



Case Number:	Petition 94 of 2014
Date Delivered:	16 Aug 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Isaac Lenaola
Citation:	Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR
Advocates:	-
Case Summary:	<p><b>The High Court has jurisdiction to award compensation for commercial losses arising from violations of fundamental rights and freedoms</b></p> <p><b>Kenneth Stanely Njindo Matiba v Attorney General</b></p> <p><b>Petition No 94 of 2014</b></p> <p><b>High Court at Nairobi</b></p> <p><b>Constitutional and Human Rights Division</b></p> <p><b>Isaac Lenaola, J</b></p> <p><b>August 16, 2017</b></p> <p><b>Reported by Beryl A Ikamari</b></p> <p><i><b>Jurisdiction</b>-jurisdiction of the High Court-the High Court's jurisdiction in the enforcement of fundamental rights and freedoms-claim in which</i></p>

*compensation was sought for commercial losses arising from human rights violations-whether the High Court had jurisdiction to provide relief for commercial losses allegedly arising from violations of fundamental rights and freedoms-Constitution of Kenya 2010, articles 22 & 23.*

**Constitutional Law**-*fundamental rights and freedoms-freedom of movement, right to personal liberty and freedom from torture, cruel and inhuman treatment-circumstances in which fundamental rights and freedoms would be said to have been violated-detention without trial, denial of medical treatment, solitary confinement, exposure to cold weather and exposure to condemned prisoners whose behaviour included continuous shouting and screaming.*

**Constitutional Law**-*enforcement of fundamental rights and freedoms-remedies for violations of fundamental rights and freedoms-compensation for commercial losses arising from violations of fundamental rights and freedoms-effect of intervening factors that could have contributed to the commercial losses-assessment of the extent of liability for the commercial losses.*

### **Brief facts**

After a press conference in which he agitated for a repeal of section 2A of the then Constitution and multi-party democracy, the Petitioner was arrested on July 4, 1990 and locked up at Lang'ata Police Station. He was served with a detention order which stated that he was detained because he was involved in subversive activities aimed at overthrowing the Government and it was necessary to detain him in order to preserve public security.

During his detention, the Petitioner stated that he was subjected to torture, inhuman and degrading treatment. He said that he slept on the floor and was exposed to cold weather without having warm and protective clothing. He added that he was subjected to solitary confinement for more than five months and that he was transferred to a block where there were condemned prisoners who

engaged in loud, tortured screams and shouts throughout the day and night, which affected him psychologically.

The Petitioner stated that while on detention, he was subjected to a poor diet which was unsuitable for his state of health. He explained that he had a mild blood pressure condition prior to his detention which was poorly managed during detention and it escalated to a stroke from which he did not fully recover.

The Petitioner stated that due to the detention and poor health, he was no longer physically fit and his businesses suffered greatly causing him immense financial loss. He was no longer able to dedicate time and make crucial decisions in the interests of his business empire.

### **Issues**

1. Whether the Court had jurisdiction to entertain a claim based on articles 22 and 23 of the Constitution in which it was alleged that commercial losses had been caused by violations of fundamental rights and freedoms.
2. Whether the Petitioner's fundamental rights and freedoms were violated in his arrest and subsequent detention.
3. Whether the Respondent was liable for the deterioration of the Petitioner's business portfolio which allegedly resulted from the Petitioner's arrest, detention and failing health.
4. What remedies was the Petitioner entitled to?

### **Held**

1. The Petition was about alleged violations of sections 70(a) & (b), 72(1), 74 (1), 78 (1), 79 (1), 80(1) and 81 (1) of the repealed Constitution in relation to the Petitioner and his business enterprise. Under section 84(2) of the repealed Constitution, an order for compensation was among the forms of redress available where a party proved

- that his or her rights had been infringed. It was irrelevant whether the Petitioner's claim possessed characteristics of a commercial nature as long as it was a claim seeking to enforce the Bill of Rights.
2. The right to freedom of movement and personal liberty were not absolute and they could be limited in circumstances where a person was held in lawful detention. Detention without trial was sanctioned under the repealed Constitution.
  3. Regulation 6(1) of the Public Security (Detained and Restricted Persons) Regulations, 1978, gave the relevant Minister power to order the detention of a person, if the Minister was satisfied that such action was in the interest of preservation of public security. It was in the exercise of those powers that the impugned detention order was issued.
  4. Under section 72 of the repealed Constitution, a person was to be held in police custody for at least 24 hours for a misdemeanour and for 14 days for a capital offence before being taken to Court. The Petitioner was held for one night before the detention order was issued and therefore his rights under that provision were not violated.
  5. Given that the right to personal liberty was not infringed and the existing law on detention was properly applied, the limitations to the freedoms in sections 70, 78, 79 and 80 of the repealed Constitution were justifiable under the circumstances.
  6. Not every prison condition amounted to torture and inhuman treatment especially where treatment was equally experienced by other prisoners. However, there were peculiar circumstances in the Petitioner's detention. For example, he was subjected to solitary confinement and was held in a block where condemned prisoners screamed and shouted at each other from dusk to dawn. Those conditions inflicted deep psychological wounds. There was an admission from the Respondent in relation to solitary confinement and the Petitioner's stay in the block near the condemned prisoners. Therefore, the Petitioner was

- subjected to torture, cruel and inhuman treatment which affected his physical, mental and psychological well-being.
7. There were allegations that prison authorities administered poison to the Petitioner's food. The allegations of food poisoning were not sufficiently proved by the Petitioner.
  8. The question as to whether the Respondent omitted to take key steps to guard against deterioration of the Petitioner's health was of relevance. There was evidence that when the Petitioner exhibited signs of illness a doctor was allowed to visit him and administer medication and collaboration between the prison doctor and the Petitioner's doctor was allowed. Despite there being such allowances, there was scanty evidence of actual collaboration between the doctors and there were indications that the prison doctor was hardly availed to check on the Petitioner's health.
  9. An unfortunate series of events contributed to the gravity of the Petitioner's illness. The Petitioner's blood pressure readings were not regularly recorded and the Respondent failed to yield in a timely manner to advice that a CT scan needed to be done in the Petitioner's case. Even after the CT scan which showed bleeding in the Petitioner's brain was done, the Respondent failed to allow the Petitioner to commence emergency treatment in a bid to revive his health. Therefore, to the extent that he was denied medical treatment, the Petitioner was subjected to torture, cruel and inhuman treatment.
  10. A company is a separate legal entity from its shareholders and it ought to sue in its own name. Generally, a director or shareholder would be unable to sue for a loss suffered by the company. Although a shareholder is a distinct entity from a company, a shareholder can claim for loss suffered by the company where it is proved that the loss is also a personal loss on the shareholder.
  11. The Petitioner's medical condition which

was triggered during detention greatly affected the business acumen, attention, focus, energy, guidance and leadership he was giving his companies and without him at the helm, they deteriorated and some eventually collapsed. Other factors such as a slump in the tourism industry also affected his businesses. It was also noteworthy that the Petitioner held shareholding amounting to 29%, 50%, 68% or 96% and the role of the other shareholders was not explained.

12. The Petitioner would not be entitled to the entire cost of refurbishing his hotels (Safari Beach Hotel) as the deterioration in the business was not wholly due to his absence but general business and trade conditions were also a potential factor.
13. Whereas the Petitioner made a claim for the entire worth of his collapsed business, amounting to Kshs.4,726,332,042.91, there were factors mitigating against 100% liability on the part of the Respondent. Compensation amounting to 20% of the Petitioners claim, being Kshs.471,664,258.50 based on a fair and reasonable assessment of the claim was appropriate.
14. Exemplary damages were not awardable in situations of changed political circumstances. The Court would therefore not award exemplary or aggravated damages.

*Petition allowed.*

*Orders:-*

1. *A declaration, to the effect that the Petitioner's right to be free from torture, cruel and inhuman treatment under section 74(1) of the repealed Constitution was violated by agents of the State, was issued.*
2. *The Petitioner was awarded Kshs. 15,000,000/= as general damages for violations of the right to freedom against torture, degrading and inhuman treatment.*
3. *The Petitioner was awarded Kshs. 18,146,631.52/= as the cost of medical*

	<p>expenses.</p> <p>4. <i>The Petitioner was awarded Kshs.471,664,258.50/= as compensation for financial losses occasioned to him through collapse of his businesses and financial ventures.</i></p> <p>5. <i>For avoidance of doubt no other damages or costs were awarded to the Petitioner. The total sum awarded as damages was Kshs. 504,810,890.02/=</i></p> <p>6. <i>As the successful litigant, the Petitioner was awarded costs of the suit plus interest.</i></p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.94 OF 2014**

**BETWEEN**

**KENNETH STANLEY NJINDO MATIBA.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Kenneth Stanley Njindo Matiba, filed this Petition alleging violation of his fundamental rights and freedoms as enshrined in **Sections 70(a) & (b), 72(1), 74 (1), 78 (1), 79 (1), 80(1) and 81 (1)** of the Repealed **Constitution**. The facts and events leading to the filing of the Petition revolve around the arrest and subsequent detention of the Petitioner by the Government of Kenya. The Petitioner alleges that the said arrest and detention was unlawful and that he was subjected to inhuman and degrading treatment leading to a complete breakdown in his health and untold losses to his very large business portfolio.

2. In his Third Amended Petition dated 15<sup>th</sup> September 2016, the Petitioner therefore seeks the following orders:

**1) A declaration that the Petitioner's fundamental rights and freedoms guaranteed under Sections 70 (a) & (b), 72 (1), 74(1), 78(1), 79 (1), 80 (1) and 81(1) of the repealed Constitution were violated by the Government of Kenya by his unlawful arrest and subsequent detention, torture, inhuman and degrading treatment meted out to him by the said Government during his detention.**

**2) A declaration that the Petitioner is entitled to the payment of compensation by way of damages and costs by the Government of Kenya for the violation of his fundamental rights and freedoms guaranteed under the aforementioned provisions of the repealed Constitution and for the above-mentioned consequences of such violation.**

**The same are as follows:-**

**(a) Special damages**

**(i) Medical expenses-Kshs.18,146,631.52**

**(ii) Financial loss amounting to Kshs.4,726,332,042.91 as at the date of filing the suit.**

**(iii) Cost of repair of Safari Beach Hotel amounting to Kshs.347,987,146.90 as at 12<sup>th</sup> February**



2013.

b) **General damages**

c) **Exemplary damages**

d) **Aggravated damages**

e) **Costs and interest on (a) to (d).**

**3) Judgment be entered for the Petitioner against the Respondent for such damages, costs and interest.**

### **Petitioner's Case**

3. The Petitioner's case is as contained in his Third Amended Petition dated 15<sup>th</sup> September 2016, affidavits sworn by himself on 28<sup>th</sup> February 2014, supplementary affidavit dated 11<sup>th</sup> June 2014, a Replying affidavit dated 13<sup>th</sup> May 2006, a further affidavit by Dr. Dan Gikonyo sworn on 12<sup>th</sup> November 2015, medical report (P.Exh.1) dated 17<sup>th</sup> December 2013, Medical report marked as (P.Exh.1) dated August 28<sup>th</sup> 2014, Mr. Dan Gikonyo's and Mr. Lawrence Riungu's oral evidence, financial reports marked as KSNM 1-20 dated 11<sup>th</sup> June 2014, financial report marked as (P.Exh.3) and supplementary financial report marked as (P.Exh.4) dated 11<sup>th</sup> June 2014 and 1<sup>st</sup> October 2014, respectively, and the Petitioner's written submissions dated 12<sup>th</sup> February 2016 and 3<sup>rd</sup> August 2016 respectively.

4. It is the Petitioner's claim that together with one Charles Wanyoike Rubia, they convened a press conference on 3<sup>rd</sup> May, 1990, in Nairobi and demanded *inter alia* the repeal of **Section 2A** of the then **Constitution of Kenya** (now repealed), the dissolution of Parliament and the holding of a fresh general election. After the press conference, they were allegedly condemned, threatened and vilified by stalwarts of the Kenya African National Union (KANU) which was the ruling party at the time. Subsequently, the Petitioner states that, they planned to hold a public rally at Kamukunji grounds in Nairobi on 7<sup>th</sup> July, 1990, in order to explain to members of the public the merits of a multi-party system of Government and also to answer the negative accusations which had been made against them.

5. The Petitioner further states that he did not even get a chance to attend the said planned meeting because he was arrested on 4<sup>th</sup> July, 1990 and locked up at Langata Police Station. On the same day, he was served with a detention order pursuant to the **Preservation of Public Security Act Cap 57 Laws of Kenya** and **Regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulations, 1978** (now repealed). The detention order stated that the reason for his detention was that he was involved in subversive activities aimed at overthrowing the Government of Kenya and that therefore his detention was necessary in order to preserve public security. The Petitioner however claims that his arrest and subsequent detention was a consequence of his firm political stand and had nothing to do with the reason given by the Government.

6. The Petitioner furthermore alleges that following his arrest, he was detained in various prison facilities in Kenya and as his health deteriorated, he was hospitalized at Nairobi Hospital on 4<sup>th</sup> June, 1991.

7. In submissions on this aspect of his Petition, it is the Petitioner's case that his arrest and subsequent detention were a violation of his fundamental rights and freedoms guaranteed by the repealed Constitution such as the rights to have a political opinion, right to liberty and security, freedom of conscience, expression, assembly and association as well as his freedom of movement. In a nutshell, he

posits that he was merely exercising his constitutional rights by calling for the re-introduction of multi-party democracy and the said acts did not in any way constitute a danger to public security.

8. The Petitioner also claims that during his detention, he was subjected to torture, inhuman and degrading treatment contrary to **Section 74** of the repealed **Constitution** and in support of this claim, he states that he was forced to sleep on the floor for majority of the time he was in detention; that he was denied warm and protective clothing and was thus exposed to severe cold weather at night and that he was subjected to poor diet which was nutritionally unsuitable for his state of health.

9. He further claims that during his detention, he was allowed limited and short visits with his family in a hangar at Wilson Airport in the presence of security officers and prison warders. In addition, that he was denied access to newspapers and the radio and was not allowed to talk to anyone. He was also allegedly held in solitary confinement for over five months and was at one time transferred to a block next to one where condemned prisoners resided and which prisoners were given to loud, tortured screams and shouts throughout the day and night which actions affected him psychologically.

10. The Petitioner in addition states that prior to his detention, he suffered from mild high blood pressure for which he was receiving treatment and was able to manage the condition with a good diet and regular exercise. However, he states that upon his detention, he was denied proper medical treatment despite his deteriorating health leading to an escalation of the blood pressure. He adds that his personal doctor was denied access to him and instead, he was visited by a prison doctor who according to him, administered sub-standard treatment which was of no use at all. That it was not until 4<sup>th</sup> June, 1991 after his illness had by then greatly aggravated that he was finally taken to Nairobi Hospital and admitted. It is at that point that it transpired that he had suffered a severe and debilitating stroke from which he has never recovered.

11. The Petitioner also states that despite his prolonged treatment which ensued after that, his condition worsened with time and continues to deteriorate, as a result of which, he has been confined to a wheelchair. He submits that he is in constant need of medical care leading to vast medical expenses.

12. The Petitioner has further contended that due to the detention and the resultant ill health, he is no longer as physically fit as he was and his business interests have greatly suffered causing him immense financial damage. He submits in that regard that whereas he had previously enjoyed good health and that his business flourished due to his great business acumen, attention, focus and energy when his health deteriorated, his businesses were greatly affected as he could no longer dedicate his time and also participate in crucial decision making in the interests of his business empire.

13. In particular, he argues that as a result of the illness suffered following his detention; five (5) of his businesses have had to be sold to settle accumulating liabilities. The said businesses are: Alliance Developments Limited, Alliance Hotels Limited, NaroMoru River Lodge Limited, Hillcrest School Limited and Hillcrest Secondary School Limited which were put on receivership by the Barclays Bank (K) Limited and eventually sold off to pay debts owed to the bank.

14. The Petitioner also submits that he was an active participant in the stock market and owned substantial shares in Carbacid Investment Ltd, East African Breweries Ltd, CMC Holdings Ltd, East African Portland Cement which shares he was forced to sell to offset liabilities arising from the poor performance of the hotel and school companies.

15. The Petitioner further states that he was unable to file this Petition earlier as he did not expect any justice during the tenure of retired President Moi and that his poor health also contributed to the delay in

filing this Petition and so he was only able to file his claim in late 2013.

16. It is in this context of the alleged ill treatment during the time when he was in detention that he seeks appropriate relief for the infringement of his constitutional rights and freedoms.

17. In addition to the above, I note that the Petitioner called witnesses whose evidence can be summarized as here below

18. Dr. Dan Gikonyo (PW1), testified that he was and has been the Petitioner's doctor prior to and after he was released from detention. According to him, the Petitioner suffered from mild blood pressure prior to his detention, which was controlled by regular consultations and medication and a proper lifestyle consisting of regular exercise and proper diet.

19. PW1 testified further that the Petitioner's health was adversely affected by his detention due to lack of prompt and proper medical care and that the Petitioner became unwell during detention wherein he started experiencing severe headache and vomiting. When he was visited by a prison doctor, he appeared confused and could not tell exactly what had happened. He stated that the Petitioner was disoriented for a few more days until he was taken to the hospital on 2<sup>nd</sup> June, 1991, for a CT scan, which revealed that the Petitioner needed urgent and professional medical care.

20. In his further evidence, PW1 made reference to the prison medical records which contained the history of the Petitioner's treatment. From the said records, PW1 observed that the Petitioner's blood pressure was not well controlled at the time when he was in prison. In particular, he referred to the recording of 11<sup>th</sup> April, 1991, which read as 145/110 and another in the same month which was 160/100. He urged that such blood pressure levels are way above the normal rate which is 140/80. Further, he submitted that according to the prison records, no blood pressure readings were done or recorded between late April, 1991 and 26<sup>th</sup> May, 1991 despite the previous high readings recorded in the month of April 1991. Accordingly, PW1 testified that in his view, the Petitioner was neglected and denied medical care while in detention.

21. In a bid to prove further neglect on the Petitioner, PW1 referred to the prison records by a prison doctor on 26<sup>th</sup> May, 1991 where the doctor noted as follows, *"called to see the patient on rather urgent basis. Found extremely agitated, restless and rather incoherent....will arrange CT scan today if possible."*

He testified that the recommended scan was not done. Similarly, on 29<sup>th</sup> May, 1991, another prison doctor made a similar recommendation after realizing that the Petitioner continued to have bitemporal headaches. Again, according to PW1, the said doctor's advice was ignored until 2<sup>nd</sup> June, 1991 when the Petitioner was finally taken to Nairobi Hospital to have a CT scan conducted.

22. PW1 added that even after the scan revealed that the Petitioner had a bleeding of the brain, he was nonetheless sent back to prison until 4<sup>th</sup> June, 1991 when his condition had tremendously deteriorated and was then admitted at Nairobi Hospital. It is at that point that PW1 took over his treatment and soon thereafter, PW1 accompanied the Petitioner for further treatment in London upon which it was confirmed that he had a bleeding brain vessel as a result of which he suffered extensive left-sided brain damage leading to difficulties in speech and movement. The Petitioner thereafter returned to Kenya in early 1992 but still had significant right-sided weakness due to the stroke.

23. According to PW1, the brain damage suffered by the Petitioner is irreparable and with increasing age, he has become weaker and is now confined to a wheel-chair. He submits that even though the Petitioner ran for the presidency in 1992, he was physically and medically unfit to run for such office.

24. Mr. Lawrence Riungu (PW2), detailed the financial loss suffered by the Petitioner as a result of his inability to manage his vast business portfolio. He submitted that the Petitioner's loss arose from four (4) categories namely: financial loss from publicly traded shares of Kshs.329,388,186.38/-; financial loss in privately held shares of Kshs.2,180,532,341.48/-; loss in commercial and real estate of Kshs.2,006,072,250.00/- and loss in income from dividends from private and public owned shares of Kshs.210,339,265.05/-. With regard to the public traded shares and commercial and real estate properties, PW2 testified that the Petitioner was forced to dispose of the said assets, in order to pay off his creditors. On the other hand, the loss on the private owned shares was tabulated by getting the margin between the companies' current performance and the expected performance had the Petitioner continued to give his leadership to those companies. Further, with the disposal of shares and the declining performance in some companies, the Petitioner lost his expected amount in dividends.

25. It was PW2's further testimony that the Petitioner's companies borrowed to fund their day to day operations and stated that borrowing is not risky if done prudently. He emphasized that the Petitioner's companies started defaulting in their loans after the detention of the Petitioner and he attributed this fact to the absence of the Petitioner and leadership skills. For the reasons above, the Petitioner seeks the prayers detailed out earlier in this Judgment.

### **Respondent's case**

26. In response to the Petitioner's case, the Respondent filed Grounds of Opposition dated 24<sup>th</sup> September, 2014. The Respondent also relies on written submissions dated 9<sup>th</sup> August 2016 as well as affidavits by Ambassador Monica Juma sworn on 29<sup>th</sup> May 2015, Joshua M. Yuma sworn on 21<sup>st</sup> October 2015, and his further affidavit sworn on 4<sup>th</sup> December 2015. In addition, he relies on David Gikonyo's and Patrick Mwaniki's affidavits both sworn on 9<sup>th</sup> December 2015.

27. The Respondent from the onset contests this Court's jurisdiction to determine the Petitioner's claim. He contends in that regard that, the Petition as framed is fatally defective in that the Petitioner has misjoined a commercial matter with a constitutional claim against the guidelines provided in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)**. His position is that, unlike the **Mutunga Rules, Order 11 to 20 of the Civil Procedure Rules, 2010**, provides a comprehensive procedure on how to handle documentary evidence hence this Court is ill equipped to interrogate the massive evidence that has been placed before it. Consequently, the Respondent submits that all such evidence of a commercial nature and all related claims thereto should be expunged from the record.

28. His further contention is that a shareholder has no ownership or right to properties held by the company since a company is a separate legal entity distinct from its shareholders. As such, he argues that one cannot sue or petition for loss of properties of a limited liability company but one's only cause would be to claim that his 'property' in form of shares has been put to risk. In submitting so, the Respondent relies on the decision in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR**.

29. The Respondent also distinguishes the United Kingdom case of **Lee v Sheard [1956] 1 QB** which has been relied upon by the Petitioner in support of his claim that damages ought to be awarded for the loss incurred by his companies. In doing so, the Respondent contends that, unlike in the United Kingdom, the statute law governing companies in Kenya specifically particularizes the rights which a shareholder has over the assets of a company thereby clearly separating the rights due to a limited company from rights due to its shareholders. Consequently, the Respondent postulates that all the companies which the Petitioner is associated with or has been affiliated to, ought to sue in their own

names as they are separate legal entities with their own distinct rights. In advancing this argument, the Respondent further relies on the Court of Appeal decision in ***Gitobu Imanyara & 2 Others v Attorney General Civil Appeal No. 98 of 2014; [2016] eKLR*** which he claims has settled the law by holding that a shareholder of a company cannot bring an action for losses and damages suffered by the company.

30. As an alternative argument, the Respondent contends that any deterioration of the Petitioner's business portfolio cannot in any way be attributed to the Respondent and further, that the Petitioner was lawfully detained under the then existing legal regime governed by the repealed **Constitution** and the **Preservation of Public Security Act** as well as the **Public Security (Detained and Restricted Persons) Regulations**. Further, that he (the Respondent) has no knowledge of the allegations of torture, harassment, inhuman and degrading treatment and submits that there was no violation of the Petitioner's rights as enshrined in **Sections 70 (a) and (b), 72 (1), 74, 78(1), 79(1) and 80(1)** of the repealed **Constitution** as alleged. In addition, he contends that the Petitioner was not ill-treated during detention and that he was accorded necessary and requisite medical care whenever he was in need of such care. Consequently, the Respondent affirms that the Petitioner's failing health cannot be attributed to any action or inaction on the part of the State and that the Petitioner's inability to manage his companies was not caused by the Respondent.

31. Further, and on the issue of the Petitioner's alleged poor health, the Respondent contends that the Petitioner emerged from detention as an able man who was in good health and indeed his doctors confirmed so. He even stood as a candidate for the office of presidency twice and in doing so, the Respondent submits that he ran his political campaigns with vigour just as he would have ran his businesses. That he was in a political party, 'Ford', which he was funding before funding his own party, 'Ford Asili', which he managed from his own funds. According to the Respondent therefore, the implication of running a political party and the Petitioner's political campaigns, must have consumed a lot of his financial fortune hence the subsequent dismal performance of the affected companies.

32. It is also the Respondent's case that the Petitioner had admitted that he had high blood pressure and dyspepsia since the 1960s and was a cigarette smoker before quitting in 1986 and that the Petitioner has been undergoing the normal process of aging and it is not possible to attribute his health problems to the detention solely.

33. In his further submissions, the Respondent opposes the Petitioner's argument that his companies' performance was negatively affected by his detention. In doing so, he relies on a tax status report on the Petitioner's business portfolio which comprises of the Petitioner's corporate and individual tax returns. He asserts that the said report indicates that several of his companies declared profits and positive turnovers in the period between 1985 and 1995 and therefore he questions why there was no interruption in the performance of the companies in the said period yet the Petitioner traces the genesis of his financial loss to the period between July 1990 and June 1991 when he was in detention.

34. In addition, the Respondent submits that since the Petitioner's businesses mainly dealt with tourism which has been a volatile sector of the Kenyan economy, many internal and external factors were likely to have affected the performance in that industry. He added that, Kenya's tourism industry has been impacted negatively by issues such as insecurity, economic performance, state of infrastructure, Kenya's competitiveness compared to other destinations and the governing legal framework. In his submissions, the Respondent relies on a Statistical Abstract from the years 1985-1995 to demonstrate the trends in tourism at that time which shows that the sector was not on a consistently rising trend and hence the Petitioner's businesses could have been genuinely affected negatively in their operations.

35. In addition to the above, the Respondent called witnesses whose evidence can be summarized as

herebelow.

36. In his testimony, Joshua Maweu Yuma (DW2), an Assistant Commissioner of Prisons testified that the Petitioner was not ill-treated during detention but rather, he was accorded the necessary and requisite medical care. He submitted that all prisoners are treated equally and most of them sleep on mattresses on the floor and are allowed visitation by family. In this regard, he submitted that the Petitioner was allowed visitation including exchange of letters with his family and further that the act of the Petitioner's sleeping on the floor was not an exclusive one but a general occurrence in prison.

37. Patrick Mwaniki (DW2), an economist and statistician, observed that the Petitioner had demonstrated that his business dealt mainly with tourism. It was his evidence in that regard that tourism industry has been a very volatile sector of the Kenyan economy which has been affected on many occasions by events within and outside the country. As a result therefore, he asserted that some businesses would as a matter of course incur losses.

38. The evidence by David Gikonyo (DW3), a supervisor at the Kenya Revenue Authority was to the effect that when a company files returns, it means that it is trading on a loss or profit basis. Further, when a company pays tax, it means that it is making a profit. In his analysis, for the period between 1985 and 1995, the companies associated with the Petitioner faithfully filed tax returns.

#### **Determination**

39. Flowing from the foregoing summary of the Parties' cases, the following issues arise for determination:

- a) ***Whether this Court has jurisdiction to entertain the Petitioner's claim.***
- b) ***Whether the Petitioner's fundamental rights and freedoms were infringed on account of his arrest and subsequent detention.***
- c) ***Whether, as a result of the Petitioner's arrest and detention and his failing health, his business portfolio deteriorated and that the Respondent should thereby be held liable.***
- d) ***What remedies should be issued, if at all"***

#### **(a) Whether this Court has jurisdiction to entertain the Petitioner's claim**

40. The Respondent disputes this Court's jurisdiction to entertain the Petition before me on the basis that it is largely premised on a commercial claim and no constitutional question arises for determination. That such a claim should be resolved at the Commercial and Admiralty Division of the High Court as opposed to the Constitutional and Human Rights Division. The Respondent also urges that, as much as the Petitioner's claim contains allegations of infringement of fundamental rights and freedoms, the Petitioner has misjoined a commercial claim on one hand with the alleged violations of rights on the other hand and urges that those two limbs are severable and should be determined separately.

41. It is also the Respondent's case that **Articles 22 and 23** of the **Constitution** and the **Mutunga Rules** do not envisage a situation where a commercial claim should be lodged alongside a claim for an individual's violation of rights. Furthermore, he urges the point that this Court is not equipped to entertain commercial claims as **Orders 11 to 20** of the **Civil Procedure Rules, 2010** provide comprehensive procedures for the handling of documentary evidence in contrast to the **Mutunga Rules**.

Further, that the inclusion of any evidence of a commercial nature will greatly prejudice the Respondent and therefore, the Court should expunge the said evidence from the record.

42. The Petitioner on the other hand submits that this Court's jurisdiction has been properly invoked and that **Section 84(1)** of the repealed **Constitution**, on which this Petition is anchored, does not impose any limit on the nature of claim that a person can bring alleging violations of the provisions envisaged therein.

43. In that regard, the beginning to the determination of the jurisdiction question is **Section 84 (1)** of the repealed **Constitution** which provided as follows:

***“Subject to subsection (6), if a person alleges that any of the provisions of Section 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.”***

44. The scope of **Section 84(1)** was explained in the case of **John Kipng'eno Koech & 2 Others v Nakuru County Assembly & 5 Others, Petition 23 of 2013** as consolidated with **Petition No. 25 of 2013 [2013] eKLR** wherein Emukule J pronounced himself as follows:

***“7.02 The case of ANARITA KARIMI NJERU [1979] KLR 154 settled this proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.***

***However as recent decisions have shown, that the case of Annarita Karimi Njeru though laying an important principle must be seen in the context of Section 84(1) of the Constitution of Kenya (1969 – Consolidated) and now repealed). That section provided –***

***“84(1) Subject to subsection (6), if a person alleges that any of the provisions of Section 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.”***

***Locus standi under Section 84(1) was established in two respects. Firstly, if the contravention related to the Petitioner personally, and Secondly, if the contravention related to a detained person. Those were the only instances where locus standi was conferred upon an individual, under the said Section 84(1) of the repealed Constitution. That is the extent in my humble view of the authority of ANARITA KARIMI NJERU.”***

45. I agree with the learned Judge and it is not in doubt that this Petition stems from perceived breaches and infringements of **Sections 70(a) & (b), 72(1), 74 (1), 78 (1), 79 (1), 80(1) and 81 (1)** of the repealed **Constitution** directly as against his person and as against his business enterprises by fact of the said violations against him. **Section 84(2)** of the repealed **Constitution** also recognized that the Court may give appropriate redress including an order for compensation where a party successfully proves that their rights have been infringed. From the materials that have been placed before me I am certain that I will be able to determine the appropriate redress to issue should the Petitioner's claim succeed. It is therefore irrelevant at this stage whether the materials possess the characteristic of a commercial nature as long as the claim before the Court seeks to protect or enforce the Bill of Rights.

46. In addition to the above, it is not in doubt that the Petitioner has the duty in law to prove all his allegations to the required standard with such evidence as is admissible. If the evidence falls short of the legal threshold, his claims will fail.

47. In conclusion, on this issue, it is my finding that the Petition is properly before me and this Court has the jurisdiction to determine it on the merits.

**(b). Whether the Petitioner's fundamental rights and freedoms were infringed on account of his arrest and subsequent detention.**

48. The Petitioner alleges that his fundamental rights and freedoms guaranteed under **Sections 70(a) & (b), 72(1), 74 (1), 78 (1), 79 (1), 80(1) and 81 (1)** of the repealed **Constitution** were violated by the Government of Kenya by his arrest and detention, which he claims to have been unlawful. He also alleges that he suffered inhuman and degrading treatment while in detention. The Respondent on his part urges that the Petitioner's arrest and detention was lawful and in accordance with **Section 85** of the repealed **Constitution** as well as the **Preservation of Public Security Act** and the **Public Security (Detained and Restricted Persons) Regulations**.

49. In the above regard, it is not in dispute that the Petitioner was arrested on 4<sup>th</sup> July, 1990 and thereafter detained on the same day until release on 4<sup>th</sup> June, 1991. The Petitioner claims in that context that he was arrested because of his persistence in calling for the repeal of **Section 2A** of the repealed **Constitution** which action would have in essence introduced a multi-party democracy. He contends that as a result of his firm political stand, he and his family were harassed by the Government and that prior to his arrest, he was under constant police surveillance until he was eventually arrested on the evening of 4<sup>th</sup> July 1990 and later served with a detention order on or about 10.00pm.

50. I note in the above context that the detention order aforesaid was issued pursuant to the **Preservation of Public Security Act, Cap 57** and the **Public Security (Detained and Restricted Persons) Regulations** (repealed) and was signed by the then Minister of State in the Office of the President, Mr. Jackson Angaine. The said Order was supplied to this Court by the Respondent as an annexure marked **JY2** in the Replying Affidavit of Joshua M. Yuma dated 4<sup>th</sup> December 2015. The detention order was to the effect that the Petitioner had been involved in subversive and illegal activities aimed at overthrowing the Government of Kenya. The Petitioner was also said to have been promoting the holding of an unlawful and illegal public meeting that was to take place at Kamukunji Grounds, Nairobi, on 7<sup>th</sup> July, 1990 where violence and anti-government activities would have resulted. The Petitioner was also said to have aligned himself to foreign elements with the purpose of discrediting and maligning the Government of Kenya. According to the Order, the Petitioner's detention was therefore necessitated by the said allegations of his involvement in anti-government activities and it was in the interest of public security to detain him. In particular, the relevant parts of the detention order read:

***"...You have been involved in subversive activities aimed at undermining and overthrowing the Government of Kenya...You have associated yourself and promoted the aims and objectives of illegal and subversive body under the name and style of MWAKENYA...Pursuant to the said aims and objectives you have involved yourself in organizing and promoting an unlawful and illegal public meeting at KAMUKUNJI GROUNDS, Nairobi on 7<sup>th</sup> July, 1990 whereat violence and other anti-government activities would result. ....You have further, organized and recruited touts, matatu operators and musicians to record, produce and distributes editions of subversive matter in the form of musical cassettes whose contents are calculated to incite and promote discontent, disaffection, ill-will and hostility among the people of Kenya"***



51. On his part, the Petitioner contends that the detention order was false as he was not part of any illegal movement neither was he involved in any illegal activities. He further states that he cancelled the planned public rally that was to take place at Kamukunji grounds after the Government had denied him a license and hence the accusations levelled against him were false and malicious. It is on that basis that he claims that his arrest and subsequent detention were contrary to various pertinent provisions of the repealed **Constitution** namely; **Sections 70(a) & (b), 72(1), 78(1), 79(1) and 80(1)**. For clarity, the said Sections provided thus:

**Section 70.**

***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"***

***(a) Life, liberty, security of the person and the protection of the law.***

***(b) Freedom of conscience, of expression and assembly and association.***

**Section 72.**

***(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following circumstances...***

**Section 78.**

***(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.***

**Section 79.**

***(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 (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondences.***

**Section 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.***

52. The above provisions speak for themselves and in addition, the Petitioner has also invoked **Section 81(1)** of the repealed **Constitution** which protected and granted freedom of movement to all persons. However, **Section 81(2)** gives circumstances under which that freedom of movement may be limited.

For clarity, that Section provided:

***“Any restriction on a person’s freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.” [Emphasis added]***

53. It was the law then, as I understand, it that the right and freedom of movement as well as the right to personal liberty under **Section 72** above are not absolute and would have been limited in circumstances such as when a person is held in lawful detention. Indeed, the Respondent has correctly argued that detention without trial was sanctioned under the repealed **Constitution** as was the holding in the Court of Appeal's decision in the case of ***Koigi Wamwere v Attorney General, Nairobi Civil Appeal No. 86 of 2013; [2015] eKLR***. In that case, the Petitioner was detained under the then existing legal regime and by virtue of the said detention, some of his rights and freedoms such as liberty and freedom of movement were automatically limited, a fact the Court of Appeal found to be lawful. I take the same view.

54. The Petitioner also questions the legality of his arrest and submits that it was unjustified, since according to him, the sole reason for his arrest was due to the firm political stand that he had taken, which was a mere exercise of his freedom of expression, assembly and association as well as his freedom of conscience which were guaranteed under the repealed **Constitution**. The Respondent on his part urges that the arrest and subsequent detention were justified in the interest of preservation of public security. In addressing that issue, it is difficult for the Court, to try and deduce the true motive of the arrest without engaging in speculation and I shall therefore be guided by the law and the materials that have been placed before me in doing so. I also note that the detention order, partly quoted earlier in this judgment, particularizes the official reasons that necessitated the arrest of the Petitioner. Whereas the Petitioner has denied those accusations and states that they are false and malicious, I note that **Regulation 6(1) of the Public Security (Detained and Restricted Persons) Regulations, 1978**, gave the relevant Minister power to order the detention of a person, if the Minister was satisfied that such action is in the interest of preservation of public security. It is in the exercise of those powers, that the impugned detention order was issued.

55. In particular, **Regulation 6** provided:

***“(1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, over any person, he may order that that person shall be detained.***

***2. Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.***

***3. The Minister may at any time revoke a detention order.”***

56. Until its repeal by Parliament the preservation of **Public Security Act** and its regulations was the operative as regards the detention of a person. I cannot by this Judgment declare it to be unlawful because I have not been asked to do so. The **Koigi Wamwere** decision also settled that question.

57. I chose to address the question of the Petitioner’s detention order in *substantio* because a lot was made of it in submissions. In addition, under **Section 72** of the repealed **Constitution**, a person was to be held in police custody for at least 24 hours for a misdemeanour and for 14 days for a capital offence before being taken to Court. The Petitioner was held for one night before the detention order was issued

and so I do not see how his rights under that Section were violated.

58. Once the right to personal liberty was not infringed and once I have found that the existing law on detention was properly applied, the limitations to the freedoms in **Sections 70, 78, 79** and **80** of the repealed **Constitution** can only be held to be justifiable in the circumstances. I will however determine the claim of violation of the right not to be subjected to torture, inhuman and degrading treatment separately and in *extenso* for reasons to be seen herebelow.

*Determining the merits of the Petitioner's allegations of torture, inhuman and degrading treatment.*

59. The Petitioner has painstakingly led the Court through how he was allegedly subjected to torture, inhuman and degrading treatment while in detention. In particular, the Petitioner claims that upon his arrest and detention, he was forced to sleep on a bare concrete floor for long periods of time before finally being provided with a mattress. It is his contention that as a result of the poor sleeping conditions, he was subjected to great physical and psychological pain, humiliation, discomfort and hardship especially during the cold seasons.

60. He also claims that immediately upon his arrest, he was locked up for several hours in a cell that was strewn with human waste and this affected his dignity and psychological well-being. Further, the Petitioner states that he was provided with an inadequate diet which was nutritionally unsuitable for his state of health and that he was not allowed visitation from family but was only taken every six weeks to Wilson Airport so that he could meet his family. He argues that the said acts were against the law which provided that a detainee was allowed to be visited only at his place of detention and further, that those visits were eventually stopped altogether and did not resume until he was hospitalized.

61. Furthermore, he claims to have been denied amenities such as newspapers, books, radio or television and was allowed very limited correspondences with his family, which were in any event strictly censored. He was also kept alone in his cell and was not allowed to talk to anybody including prison warders and submits that all those deprivations were meant to cause him psychological torture and mental anguish. In a nutshell, the Petitioner's contention is that the conditions under which he was detained constituted torture, inhuman and degrading treatment and violated his fundamental right conferred by **Section 74** of the repealed **Constitution**.

62. The said **Section 74 (1)** of the repealed **Constitution** provided as follows:

***"No person shall be subject to torture or to inhuman or degrading punishment or other treatment."***

**Section 74(1)** therefore prohibited any form of torture or inhuman treatment against all persons, without any qualifications.

63. In response to the alleged violations, the Respondent's position is that the Petitioner's experience while in detention did not amount to cruel and inhuman as he was subjected to the same treatment as other prisoners. He submits further that, sleeping on the floor was standard for all detained persons and each detainee was in any event provided with a mattress and two blankets. In support of his contention, the Respondent relies on the case of ***Koigi Wamwere v Republic, H.C Petition No. 737 of 2009; [2012]eKLR*** wherein the High Court pronounced itself as follows:

***"...I must, regretfully, find that there were no acts of torture as recognised in law committed against the petitioner during his detention in prison. What the petitioner was subjected to was***

***the same deplorable conditions to which other prisoners in Kenya are subjected to. The poor diet, lack of adequate medical and sanitation facilities, lack of an adequate diet, have been hallmarks of prison conditions in Kenya. The discriminatory dietary regulations that the petitioner refers to, if they were indeed in force as the petitioner avers, are doubtless a carry-over from the discriminatory colonial regulations which independent Kenya inherited and has not seen fit to question and change.***

64. The above findings by Mumbi Ngugi J were upheld by the Court of Appeal while they are expressive of the finding of this Court in previous cases and whereas I recognize that the act of detaining a person necessarily limits some of privileges and 'rights', which a free person would as a matter of course enjoy, the conditions within which the confinement occurs should not be so gross as to remove any 'human' element from them. I harbor no doubts whatsoever that **Section 74(1)** of the repealed **Constitution** was intended to protect all persons, and principally those that are in custody who are particularly vulnerable and are therefore mostly in need of such protection. That notwithstanding, I respectfully agree with the sentiments of the learned Judge in the **Koigi Wamwere case** (Supra) wherein she proclaimed that, not every prison condition amounts to torture and inhuman treatment more so where that same treatment is meted equally on other prisoners. However, in the present case, there is peculiarity in the way in which the Petitioner was treated at the time of his detention. For example, uncontroverted evidence on record suggests that the Petitioner was for a period of over five months held in solitary confinement and was also at some point, held in a block next to where condemned prisoners resided and which prisoners screamed and shouted at each other from dusk to dawn. Such conditions would in no doubt inflict deep psychological wounds at the heart of any ordinary human being. Indeed the Respondent admits that when the Petitioner complained of his confinement, he was moved away from his cell which was next to the block where condemned prisoners stayed. This is an admission on the part of the Respondent that indeed, the Petitioner was at some point held near such condemned prisoners and subjected to continuous high level of noise all day long.

65. Having so held, the European Court of Human Rights has defined torture and inhuman treatment in the case of **Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm'n on H.R)** in the following terms:

***“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”***

66. Visram J (as he then was) in the case of **Samwel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003**, expounded on what amounts to torture, cruel and degrading treatment. He stated thus:

***“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonour or contempt”***

67. I stand guided by these pronouncements and see no reason to deviate from them and for the above reasons, I find that indeed the Petitioner was, to the extent already discussed above, subjected to torture, cruel and inhuman treatment which affected his physical, mental and psychological well-being.

68. I should particularly repeat that the evidence on record shows that the Petitioner suffered from mild high blood pressure prior to his detention. According to him, it was easy to manage and control that condition through regular exercise and proper diet. The Petitioner submits that owing to the poor conditions and mistreatment to which he was subjected to during detention, his condition worsened and on 26<sup>th</sup> May, 1991, he started experiencing symptoms of severe illness yet the prison authorities denied him to his doctor or even give him the medicine that had been prescribed by his doctor. The Petitioner submits that instead, he was given sub-standard treatment by the prison doctor.

69. Further, according to the Petitioner, it was only ten days later, when his illness had by then escalated that he was taken to the hospital on 2<sup>nd</sup> June, 1991 and it was at that point that it transpired that he had suffered a severe illness which led to a stroke.

70. The Petitioner also believes that the prison authorities administered poison to his food thus aggravating his condition. I must however state that the allegations of food poisoning were not sufficiently proved by the Petitioner and add no value in the determination of the case. In summary, the Petitioner particularizes the following factors as what triggered the severity of his illness and hence the stroke:

a. Denial of access to his doctor or the refusal to allow the medicine administered by his doctor to be administered to him;

b. Poor medical attention by the prison doctor; and

71. As a result of that stroke, it is claimed that the Petitioner suffered permanent brain damage which has left him paralysed on one side, has epileptic seizures and loss of the ability to read and write. It is submitted further that he lost all those functions within one month after the detention and that despite prolonged treatment, his condition worsened with time and continues to deteriorate.

72. It is furthermore submitted that whereas the Petitioner was a very active and outgoing person, who participated in sporting activities and engaged in other rigorous activities, he is now only a shell of his former self of relevance however is whether the Respondent omitted to take key steps to guard against deterioration of the Petitioner's health especially because the Petitioner had a pre-existing condition which if not properly treated would have resulted in fatal consequences. The evidence on record suggests that when the Petitioner begun to exhibit signs of illness, a prison doctor was allowed to visit him and administer medication. According to the Respondents, the Petitioner's doctor was allowed to collaborate with the prison doctor on what medication was to be administered. I however note that the medical notes attached as evidence show scanty collaboration, if at all. Even without full proof of collaboration, the evidence before me indicates that at the very least, the prison doctor was hardly availed to check on the Petitioner's health.

73. The critical question for determination therefore is whether by the acts or inactions of the Respondent, the Petitioner's illness was aggravated to the extent that it was impossible to reverse any consequent damage" I note from the materials placed before me that the prison doctor recommended on 27<sup>th</sup> May, 1991 that a CT scan should have been immediately done on the Petitioner to establish the cause of his then deteriorating health. It seems that, the said scan was not done until 2<sup>nd</sup> June, 1991, where it was revealed that the Petitioner had bleeding of the brain. From the evidence of Dr. Gikonyo, which stands undisputed, it is clear that high blood pressure if not properly controlled could lead to a stroke and subsequent brain damage. Further, the record indicates that there was no blood pressure readings which were done on the Petitioner between late April 1991 and May 1991 and it seems that, his condition worsened by 2<sup>nd</sup> June, 1991 when he was finally taken to the hospital. However, despite the

dire revelations of the CT scan, the Petitioner was ferried back to prison and when his condition tremendously worsened, he was taken back to the hospital for admission and it is only then that it was discovered that the Petitioner had suffered a severe stroke.

74. Undoubtedly, the occurrence of those unfortunate series of events with regard to the Petitioner's health, contributed to the gravity of his illness because firstly, the Petitioner's blood pressure readings were not regularly recorded as should have been the case. This is more so where the Respondent, through its representative, was well aware of the Petitioner's pre-existing medical condition. Secondly, the Respondent failed to timely yield to the advice of the prison doctor by promptly ensuring that a CT scan was done on the Petitioner. Lastly, even when the CT scan was finally done and a diagnosis issued, the Respondent still failed to promptly act on the medical advice given by allowing the Petitioner to commence emergency treatment in a bid to revive his health. All those acts of the Respondent taken cumulatively inescapably leads to the conclusion that the Respondent's sole intent was to cause the Petitioner mental, psychological and physical agony. Certainly, the Petitioner was at that time at the blink of death and that alone is torturous enough. I therefore hold that, to the extent that the Petitioner was deliberately denied proper medical attention, his right not to be subjected to torture, cruel and inhuman treatment was violated.

**(c) Whether, as a result of the Petitioner's arrest, detention and failing health, his business portfolio deteriorated and that the Respondent should be held liable thereto**

75. It was the Petitioner's case that prior to his detention, he had a business enterprise involving several private companies most of which were related. In that context, he had a fifty per cent (50%) stake in Alliance Nominee Limited, Alliance Investments Limited, Alliance Developments Limited, Alliance Hotels Limited, Hillcrest School Limited and NaroMoru River Lodge Limited. In Hillcrest Secondary School, Kenya Nurseries Limited and Orchids Kenya Limited, he had a twenty-nine (29), ninety-six (96) and sixty-eight (68) per cent stakes, respectively.

76. Further, the Petitioner had shares in public traded companies, shares in private companies and commercial real estate. With regard to shares in publicly traded companies, the Petitioner held 2,561,481 shares in Carbacid Investment Ltd, 92,688 in CMC Holdings Ltd, 278,652 shares in East African Breweries Ltd and 7,500 shares in East African Portland Cement Ltd. According to the Petitioner, he sold off all his shares in Carbacid Investments and East African Portland Cement and he also sold off most of his shares in East African Breweries Limited and CMC Holdings Limited. He submits that the purpose of the sale was to offset the accumulating liabilities in his businesses and states that even after his attempt to salvage the affected businesses, they were still put into receivership and sold off by his creditors. Consequently, he seeks damages for the said loss.

77. In order to effectively address this novel issue, I need to first determine whether the Petitioner can claim for the financial loss allegedly suffered in the context of the present Petition. In doing so, I will be answering the question whether a shareholder can claim for loss suffered by a company upon his detention and its effects and if the answer is in the affirmative, in what circumstances and to what extent"

78. At the outset therefore, I need to determine whether indeed it is possible to attribute the loss suffered by the Petitioner's companies to his poor health caused by his detention and which presumably affected his ability to effectively run the businesses. Closely related is the question whether a shareholder can claim on behalf the Company the loss suffered by it as a result of actions of the State leading to inability of the founder of a company to give it guidance and leadership.

79. The Respondent in the above regard takes the position that a company is a separate legal entity

from the shareholders and hence ought to sue in its own name. In support of his claim, he relies on the case of ***Gitobu Imanyara & 2 Others v Attorney General Civil Appeal No. 98 of 2014; [2016] eKLR*** in which the Court of Appeal addressed its mind on the appropriate damages to award for losses suffered by the Appellants' companies as a result of attacks by agents of the State on their business premises leading to loss and destruction of properties. The Court thus held:

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

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

80. I am bound by the above decision and I note to the extent above and that in the present case, the Petitioner was not only a shareholder of the various companies, the subject of this particular determination, but was also a founder, an executive chairman and a director of some of those named companies. He submits that he was the force behind the running of those businesses and as a result of his illness attributable to his arrest and detention, he was unable to provide the leadership required and offer his time and energy towards the continuation of the said businesses. In that context, I agree with the Court of Appeal decision in the ***Gitobu Imanyara*** case (supra), which affirmed the already established legal principle that a company is a separate legal entity with powers to sue in its own name and a shareholder or director therefore cannot as a matter of course claim for loss suffered by a company since such loss would not necessarily translate to the individual loss on a shareholder. But having so said, the Petitioner's case is quite different; he claims that his arrest and detention deprived his companies of his exemplary leadership and guidance which was not the issue in ***Gitobu Imanyara*** (supra) which is therefore distinguishable. What is the law in such a situation"

81. The South African case of ***Rudman v Road Accident Fund [2002] 4 ALL SA 422 (SCA)***, highlighted some of the guiding principles that a Court should have in mind when determining circumstances under which a person can lay a claim on loss suffered by a company, as a result of injuries suffered by its founder/director attributable to the Respondent. In that case, the Appellant (Rudman) was a game farmer and professional hunter. He was involved in a motor vehicle accident and sustained severe bodily injuries. His injuries totally precluded him from hunting professionally and partially disabled him from resuming his duties of running his farming operation. Before the accident, Rudman had acquired a number of farms. He had also formed a trust and acquired control over a company. The trust held the majority of the shares in the company. Rudman's accountants handled all the financial aspects of his extensive farming operation while he still continued to be the driving force behind the operation and his business flourished into a multi-million rand farming operation. After the accident, he was no longer able to resume with the same vigour the role of a hands-on manager since he was permanently disabled.

82. Rudman argued therefore, that he should be compensated for the loss incurred by his company

because he was in fact the person who directly suffered the losses incurred by the company. The High Court in South Africa ruled that a company is a separate legal entity which was distinct and separate from Rudman's estate. On appeal, Supreme Court of Appeal settled the matter as follows (Jones AJA):

**“For present purposes, I am prepared to accept the proposition (without pronouncing finally upon it) that in appropriate circumstances a farmer in Rudman’s position, who operates through a “family” company, may be able to prove and quantify his personal loss in a delictual claim with reference to the loss of income suffered by the company, provided that he does not fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. In the present case, there is evidence to show that the company has lost income because, by reason of Rudman’s injuries, it did not achieve the increases in hunting income that were confidently and reasonably expected. There is also evidence to show that the company has incurred and will in future incur the additional expense of employing others to do what Rudman used to do. However, there is no proof that this produces loss to Rudman. There is no evidence, for example, that the value of his shares in the company is less, or even that he received less from the company by way of dividends or fees or drawings because of the company’s reduced income, or that he will do so in the future. Rudman’s financial statements, the company’s financial statements, and the trust’s financial statements for the years 1997, 1998, 1999 and 2000 do not show any loss to Rudman at all, and neither does Rudman’s evidence nor the evidence of his accountant.”** (Emphasis added)

83. Of relevance also is the case of ***Raath v Nel (2012) 4 ALL SA 26 (SCA)*** wherein damages were sought for the loss occasioned by the Respondent’s inability to manage the affairs of his business to the same degree as before the failed pre- procedure conducted by an anesthetist. The Court held thus:

***“As Jones AJA correctly pointed out in Rudman, it is not axiomatic in these circumstances that the company’s loss is the individual’s personal loss, even if he is the sole shareholder and/or the driving force behind the company. Proof of the individual’s personal loss is still required.”***

In its decision, the Court noted that the Respondent had proved his personal loss through the company and that, but for his neglect and absence from his business, of which he was the sole shareholder in the company, the price of shares, at the time of selling his business would have been more. That was found to be a personal loss and he was awarded damages.

84. Further, in the case of ***Bellingham v Dhillon and another (1973) 1 ALL ER 20*** Forbes J observed thus on special damages in the manner pleaded by the present Petitioner:

***“The more difficult problem is, however, the question of special damages. The plaintiff owns 500 out of 501 shares in a company which carries on the business of the driving school; the remaining share is held by the wife. He is the managing director. Both parties agree that the company’s loss is his loss for the purpose of this action. I may say at once that I found him a most impressive witness and I have not the least doubt that in business he is a man of immense drive and acumen. It is also clear that he has a profound knowledge of the business of running a driving school. Because of his injury, his work at the driving school was affected.”***

85. In the above case, the Plaintiff had claimed that because of his injuries, he was not able to devote his energies to expanding the Strood branch as quickly as it should have expanded. After considering the evidence, Court awarded the Plaintiff £1,019 damages, after allowing for the incidence of tax, in respect of that venture. The Court in doing so noted that the plaintiff had been forced to close down the Meopham branch in April 1967 and awarded the plaintiff £340 damages in respect of that venture after



deduction of tax.

86. In addition to the above decisions, in the case of **Lee v Sheard [1956] 1 QB, 192** which the Respondent proposes that this Court should not rely on, the Plaintiff was both a shareholder and a director of a company which he owned together with one other person. As a result of injuries sustained during an accident, he was unable to work for the company like he normally did as a consequence to which the profits for that period were much lower than expected. Lord Denning found in favour of the Plaintiff and held that the Plaintiff was entitled to recover from the wrong doer the loss which he suffered arising from reduced profit margins. I see nothing unlawful about that finding and I therefore reject the argument postulated by the Respondent that the United Kingdom governing law on companies is materially different from Kenyan law with regard to the legal status of a company and the rights of a shareholder over the assets of a company.

87. In making my own finding, I note the above decisions were all made in the context of civil law claims but they also, in my view, express general principles of law that can be applied in constitutional petitions such as the present one. Flowing from the foregoing comparative decisions therefore, it is clear that, although a shareholder is a distinct entity from a company, there are circumstances under which such a shareholder can claim for loss suffered by the 'company' where it is proved that, the said loss was also a personal loss on the shareholder. This is particularly the case where, a shareholder actively participated in the day to day running of the company, by contributing his own skills and time to the company and where any discontinuation of such shareholders 'services' negatively impacts on the company.

88. In the above context, the Petitioner has raised a unique and novel claim, in my experience; that because he was the founder, leader and the motivator behind the success of his companies, his ill treatment in detention leading to his ill health gravely affected his companies' performances. The Respondent has contested that fact claiming that the Petitioner was fit enough to run for election as President after his release and that he may have blown his money in the campaigns. Further, that because some of his companies were in the tourist business, the slump in the said business adversely affected the entire industry and had nothing to do with the Petitioner's ill health.

89. I have deeply considered the above contradictory positions and I note that I have already found that the negligence and ill treatment meted out to the Petitioner in detention, caused his stroke. It is also a matter of public notoriety that the Petitioner is far from his old self, age notwithstanding. A fitness buff who climbed mountains and was known as an avid body exercises was reduced to a state of complete inactivity and all evidence before me points to the fact that his problems started at detention. Dr. Gikonyo's evidence in that regard is uncontested.

90. From my analysis of comparable decisions above, the finding in **Salmon v Salmon UKHL 1, AC 22** that a company is so distinct as a juristic person not to have any connection with its natural founders is not unassailable. I have also shown that **Gitobu Imanyara** is distinguishable and I am therefore more attracted to the reasoning in **Rudman and Lee (supra)** in that regard.

91. It is therefore my finding that the Petitioner's medical condition triggered by the events in detention leading to his stroke so greatly affected the business acumen, attention, focus, energy, guidance and leadership he was giving his companies that without him at the helm, they deteriorated and some eventually collapsed.

92. However, I am also certain that other factors apart from the above came into play to affect the Petitioner's business empire. These include, as argued by the Respondent, a slump in the tourism

industry based on the credible evidence of Mr. David Gikonyo. I also note that the Petitioner in some companies held only either 29, 50, 68 or 96% shareholding and the role of other shareholders such as Mr. Nesbitt was not explained.

93. Similarly, to argue that the Petitioner is entitled to the entire cost of refurbishing one of his hotels (Safari Beach Hotel) is to stretch his claims too far. That is why in **Mc Gregor on Damages, 18<sup>th</sup> Ed. (2009)**, the authors observe thus:

***“The deterioration in company or business profits may not be completely due to the claimant’s absence; general business and trade conditions may have been an operative factor.”***

94. I wholly agree and in addition to the above, the Petitioner sold shares in publicly traded Companies to offset company debts and that amount must impact on the sum that he will be entitled to as damages arising from the collapse of his business empire. In stating so, Mr. Riungu’s evidence and his report were credible and in my view professionally done and believable. Exhibits KSNM 2-12 and 20, PE 3, and 4 and the particulars of facts therein relating to each of the Petitioner’s companies was consistent and logical. That evidence for avoidance of doubt related to annual returns filed with the Registrar of Companies, audited accounts of the Holding Companies, valuation reports by real estate professionals, information memoranda prepared for sale of assets and independent and its reports of sale of the Petitioner’s companies properties.

95. In the above context, whereas the Petitioner had sought the entire sum of the worth of his collapsed businesses totaling Kshs.4,726,332,042.91 noting the factors I have raised at paragraph 75 above, mitigating against 100% liability by the Respondent, it is my finding that the Respondent should bear 20% of the Petitioner’s claim being Kshs.471,664,258.50. I have made that finding as being a fair and reasonable assessment of the claim before me.

### **Remedies**

96. Having found in favour of the Petitioner in the above limited sense, the subsequent issue for determination is what the appropriate remedies in the circumstances are. The Petitioner seeks special damages in the form of medical expenses, financial loss and cost of repairs of Safari Beach Hotel.

97. The Petitioner also seeks exemplary and aggravated damages for the violation of his rights by the Respondent. However, the High Court has been reluctant in awarding exemplary damages for reasons that they are not awardable in changed political circumstances. In ***Benedict Munene Kariuki and 14 Others v the Attorney General High Court Petition No. 722 of 2009*** it was for example determined that no exemplary damages should be awarded in addition to general damages in respect of violation of constitutional rights. Similarly, in ***Standard Newspapers Limited & another v Attorney General & 4 others Petition no. 113 of 2006 [2013] eKLR*** Mumbi Ngugi J held:

***“It is worth noting that exemplary damages are sought not to compensate the victim for the impugned action but to punish and serve as an example to the perpetrator and act as a deterrent for any such future conduct. The High Court has held that exemplary and aggravated damages are inappropriate remedies where unconstitutional action is the subject of challenge.”***

98. In the circumstances, I do not find it necessary to award exemplary and aggravated damages.

99. On general damages for violation of the freedom against torture, degrading and inhuman treatment, following the decision in ***Koigi Wamwere*** where the Appellant was awarded Kshs.12,000,000 for *inter*

*alia* violation of the right not to be subjected to torture, degrading and inhuman treatment, I will award the Petitioner Kshs.15,000,000 as damages in the above regard.

100. On medical expenses, I have seen Dr. Gikonyo's reports and heard his oral evidence. I am unable to disregard the medical costs of Kshs.18,146,631.52 and so the same is awarded as claimed.

101. Regarding the claim for refurbishment of Safari Beach Hotel being Kshs.347,987,146.90 that claim is far-fetched and is not allowed.

102. The Petitioner is entitled to and is awarded the costs of the Petition.

### **Conclusion**

103. Over the last couple of years, the High Court has been inundated with claims by victims of past violations of fundamental rights and freedom seeking *inter alia* orders of compensation for such violations and losses arising during the KANU One Party regime. Many of the victims include political leaders of the time including Koigi Wamwere, Gitobu Imanyara and others. The High Court has in almost all such cases found the State culpable and has been unrelenting in doing so.

104. This Judgment has joined that list save for the unique claim made by the Petitioner relating to the collapse of his business empire. I have made certain findings in that regard and whatever the findings, one thing is certain in my mind: the State must now wake up to the reality that past conduct of its officials and agents will no longer remain unpunished. The huge democratic space that Kenyans are presently enjoying, the opening of the temple of justice to victims of historical injustices and the acceptance by today's leadership that such injustices indeed occurred, must remain lessons for Kenya not to return to those dark days.

105. The decisions by the Courts in ensuring that justice is indeed done must be looked at from the prism of ensuring that justice is seen in the eyes of victims and not the amounts awarded in damages. Real justice can be expensive and nothing in compensation can return Kenneth Stanley Njindo Matiba to the sprightly and fit man that he was before his detention and stroke.

106. Nothing in compensation can return him to the business mogul that he once was and who towered over the political and financial landscape of Kenya like a colossus. His days are numbered according to Dr. Gikonyo and so let this Judgment merely serve as a warning to the State that each Kenyan life matters and that it should never treat any of its citizens the way that it treated Mr. Matiba, whatever disagreements agents and officials of the State at the time may have had with him. I digress. The matter is at an end.

### **Disposition and Final Orders**

107. For the above reasons the following are the final orders to make:

***a. A declaration is hereby issued that the Petitioner's right to be free from torture, cruel and inhuman treatment under Section 74(1) of the repealed Constitution were violated by agents of the State.***

***b. The Petitioner is awarded Kshs.15,000,000 as damages for violations in (a) above.***

***c. The Petitioner is awarded Kshs.18,146,631.52 being the cost of medical expenses.***

*d. The Petitioner is awarded Kshs.471,664,258.50 as compensation for financial losses occasioned to him through collapse of his businesses and financial ventures.*

*e. For avoidance of doubt no other damages or costs are awarded to the Petitioner.*

*f. As the successful litigant, the Petitioner is awarded costs of the suit plus interest thereon.*

108. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2017**

**E. CHACHA MWITA**

**JUDGE**



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