture of the GSS' interrogation practices, the material ones being;

1) Shaking: A number of applicants (like Hat'm Abu Zayda) claimed that the shaking method was used against them. Among the investigation methods outlined in the GSS' interrogation regulations, shaking is considered the harshest. The method is defined as the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly. According to an expert opinion submitted in one of the applications (H.C. (motion) 5584/95 and H.C. 5100/95), the shaking method is likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit, urinate uncontrollably and suffer serious headaches.

The State admitted to the use of this method by the GSS. It however, entered several countering expert opinions into evidence, contending that there was no danger to the life of the suspect inherent to the shaking method; the risk to life as a result of shaking is rare and that there was no evidence that shaking caused fatal damage or even medical literature that had listed a case in which a person died directly as a result of having only been shaken.

All parties agreed that in one particular case (H.C. 4054/95) the suspect in question 'expired' after being shaken. According to the State, that case constituted a rare exception, with the death being caused by an extremely rare complication resulting in the atrophy of the neurogenic lung. In its response, the State also argued that the shaking method was only resorted to in very particular cases, and only as a last resort.

The Respondents (i.e. the state) endorsed that shaking was indispensable to fighting and winning the war on terrorism. That it was not possible to prohibit its use without seriously harming the GSS' ability to effectively thwart deadly terrorist attacks. And, further, that its use in the past had led to the thwarting of murderous attacks.

2) Waiting in the 'Shabach' Position: This interrogation method was alleged by numerous applicants (Hat'm Abu Zayda; Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat; Fouad Awad Quran). As per the applicants' submissions, a suspect investigated under the 'Shabach' position had his hands tied behind his back. He was seated on a small and low chair, whose seat was tilted forward, towards the ground. One hand was tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand was tied behind the chair, against its back support. The suspect's head was covered by an opaque sack, falling down to his shoulders. And powerfully loud music was played in the room. According to the affidavits submitted, suspects were detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals and that this caused serious muscle pain in the arms, the neck and headaches.

The State did not deny the use of this method before the Court. Instead, they submitted that both crucial security considerations and the investigators' safety required tying up of the suspect's hands as he was being interrogated. The head covering was intended to prevent contact between the suspect in question and other suspects. And the powerfully loud music was played for the same reason.

3) The 'Frog Crouch': This interrogation method appeared in one of the applications (i.e. that of Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat). According to the application and the attached corresponding affidavit, the suspect being interrogated was placed in a 'frog crouch' position. This refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals. The State did not deny the use of this method.

4) Excessive Tightening of Handcuffs: In a number of applications before the Court (e.g. those of Wa'al Al Kaaqua and Ibrahim Abd'alla Ganimat; and Abd Al Rahman Ismail Ganimat), applicants had complained of excessive tightening of hand or leg cuffs. They contended that this practice resulted in serious injuries to their hands, arms and feet, due to the length of the interrogations. The applicants alleged that particularly small cuffs, ill fitted in relation to the suspect's arm or leg size were purposely used.

The State, for its part, denied any use of unusually small cuffs, arguing that the cuffs used were both of standard issue and properly applied. They, nonetheless, admitted that prolonged hand or foot cuffing was likely to cause injuries to the suspect's hands and feet, but that injuries of this nature were inherent in any lengthy interrogation

5) Sleep Deprivation: In a number of applications (i.e. those of Hat'm Abu Zayda; Abd Al Rahman Ismail Ganimat; and Fouad Awad Quran) applicants complained of being deprived of sleep as a result of being tied in the 'Shabach' position, being subjected to the playing of powerfully loud music, or intense non-stop interrogations without sufficient rest breaks. They claimed that the purpose of depriving them of sleep was to cause them to break from exhaustion. However, while the State agreed that suspects were at times deprived of regular sleep hours, it argued that this did not constitute an interrogation method aimed at causing exhaustion, but rather was the result of the prolonged amount of time necessary for conducting the interrogation.

The Court considered that though the different applicants raised different arguments, in principle, all the applications raised three essential arguments: Firstly, the applicants submitted that the GSS was never authorized to conduct interrogations. Secondly, they argued that the physical means employed by GSS investigators not only infringed upon the human dignity of the suspect undergoing interrogation, but in fact constituted criminal offences. Thirdly, that the methods employed were in violation of International Law as they constituted 'Torture', which is expressly prohibited.

The attorneys for the State countered this argument contending that the

Physical means of interrogation in question did not violate International Law. Indeed, it is submitted that these methods could not be qualified as 'torture', 'cruel and inhuman treatment' or 'degrading treatment', that are strictly prohibited under International Law as, according to the State, the practices of the GSS did not cause pain and suffering.

Moreover, the State argued that these physical means of interrogation were equally legal under Israel's internal (domestic) law due to the 'necessity' defence outlined in article 34(11) of the Penal Law (1977) which provided as follows;

> **A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.**

Hence, in the specific cases bearing the relevant conditions inherent to the 'necessity' defence, GSS investigators were entitled to use 'moderate physical pressure' as a last resort in order to prevent real injury to human life and well being. Such 'moderate physical pressure' may include shaking, as the 'necessity' defence provides in specific instances. Therefore, resorting to such means was legal, and did not constitute a criminal offence.

In support of their position, the State noted further that the use of physical means by GSS investigators was most unusual and was only employed as a last resort in very extreme cases. Moreover, even in those rare cases, the application of the methods in question was subject to the strictest of scrutiny and supervision, as per the conditions and restrictions set forth in the Commission of Inquiry's Report. Consequently, when the exceptional conditions requiring the use of these means were in fact present, the above described interrogation methods were fundamental to the saving of human lives and the safeguarding of Israel's security.

The attorney for the applicants disagreed with the State assertion of the necessity defence arguing that the doctrine of 'necessity' at most constituted an exceptional *post factum* (i.e. after the fact) defence, exclusively confined to criminal proceedings against investigators. It could not, however, by any means, provide GSS investigators with the pre-emptory authorization to conduct interrogations *ab initio* (i.e. from the outset). Therefore, GSS investigators were not authorized to employ any physical means of interrogation in the absence of unequivocal authorization from Legislation permitting the use of such methods, which legislation should also conform to the requirements of the Basic Law: Human Dignity and Liberty (i.e. the Israeli equivalent to the Constitutional Bill of Rights).

The Court asked the applicants' attorneys whether the 'ticking time bomb' rationale raised by the respondents was not sufficiently persuasive to justify the use of physical means, for instance, when a bomb is known to have been

placed in a public area and would undoubtedly explode causing immeasurable human tragedy if its location were not revealed at once. This question elicited a variety of responses from the various applicants before the Court. There were those convinced that physical means were not to be used under any circumstances; the prohibition of such methods was, to their minds, absolute, whatever the consequences may be. On the other hand, there were others who argued that even if it were perhaps acceptable to employ physical means in the most exceptional 'ticking time bomb' circumstances, these methods were in practice used even in absence of the 'ticking time bomb' conditions. To these, the very fact that, in most cases, the use of such means was illegal provided sufficient justification for banning their use altogether, even if doing so would inevitably absorb those rare cases in which physical coercion may have been justified.

COURT DECISION

After considering both arguments, the Court decided against the Respondents, declaring that that the GSS did not have the authority to 'shake' a man, hold him in the 'Shabach' position, force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which was inherently required by the interrogation. The Court went further to declare that the 'necessity' defence, found in the Penal Law, could not serve as a basis of authority for the use of those interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of the kind in question.

RATIONALE FOR THE DECISION

The Court in coming to this decision reasoned that a general authority to establish directives with respect to the use of physical means during the course of a GSS interrogation could not be implied from the 'necessity' defence. This was as the defence dealt with those cases involving an individual reacting to a given set of facts. It is an ad hoc endeavour, in reaction to an event. It is the result of an improvisation given the unpredictable character of the events. The very nature of the defence, therefore, could not allow it to serve as the source of a general administrative power.

The Court reasoned that though the 'necessity' defence had the effect of allowing one who acted under the circumstances of 'necessity' to escape criminal liability; it did not in itself authorize the continued carrying out of that deed. General directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defences to criminal liability. Therefore, the court declared that if the State wished to enable GSS investigators to utilize physical means in interrogations, they would have to seek the enactment of legislation for that purpose.

Consequently, although the GSS personnel who had received permission to conduct interrogations (as per the Criminal Procedure Statute) were authorized to do so, this authority did not include most of the physical means of interrogation that were the subject of the applications before the Court. There was no law that gave explicit authorization permitting GSS to employ the physical

means of interrogation in question. However, in the State's opinion, such authorization could be obtained in specific cases by virtue of the criminal law defence of 'necessity', prescribed in the Penal Law.

The court disagreed with this contention when it stated that;

> **...neither the government nor the heads of security services possess the authority to establish directives and bestow authorization regarding the use of liberty infringing physical means during the interrogation of suspects suspected of hostile terrorist activities, beyond the general directives which can be inferred from the very concept of an interrogation. Similarly, the individual GSS investigator – like any police officer – does not possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently accessory to the very essence of an interrogation and are both fair and reasonable.**

Therefore, the Court took the position that an investigator who insisted on employing physical methods of interrogation was exceeding his authority, where the use of those means was not explicitly provided for by law. He thereby becomes criminally liable, which liability would be examined in the context of the 'necessity' defence, and the investigator may find refuge under the 'necessity' defence's wings (so to speak), provided this defence's conditions are met by the circumstances of the case.

Consequently, the Court decreed that the order *nisi* be made absolute, and further declared that the GSS had no authority to 'shake' a man, hold him in the 'Shabach' position, force him into a 'frog crouch' position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Furthermore, the court declared that the 'necessity' defence, found in the Penal Law, did not serve as a basis of authority for the use of those interrogation practices, nor for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of that kind.

CHAPTER 5

PROGNOSIS AND RECOMMENDATIONS

5.1 PROGNOSIS

It should be apparent by now that the use of torture by state agencies presents a clear and present danger to any society regardless of the level of a country's development or its claim to a good record with regard to respecting human rights within its boundaries. The one common thread that runs through these incidents of state torture is the state sanctioned ability to arbitrarily arrest and unlawfully detain individuals for lengthy periods of time in specific circumstances.

Within the framework of most state laws, there are express provisions or claw back clauses that permit the state to, in certain special circumstances, arrest and detain individuals outside due process. Where a state can detain any individual for an inordinately long period of time without being required to promptly produce the detainee before a properly constituted court of law, the circumstances are ripe for torture to be inflicted.

Couple this with the fact that, usually, the 'special circumstances' that are deemed to justify such arrests and detention often regard the prevention and detection of imminent threats to State security. Torture inevitably ensues not only as a tool of investigation but at times as a repressive measure as well.

This was the case in the Kenyan context. After the Coup Attempt of 1982, the Moi Government, bent on cementing it's strangle hold on power, proceeded to arbitrarily arrest and detain those it considered dissidents to the regime. Initially, it began as a way to catch and detain those who had participated in the 1 August, 1982, Coup attempt – an obvious act of treason and a capital offence for which a person can be detained for a period of 14 days under Section 72 (3) (b) of the Constitution.

However, by the late 1980s, the practice had developed into a State instrument to be used to silence the voices of the opponents to the dictatorial reign of the then President Moi. Using the Section 85 of the Constitution and Preservation of Public Security Act (Cap 57), the state security agencies justified the inordinately lengthy detentions arguing that the Act gave them power to detain anyone indefinitely. This, coupled with the administration's need to extract information from those it had detained at any cost, created the perfect mix for state sanctioned torture. Nyayo House became the centre stage upon which this tragedy was to be acted.

This was not a unique situation. It was merely a replication of what had been implemented about 15 years prior by the **Apartheid regime of South Africa**, as we have illustrated in the preceding chapter.

Therefore, it is our contention that preceding any acts of torture is the power to arbitrarily arrest and inordinately detain an individual. That this power is indeed the root from which the bitter fruits of torture and inhumane treatment may stem. Without this unfettered ability, it becomes extremely difficult for the state or any other agency to pursue interrogation or intimidation activities that would include torture or inhuman treatment. These practices require time and

legal sanction (whether express or implicit) to be efficiently pursued. It is this time and sanction that must be denied all state agencies.

The State's powers of arrest and detention must be thoroughly regulated. Indeed there should be no grounds upon which any state agency may be allowed to detain any individual for a period exceeding two weeks let alone being held indefinitely. Secondly, those arrested should immediately thereafter be allowed to inform others of the details of their arrest and detention, without exception. This is meant to eliminate secret arrests which would in turn eliminate the incidents of disappearances at the hands of arresting authorities. Moreover, there should be a requirement that those arrested for a period exceeding three days should be brought before a court of law and questioned as to the circumstances of their arrest and detention. More specifically, the court should inquire as to whether the person has been dealt with in any way that would amount to cruel, inhuman or degrading treatment.

These requirements should be embodied within the Constitution of the state and NO EXCEPTIONS should be allowed to these requirements whatsoever.

5.2 RECOMMENDATIONS

The process of accessing justice can be enhanced if reforms can be undertaken within the various institutions involved in the administration and dispensation of justice. Among the reforms include;

- The total independence of the judiciary through a rethink of section 61 of the Constitution which gives the President power to appoint the Chief Justice and Judges of the High Court of Appeal. This will hopefully be dealt with during the forth coming constitutional review process.
- The Chief Justice needs to initiate administrative measures to ensure that cases instituted at High Court and demanding constitutional reference are executed expeditiously. The precedents set in this case among other relat ed rulings should be decisions of state institutions in charge of justice, human rights, penal and security affairs.
- Related to the above, there should be a decentralized judicial system com prising of a High Court at every Provincial Headquarters and a Magistrates Court in every district to increase the accessibility to judicial services. This is critical because most of the torture cases requiring constitutional refer ences have to be instituted at the High Court based in Nairobi.
- The office of the Attorney General should be limited to its role as legal advi sor to the State. Its prosecutorial power should be fettered to include the regulation of the use of its *nolle prosequi* powers.
- The annual vacation of the Judges should also be scrapped and replaced with an annual leave in order to avail more time to attend to the crippling case backlog which delays the conclusion of many cases.
- The government should also hasten the payment of damages awarded by our courts and also simplify the cumbersome and complex process of accessing justice for victims of human rights violations. This demands ini tiating effective administrative and coordination measures between the office of the Attorney General; Ministry of Justice, National Cohesion and Constitutional Affairs; Ministry of State in the Office of the President in

charge of Internal Security; and Ministry of Finance.

- Beyond compensation, the Government should develop programmes pos sibly through the Truth, Justice and Reconciliation Commission to ensure that survivors of torture and other human rights violations receive ade quate and comprehensive reparations in the form of restitution, rehabilita tion and satisfaction. Moreover, the state must undergo transformation through comprehensive legal, policy and institutional reforms in order to banish the culture of impunity and enhance guarantee of non-Repetition.
- Related to reparations is the need for the government to fastrack the for mulation of the S/Heroes project which has stalled at the Ministry of State in the Office of the President responsible for Culture and National Heritage. The Government should also stop any further destruction of the former Nyayo House Torture Chambers, and instead convert it into the Monument of Shame as promised in 2003 when the chambers were opened to the public for the first time in February 2003.
- To prove its commitment to protecting and preserving Human Rights, the government should ensure that formulation of the National Human Rights Policy is finalized and its implementation enforced. Moreover, the on-going constitutional review process must ensure that human rights are main streamed in all the chapters and that the comprehensive Bill of Rights is enshrined. The Bill of Rights should outlaw torture among other forms of gross human rights violations.
- Moreover, there is a dire need to institute radical surgery with the state security apparatus. To begin with, we need to restructure the police with in the on-going constitutional and legal processes. Since police was a colo nial artefact, it must be overhauled to pave way for the Kenya police serv ice which is accountable and human rights compliant. While we take note of the transition of the state intelligence apparatus from the repres sive Special Branch unit of the police to the National State Intelligence Service (NSIS), we hereby propose that it requires more independence, focus and transformation to ensure that it serves public interests rather than the whims of the political elite.
- Related to institutional reforms is the need for the government to give the Kenya National Commission on Human Rights (KNCHR) more financial and political support to enable it to monitor and expose human rights vio lations committed by and within the state's security and penal institutions.
- Beyond the proposed legal and administrative reforms, the government should domesticate the optional protocol of the Convention against Torture (OPCAT) through the proposed Torture Bill. Finally, victims and civil soci ety organizations should strengthen their political and legal actions against torture among other human rights violations in Kenya. The prece dents set in this *CASE DIGEST* among others, provide progressive mile stones for further public interest litigations.

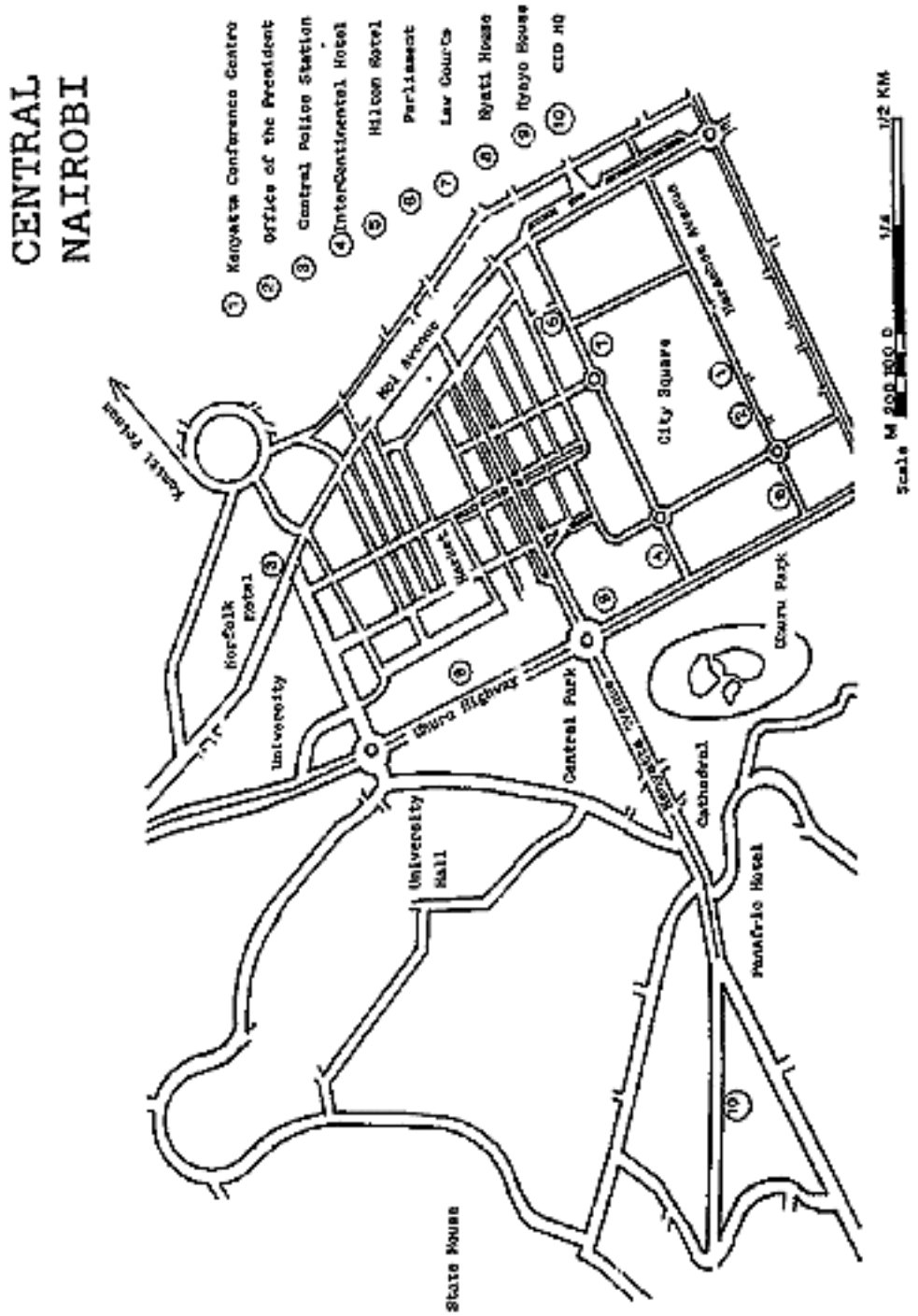
To all stakeholders, it is important to note that: " the effective elimination of torture and other forces of violence requires a multifaceted and integrated approach addressing respect for a wide range of human rights, civil and polit-ical as well as economic, social and cultural".[41]

41. OMCT, IC-K and IMLU, 'Addressing the economic, social and cultural root causes of Torture in Kenya: An alternative report to the Committee Against Torture, November 2008'; available in: http://www.imlu.org/images/documents/addressing_the_root_causes_of_torture_in_kenya.pdf

APPENDICES

APPENDICES

APPENDIX I



Source: Amnesty International, Kenya: Torture, Political Detention and Unfair Trials (London: Amnesty International Publications, 1987

APPENDIX II

Name	Case no.	Violation type and Date	Legal counsel(s)	Outcome, Bench & Date
Wafula Buke	?	Illegal arrest/torture and detention-1995	Rumba Kinuthia	Awarded kshs.500,000 2003 By Justice Kalpana Rawal
Dominic Amolo Arony	HC.Misc.Application 494/2003	Torture-1982	Gitobu Imanyara	Awarded Kshs.2.5m 2003
Odhiambo Olel	HCCC.366/95	Torture / inhuman treatment-1987	Khaminwa/Olel	Awarded kshs.3.6million 2006
David Mbewa Ndede	HCC. 284/1994	Torture-1987	E.A. Olago	Awarded Kshs. 2.7 million (ref digest)
Rumba Kinuthia	HCCC.1408/04 (O.S)	Torture-1990	Gitau Mwara	Awarded Kshs.1.5m 2008
Ngotho Kariuki	?	Illegal Detention-1986	Muturi Kigano	Awarded Kshs.1million 1988
Wanyiri Kihoro	HCCC. No. 151 of 1998	Torture/Illegal Detention-1986	GibsonK.Kuria / KiraituMurungi	Awarded Kshs.400,000
Njuguna Mutahi	HCCC.1410/04 (O.S)	Torture-1986	Gitau Mwara	Awarded Kshs.400,000
Andrew M.Ndirangu	HCCC. 1409/04	Torture-1986	Gitau Mwara	Awarded Kshs.1.5million
Margaret W.Kinuthia	HCCC. 1412/04	Torture-1986	Gitau Mwara	Awarded Kshs.1.5 million
Alex.O.Ondewe	HCCC. 384/04	Torture-1986	Gitau Mwara	Awarded Kshs.1.5 million
Naftaly K.Wandui	HCCC. 385/05	Torture-1986	Gitau Mwara	Awarded Kshs.1.5million By Justice R.V.P.Wendoh
Joseph G.Karanja	HCCC. 386/05	Torture-1986	Gitau Mwara	Awarded Kshs.1.5million By Justice R.V.P.Wendoh in 2008
S. Njenga Karanja	HCCC	Torture/Extra Judicial Execution	Late Dr.O.Ombaka/ another	Awarded Kshs.2.5 million
Elijah G. Kabubu	?	Illegal detention/ torture		Awarded Kshs. 651,000 by Justice Rimita
Wallace Gichere	HCCC 1235/2002	In human treatment - 1991	Lucy Njiru	Out of court settlement Kshs. 9.4 million

APPENDIX III

Pending cases: There are over 150 cases which are either still pending or are yet to be instituted in court. Out of these the KHRC, in partnership with the lawyers for torture survivors, has filed 112 cases.

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