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| Court:               | High Court at Nairobi (Milimani Law Courts)   |
| Case Action:         | Judgment  |
| Judge:               | George Matatia Abaleka Dulu, Hannah Magondi Okwengu   |
| Citation:            | WACHIRA WEHEIRE v ATTORNEY-GENERAL [2010] eKLR  |
| Advocates:           | -   |
| Case Summary:        | <p><b>Constitutional law-</b> fundamental rights and freedom- breach of-torture by police contrary to sections 74(2) of the Constitution-alleged violation of right to liberty contrary to section 72 of the constitution- period of arraignment in court-constitutional reference after dismissal of appeal by High Court- whether the matter was <i>funtus officio</i>-limitation period in claims against the government under the Public Authorities Limitation Act-claim made 17 years after cause of action arose-doctrine of delay and laches in constitutional matters-damages- award of damages- whether damages could be awarded-the Constitution sections 72 and 74(2), Public Authorities Limitation Act (Cap 39) section 3</p> |
| Court Division:      | -   |
| History Magistrates: | -   |
| County:              | -   |
| Docket Number:       | -   |
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| 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 (NAIROBI LAW COURTS)**

**Miscellaneous Civil Case 1184 of 2003**

**IN THE MATTER OF CONSTITUION OF KENYA**

**AND**

**IN THE MATTER OF CONSTITUTIONAL REFERENCE UNDER SECTION 84 OF THE  
CONSTITUTION OF KENYA**

**BETWEEN**

**WACHIRA WEHEIRE..... PLAINTIFF**

**V E R S U S**

**THE HON. ATTORNEY-GENERAL.....DEFENDANT**

**J U D G M E N T**

Before us is an Originating Summons dated 6<sup>th</sup> October, 2003 in which the plaintiff is **WACHIRA WAHEIRE** and the defendant is **THE ATTORNEY-GENERAL**.

The Originating Summons is said to have been brought under section 84(1), (2) and (6) of the Constitution, and Rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, as read together with Chapter V of the Constitution (namely Section 70 to 83) and Order XXXVI of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The orders sought are as follows-

**1. *A declaration that the Plaintiff's fundamental***

***rights and freedoms under section 70, 72 (3&5), 74(1) 77, 78(1), 79(1), 80(1), and 82(3) have been and were contravened and grossly violated by police officers and other Government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.***

**2. *A declaration that the plaintiff is entitled to the payment of damages and compensation for violations and contraventions of his fundamental rights and freedoms under the***

***aforementioned provisions of the Constitution.***

**3. *General damages, exemplary damages on an aggravated scale under section 84(2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.***

**4. *Any further orders, writs, directions, as this***

***Honourable Court may consider appropriate.***

**5. *Costs of the suit, with interest at court rates.***

The originating summons was accompanied by a supporting affidavit sworn by the plaintiff on 6<sup>th</sup> October, 2003. It was deponed in the said affidavit, inter alia, that on 2<sup>nd</sup> December, 1986 the applicant who was a Commercial Officer with Associated Battery Manufacturers (EA) Ltd Nairobi, was arrested without a warrant in breach of section 72(3) & (5) of the Constitution. That on the same day his house was unlawfully searched; and that he was locked up at Jogoo Road Police Station in contravention of section 72(1) of the Constitution. That the plaintiff was subsequently blindfolded and locked up for 16 days at Nyayo House basement which was not officially gazetted as a police station, in contravention of section 72(3) and (5) of the Constitution.

The plaintiff swore that while at Nyayo house he was interrogated while naked for lengthy sessions, while hungry, thirsty and without sleep, and held incommunicado in a dark cell. That he was frequently assaulted by Special Branch Officers using slaps, kicks, whips, tyre strips, broken table, chair legs, as well as hose pipes, and placed naked in water logged cells, and that he was threatened with death and forced to confess to false charges in breach of section 74(1) of the Constitution.

The plaintiff further averred that he was arraigned in court on 17<sup>th</sup> December, 1986 on charges of taking an illegal oath and failure to prevent a felony to which he pleaded guilty; that the court failed in its constitutional and mandatory statutory duties in that it failed to notice that the plaintiff was not a free agent, and allowed the same officers who had tortured the plaintiff to stay in court thus psychologically forcing the plaintiff to plead guilty, and failing to enquire about his unlawful and inordinate incarceration for 16 days.

The plaintiff also deponed that his appeal No.469 of 1987 was summarily rejected in breach of the provisions of section 77 of the Constitution; and that he was taken to Industrial Area Prison where he underwent severe mental and psychological torture. He was later transferred to Kamiti Maximum

Prison and then further transferred to Kodiaga Maximum Security Prison Kisumu, (then notorious for high prisoner mortality rate), where he was subjected to hard labour thus aggravating his mental and psychological suffering.

In a supplementary affidavit sworn by the plaintiff on 11<sup>th</sup> August, 2009 and filed on 12<sup>th</sup> August, 2009, with leave of the court, the plaintiff reiterated the same facts that he had sworn in the earlier affidavit, but provided annexures in support of his averments. The annexures included a charge sheet and proceedings in respect of Chief Magistrate's Criminal Case No.5864 of 1986, which confirmed that the plaintiff was charged before the Chief Magistrate on 17<sup>th</sup> December, 1986 with two counts. The first count was that of taking an unlawful oath, contrary to section 61(b) of the Penal Code Cap 63 of the Laws of Kenya. And the second count was that of neglect to prevent a felony contrary to Section 392 of the Penal Code Cap 63 Laws of Kenya as read with Section 36 of the same code. The plaintiff who was unrepresented was convicted on his own plea of guilt, and sentenced to 4 years imprisonment on count 1, and 18 months on count two.

Also annexed to the supplementary affidavit, is the plaintiff's letter of appointment with Associated Batteries Manufacturers East Africa Limited and correspondences showing his progression. Newspaper reports reporting the plaintiff's arrest and conviction, as well as medical reports from a doctor and counseling psychologists which showed that the plaintiff suffered physical and psychological trauma, were also annexed.

The plaintiff filed two sets of written submissions. The first submissions were filed on 28<sup>th</sup> February, 2008 by which time no reply to the originating summons had been filed by the Attorney General, and the plaintiff assumed that the matter was proceeding *ex-parte*. The second set of submission was filed by the plaintiff on 5<sup>th</sup> November, 2008. In the submissions, the plaintiff recapped the facts leading to his claim. He explained that as a result of his arrest and imprisonment, he suffered physical and psychological trauma. In addition, the plaintiff claimed that he lost his employment, and his reputation was also ruined, as a result of which he was not able to secure formal employment. It was the contention of the plaintiff that the Police Act (Cap. 84) and the Criminal Procedure Code (Cap. 75) do not allow the subjection of any individual to degrading or inhuman treatment.

The plaintiff urged the court to take judicial notice of the fact that there existed a torture chamber at Nyayo House, as the existence of the torture chamber was documented in many publications including Amnesty International, Journal Index AFR/32/17/87 of July 1987 entitled "Kenya Torture Political Detention and Unfair Trials" and another one entitled "We Lived to Tell the Nyayo House Stories", both of which captured the plaintiff's story. The plaintiff further referred to the **High Court of Kenya at Nyeri Criminal Case No.12 of 2006, Republic vs Amos Karugu Karatu** in which the existence of the Nyayo House Torture Chambers was acknowledged.

The plaintiff cited the case of **Felix Njagi Marete –vs- the Attorney –General – [1987] KLR 690**, where Shields J. in awarding damages for contravention of Section 74(1) of the Constitution

stated:

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

The plaintiff also cited the case of ***Dominic Arony Amolo –vs- the Attorney General HC. Misc. Application No. 494 of 2003***, contending that in that case, the High Court asserted that claims under the Fundamental Rights and Freedom in the Constitution, cannot be interpreted subject to the restrictions imposed by the Limitation of Actions Act Cap 22, and that under Section 84(1) of the Constitution, the High Court can grant redress to a party in a manner specified in Section 84(2) of the Constitution if there exist proof of violation of Section 70 to 83. The plaintiff further pointed out that the rules under the Legal Notice No.133 of 2001 Constitution of Kenya (protections of fundamental rights and freedoms of the individual, practice and procedure rules), do not place any limitations on the citizen’s rights to institute a suit of the nature before the court.

The plaintiff relied also on ***HCCC No.3829 of 1994, James Njau Wambururu vs the Hon. Attorney General***, in which the High Court considered Article 4 of the Convention against torture, criminal and other cruel, inhuman and degrading treatment, and Article 5 of the African Charter on human and people’s rights, and expressed the view that the State has a duty in its legal system to ensure that victims of acts of torture obtain redress and adequate compensation as contemplated by Article 14, and further confirmed that the constitution of Kenya recognizes the dignity of all persons and entitles any victim of breach of fundamental rights to damages.

In his first set of submissions the plaintiff asked the court to award him general damages of Kshs.3 million and exemplary damages of Kshs.2 million, while in the second set of submissions the plaintiff asked the court to award him general damages of Kshs.4,500,000/=, special damages for loss of income Kshs.1,902,600/= and exemplary damages, Kshs.2 million. The plaintiff further urged the court to consider awarding moral damages arising from gross violation of international human rights law and international humanitarian law by the government and its agents.

In response to the originating motion, the defendant filed grounds of opposition and written submissions. Both documents were filed on 6<sup>th</sup> November, 2009. Briefly, the defendant pointed out that the plaintiff failed to fully disclose the facts of the matter. This was because the identity of the policemen who arrested him was not disclosed. Nor did the plaintiff offer any evidence that he was tortured at Nyayo House torture chamber, or disclose the name of the Chief Magistrate before whom he was arraigned, or cite the criminal case number. It was contended that the allegations made by the plaintiff were therefore oppressive to the defendant and not capable of being respondent to.

Further, it was maintained that the matters complained of by the plaintiff could be adequately

adjudicated upon by the Truth, Justice and Reconciliation Commission. It was submitted that in enacting the Truth Justice and Reconciliation Commission Act 2008, Parliament was concerned that some of the transgression against our country and its people, could not be properly addressed by our judicial institutions due to procedural and other hindrances. But that the Nation must address the past in order to prepare for the future, by building a democratic society based on the rule of law and desirous to give the people of Kenya a fresh start, where justice is accorded to the victims of injustice, and past transgressions are adequately addressed. It was argued that the court could not make informal decisions without the very important facts left out by the plaintiff. It was noted that there was a grave danger that the court could award damages to imposters whose rights were never violated.

The plaintiff's claim was further objected to on the grounds that there was inordinate delay and acquiescence. It was noted that the plaintiff's claim was stale having been made after 17 years. It was further submitted that the plaintiff having been arraigned in court, he ought to have invoked the provisions of Section 84 of the Constitution which gave him the right to raise issues regarding the violation of his rights. It was noted that the High Court to which the plaintiff appealed against his sentence had the jurisdiction to consider the alleged breaches but the same was not brought to it.

It was contended that the plaintiff was circumventing the inordinate delay and the limitation period by filing a Constitutional Reference instead of a normal suit commenced by a way of plaint. It was emphasized that the plaintiff's complaints, if at all, were tortuous in nature and that under Section 3 of the Public Authorities Limitation Act (**Cap. 39**) such proceedings could not be commenced after the lapse of 12 months. It was also emphasized that there were no facts provided that would establish that the plaintiff was detained for more than 16 days before being arraigned in court contrary to the provisions of Section 72 of the Constitution. It was noted that the plaintiff had remedies for his alleged claim under the law of tort but he slept on his rights and was caught up by the limitation period.

The defendant relied on ***Chaudhuri and Chaturvedi's*** Commenting on ***Law of Fundamental Rights, 4<sup>th</sup> Edition***, for submissions that delay, laches and acquiescence has the effect of rendering the application fatal if the subject matter is such that if a suit was filed the same would have been barred by the law of limitation and therefore such an application should be dismissed on the ground of delay.

It was pointed out that under the Public Authorities Limitation Act Cap 39 Laws of Kenya the limitation period for all torts committed by the state was 12 months. Reference was further made to ***Constitutional Application No.128 of 2006 in the matter of Lt. Col. Peter Ngari Kagume & others vs the Attorney General***, where Nyamu J. (as he then was), considering a similar suit stated:

***“The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process..... In view of the specified time limitation in other***

***jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases.”***

It was further noted that the plaintiff was convicted on his own plea of guilty and therefore the plaintiff acquiesced to the magistrate’s decision by appealing against the decision, instead of challenging the constitutionality of the proceedings.

It was submitted that the plaintiff failed to disclose sufficient facts upon which his claim could be anchored. It was noted that the allegations made against the Kenya Police, were not clearly spelt out as required by law, as there was no clear disclosure of the police officers who arrested the plaintiff and tortured him. It was pointed out that the plaintiff had not annexed any tangible documents as proof of his allegation that he was taken to the Nyayo House Torture Chambers and tortured. It was noted that the plaintiff’s allegations of torture could only be proved by a medical report. It was contended that the medical documents annexed by the plaintiff to his affidavit were hearsay documents and ought to be struck out as offending the provisions of Order XVIII Rule 3(1) of the Civil Procedure Rules.

It was further submitted that the plaintiff had not demonstrated that his constitutional rights under Section 70 to 83 of the Constitution had been violated. It was argued that the enjoyment of the plaintiff’s rights was subject to limitation under Section 70 of the Constitution. It was maintained that the plaintiff had not offered any evidence to the effect that the defendant had hindered the enjoyment of his fundamental rights contrary to Section 80 of the Constitution nor had the plaintiff demonstrated that he was discriminated against. It was submitted that the state being a signatory to the charter of human rights does not condone torture and that any police officer who in the course of conducting investigations tortured a suspect was liable to very serious punishment. It was further submitted that although the essence of Section 72(3) and (5) of the Constitution was to provide protection of rights to personal liberty, that fundamental right was not absolute and could be taken away by the State, if the enjoyment of that right by an individual prejudices the rights and freedom of others.

It was pointed out that the plaintiff pleaded guilty before the Chief Magistrate and therefore his arrest could not be termed as having been done in bad faith. It was argued that the seriousness of the charge that the plaintiff was facing justified interference with his freedom. It was submitted that the plaintiff was tried by a court of competent jurisdiction and that the High Court having dismissed his appeal, the High Court was *functus officio*. It was maintained that the charges against the plaintiff were within the provisions of the law and that the plaintiff’s arguments were contrary to the provisions of Section 82(8) and (9) of the constitution. The court was urged to dismiss the plaintiff’s case as he had not demonstrated the violation of any rights.



In his oral submissions before the court, Mr. Obwayo who appeared for the Attorney General, reiterated the written submission. Mr. Obwayo took exceptions to some of the annexures to the plaintiff's supplementary affidavit sworn in support of his originating summons. Mr. Obwayo pointed out that annexure WW6A and 6B which were newspaper report, regarding Mwakenya trials were not of any evidential value, and that annexure WW7A, B and C which were the medical reports, were not properly produced in accordance with the Evidence Act, and that annexure WW8A and B which were the publication on the Nyayo House Torture story and the Hansard report from the National Assembly, were not properly produced as they were not prepared by the plaintiff.

Mr. Obwayo reiterated that the plaintiff was guilty of non-disclosure as the issue of his arrest and torture was not properly brought out in his affidavit. Mr. Obwayo further reiterated that the plaintiff was guilty of inordinate delay in bringing this suit. He noted that the plaintiff's appeal to the High Court was dismissed 13 years ago and that the plaintiff ought to have filed his suit immediately upon his release on 17<sup>th</sup> August, 1989. He urged the court to find that the plaintiff's claim was time barred and dismiss it. He further urged the court find that there were reasonable and probable grounds for the arrest of the plaintiff. And that there were no facts in support of the alleged violations of the plaintiff's rights.

We have considered the application, the documents filed, the written and oral submissions of both parties, as well as the authorities cited to us.

In our view, the following issues stand out for determination.

1. Whether the plaintiff's claim as pleaded is statute barred.
2. Whether the plaintiff has disclosed or failed to disclose sufficient facts upon which his claim can be anchored.
3. Whether the plaintiff's claim should be defeated on grounds of inordinate delay and acquiescence.
4. Whether the plaintiff's claim should be referred to the Truth Justice and Reconciliation Commission established under Section 3(1) of the Truth Justice and Reconciliation Act 2008.
5. Whether the plaintiff has established to the required standard the unlawful violation of his fundamental rights and freedom contrary to Section 70 to 82 of the Constitution of Kenya.
6. What damages if any is the plaintiff entitled to.

On the issue of limitation, it was maintained by the defendant that the proceedings before this court were statute barred. The defendant relied on Section 3 of the Public Authorities Limitation Act (**Cap. 39**) which limits the period for filing tortuous claims against public authorities to 12 months. The defendant also relied on the case of ***Lt. Col Peter Ngari Kagume and Others – vs- Attorney-General – Nairobi*** HCC Application No. 128 of 2006.

We note that the plaintiff's proceedings have been brought under section 84 of the Constitution and the rules made thereunder. Neither section 84 of the Constitution, nor LN 133 of 2001, The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, provide for any limitation period for bringing actions to enforce fundamental rights. We have considered the case of ***Lt. Col. Peter Ngari & Others -Vs- Attorney-General*** (supra), which was relied upon by the defendant. We note that the Judge did not say that there was a limitation period for filing proceedings to enforce constitutional rights, though he found no justification for the delay in that particular case.

We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual, under the Constitution of Kenya. Indeed, Section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail. In our view, the provisions of the Public Authorities Limitations Act limiting the period for initiating actions against public authorities is inconsistent with the Constitution, to the extent that it limits a party's rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the constitution and it cannot therefore be used to curtail rights provided under the Constitution. We therefore find and hold that the plaintiff's claim arising from violation of his constitutional rights is not statute barred.

The second issue that we wish to deal with is whether the plaintiff has disclosed or failed to disclose sufficient facts upon which his claim can be anchored. There is no doubt that a person who comes to this court under Section 84 of the Constitution alleging contravention of his fundamental rights, is required to be candid with regard to the alleged contraventions, the sections contravened, as well as facts supporting the contravention. This was clearly reiterated in ***Matiba –vs- The Attorney –General Misc. Application No. 666 of 1990***, as follows:

***“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularly invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement.”***

In our present case, the plaintiff moved this court by way of originating summons under Section 84 of the Constitution as read with Rules 9 and 11 of the Constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules 2001. Rule 11 provides for the procedure to be followed as that laid down under Order XXXVI of the Civil Procedure Rules. Order XXXVI Rules 9 and 10(1) of the Civil Procedure Rules, provides as follows:

***“9. On the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.*”**

***10(1) where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.*”**

It is apparent from the above provisions that the issue of sufficiency of facts set out in the summons and supporting affidavits, was a preliminary issue which ought to have been raised before the hearing of the originating summons, and directions of the court sought. In this case, the parties appeared before the court on several occasions. Directions were given for the hearing of the matter to proceed by way of affidavit and submissions. At no time did the defendant complain about the correctness or sufficiency of the facts, or seek the court’s direction in that regard. It is therefore rather late for the defendant to complain about the sufficiency of facts at this stage. Secondly, the plaintiff filed an affidavit in support of the originating summons in which he deponed to facts in support of his claim. The plaintiff did with leave of the court file a supplementary affidavit on the 12<sup>th</sup> August, 2009 in which he again deponed to the facts in support of his claim, and also annexed documents in support of his claim.

The matters deponed to by the plaintiff in the two affidavits included the fact that he was arrested on 2<sup>nd</sup> December, 1986 while at his place of work at Associated Battery Manufacturers EA Limited, the fact that his house was unlawfully searched, the fact that he was locked up at Jogoo Road Police Station and later taken to Nyayo House Basement where he was held for 16 days and subjected to various acts of physical, mental and psychological torture. The fact that he was subsequently arraigned in the Chief Magistrate’s court at Nairobi on 17<sup>th</sup> December, 1986, charged and convicted on his own plea of guilty, the fact that the plaintiff’s appeal to the High Court was summarily rejected, and the fact that the plaintiff was subsequently held at various prisons whose names have been disclosed.

The plaintiff further identified in his affidavit the various sections of the Constitution which were

contravened in regard to his fundamental rights. The defendant's complaint that the plaintiff did not state the names of the police officers who arrested him was true. However, that complaint had really no substance as the plaintiff gave sufficient particulars of his arrest, confinement and arraignment in court, which was sufficient to enable the defendant to identify the officers who were involved in the investigation and arrest of the plaintiff. In our view, even without taking into account the various annexures which were questioned by the defendant, the facts deponed to by the plaintiff, provided a sufficient base for the plaintiff's claim regarding the infringement of his rights under the Constitution.

We note that as admitted by the plaintiff, the alleged contraventions occurred in the year 1986, and that the plaintiff was arraigned in the criminal court in the same year, when he was tried and convicted. Nevertheless, the plaintiff did not raise the issue of the contravention of his constitutional rights as provided under Section 84(3) of the Constitution in the Chief Magistrate's Court, or in the High Court during the appeal as provided under Rule 10 of the Constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules. The question is, should the plaintiff be barred from raising his claim because of this failure"

Section 84(3) of the Constitution provides as follows:

***“84(3) if in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.”***

In our view, although the issue of the contravention of the plaintiff's constitutional rights could have been raised before the trial magistrate, and referred to the High Court for determination, this was not mandatory. The plaintiff's complaints included violations of his fundamental rights and freedoms, otherwise than in the course of the proceedings before the subordinate court. The plaintiff had therefore the alternative of filing an application directly to the High Court (as he eventually did), under rule 9 of the Constitution of Kenya (protection of fundamental rights and freedoms of the individual) practice and procedure rules 2001 which provides:

***“Where contravention of fundamental rights and freedom is alleged otherwise than in the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court.”***

Of greater concern is the fact that the plaintiff lodged his claim before this court after a period of about 16 years from the time his cause of action arose. As observed earlier, although there is no time limitation for claims regarding violation of fundamental rights and freedoms of the individual, the need to bring proceedings to court as early as possible cannot be overemphasized. We have considered whether the plaintiff's delay in bringing his action was inordinate such as to vitiate his claim. The plaintiff has explained that he was confined in prison until August, 1989 when he was released and that

upon his release, he could not immediately lodge his claim until after the year 2002, when elections were held and there was change in the Government.

We have considered this explanation. The elections held in the year 2002 and the consequent wave of change in this country are a historical fact. The explanation given by the plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after the change, such as ***Dominic Arony Amolo vs The Attorney General*** (Supra) in which the plaintiff's claim filed in the year 2003 which was more than 20 years after the cause of action arose, was allowed. We are therefore not persuaded that the plaintiff's claim should be defeated because of the delay in filing his claim.

As regards the issue as to whether the plaintiff's claim should be referred to the Truth, Justice and Reconciliation Commission established under Section 3(1) of the Truth Justice and Reconciliation Act, 2008, we find no basis for this. The plaintiff has come to this court seeking redress for specific violation of his fundamental rights under the Supreme Law of this land. Nothing has been laid before this court to show that there is any hindrance, procedural or otherwise, to this court addressing the violations complained of. This court not only has powers to deal with the issue of violation of constitutional rights, but is also under a responsibility to uphold the Constitution of Kenya. There is therefore no reason why the court should abdicate this responsibility to an inferior Tribunal.

We note that the defendant did not file any affidavit in response to the affidavits filed by the plaintiff. Thus, the facts deposed to by the plaintiff under oath stood unchallenged.

Section 72(1) and (3)(a) & (b) of the Constitution states as follows:

***“72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:***

***(a) In execution of the sentence or order of a court whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted.***

***(2) .....***

***(3) A person who is arrested or detained -***

***(a) for the purpose of bringing him before a court in execution of the order of a court; or***

***(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence and who is not released, shall be brought before a court of law as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from commencement of his detention, or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person***

***alleging that the provisions of the subsection have been complied with”***

The plaintiff's arrest, confinement and arraignment in court are clearly confirmed by the charge sheet and the proceedings in respect of Nairobi Chief Magistrate Criminal Case No.5684 of 1986 which were annexures WW1(A) and (B) to the plaintiff's supplementary affidavit. It is evident that the plaintiff was arrested on 2<sup>nd</sup> December, 1986 and produced in court on 17<sup>th</sup> December, 1986. No explanation appears to have been given to the Criminal court, nor has any explanation been offered to this court, for the delay in producing the plaintiff in court. The charges for which the plaintiff was arraigned in court were no doubt serious and carried a maximum penalty of 10 years. Nevertheless, this did not provide any justification for the police to hold the plaintiff for a period of 16 days. We find that there was violation of the plaintiff's right to personal liberty as the plaintiff should have been produced in court within 24 hours as provided under Section 72(3)(b) of the Constitution.

As regards the presence of the Nyayo House Torture Chamber, the plaintiff has stated under oath that he was held at Nyayo House basement where he was tortured. The plaintiff has given specific details of how the torture was carried out. The fact that the defendant has not attempted to deny these allegations under oath can only be an indication that the allegations are true. We therefore have no reason to doubt the plaintiff's assertions. Section 74(1) of the Constitution states:

***“No person shall be subject to torture or to inhuman or degrading punishment or to any other treatment.”***

The acts that the plaintiff was subjected to of being kept hungry and without sleep for several days, being physically assaulted by being kicked, whipped and burned with cigarettes, pricked with pins, hose piped and placed naked in water-logged cells, were all cruel and degrading treatment and therefore a violation of Section 74(1) of the Constitution. The extent of the plaintiff's torture could only have been determined through medical evidence. No evidence of medical examination done around the time of the incidence complained of was however produced. Nonetheless, the medical reports annexed by the plaintiff as annexure WW7(A), 7(B) and 7(C) provided consistency to the evidence of the plaintiff that he was physically, psychologically and mentally tortured, and that he continues to suffer the consequences of the torture

We are satisfied that the plaintiff has established on a balance of probability that his rights to personal liberty under Section 72 was violated when he was held at Nyayo House for more than 24 hours contrary to Section 72(3)(b). We are also satisfied that the plaintiff was subjected to torture, inhuman and degrading treatment contrary to Section 74(1) of the Constitution, during his confinement at Nyayo House.

We have considered the plaintiff's claim that his house was unlawfully searched contrary to Section 76 of the Constitution. However, it is apparent that the search of the plaintiff's house was related to the criminal charge with which the plaintiff was subsequently arraigned in court. The plaintiff's right to protection against arbitrary search or entry as provided under Section 76(1) of the

Constitution, was not absolute but was subject to subsection (2) which allows such search in the interest of defence, public safety and public order or maintenance of public security. We therefore find that the search at the plaintiff's house was justified and his rights were not violated in that regard.

As regards the plaintiff's complaints regarding breach of his constitutional rights during the trial before the Chief Magistrate's Court, Section 77 of the Constitution states as follows:

- “(1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.***
- (2) Every person who is charged with a criminal offence –***
- (a) Shall be presumed innocent until he is proved or has pleaded guilty***
  - (b) Shall be informed as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence with which he is charged.***
  - (c) Shall be given adequate time and facilities for the preparation of his defence.***
  - (d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice.***
  - (e) Shall be afforded facilities to examine in person or by his legal representative, the witness called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and***
  - (f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.***

The record of proceedings of the Chief Magistrate's Court which were annexed to the plaintiff's affidavit, showed that the above provisions were complied with, and that the plaintiff who was allowed to represent himself in person, pleaded guilty to the charge. The plaintiff having pleaded guilty to the charges put to him, the Chief Magistrate had no way of knowing that the plaintiff was not a free agent, or that the plaintiff had been forced to plead guilty. The Chief Magistrate could only have known this if the same was brought to his attention by the plaintiff. This, the plaintiff failed to do. We concur with the defendant's submission that the plaintiff relinquished his rights by submitting to a plea of guilty and further acquiesced in the Chief magistrate's decision by appealing from that decision instead of challenging the constitutionality of the proceedings. We therefore find no substance in the plaintiff's allegation that his constitutional rights under Section 77 were breached either in the Chief Magistrate's Court or in the High Court during the hearing of his criminal appeal.

As regards the imprisonment and confinement of the plaintiff at Industrial Area Prison, Kamiti Medium Prison and Kodiaga Maximum Prison, it is evident that the plaintiff was held in these

institutions pursuant to his conviction and imprisonment, following his criminal trial. His confinement in prison was in accordance with Section 72(1)(a) of the Constitution and therefore lawful. We reject the plaintiff's allegations that his imprisonment and confinement at the various prison institutions contravened his fundamental rights under the Constitution.

We have further considered the plaintiff's allegations that his rights to protection of freedom of assembly and association under Section 80(1) and protection from discrimination under Section 82(3) of the Constitution were violated. We have however found no evidence in support of these allegations.

We come to the conclusion that the plaintiff's constitutional rights to personal liberty under Section 72 of the Constitution was violated when he was held at the Nyayo House Basement for a period of 16 days, and that the plaintiff's rights to protection against torture, degrading and inhuman treatment under Section 74 of the Constitution were also violated when he was subjected to physical, mental and psychological torture during his 16 days confinement at Nyayo House. Our next task is to consider what damages if any the plaintiff is entitled to.

We find that the plaintiff was arrested and held by police officers, and that he suffered the violation of his fundamental rights at the hands of the officers of the government. The government must therefore take responsibility for the action. As already stated, this court has the responsibility of upholding the supreme law of this land. In the case of the plaintiff, this court will do this by ensuring appropriate redress for the violation of the constitutional rights of the plaintiff through monetary compensation. Therefore an award of damages would be appropriate.

The plaintiff relied on the cases of ***Dominic Arony Amolo vs the Attorney General*** (supra), where a sum of Kshs.2.5 million was awarded in the year 2005, for similar violations; ***Dr. Odhiambo Olel vs the Attorney General, HCCC (Kisumu) No.366 of 1995***, where a sum of Kshs.12 million was awarded, including exemplary damages of Kshs.4 million; the case of ***James Njau Wambururu vs the Attorney General*** (supra), where Kshs.800,000/= was awarded in; and ***Rumba Kinuthia vs the Attorney General, HC. Misc. App. No.1408 of 2004***, where a sum of Kshs.1.5 million was awarded in 2008. No submissions were made by the defendant on the issue of quantum of damages.

Having considered the authorities which were cited to us, we wish to distinguish the case of ***Dr. Odhiambo Olel vs the Attorney General*** (supra). In that case, the plaintiff sought general and special damages for unlawful arrest, malicious prosecution, false imprisonment, loss and damage arising from severe physical, psychological and mental torture. The damages awarded to the plaintiff included Kshs.4.5 million in respect of malicious prosecution and special damages of Kshs.3,977,675/= in respect of medical expenses, loss of salary and loss of pension all of which were proved. We have taken into account the circumstances of the plaintiff which include the fact that the plaintiff lost his job and that his social standing and reputation was adversely affected by the violation of his fundamental rights and freedom, and that he also suffered physical, mental and psychological torture.



We note that the plaintiff did not specifically plead or prove any special damages. We are therefore of the view that a global award of Kshs.2.5 million would be sufficient compensation to the plaintiff for the violations suffered by him and the consequent loss. In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages.

In conclusion, we give judgment for the plaintiff and declare:

- (i) That his fundamental rights and freedom under Section 70, 72(3) and (5) and 74(1) of the Constitution were contravened and violated by police officers and other government servants or agents in the year 1986.
- (ii) We declare that the plaintiff is entitled to damages for the violation and contravention of his fundamental rights and freedoms under the Constitution.
- (iii) We award the plaintiff general damages of Kshs.2.5 million.
- (iv) We further award the plaintiff costs of the suit and interests on the judgment sum from the date of this judgment.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of April, 2010.**

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H. M. OKWENGU

JUDGE

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**G. DULU**

JUDGE



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