REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 51 OF 2018

MIGUNA MIGUNA.....PETITIONER

VERSUS

DR. FRED OKENGO MATIANG'I, CABINET SECRETARY,

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

RTD MAJOR GORDON KIHALANGWA, DIRECTOR

OF IMMIGRATION.....2ND RESPONDENT

JOSEPH BOINNET, THE INSPECTOR GENERAL OF

POLICE THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

GEORGE KINOTI, DIRECTOR OF CRIMINAL

INVESTIGATIONS.....4TH RESPONDENT

SAID KIPROTICH, OFFICER IN-CHARGE, THE FLYING

SQUAD OF KENYA POLICE SERVICE.....5TH RESPONDENT

OFFICER COMMANDING POLICE DIVISION

JOMO KENYATTA INTERNATIONAL AIRPORT.....6TH RESPONDENT

ATTORNEY GENERAL.....7TH RESPONDENT

AND

KENYA NATIONAL

COMMISSION ON HUMAN RIGHTS.....1ST INTERESTED PARTY

JUDGMENT

1. On 2nd February 2018, a group of police officers lead by the 3rd, 4th and 5th Respondents broke into the Petitioner's house at Runda Estate, Nairobi and arrested him. This was after they used explosives to gain entry into the premises. They drove off with the Petitioner in a convoy of police cars and headed to Kiambu Police Station where the Petitioner remained for some time. They later moved him to Githunguri Police station before taking him to Lari Police station where he was held for several days.

2. According to the petition, the Petitioner was held incommunicado for most of the period he was in police custody and was subjected to torture; inhuman treatment; was made to stand for long periods and was only given food twice for the entire period under incarceration. The petition states that the Petitioner was later moved to the Internal Container Depot Police Station in Industrial Area Nairobi for another round of confinement before he was taken to Kajiado Law Courts with an intention to charge him. It is stated that a plea was not taken after the Magistrate declined on learning that the Petitioner's issue was live before the High Court in Nairobi.

3. It is averred that the Petitioner was to be taken to the High Court but this did not happen and instead, he was taken to JKIA and deported to Canada because he had been declared a prohibited immigrant and his passport suspended by the 1st Respondent on grounds that he was an unwanted person in the country and had to be deported out of the country. At the same time NRM an organization he was said to be a member of was also declared an illegal organization.

4. Based on the above facts, this petition was filed against Dr Matiang'i, Major (RTD) Gordon Kihalangwa, Joseph Boinet, Gorge Kinoti, Said Kiprotich, public officers as well as the Honourable the Attorney General, challenging the various acts committed by the 1st to 6th Respondent or under their watch on grounds that they not only violated the Petitioner's rights and fundamental freedoms, but also breached the constitution and the rule of law. The petition sought the following reliefs:-

a. That a declaration be and is hereby issued that the action of the 1st Respondent purporting to cancel the citizenship of the Petitioner, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant and removal from Kenya were made in violation of Articles 12, 14(1)-(2) and 16 of the Constitution and a violation of the Petitioner's right to citizenship including those specified in Article 39(3) of the constitution and the 1st Respondent's decision made on 6th February, 2018 is therefore, unlawful, unconstitutional, invalid and void ab initio.

b. That a declaration be and is hereby issued that the action of the 1st Respondent purporting to cancel the citizenship of the Petitioner, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant and removal from Kenya were made in violation of Articles 47, 48 and 51(10 of the Constitution because they were done without due regard to the requirements of fair administrative action, access to justice and denied the Petitioner a fair hearing before a court or, another independent and impartial tribunal or body and the 1st Respondent's decision made on 6th February, 2018 is therefore, unlawful, unconstitutional, invalid and void ab initio.

c. That a declaration be and is hereby issued that the manner in which the Respondents conducted themselves resulting to the purported cancellation of the citizenship of the Petitioner, revocation and confiscation of his passport and other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant and removal from Kenya were done in violation of the rule of law and in direct contravention of provisions of the constitution that guide each of the named Respondents and was therefore an abuse of office.

d. That a declaration be and is hereby issued that detaining the Petitioner without justification, and without informing him of the reas0ons of detention, holding him incommunicado, holding him in deplorable and inhumane conditions, threatening him with death and physical harm, denying him food and basic sanitation services, was a violation of the Petitioner's rights protected in Article 29 of the Constitution on freedom and security of the person.

e. That a declaration be and is hereby issued that the action of the Respondents effectively infringes on the Petitioners rights on dignity (Art 28); property (Art.40) family (Art 45) rights of a detained person, arrested and persons held in custody (Art 510 and all other rights that flow with the right to citizenship.

f. That an order of certiorari be and is hereby issued removing into this court and quashing the declaration under Section 33(1) of The Kenya Citizenship and Immigration Act, 2011 dated 6th February 2018 and signed by the 1st Respondent indicating that the Petitioner is not a citizen of Kenya and that his presence in Kenya was contrary to national interest.

g. That an Order of certiorari be and is hereb7 issued removing into this court and quashing the declaration under Section 43(1) of the Kenya Citizenship and Immigration Act, 2011 dated 6th February 2018 and signed by the 1st Respondent directing the removal of the Petitioner from Kenya.

h. That an Order of certiorari be and is hereby issued removing into this and quashing Gazette Notice No Vol. CXX – No 15 issued on 30th January 2018 by the 1st Respondent, declaring the National Resistance Movement (NRM) to be a criminal organization.

i. That an Order of certiorari be and is hereby issued removing into this court and quashing the entire proceedings against the Petitioner before the Chief Magistrates Court at Milimani law Courts in Miscellaneous Criminal Appl. No 375 of 2018 County CID Nairobi Area of Criminal Investigation Department v Joshua Miguna Miguna.

j. That an Order of certiorari be and is hereby issued removing into this court and quashing he charge sheet and entire proceedings against the Petitioner before the Chief Magistrates Court at Kajiado law courts in Criminal Case No 174 of 2018 republic v Miguna Miguna.

k. That an order of mandamus be and is hereby issued compelling the Respondents to return to the Petitioner his Kenyan passport and any other identification documents taken from him, within 14 days of this order.

l. That an order be and is hereby issued requiring the Respondents to facilitate the re-entry of the Petitioner to Kenya at a date and time of his appointing including by issuing him with necessary travel documents if need be.

m. That an order for exemplary and punitive damages be and is hereby issued against the 1st to 7th Respondents jointly and severally, in their individual personal and official capacities, on account of their gross violation of the Petitioner's fundamental freedoms and rights as enumerated in the Petitioner.

n. That a declaration be and is hereby issued that Dr Fred Okengo Matiang'i, Rtd Major Gordon Kihalangwa, Joseph Boinett, George Kinoti, Said Kiprotich and Prof Githu Muigai are unfit to hold public office on account of their violations of the constitution of Kenya written law and the Petitioner's rights.

o. The 1st to 7 Respondents be and are hereby directed bear the costs of this petition jointly and severally, in their individual personal and official capacities.

p. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

1st Respondent's response

5. ***Dr Fred Matiang'I***, the 1st Respondent herein, filed a replying affidavit sworn on 16th February 2018 and filed in court on the same day, deposing that as the Cabinet Secretary responsible for matters relating to citizenship and management of foreign nationals, he did not mastermind destruction of Petitioner's property and that under Section 97 of the repealed constitution, a citizen who acquired citizenship of another contrary lost the Kenyan citizenship.

6. He deposed that he was informed by the 2nd Respondent that although the Petitioner was a Canadian citizen, he had not renounced the Canadian citizenship prior to being issued with a Kenyan passport. He contended, therefore, that the Petitioner illegally obtained the Kenyan passport and contrary to express provision of the repealed constitution through political patronage.

7. It is ***Dr Matiangi's*** deposition that the repealed constitution did not permit dual citizenship hence the Petitioner lost his Kenyan citizenship the moment he obtained the Canadian citizenship. In that regard, he deposed, the issuance of the Kenyan passport to the Petitioner was un-procedural since he had not applied to regain the lost citizenship.

8. The 1st Respondent further deposed that he informed the Petitioner by letter dated 5th February 2018 that his passport had been suspended and that he was required surrender it to the 2nd Respondent's offices. According to the 1st Respondent, on 6th February. 2018 he issued a declaration under Section 33(1) of the Kenya Citizenship's and Immigration Act declaring the Petitioner a member of a prohibited class and a prohibited immigrant leading to his deportation from the country.

2nd Respondent's response

9. The 2nd Respondent filed a replying affidavit sworn on 15th February 2018 and filed on the same day deposing that he is mandated by the Kenya Citizenship and Immigration Act to advice the 1st Respondent on matters relating to grant and loss of citizenship, issuance of passports and travel documents as well as on declaration and removal of prohibited immigrants and undesirable persons from the country.

10. ***Major (Rtd) Kihalangwa*** deposed that according to the record held by his department, the Petitioner was born on 31st December, 1962 in Nyando, Kisumu County; that sometime in 1987, the Petitioner applied for a Kenyan Passport to enable him travel to Havana Cuba for the 15th Congress of International Union of Students and the Word Students' Conference as a student leader, that but his application was rejected owing to adverse report from the office of Director of Security Intelligence implicating the Petitioner for involvement in student riots at the University of Nairobi in the same year. He deposed that the department of Immigration then wrote to the Petitioner on 15th December 1987 informing him of the decision to reject his application.

11. ***Major (Rtd) Kihalangwa*** further deposed that on 12th September 1992, the Petitioner wrote to the Kenya High Commission in Ottawa, Canada requesting the Commissioner to issue him with a Kenyan Passport stating that he had fled to Canada in 1988 as a political refugee, but again upon receipt of that request, on 29th December 1992, the Director of Security Intelligence recommended that the Petitioner be issued with a one way travel document to Kenya but the Petitioner never travelled.

12. It is deposed that on 3rd march 2009 the Petitioner made an application at the Kisumu Passport Control and upon receipt of the request, the then Minister in charge of Immigration and Registration of Persons, the late ***Hon Gerald Otieno Kajwang*** approved the opening of a duplicate file at Directorate's Headquarter in Nairobi, and directed that the Petitioner, who was then the advisor to the Prime Minister, be issued with a Kenyan passport. The 2nd Respondent stated that the repealed constitution did not allow dual citizenship and that under Section 97 of that constitution, a citizen who became a citizen of another country ceased to be a citizen of Kenya, and for that reason, the Petitioner lost his citizenship because he had not renounced his Canadian citizenship.

13. He contended that the Kenyan passport was illegally issued to the Petitioner; that the Petitioner had failed to disclose this material fact which disentitled him to judicial discretion. It is ***Major (Rtd)Kihalangwa's*** case that Section 10 of the Kenya Citizenship and Immigration Act provides how a citizen by birth who had lost citizenship may regain the lost citizenship but the Petitioner had not taken advantage of the Section. He deposed that by a letter dated 5th February 2018, he informed the Petitioner of the ***address Runda Meadow, Nairobi*** that his ***Passport No 4116842*** had been suspended and he was required to surrender it within 21 days of receipt of the letter.

14. He stated that based on the materials in the Petitioner's immigration file and classified intelligence report, he advised the 1st Respondent regarding the Petitioner's citizenship status and presence in Kenya. And based on that information, ***Major (Rtd) Kihalangwa*** deposed, on 6th February 2018, the 1st Respondent declared the Petitioner a prohibited immigrant and issued deportation orders under Sections 33(1) and 43 of the Act after which he, the 2nd Respondent, instructed his officers to ensure the orders by the 1st Respondent were enforced.

15. The 2nd Respondent went on to depose that following the above developments, the Petitioner was arrested within the precincts of Inland Container Deport and taken to JKIA from where he boarded KLM Flight KL0506 to Toronto Canada via Amsterdam. He contended that their actions were guided by the constitution and Sections 33 and 43 of the Act and on the authority of the decision in ***Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration & Another*** [2015}eKLR and ***Mashir Mohamed Jamo Abdi v Minister for Immigration and Registration of persons & 2 others*** [2014]eKLR.

3rd, 4th, 5th and 6th Respondent's Response

16. The 3rd, 4th, 5th and 6th Respondents filed a replying affidavit by ***Chief Inspector Robert Owino,*** sworn on 16th February 2018 deposing that on 30th January 2018, the 1st Respondent issued ***Gazette Notice Vol. CXX-No 15*** outlawing ***National Resistance***

Movement (NRM) by declaring it a criminal gang. He deposed that subsequent to that declaration, the Petitioner held a press conference on 1st February 2018 declaring himself the leader of ***NRM*** which was by then an outlawed organization and that Section 35 of the National Police Service Act allows the DCI to collect intelligence on criminal activities including investigating crimes and maintaining law and order.

17. ***CI Owino*** further deposed that on the basis of the above facts, a search warrant was obtained vide ***Misc, Criminal case No 375 of 2018*** authorizing searches at the Petitioner's premises. According to ***CI Owino,*** a search was conducted at the Petitioner's premises on 2nd February, 2018 and the Petitioner was arrested for his association with an out lawed criminal organization.

18. He stated that the Petitioner was taken to different police stations in search of space and for his own safety away from crowds that kept on swelling at police stations wherever they learnt of the Petitioner's presence at a particular police station; that the Petitioner was held together with other inmates; that police cells are standard with facilities required by those in custody; that the Petitioner was not denied access to his property and that he was accorded all his rights as a suspect. It was ***CI Owino*** deposition that the Petitioner was charged in ***Criminal Case No 174 of 2018*** with the offence of being present and consenting to administration of an oath which amounted to committing a capital offence namely treason under Section 59(a) of the Penal Code.

1st Interested Party's response

19. ***Kenya National Commission of Human rights,*** the 1st Interested Party, filed an affidavit by ***Benard Mogesa***, the 1st Interested Party's CEO, sworn on 18th April 2018, deposing that the 1st Interested Party is empowered under Article 59(1) (d) of the Constitution to monitor, investigate and report on the observance of human rights in all respects including by national security organs.

20. ***Mr Mogesa*** deposed that the 1st Interested Party received a complaint on 2nd February 2018 that police officers had forcefully broken into the Petitioner's house and destroyed property in violation of Article 40 of the Constitution; arrested the Petitioner and took him to an undisclosed location. He deposed that although court orders had also been issued to have the Petitioner produced in court, none had been complied with but instead, the Petitioner was deported outside the jurisdiction of the court, a threat to the constitution and the rule of law.

21. He further deposed that following court orders of 26th February, 2018 allowing the 1st Interested Party's access immigration areas to monitor the Petitioner's re-entry into the country, the commission observed the Petitioners re-entry on 26th March, 2018 and compiled a report documenting various human rights violation. He stated that between 2nd February, 2018 and 29th March 2018, the Respondents jointly and severally disobeyed court orders and violated the Petitioner's fundamental rights and freedoms.

2nd Interested Party's Response

22. ***The Law Society of Kenya,*** the 2nd Interested Party herein, filed a replying affidavit by ***Mercy Wambua,*** its CEO, sworn on 23rd April 2018 and filed in court on 24th April 2018, deposing that the Petitioner is an advocate of the High Court of Kenya; that the 2nd Interested Party has mandate to uphold the constitution and advance the rule of law among others; that on 2nd February 2018 police officers under the command and direction of the 5th Respondent, forcefully invaded the Petitioner's house and arrested him and that they not only held the Petitioner incommunicado in various police stations but also ignored various court orders. She also stated that the Petitioner was deported from the country on 6th February 2018 in defiance of valid court orders.

23. According to ***Ms Wambua,*** the Respondents jointly and severally failed to facilitate the Petitioner's re-entry into the country in breach of court orders and that the 1st to 6th Respondents' conduct violated the constitution and the Petitioner's fundamental rights and freedoms.

Petitioner's submissions

24. ***Dr Khaminwa*** Senior Counsel, assisted by ***Mr Waikwa Wanyoike, Valentine Khaminwa*** and ***July Soweto*** appeared for the Petitioner, with ***Mr Waikwa*** submitting first. Learned counsel submitted that although it was the Petitioner's wish to be present to testify, this was not possible because he had been denied re-entry into the country hence they were forced to proceed by way of written submissions.

25. Learned counsel contended that the Petitioner is a Kenyan citizen born in Kenya in 1962 and that his parents were Kenyan citizens too. According to ***Mr. Waikwa,*** the Petitioner received his education in Kenyan schools up to university; that the Petitioner has a Kenyan passport issued in 2009 and Kenyan identity card ***No 2790598*** issued on 12th November 2012, ***KRA Pin No A004268202L*** and is an advocate of the High Court ***No PI05/68/65/08.*** He submitted that the Petitioner also ran for an elective post for MP in Nyando constituency in 2007 and was candidate for governor for Nairobi in 2017.

26. According to ***Mr Waikwa***, the Petitioner's house was raided by police officers and damaged; the Petitioner was arrested and detained in various police stations and that although anticipatory bail was granted for his release, it was not obeyed. Learned counsel went on to submit that the 5th Respondent and his officers took the Petitioner to ***Kajiado Law courts*** for plea but the court declined as the matter was already before the High Court. He submitted that instead of the police officers taking the Petitioner to the High Court as was expected, they took him to JKIA where he was put on a plane and deported to Canada.

27. ***Mr.Waikwa*** contended that court orders issued on 26th February 2018 allowing the Petitioner to re-enter the country were disobeyed because the Petitioner's attempt to re-enter the country on 26th March 2018 was thwarted by state agents who again put the Petitioner on another flight back to Canada after spending about three days at the JKIA.

28. ***Mr Waikwa*** argued that that the petition was so much about whether the Petitioner is a citizen but rather whether his detention from 2nd February 2018, the attack on his house and failure to produce him before court violated his rights and fundamental freedoms. He also questioned whether the purported designation of the Petitioner by the 1st Respondent as a prohibited immigrant and his removal from the jurisdiction on the basis that designation was in accordance with the law or whether it was done in a manner that violated the Petitioner's fundamental rights and freedoms; in violation of Article 47(1) of the constitution and further whether failure to obey the various court orders was a violation of the rule of law.

29. ***Mr. Waikwa*** then submitted highlighting their written submissions dated 20th August, 2018 and filed in court on the same day as well as the Petitioner's affidavit that the Petitioner's rights were violated at the JKIA. The affidavit states that he was injected with foreign substances which were confirmed after medical treatment upon arriving in Canada.

30. Learned counsel contended that the 1st Respondent's action of purporting to cancel the Petitioner's passport and declare him a prohibited immigrant was in violation of the Petitioner's right to fair administrative action and fair hearing contrary to Articles 47(1) and 50(1) of the constitution. Counsel relied to the case of ***Muslim Human rights v Inspector General*** [2015} eKLR on the rule of law and the scope of rule of law as well as the scope of application of Article 47. He also cited the case of ***Republic v Chuka University Exparte Kennedy Omondi Waringa*** [2016] eKLR on the right to fair administrative action and legal representation.

31. ***Mr. Waikwa*** argued that there was failure to accord the Petitioner fair administrative action and fair hearing and relied on the decision of ***Guchan Investment Ltd v Ministry of National Heritage & Culture & 3 Others*** [2016)eKLR for that submission. It was ***Mr. Waikwa's*** submission that the 1st Respondent had no power to strip a citizen by birth of his citizenship and that he can only do what the law allows. Learned counsel contended that even if the cabinet secretary had such power, the procedure was ignored.

32. On citizenship, learned counsel relied on the decision by African court on Human right in the matter of ***Anundo Ochieng Anundo v United Republic of Tanzania Application No 012/2015 para 79***, to contend that the Petitioner is a citizen of Kenya in terms of Article 14 of the constitution; that Article 16 allows dual citizenship and that a citizen does not lose citizenship by acquiring citizenship of another country. He contended that even where one had dual citizenship, one has to look at the relevant provision of the repealed constitution to address the issue. Learned counsel submitted that Article 14 as read with Article 16 are restorative and, therefore, annul anything that was said to be based on the law under the old constitution that was oppressive.

33. He contended that the wording of Article 16 is deliberative in that one does not lose citizenship. According to learned counsel, whereas Section 87 of the repealed constitution was on citizenship, Section 97 was with regard to dual citizenship. ***Mr. Waikwa*** urged that even if the court was to find that the present petition is informed by the repealed constitution as it related to dual citizenship, it would still find that the Petitioner is a citizen under the current constitution and that dual citizenship was not prohibited under the old constitution. He relied on the case of ***Mahamund Muhumed Sirati v Ali Hassan Abdirahman & 2 others (***Election Petition No 15 of 2008[2010] eKLR submitting that is only a certain class of citizens was prohibited and distinguished the case from the judgment relied on by the Respondents namely ***Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration & Another*** [2015] eKLR, on the basis that parents of the Petitioner in the latter case were not citizen at the time of his birth.

34. ***Mr. Waikwa*** submitted that the old constitution did not given a blanket ban to dual citizenship arguing that Section 97(3) only prohibited voluntary acquisition of dual citizenship. He contended that the Petitioner did not acquire another country's citizenship voluntarily and referred to the Petitioner's affidavit paragraphs 2-24 which state that the Petitioner was in exile hence he remains a citizen and, therefore, the 1st Respondent could not take away his citizenship.

35. Learned counsel further submitted that holding the Petitioner incommunicado; under inhuman and degrading conditions, pushing him and destroying his property was a violation of Articles 28, 29, 40, 49 and 51 of the constitution. ***Mr. Waikwa*** contended that the Respondents were perpetrating continued violation of the Petitioner's rights.

36. ***Dr Khaminwa***, learned Senior Counsel, added that the Petitioner had a valid passport which was taken away by state agents and the contention that he should apply for a new passport is untenable. According to learned senior counsel, under Section 28 of the Kenya Citizenship and Immigration Act, a person whose travel document is lost, mutilated or damaged, may apply for a replacement and under Section 29(4) an application should be accompanied with an affidavit explaining the circumstances of mutilation or damage. According to Senior Counsel, the Petitioner cannot explain the circumstances under which his passport was mutilated.

37. ***Dr. Khaminwa*** contended that looking at the Petitioner's case as a whole, there was gross violation of his human rights and fundamental freedoms including violation and disregard of court orders by the Respondents, damaging his property and forcing the Petitioner to spend time in a toilet at the JKIA and injecting him with tranquilizers among other violations. He submitted that Article 1 of the constitution is critical; that Article 2 on supremacy is important and that Article 23 requires the court to uphold the rule and human rights. Senior counsel argued that the Petitioner is a citizen, an advocate of this Court and that when he was charged at ***Kajiado Law courts*** he was charged as a citizen of Kenya. He urged the court to allow the petition as a way of upholding and strengthening the constitution.

1st Interested Party's submissions

38. ***Mr Maweu,*** learned counsel for the 1st Interested Party submitted, relying on their responses filed herein and written submissions dated 27th April 2018 and filed in court on 20th April 2018, that the 1st Interested Party has mandate pursuant to Article 59 of the constitution to promote and protect human rights in the Country; that pursuant to that mandate and orders of the court made on 26th February 2018, the 1st Interested Party planned the Petitioner's return to the country and filed a report dated 12th April 2018 annexed to the affidavit of ***Bernard Mugesa*** and ***Kamanda Muchelie*** and relied entirely on those reports.

39. Learned counsel added that the report discloses various violations including violation of the right to fair administrative action and fair hearing. Regarding the declarations made by the 1st Respondent pursuant to Sections 33(1) and 43(1) of the Kenya Citizenship and Immigration Act counsel contended that they were made in violation of the Petitioner's right to fair administrative action and fair hearing which apply to everyone, citizenship notwithstanding. ***Mr. Maweu*** relied on the case of ***Republic v Cabinet Secretary for Ministry of Internal Co-ordination*** [2013] eKLR for the submission that Article 47(1) applies to everyone irrespective of citizenship status.

40. He went on to submit that Article 49 was also violated with respect to the arrest of the Petitioner and referred to paragraph 39 of the report; that the Petitioner though arrested on 2nd February 2018, was only produced before court on 6th February 2018 in violation of clear provisions of Article 49 (f) of the constitution. Learned counsel submitted, referring to paragraph 26 of the report and paragraph 105 of the Petitioner's affidavit, that they disclose the circumstances under which the Petitioner was held at JKIA, that is; the Petitioner was held in a toilet reserved for persons with disabilities and that he was in a standing position for 12 hours without a seat. Learned counsel submitted that even persons deprived of liberty are entitled to be respected and treated in a dignified manner.

41. On the issue of citizenship, ***Mr Maweu*** submitted that citizenship can only be revoked under Article 17 of the constitution and only citizenship acquired otherwise than by birth. He contended that even if the 1st Respondent had power to revoke citizenship, Section 21 of the Act is clear on the procedure to be followed which was not followed in the Petitioner's case.

2nd Interested Party's Submission

42. ***Mr. Ndubi,*** learned counsel for the 2nd Interested Party submitted, highlighting their written submissions dated 31st August,

2018 and filed in court on 3rd September, 2018, that in the preamble to the constitution, people committed themselves to the nurturing and protecting the wellbeing of individual family, communities and the nation, and in recognition of aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

43. Learned counsel submitted taking, into account the above statement, that the Petitioner was treated contrary to the values which Kenyans committed themselves to while enacting the constitution. ***Mr. Ndubi,*** while referring to Article 20(3) of the constitution, submitted that courts are required to develop the law to the extent that it does not give rights or fundamental freedom; they should adopt an interpretation that most favours enforcement of rights or fundamental freedoms and that under Article 20(4) the court is required to promote the Bill of Rights. Learned counsel went on to urge the court to interpret the preamble to the constitution to further the principles of our constitution. He contended that the actions taken by the Respondents were not in consonance with the spirit of the constitution.

44. Referring to Article 27(1), ***Mr. Ndubi*** submitted that every person is entitled to equal protection and benefit of the law; that at the time the Petitioner was arrested, was during the operation of the constitution but he was denied the rights under Article 27.

45. On citizenship, ***Mr. Ndubi*** submitted that the Cabinet Secretary could only make an order after receiving recommendations from a committee under Section 21 of the Act and even then, that would only affect those persons whose citizenship is by registration in accordance with Article 17 of the constitution. Learned counsel contended that there was no evidence that the procedure was followed or that the Petitioner even renounced his Kenyan citizenship.

46. ***Mr Ndubi*** argued that the Petitioner is a member of the 2nd Interested Party and was admitted to the Bar in 2008 hence the 1st Respondent's action of revoking his citizenship will have negative effect including depriving the Petitioner the right to practise law in Kenya. He referred to Section 12 of the Advocates Act which restricts legal practise to EAC members only contending that the action will deprive the Petitioner his means of livelihood. He submitted that the actions complained of are on violations that happened and continue to happen notwithstanding live and active court orders.

Respondent's submissions

47. ***Mr. Bitta,*** learned counsel for the Respondents, submitted highlighting their written submissions that parties are bound by their pleadings and issues arise from the pleadings. Counsel contended that since there is no amended petition, the reliefs sought should be confined to those in the petition filed on 12th February 2018. He relied on the case of ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others*** CA N 219/2013[2014] eKLR to contend that prayers in the submissions should not be granted.

48. Regarding citizenship, ***Mr Bilta*** submitted that the Petitioner is a Canadian citizen as he holds that county's passport and further that Section 32 of the Kenya Citizenship and Immigration Act is clear that a passport is *prima facie* evidence of citizenship. Learned counsel submitted, referring to the affidavit of the 1st Respondent, that the 1st Respondent was informed by the 2nd Respondent that the Petitioner never renounced his Canadian citizenship and for that the Petitioner is a citizen of Canada; that there are decisions which have decided on the issue of citizenship and that the Respondents acted in accordance with those decisions in the case of the Petitioner hence did not violate the law.

49. ***Mr Bilta*** contended that based on those decisions, a citizen of Kenya by birth could lose his/her citizenship prior to the 2010 Constitution. Learned counsel argued that the 2010 Constitution cannot apply retrospectively and relied on the decision in ***Rawal v Judicial Service Commission*** [2015] eKLR to support this contention. Counsel argued that when interpreting the Constitution, the court should look at the history to understand the situation under which it was enacted. He contended that Article 14(3) of the current Constitution is conditioned on Section 97 of the repealed Constitution and that only Article 16 has similarity with the repealed Constitution.

50. Learned counsel further submitted, relying on Section 10 of the Citizenship and Immigration Act that a person who lost citizenship can regain it on application and contended that the Petitioner had never applied to regain his lost citizenship. He argued, relying on the case of ***Mashir Mohamed Jamo Abdi v Minister for Immigration and Registration of persons & 2 others*** (supra), that the court was clear that a person who lost citizenship has to apply to regain it. Learned counsel distinguished the case of ***Muhumed Sirati (1)*** from the present petition contending that the ***Sirati case*** was an election petition and that that there was no evidence in that case that the 1st Respondent in the case had obtained another country's citizenship. ***Mr Bitta*** went on to submit that

the Petitioner had stated that he came to Kenya in 1994 after the repeal of Section 2A of the retired constitution but had no Kenyan Passport and therefore, whatever reasons had made him stay away, did not obtain in 1994 when he returned to Kenya.

51. On the National Identity Card, he submitted that the identity card the Petitioner has is a replacement of the old generation identity card and that the Petitioner did not inform the Registrar of Persons that he had obtained a Canadian Passport. Regarding the orders made by various courts, ***Mr Bilta*** submitted that the issue has been determined and is now ***res judicata*** hence this Court is ***functus officio*** as the issues had already been determined, sentence passed and is now pending before the Court of Appeal, being Civil Appeal No 96 of 2018

52. ***Mr Bitta*** further submitted, regarding the report by the 1st Interested Party, that the matters raised in the report dated 14th August, 2018 were obtained after the petition had been filed and that the 1st Interested Party's actions are merely administrative. On the allegations of torture, learned counsel submitted that the onus is on the Petitioner to prove through evidence. He also contended that there is no proof of the physical damage on the property. Learned counsel submitted that it is up to the Petitioner to demonstrate ownership and infringement of property rights and whether there was damage to the property. He argued that damage to property denotes special damage that must be proved and argued that there was neither pleading nor proof of the same.

53. On the allegations of ill treatment while in the police custody, learned counsel contended that the Petitioner was placed in police cells and that this did not amount to in human treatment and so was the treatment at JKIA. He contended that the Petitioner was placed in a self-contained cell with decent facilities while at the JKIA. He also sought to distinguish the ***Anundo Ochieng Anundo v United Republic of Tanzania case*** from the present petition. He contended that the legal regime in Tanzania did not provide for judicial redress hence the effect had rendered ***Anundo*** stateless unlike the Petitioner in the present case who had chosen to take citizenship of another country and was, therefore, not stateless.

54. Counsel relied on the case of ***Samson Chinube Muli v Nelson Kilomo & 2 Others*** [2011] eKLR for the submission that if a statute provides for a mechanism, for redress one must avail himself that mechanism before coming to Court and relied on Section 9 of FAAA).

Analysis and Determination

55. I have considered this petition; responses, submissions and the authorities relied on. For a proper and conclusive determination of this petition, three questions arise for determination, namely; whether the Petitioner is a citizen of Kenyan; whether the 1st and 2nd Respondents acted lawfully in declaring the Petitioner a prohibited immigrant and suspending his passport and whether the Petitioner's rights and fundamental freedoms were violated. Finally, depending on the answers to the above issues, the court will then consider the remedies, if any, it should grant.

Whether the Petitioner is a Citizen

56. The facts of this petition are not in dispute. ***Miguna Miguna*** was born a citizen of Kenya in Nyando, along the shores of Lake Victoria in what is now called Kisumu County. His parents were also citizens of Kenyan by birth. The Petitioner grew up as a citizen and attended local schools. After his High School education, he joined the University of Nairobi but at some point in time, he had a brash with the then government of President Moi and took a flight out of the country ending up exiled in Canada. And as the facts of this petition show, the Petitioner would then acquire a Canadian Passport while in that country. This was after his efforts to obtain a Kenyan passport both in Nairobi and later in Canada had failed.

57. According to the pleadings, the Petitioner lived in Canada until sometime in 2007 when he returned to Kenya, renewed his Kenyan Identity Card and acquired a Kenyan Passport both of which show that he was born a citizen of Kenya. He was even admitted as an advocate of this court a profession reserved for citizens of Kenya and those from the East African Community only. During the Coalition government formed after the 2007 general elections, the Petitioner served as a senior adviser in the Prime Minister's office. In 2013 during the first general elections under the new constitution, the Petitioner stood for an elective post as Member of Parliament for a constituency in Nairobi County but did not succeed. He again tried his luck in the 2017 General elections for Governor of Nairobi but again lost.

58. From the above facts, it is not in dispute that the Petitioner was born in Kenya and to Kenya Citizen parents, only that he travelled out of the country without a Kenyan passport. It is also not in dispute that he obtained a Canadian Passport on which he has

travelled couple of times but he later obtained a Kenyan passport in 2009, after his application was approved by the Minister then responsible for Immigration. The question that this court must answer is; did the Petitioner lose his Kenyan citizenship the moment he obtained a Canadian passport"

59. The Petitioner's counsel argued that the Petitioner did not lose his citizenship and have pegged their contention on Articles 14 and 17 of the constitution. It is their submission that a citizen by birth cannot lose his/her citizenship merely by reason of acquiring citizenship of another country. They have relied on the case of ***Mahamud Muhumed Sirati v Ali Hassan Abdirahman & 2 others (supra)*** to buttress this argument.

60. The Respondents on their part have contended that the Petitioner lost his citizenship the moment he obtained the Canadian passport which conferred on him that country's citizenship contrary to the repealed constitution. They have also relied on the case of ***Mashir Mohamed Jamo Abdi v Minister for Immigration and Registration of Persons & 2 others*** (supra) to contend that a citizen who loses citizenship must apply to regain it in terms of Section 21 of the Kenya Citizenship and Immigration Act. It is therefore their contention that the Petitioner having acquired another country's citizenship, lost his Kenyan citizenship and had to apply to regain it but which he has not done.

61. Article 14(1) of the constitution provides on who a citizen by birth is. One is a citizen by birth if, on the day of his birth whether he is born in Kenya or not, either the parents was a citizen. This applies equally to a person born before the effective date, (27th August, 2010). Article 14(2). To the extent, that Article 14 is clear on the fact of citizenship by birth. Taking the two provisions into account, it is clear that the Petitioner would, without a doubt fall in the category of citizen by birth. This is because the Petitioner was not only born in Kenya but both of his parents were also citizens of Kenya.

62. Article 13 of the constitution on retention of citizenship, provides generally that every person who was a citizen on the effective date remains a citizen and retains his citizenship status. This is a general provision and would appear to apply to citizens other than those who are citizens by birth because citizenship by birth could not change despite the country's adoption of a new constitution.

63. Article 14(5) on the other hand provides that a citizen by birth, who had lost citizenship on the effective date by acquiring citizenship of another country, is entitled, on application, to regain the lost citizenship. This is the provision the Respondents have relied on to argue that the Petitioner had lost citizenship by acquiring Canadian citizenship hence he has must take advantage of this provision and apply to regain his citizenship. The Petitioner and his counsel have maintained that Article 16 is clear that a citizen by birth does not lose citizenship by acquiring citizenship of another country. With the Respondents countering that this provision cannot apply to the Petitioner since his acquisition of citizenship of another country arose during the repealed constitutional dispensation and not the current one.

64. On the effective date 27th August 2010, the Petitioner was a Kenyan citizen holding a valid Kenyan passport issued by the government. There was no issue over his citizenship and went about as such including being an advocate in the country which was reserved for citizens. If there was a question of citizenship, the Petitioner would remain a citizen until the dispute had been resolved by a competent authority. This, however, never arose in the case of the Petitioner.

65. So did the Petitioner lose his citizenship under the old constitution as the Respondents contend" To answer this question we must interpret the relevant provisions of the repealed constitution on the issue taking into account the principles that guide in interpreting the constitution. They require that a constitution be given a liberal interpretation in order to meet the ideals and aspirations of the people (***Njoya & 6 Others v Attorney General & another*** [2004] eKLR); that as living document, the constitution should not be interpreted in a simplistic and technical manner (***State v Acheson*** 1991 20 SA 505, ***Re The Matter of the Interim Independent Electoral and Boundaries Commission***. Application No 2 of 2011) and that a constitution should be read as an integrated whole, not one particular provision destroying the other but each sustaining the other. (***Tinyefuze v Attorney General*** [1996] 3 UGCC)

66. Section 87 of the repealed constitution provided for citizenship and the circumstances under which one would become a citizen. It provided that;

[87]. ***(1) Every person who, having been born in Kenya, is on 11th December, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on 12th December, 1963: Provided that a person shall not become a citizen of Kenya by virtue of this subSection if neither of his parents was born in Kenya.***

(2) Every person who, having been born outside Kenya, is on 11th December, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall, if his father becomes, or would but for his death have become, a citizen of Kenya by virtue of subSection (1), become a citizen of Kenya on 12th December, 1963

67. Section 89 provided that persons born in Kenya after independence were to become citizens if at birth one of their parents was a citizen of Kenya. This is the equivalent of the current Article 14 of the constitution. Section 94 conferred discretion on the minister to revoke citizenship but only the citizenship acquired through registration. The Section provided for the circumstances under which the minister could do it. These provisions do not affect the current petition.

68. The petition, therefore, turns on the interpretation of Section 97 of the repealed constitution which is material to this case. The Section provided for dual citizenship and loss of citizenship. Section 97(1) provided for circumstances under which a person would lose citizenship. It states that where a person on attaining the age of 21 years was a Kenyan citizen "***and also a citizen of another country, he would cease to be a citizen of Kenya if he did not renounce the citizenship of that other country".*** Section 97(3) further provided that ***a citizen of Kenya would subject to subSection (7) cease to be a citizen if (a) having attained the age of 21 years he acquired citizenship of some other country by voluntary act (other than marriage)***. Parliament could however by legislation provide for extension of the period within which one could renounce that other country's citizenship.

69. Kenya was transiting from colonial governance to independence and was therefore keen to make provision for accommodating interested persons to make a choice of the country they wanted to owe allegiance to. In that regard, Section 97(3) (a) would appear to have been intended to prohibit acquisition of citizenship of another country by a voluntary act. But as was held in ***Mahamud Muhumed Sirati v Ali Hassan Abdirahman & 2 others*** [2010] eKLR, and I agree, the repealed constitution only prohibited persons of a certain category who were citizens of other countries at the time of independence to choose to be citizens of Kenya or that other country. It did not apply to citizens of Kenya by birth. This is because citizenship by birth is a birth right and an in alienable right. The Petitioner would be required to do much more than mere acquisition of a passport of another country to lose it. This is in line with the principle that ***"A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible… The role of the Court should be to expand the scope of such a provision and not to extenuate it."(Tinyefuze v Attorney General of Uganda) (***supra)

70. If I be wrong on this, the court must then look at the true meaning and import of Section 97 (3) (a) as used in that Section. It has been in the alternative argued on behalf of the Petitioner that he could not lose his Kenyan citizenship on acquiring another country's citizenship because his acquisition of the Canadian passport was not a voluntary act in terms of Section 97(3)(a). The Respondents on their part contended that the Petitioner acquired the passport voluntarily and, therefore, he has to apply in terms of Article 14(5) of the constitution to regain his citizenship. Did the Petitioner acquire the Canadian passport voluntarily to fall within the ambit of Section 97(3) (a)" In order to determine this question, the court has to consider the facts and circumstances under which the Petitioner acquired the Canadian passport.

71. The Petitioner has deposed that he went to Canada as a political refugee after he and other students were expelled from the University of Nairobi in 1987. He deposed that in 1988, he was officially recognized by UNHCR as a refugee and was issued with a UN travel document which enabled him to travel to Canada as a Canadian government sponsored refugee, being a conventional refugee. He was subsequently given the Canadian passport purely on the basis of being a refugee. These facts have not been controverted, but appear to be supported by the 2nd Respondent who deposes in his affidavit, that the Petitioner applied for a passport to enable him attend university students' conference in Cuba, but upon consulting with the national intelligence, the Petitioner's application for a passport was declined. The reason given was that he had been involved in students' riots at the university.

72. The 2nd Respondent further deposed that in 1989 the Petitioner once again applied for a travel document at the Kenyan High Commission offices in Ottawa Canada, but upon the intelligence being consulted it advised that the Petitioner be issued with a one way travel document back to Kenya. This is a clear confirmation that the Petitioner was not in good books with the then government. The 2nd Respondent does not, however, disclose whether or not the Petitioner was issued with the one way travel document to Kenya.

73. Taking the above circumstances into account, it is clear to me that the government denied the Petitioner the right to have a travel document (Passport). The government had reduced the Petitioner's right to a passport to a privilege that it could grant or deny at whims. In the circumstances, the Petitioner begun a foreign journey as a political refugee without passport, reached out to

UNHCR who issued him with a travel document that enabled him travel to Canada where he eventually got a passport while a conventional refugee. Acquisition of the Canadian passport under the circumstances that the Petitioner was in, could not, in my respectful view, be construed to have been a voluntary act in terms of Section 97(3)(a) of the repealed constitution to the extent of resulting into the Petitioner losing his citizenship.

74. This view is reinforced by the dictionary definition of the word "***voluntary".*** Concise Oxford English Dictionary, Twelfth Edition, defines the word ***voluntary*** to mean "***done, given or acting of one's own free will"***. Black's Law Dictionary, 10th Edition, defines the word "***voluntary"*** to mean; 1. ***"Done by design or intention.*** 2. ***Unconstrained by inference; not impelled by outside influence"***. These definitions mean that to be voluntary, the act must have been done willingly and without external pressure or influence.

75. Taken in the above context, the Petitioner's acquisition of the Canadian Passport could not come within the confines of Section 97(3) (a) of the repealed constitution. In the circumstances, I find and hold that the Petitioner did not lose his citizenship upon acquiring the Canadian Passport. He remained and still is a Kenyan Citizen.

Whether the 1st and 2nd Respondents could suspend the Petitioner's passport and declare him a prohibited immigrant.

76. Having determined that the Petitioner as a citizen by birth had not lost his citizenship, the next question for determine is whether the 1st and 2nd Respondents could declare him a prohibited immigrant and suspend his passport.

77. According to the 2nd Respondent, he became aware of the Petitioner's file at the department and on perusing it; he discovered that the Petitioner was irregularly issued with a Kenyan passport on the authority of the Minister then responsible, the late ***Hon Otieno Kajwang,*** without following the law and on political considerations. As a result, he deposed, he informed the 1st Respondent of these facts and the 1st Respondent took action and issued declarations under Sections 33(1) and 43(1) of the Kenya Citizenship and Immigration Act, declaring the Petitioner a prohibited immigrant and suspended his passport.

78. First and foremost, as I have already determined, the Petitioner as a citizen of Kenya is not foreigner who could be declared a prohibited immigrant. Second, Article 17(1) of the constitution is to the effect that citizenship acquired by registration can be revoked. And Article 17(2) on the other hand provides that citizenship of a person who was "***presumed"*** to be a citizen by birth as contemplated in Article 14 (4), may be revoked if; (*a*) ***the citizenship was acquired by fraud, false representation or concealment of any material fact by any person; (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.***

79. Other than citizenship falling in the above categories, citizenship by birth cannot be revoked and for that reason, the 1st and 2nd Respondents did not have power or discretion to exercise in so far as the Petitioner's citizenship was concerned. He was not one whose citizenship could be revoked as contemplated by Article 17 of the constitution or whose passport could be suspended or revoked in terms of Section 33(1) of the Act.

80. Even if the 1st Respondent had power to revoke citizenship, he had to comply with the law namely, Section 21 of the Act. The Section is clear that where there is sufficient proof and on recommendation of the ***Citizenship Advisory Committee***, the Cabinet Secretary may revoke citizenship acquired by ***"registration"*** on the grounds specified in Article 17 of the Constitution. However before doing so, the Cabinet Secretary is required to give written notice and inform the person whose citizenship is due for revocation, of the intention to revoke his or her citizenship, giving reasons for the action. The Cabinet Secretary is then required to give the person who has been given such notice an opportunity to present reasons why his or her citizenship should not be revoked.

81. As public servants, the 1st and 2nd Respondents were required to act only in accordance with the constitution and the law. That is the hallmark of our constitutional architecture, requiring them to observe the rule of law as a foundational value of our constitution. The people of Kenya while adopting the constitution stated in Article 1, that all sovereign power belongs to them and is to be exercised only in accordance with the Constitution. They also firmly stated that they were delegating their sovereign power under the Constitution, to named State organs which should perform their functions in accordance with the Constitution. Those state organs are Parliament, the national and county executives and the Judiciary.

82. The people had earlier made it clear in the Preamble to the constitution, that they were giving themselves the constitution in

recognition of their aspirations for ***"a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law".*** In other words, the people were clear that the ***"Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government"***. (Article 2(1)). They meant that ***"no person may claim or exercise State authority except as authorised under the Constitution***".(Article 2(2)

83. The above provisions mean one thing; that the 1st and 2nd Respondents were required to act within the constitution and exercise only power or authority as donated by the constitution and the law. In that regard, Section 33(1) which the 1st and 2nd Respondents have heavily relied on, only give circumstances under which a passport can be suspended. Those circumstances include where the holder permits another person to use his passport or travel documents; the holder has been deported to Kenya at the government's expense; the holder is a convict for drug trafficking, money laundering, trafficking in persons, smuggling, acts of terrorism, a warrant of arrest has been issued against him and there is need to prevent him from absconding or he is involved in passport or document fraud among others. There is no evidence in so far as the Petitioner is concerned, that he fell into any of these circumstances for purposes of suspending or confiscating his passport.

84. The other provision that the 1st and 2nd Respondents used to justify their actions against the Petitioner is Section 43(1) of the Act which is for removing persons who are unlawfully in Kenya. The Section authorises the Cabinet Secretary to make an order in writing, directing that a person whose presence in Kenya was, immediately before the making of that order, ***"unlawful"*** under the Act or in respect of whom a recommendation has been made to him or her under Section 26A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

85. First, the Petitioner, as a citizen, was not unlawfully in Kenya and, therefore, the Petitioner was not one of the people who fell under the category of persons who may be removed from the country under Section 43(1) of the Act. It is also important to note the provisions of Section 21 of the Act as highlighted elsewhere in this judgment which provides for revocation of citizenship and the procedure to be followed.

86. Even assuming that the Petitioner deserved to be removed from Kenya, he had to be subjected to the provision of the Act and Articles 47(1) and 50(1) of the Constitution and given the right to fair administrative action and fair hearing as amplified by Section 21 of the Act. So much so that whatever the Respondents were doing had to comply with constitutional standards of procedural fairness and fair hearing. The 1st and 2nd Respondents could not just decide to suspend the Petitioner's passport and declare him a prohibited immigrant without subjecting him to any known form of due process. Their actions were not in accord with the constitution and the law thus violated the rule of law.

87. In the case of ***Muslims for Human Rights (MUHURI) & another v Inspector General of Police& 5 others*** 2015] eKLR the court observed that;

"[141] Elements of the rule of law include firstly; that the law is supreme over acts of both government and private persons; secondly; that the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order and thirdly; the exercise of all public power must find its ultimate source in a legal rule."

88. In ***Law Society of South Africa v Minister for Transport*** [2010]ZACC2011(2) BCLR 150 (CC), the Constitutional Court of South Africa stated that the rule of law requires that all public power be sourced in law, which means that state actors should exercise power within the formal bounds of the law.

89. And Lord Bingham, one of the greatest jurists observed, ***"All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts"***. He went on to state that; "***Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion***" and that; ***"Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably"(*** The Rule of law, 2010, London Penguin)

90. Professor H.W Wade and CF Forsy on their part opine in their treatise Administrative Law, 10th Edition (page 17) that;

"…The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done

according to law. Applied to the power of government, this requires that every government authority which does some act which would otherwise be a wrong or which infringes a man's liberty, must be able to justify it as authorised by law and in every case, it will mean authorize directly by act of Parliament. Every act of governmental power, i.e. every act of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law and if the legal pedigree is not found to be perfectly in order, the courts will invalidate the act which he can then safely disregard"

91. One way the 1st and 2nd Respondents could observe the rule of law was for them to act in accordance with the law and subject the Petitioner to the safeguards guaranteed by Articles 47(1) and 50(1) of the constitution and give him a fair administrative action and hearing. Article 47 is intended to bring discipline to administrative action so that values and principles of the constitution are infused in matters of public administration.

92. In the case of ***Judicial Service Commission v Mbalu Mutava Musyimi***[2015] eKLR the Court of Appeal stated that;

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed".

93. In this regard, it did not matter whether the Petitioner was a Kenyan citizen or not. He was entitled to due process of the law as an incidence of the rule of law. That is what the Court of Appeal stated in ***Moses Tengenya Omweno v Attorney General*** [2018] eKLR that one is entitled to due process irrespective of citizenship.

94. It is therefore my finding, and I so hold, that the 1st and 2nd Respondents had no mandate to declare the Petitioner a prohibited immigrant because he was not an immigrant after all. They could not also suspend his passport under Section 33(1) of the Act since he did not fall in the category of persons whose passports could be suspended and or confiscated.

95. The Respondents argued that the Petitioner could have applied for the re-issue of his passport. ***Dr Khaminwa*** submitted, and correctly so, that the Petitioner had not lost, damaged or mutilated his passport for him to apply for a new one. His passport it was irregularly seized by state agents.

Whether the Petitioner's rights and Fundamental Freedoms were violated

96. The Petitioner has contended that his rights and fundamental freedom were violated. It has been argued that he was wrongly arrested and held incommunicado in various police stations; was not produced in court as required by the constitution and was deported out of his country of birth without reason or even following the law. And despite court orders issued in his favour, he was not allowed into the country and was again put on a flight and deported to Canada a second time. He claims that he was injected with tranquilizers in violation of his rights and that his house was destroyed. The Respondents contended on their part, that the Petitioner was not mistreated; that he was held with other prisoner and that his rights were not violated.

97. The Petitioner's as a human being is entitled to his inalienable rights and fundamental freedoms. Human rights are inherent to human beings by virtue of them being human. In this regard, the Constitutional Court of South Africa observed in ***State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*** [2017] ZACC 40, that the philosophical underpinnings of the very notion of whom fundamental rights are meant to protect would quite automatically seem clear that fundamental rights are meant to protect warm-bodied human beings, primarily against the State

98. In 2010, the people of Kenya adopted an expensive Bill of Rights to ensure that they did not experience the kind of violation of human rights the country had witnessed in the years past. Article 19 of the constitution states therefore, that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19(2) further states, that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings and that the rights and fundamental freedoms in the Bill of rights belong one to each individual and are not granted by the state. They can only be

limited as contemplated by the constitution itself.

99. The Petitioner was arrested on 2nd February 2018 after state agents blew off doors to his residence and entered his house. He was taken away and held at various police stations within Kiambu County. This is clear from both the petition and the Respondents responses. He was not produced before a court of law until 6th February 2018 when there was an attempt to charge him before a Kajiado Magistrate's court. It is, therefore undeniable that the Petitioner was not produced before a court of law within twenty four hours as demanded by the constitution.

100. Article 49 of the constitution documents rights of arrested persons including (Article 49(1) (f)) to be brought before a court as soon as reasonably possible but not later than twenty four (24) hours or the next working day if the day of arrest was not a working day. There can be no doubt that the Respondents breached this important constitutional provision and, therefore, violated the Petitioner's constitutional right to be accorded due process of law.

101. Second, the Petitioner was deported from his country without being subjected to any known due process and or explanation. He also deposed that he was held incommunicado and later forcefully deported to Canada. The Respondents denied allegations of violations but did not explain why the Petitioner was not produced in court or charged within the constitutionally permissible period. The Respondents were unable to justify their actions against the Petitioner. It is inconceivable that a state can deport its own citizen to a second country without regard to the constitution and the law. Even if the state had reason to act as it did, it was under a constitutional obligation to follow the law and not act at whims in complete disregard of the constitution and the law.

102. The Petitioner was deported despite court orders directing that he be produced in court, a violation of the rule of law and a key national value in Article 10 of the constitution. The Petitioner's attempt to return upon the court suspending the declaration that he was a prohibited immigrant and the suspension of his passport; he ended up spending days in a toilet at the JKIA. And despite depositions that he was held in a toilet, a fact that was supported by the 1st Interested Party's report made pursuant to the court order of 26rh February 2018, the Respondents never filed an affidavit to counter these depositions. ***Mr. Bitta*** merely submitted orally that the Petitioner was held in a self -contained facility at the Airport.

103. There cannot be worse violation of human rights and fundamental freedoms in the current constitutional dispensation than the Petitioner was subjected to. Holding a human being in a toilet and in total disregard of his human rights and fundamental freedoms is the worst violation of the person's dignity. Even where one is perceived a criminal, he must be subjected to due process. The conditions the petitioner was subjected to amounted to torture and inhuman and degrading treatment that are absolutely outlawed by our Bill of Rights. Torture does not have to be physical alone. Mental and psychological harassment too amounts to torture.

104. Article 1 of the UN Convention against Torture and other Cruel and Inhuman or Degrading Treatment defines the term 'torture as;

"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

105. Appreciating this definition, the Court of Appeal stated in ***Moses Tengenya Omweno v Attorney General (supra)*** also referring to the East African Court of Justice Decision in ***Samuel Mukira Mohochi -v- Attorney General of Uganda,*** **EACJ Reference No. 5 of 2011,** that ***detention is indeed deprivation of liberty. When it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity***.

106. In the present petition, it has been averred and I agree, that the Petitioner's detention at various police stations including Inland Container Deport Police station JKIA Police station, being put on a flight and deported to Canada and later confinement at JKIA on March 26 2018, injecting him with foreign substances and again putting him on a flight back to Canada, were a violation of his fundamental rights.

107. The Respondents may not like the Petitioner. They may not even like his abrasiveness, what he says or how he says it. They have a constitutional duty to respect and protect his rights and fundamental freedoms. Where they fail, this court, as the arbiter of disputes, protector of the constitution, human rights and the rule of law, will rise to its constitutional mandate and give such protection. I am therefore satisfied that the Respondents violated the Petitioner's rights and fundamental freedoms guaranteed by our Bill of Rights.

Appropriate reliefs to grant

108. In the case of ***Mackeigan v Hickman*** [1989] SCR 796, it was observed that ***"courts are the protectors of the Constitution and the fundamental values embedded in it, that is; the rule of law, fundamental justice and preservation of the democratic process"***. The Petitioner has come to this court seeking redress for violation of his rights and fundamental freedoms enshrined in the Bill of Rights. He has shown that his constitutional rights were violated by the same state that is enjoined by the constitution to protect those rights.

109. Human rights and fundamental freedoms are for enjoyment and to the greatest extent possible but not for curtailment. This was the edict by the Court of Appeal in ***Attorney General v Kituo Cha Sheria & 7 others*** **[2017] eKLR** that;

"…rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largely because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey".

110. The Court was clear that on the application of the Bill of Rights stating that**;**

"Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus Courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and the highest claims they are enjoined in their interpretive role to adopt a pro-rights realization and enforcement attitude and mind-set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms…they must aim at promoting through their interpretation of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is humanity, equality, equity and freedom."

111. And in ***Tinyefuze v Attorney General of Uganda*** (supra), the court held that "***If a Petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course."*** *On the basis of the evidence on record and the law, it is clear to me that the 1st Respondent's declaration that the Petitioner is a prohibited immigrant and the direction that he be deported to Canada had no basis in law. Further, the action of suspending his passport lacked legal authority and cannot stand. The Petitioner has therefore succeeded to show violations. What remains is the level of damages.*

112. One reason why courts grant compensation in cases of breach or violation of rights and fundamental freedoms is not so much to restore a person's already violated rights, but to act as a deterrent against similar violation in the future. It was stated in ***Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms [1984] 62 Canadian Bar Review 517*** *,that* ***"the purpose of awarding damages in Constitutional matters should not be limited to simple compensation, but such an award 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".***

113. The other reason is to send a message that there should be no right without a remedy and to remind the state and its agents that

rights are for enjoyment and must be respected, enhanced and protected as demanded by the constitution. This sends a clear message that violation of rights will attract compensation.

114. In determining the level of award, the Court has to consider factors such as the torture inflicted; the circumstances of the violation and decided cases on the issue but bearing in mind that no case resembles the other. The court should therefore, consider what would be fair compensation in the circumstances of the case before it.

115. In the case of ***Lucy Wanjiku Mukaru (suing as the legal representative of Mukaru Ng'ang'a–Deceased) v Attorney General*** *[2018] eKLR* this court awarded general damages of Kshs 15 million for violation of rights and fundamental freedoms including torture and inhuman and degrading treatment. In ***Koigi Wa Wamwere v Attorney General*** the court awarded general Damages in the level of Kshs. 12 million and in ***John Muruge Mbogo v Chief of Defence Forces & another*** [2018] eKLR an award of Kshs. 7 million was made for similar violations. These cases were on conventional torture and did not include the aspect of deportation. In the more recent case of ***Moses Tengeya Omweno v Commissioner of Police & another*** [2018] eKLR which involved torture and unlawful extradition out of Kenya, the Court of Appeal awarded general damages of Kshs. 5 million.

116. In the present petition, the Petitioner's rights were not only violated but the violation continues as the Petitioner, a citizen, is forced to remain in Canada, which calls on this court to invoke the doctrine of continued violation. (See ***Federation of African Journalists & others v The Republic of The Gambia***;(SuitNo.ECW/CCJ/APP/36/15;JudgmentNo.ECW/CCJ/JUD/04/18) In the circumstances, I find an award of general damages of Kshs 7 million fair and reasonable.

117. Counsel for the Petitioner submitted that the Petitioner was entitled to the cost for the damaged house and relied on the affidavit of ***Edigar Monsey Oriedo*** which put the estimate cost at Kshs. 274,000. ***Mr. Bitta*** opposed this arguing that there was no such claim in the petition. He contended that the claim was in the nature of special damages and had not only to be pleaded but also specifically proved.

118. I agree with counsel for the Respondents that special damages must be pleaded and proved. This is the conventional wisdom in such special damages claims. However, the cost sought was a direct result of violation of the right to property arising from the actions of the Respondents. This was not anticipated and at the time of filing the petition this had not been ascertained. Moreover, the Respondents' counsel conceded that they were aware of the damaged house and sought leave to file a response to that affidavit but did not do so despite leave having been granted. It is my view that this court in exercise of its jurisdiction under Article 23 should be able to fashion a remedy that would be appropriate in the circumstances of this case. It is my view that the damage caused should be penalised and the estimate cost of repairs granted.

119. The last point I should address is who should bear the damages awarded. This is because the people of Kenya enacted a constitution that envisioned observance of the constitution and the law by all. Where overzealous public servants commit wanton violation of the constitution and the law, any awards arising from such violations should not be vested on the public. They should be borne by the responsible public officers themselves so that the public is shielded from such unnecessary costs.

120. In that regard therefore, it is my holding that damages and costs in this petition be borne by the Respondents jointly and severally to dissuade any motivation for continued assault on our constitution, democracy human rights and the rule of law. This is in my view in line with Article 259(1) (b) and (c) to advance the rule of law, human rights and fundamental freedoms in the Bill of Rights and development of the law.

Conclusion

121. In conclusion, having considered the petition, the responses, submissions, authorities relied on as well as the constitution and the law, I am satisfied that the Petitioner, a citizen was illegally held and later deported from the country. His rights and fundamental freedoms were also grossly violated as a consequence. His petition is merited and is therefore allowed. I make the following orders.

a. A declaration be and is hereby issued that the 1st Respondent, in purporting to cancel the Petitioner's citizenship, revoke and confiscate his passport or other identity documents, the declaration that he was a member of a prohibited class and a prohibited immigrant and the order for his removal from Kenya were made in violation of the Constitution hence his decision made on 6th February, 2018 is unconstitutional, unlawful, invalid null and void ab initio.

b. A declaration be and is hereby issued that the manner in which the Respondents conducted themselves resulting into the purported cancellation of the Petitioner's citizenship, revocation and confiscation of his passport or other identity documents and the declaration that he was a member of a prohibited class and a prohibited immigrant and his removal from Kenya were done in violation of the rule of law and in direct contravention of provisions of the constitution that guide each of the Respondents and was, therefore, an abuse of office.

c. A declaration be and is hereby issued that detaining the Petitioner without justification, and without informing him of the reasons for such detention, holding him incommunicado, in deplorable and inhumane conditions, threatening him with death and physical harm, denying him food and basic sanitation services, was a violation of the Petitioner's rights protected by the Constitution.

d. A declaration be and is hereby issued that the actions of the Respondents effectively infringed on the Petitioner's rights to dignity; property; family; rights of a detained, arrested or persons held in custody and all other rights that flow with the right to citizenship.

e. An order of certiorari be and is hereby issued quashing the 1st Respondent's declaration under Section 33(1) of The Kenya Citizenship and Immigration Act, 2011 dated 6th February 2018 declaring the Petitioner a non-citizen of Kenya or that his presence in Kenya was contrary to national interest.

f. An order of certiorari be and is hereby issued quashing the 1st Respondent's declaration under Section 43(1) of the Kenya Citizenship and Immigration Act, 2011 dated 6th February 2018 directing the removal of the Petitioner from Kenya.

g. An order of certiorari be and is hereby issued quashing Gazette Notice No Vol. CXX – No 15 issued on 30th January 2018 by the 1st Respondent, declaring the National Resistance Movement (NRM) to be a criminal organization.

h. An order of mandamus be and is hereby issued compelling the Respondents to immediately return to the Petitioner his Kenyan passport and any other identification documents taken from him.

i. The Petitioner is hereby awarded general damages of Kshs7 million for violation of his rights and fundamental freedoms to be borne by the 1st to 6th Respondents jointly and severally.

j. The Petitioner is awarded Kshs. 270,000 for the damage of his house to be borne by the 1st to 6th Respondents jointly and severally.

k. The 1st to 6th Respondents do bear costs of this petition jointly and severally.

Dated, Signed and Delivered at Nairobi this 14th Day of December 2018

E C MWITA

JUDGE