

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 15 OF 2017

—BETWEEN—

HON. GITOBU IMANYARA.....1ST APPELLANT

HON. NJEHU GATABAKI.....2ND APPELLANT

BEDAN MBUGUA.....3RD APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Visram, Sichale & Mohammed, JJA) in Civil Appeal No. 98 of 2014 delivered on 19th May 2016)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Appeal is dated 21st September 2017, and filed on even date. The appellants are challenging the entire judgment and orders of the Court of Appeal (*Visram, Sichale & Mohammed, JJA*) at Nairobi in Civil Appeal No. 98 of 2014, delivered on 19th May 2016.

B. BACKGROUND

[2] The issues complained about by the appellants are attributed to the struggle for the second liberation in Kenya. The appellants allege that on various dates, between 1985 and 1994, in the course of agitation for opening up of the democratic space and respect for freedoms in the country, their fundamental rights and freedoms were systematically contravened and grossly violated by the then Kenya Police and Criminal Investigation Department (CID) officers, prison warders, and other Government servants, agents, employees and institutions. It is the

appellants' contention that they were severally arrested, subjected to torture, had trumped-up charges brought against them, were improperly convicted and imprisoned, and held in solitary confinement at the notorious E Block at Kamiti Maximum Prison, where insane prisoners were held. The appellants stated that their sources of livelihood were destroyed by various Government agencies under the leadership of former President Daniel Toroitich Arap Moi.

[3] It is their contention, that as a result of the unlawful arrest, malicious prosecution and conviction, imprisonment, police harassment and physical torture, the appellants suffered psychological torture, post-traumatic stress disorder, and economic loss. Furthermore, they stated that their families suffered and lived under great uncertainty and anxiety. Each of the appellants filed separate constitutional petitions at the High Court.

[4] Gitobu Imanyara (the 1st appellant) filed *Constitutional Petition No. 78 of 2010 Gitobu Imanyara v Attorney General*, where he alleged that between 1985 and 1991, the Attorney General through the Kenya Police officers, prison warders and other Government servants, agents, employees and institutions violated his fundamental rights and freedoms by subjecting him to unlawful arrest, malicious prosecution, imprisonment, police harassment and torture among other violations.

[5] At the High Court, the 1st appellant sought: *a declaration that his fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1) of the Constitution (previously Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)) were contravened and grossly violated by the police officers, prison warders and other Kenyan government servants, agents, employees and institutions on various dates at Nyayo House Torture Chambers, Jomo Kenyatta International Airport Police cells, Kamiti Maximum Prison and Meru Prisons; declaration that he was entitled to payment of damages and compensation for violations of his fundamental rights and freedom*

and in particular to full indemnity from the Government arising out of the suits filed against him by National Bank of Kenya, Deposit Protection Fund on behalf of Eurobank and National Council of Churches of Kenya and for such damages and/or order; general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution (previously Section 84(2) of the repealed Constitution) for the unconstitutional conduct of the Kenya Government and its agents; a declaration that the conduct of Attorney General, Mathew Guy Muli, at his trial and conviction on account of alleged theft by agent, amounted to a mistrial and gross miscarriage of justice and an order quashing the conviction and restoring his record”.

[6] Similarly, Njehu Gatabaki (the 2nd appellant) filed *Constitutional Petition No. 80 of 2010, Njehu Gatabaki v. Attorney General*, where he alleged gross, systematic, flagrant and repeated violation of his rights to liberty, property, fair hearing and not to be subjected to inhumane treatment, and freedoms of expression, freedom of movement, freedom of association, freedom and security of the person and freedom of assembly by Kenya Police and CID officers, prison warders and other Government servants, agents, employees and institutions between 1990 and 2002.

[7] In the Petition, the 2nd appellant sought: *a declaration that his fundamental rights and freedoms under Articles 28, 29, 31, 31(1), 33(1), 34(1) &(2), 37, 39 and 40(1) of the Constitution (previously Sections 72(1), 72(2), 72(3),72(5),74(1), 75(1), 77(1), 77(2), 79(1) and 81(1) of the repealed Constitution) at all material times had been, and were repeatedly contravened, and grossly violated by the police officers, C.I.D officers, N.S.I.S (formerly the Special Branch), prison warders and other Kenyan Government servants, agents, employees and institutions on numerous dates at various police stations, in Nairobi City and surrounding towns in Nairobi, Industrial Area Remand Prison, police cells and Kamiti Maximum Prison; a declaration that he is entitled to payment of damages*

and compensation of 950,000 copies of the Finance Magazine directly impounded by the Kenya Police and CID Officers amounting to Kshs. 95,000,000/= in addition to damages and compensation for gross violations and contraventions of his fundamental rights and freedoms under the Constitution; general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution, (previously Section 84(2) of the repealed Constitution).

[8] Bedan Mbugua (the 3rd appellant) also filed at the High Court *Constitutional Petition No. 81 of 2010, Bedan Mbugua v. Attorney General* where he alleged that his fundamental rights to liberty, property, not to be subjected to inhumane treatment, fair hearing, freedom and security of the person, freedom of expression, freedom of assembly, freedom of association and freedom of movement were contravened and grossly violated by the servants, agents, employees and Government institutions between 1988 and 1994 at the offices of the Beyond Magazine where he was the Editor-in-Chief and subsequently, when he was the Editor at the People Daily.

[9] The 3rd appellant sought: *a declaration that his fundamental rights and freedoms under Articles 28, 29, 31, 33(1), 34(1) &(2), 37, 39 and 40(1) of the Constitution (previously Sections 72(1), 72(2), 72(3),72(5),74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1) of the repealed Constitution) had been contravened and grossly violated by police officers, prison warders and other Kenyan government servants, agents, employees and institutions on various dates at police cells, Kamiti Maximum Prison, Mbagathi Prison and Manyani Maximum Prison; a declaration that he is entitled to the payment of damages and compensation for the violation and contravention of his fundamental rights and freedom under the Constitution; and general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution (previously Section 84(2) of the repealed Constitution) for the unconstitutional conduct of the Kenya Government and its agents and/or servants.*

[10] On 11th January 2012, each of the appellants recorded a consent with the Attorney General, wherein it was stated, “*that liability was not contested save in respect of any lawful conviction which issue, is left for the adjudication by the court on the basis of the parties’ written submissions, evidence, authorities, and highlighting.*”

[11] Subsequently, on 6th February 2012, an order was made consolidating Petitions No. 78 of 2010, No. 80 of 2010 and No. 81 of 2010.

[12] On 14th June 2013, the High Court *Lenaola J (as he then was)*, observed that since liability was expressly admitted, he would address the issue of compensation for the admitted violations of the appellants’ fundamental rights and freedoms as provided for under Article 23(3) of the Constitution. On the claim for aggravated and exemplary damages, the learned Judge noted that no benefit was procured by the Moi regime in its unconstitutional actions, and that the appellants were not labouring for the second liberation to get monetary compensation, but the attainment of a higher ideal; a just society. Therefore, exemplary damages are not properly awardable noting the burden to the innocent taxpayer.

[13] Placing reliance on Section 72(1) (a) and (b) of the repealed Constitution, the learned Judge found that he was unable to circumvent the Constitution and could not declare those convictions unconstitutional. This was because it was admitted by the appellants that the criminal convictions and sentence were overturned (wholly or partly) on appeal. The learned Judge, also found that once liability was admitted, then, it meant that the Attorney General also admitted that the then Attorney General, Mathew Guy Muli, acted improperly, and it could therefore be surmised that he instigated the 1st appellant’s arrest. He concluded that if the Attorney General admitted past misconduct on the part of his predecessor, the court could not but accept the admission.

[14] Ultimately, the learned Judge entered judgment in the following terms; **Petition No. 78 of 2010**; the trial court declared that the 1st appellant’s

fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1) & 34(2), 37, 39 and 40(1)** of the **Constitution** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of Kenya at material times had been, and were repeatedly contravened and grossly violated. The learned Judge, also found that the Attorney General having admitted that the conduct of the then Attorney-General, Mathew Guy Muli, with regard to the 1st appellants arrest for alleged theft by agent amounted to misconduct, it was so declared. Further, the trial court awarded the 1st appellant general damages of Kshs. 15 Million, costs of the petition and interest at court rates on damages from the date of the judgment until payment in full.

[15] In respect of **Petition No. 80 of 2010**, the trial court declared that the 2nd appellant's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the **Constitution** and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution of at material times had been, and were repeatedly contravened and grossly violated. The trial court awarded him general damages of Kshs. 10 Million and costs of the Petition together with interest at court rates on damages from the date of the judgment until payment in full. Lastly, in regard to **Petition No. 81 of 2010**, the learned Judge declared that the 3rd appellant's fundamental rights and freedoms under **Articles 28, 29, 31, 33(1), 34(1), 34(2), 37, 39 and 40(1)** of the Constitution and under **Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1)** of the repealed Constitution at material times were repeatedly contravened and grossly violated. The trial court awarded him general damages of Kshs. 7 million and the costs of the Petition. The 3rd appellant was also awarded interest at court rates on damages from the date of the judgment until payment in full.

[16] Dissatisfied with the judgment of the High Court, the appellants filed *Nairobi Civil Appeal No. 98 of 2014, Hon. Gitobu Imanyara, Hon Njehu Gatabaki, Bedan Mbugua vs. Attorney General*, seeking a declaration that the awards of Kshs. 15 Million, 10 Million and 7 Million were grossly inadequate redress for the admitted breaches of the Constitution; an order setting aside the said awards, substituting it with others making reasonable awards that compensate each of the appellants' respectively for the various breaches of their constitutional rights with interest thereon at court rates; and an order setting aside the conviction of the 1st appellant.

[17] The appellants raised seven grounds of appeal stating that the learned Judge erred in law and in fact: in making awards of damages that were manifestly inadequate redress given the gravity of the breaches of the fundamental rights under the Constitution as set out in the respective Petitions of the appellants before the Judge; in specifically finding that aggravated and exemplary damages are not properly awardable noting the burden to the innocent tax payer; by declaring that the allegations by the 2nd appellant that 950,000 copies of the *Finance Magazine* were destroyed were exaggerated and basing his verdict on extracts read from the *Daily Nation* and *Standard* newspapers dated 28th -29th April 1993; in stating that the 2nd appellant lacked locus standi to institute proceedings in relation to losses incurred by destruction meted on the *Finance Magazine* while admitting that he was associated with the named companies; given the admission of liability by the Attorney General the learned Judge fundamentally erred in both law and fact in not acting on the undisputed expert evidence of KPMG; and that the learned Judge having found as a fact that the Attorney General had acted unconstitutionally, erred in not setting aside the conviction of the 1st appellant.

[18] On 19th May 2016, the Court of Appeal unanimously dismissed the appeal with no order as to costs. In doing so, the appellate court delineated two issues for

determination: *whether the learned Judge applied wrong principles in law and abused the exercise of his discretion in the award of damages to the appellants; and whether the learned Judge erred in law by failing to set aside the criminal conviction of the 1st appellant.*

[19] On the first issue, the court found no reason to interfere with the learned Judge's exercise of discretion in assessing the damages awarded to the appellants based on the evidence before him. The Court of Appeal further observed that it could not downplay the violations of the appellants' dignity and liberty suffered in the climate of fear and terror created by the then Government. However, it observed that as a court of law, courts are constrained to apply the law based on the evidence presented before it. On the second issue, as to whether *the learned Judge erred in law by failure to set aside the criminal conviction of the 1st appellant*, in declining to set aside the conviction, the appellate court observed that the particulars and extent of the interference at the lower court and subsequently, at the appellate court were not explained and the record was completely silent on this. Further, that the complaint was directed neither to the lower court nor to the 1st appellate court, but to the Attorney General.

[20] Aggrieved by the finding of the Court of Appeal, the appellants filed the present appeal as of right pursuant to Article 163(4) (a) of the Constitution. The appellants seek the following orders from the Court:

- a. *That part of the judgment of the Court of Appeal delivered by Visram, Sichale and Mohammed JJA on 19th May 2016, wherein they deemed the judgment of the High Court as sufficient, be set aside and/or varied and this Honourable Court be pleased to enhance the award of damages and award compensation for losses for each Petitioner as per the KPMG Report namely:-*

Hon. Gitobu Imanyara

Kshs 146,603,604.15

Hon. Njeru Gatabaki

Kshs 799,515,675.59

Mr Bedan Mbugua

Kshs126,041,683.51

- b. *That the 1st appellant's unlawful criminal conviction be set aside.*
- c. *Refund of professional fees paid to KPMG by the Petitioners namely:-*
 - Hon. Gitobu Imanyara US\$ 68,701.00*
 - Hon. Njeru Gatabaki US\$ 77,626.00*
 - Mr. Bedan Mbugua US\$62,834.30*
- d. *Interest at court rates*
- e. *Costs in the Court of Appeal and in the Supreme Court*

[21] In summary, the appellants raised eight grounds stating that the learned Judges erred in law and in fact: *by applying wrong principles in declining to disturb the quantum of damages awarded by the High Court and ignoring the uncontested expert opinion by KPMG, awarding amounts that were manifestly low; in failing to set aside the 1st appellant's criminal conviction and failing to appreciate that his rights had been gravely violated and had to carry the status and stigma of an unlawful conviction, and the attendant consequences on his record for life; by relying on the principles enunciated in the case of Salmon v Salmon (1895-9) ALL ER 33, yet the Nairobi Law Monthly, The Finance Magazine, Beyond Magazine and The People Magazine cannot be separated from the appellants; for failing to find and hold that the breaches of the appellants' rights under Article 34 of the Constitution were breached against them and their business, the state fettered the enjoyment of their rights and used state machinery to frustrate the appellants' eventually causing huge losses by shutting down their respective publications; disregarding a matter of public notoriety, and a fact in history that the appellants and their businesses as cited in the KPMG Reports, were persecuted by state agencies interchangeably causing them to shut down; and that the finding that there is no remedy, is incongruent and ought to be set aside by the Court.*

C. PARTIES SUBMISSIONS

a. *The appellants'*

[22] The appellants' in their submissions dated 27th October 2017, noted that the struggle for democracy and reforms to the political system came at a high price. Likewise, that the period and facts informing this petition flow from the worst of times in the Republic of Kenya. They noted that they were part of the struggle for legal, democratic and political reforms in the period when Kenya was a single party State and after the re-introduction of multi-party democracy in the early 1990s. Furthermore, that serious breaches were committed on many people, but worst was reserved for the boldest and most outspoken like the appellants.

[23] The appellants submitted that it was common ground that their businesses were their sources of livelihood, and that the said specific businesses were associated with them in their personal capacities. They also urged, that the state clogged the enjoyment of their right to property, and used machinery at its disposal to frustrate them eventually, causing them huge losses by shutting down their respective publications.

[24] The appellants' Counsel faulted the High Court and the Court of Appeal for failing to consider the quantified damages as per the KPMG Report in the award of damages. The appellants contended that in calculating their damages, the courts ought to have applied a holistic approach to the facts, and interrogated the reports before them. They urged that the reports were prepared for court purposes and therefore, there was an expectation that the same would form the basis for making the finding on quantum. In that regard, reliance was placed on the case of *Hon. Kenneth Stanley Njindo Matiba vs. The Attorney General* [2014]eKLR, where the court acknowledged that loss of business arising from unlawful or unconstitutional conduct of the State was a legitimate factor in assessing damages.

[25] Furthermore, the appellants submitted that the learned Judges erred by failing to find that the breaches to their rights under Article 34 of the Constitution

were against them and their businesses. They maintained that it was common ground that *Lenaola J (as he then was)* found the breach was on both the appellants in person and their businesses. It would therefore follow that compensation ought to have been awarded to both the appellants personally, and separately to their businesses.

[26] It is the appellants' further submission that the uncontested expert reports by KPMG not only gives verifiable, detailed and quantified losses suffered by the appellants, together with their respective families, but also the damages suffered or incurred and loss of business suffered by the appellants as a result of the violations of their constitutional rights. They argued that had the violations not occurred to them personally and on their businesses they would have had major financial successes in their businesses, and that the inability to grow was caused by the interference by the State. Therefore, they stated that they are entitled to compensation that translates to the income that would have cascaded to them as years went by had the State accorded them the benefit of the Constitution and the law.

[27] In addition, learned Counsel for the appellants submitted that the awards given by the trial court failed to appreciate the fact that a violation of the rights of the appellants also directly affected their businesses. They further faulted the learned Judges of Appeal for applying wrong principles in declining to disturb the quantum of damages awarded at the High Court, and also ignoring the uncontested expert opinion produced by the appellants. The appellants further submitted that Article 23(1) of the Constitution grants the High Court jurisdiction in accordance with Article 165 to grant appropriate reliefs to any proceedings brought under Article 22 of the Constitution.

[28] The 1st appellant agreed with the finding of the trial Judge to the extent that his human rights were violated, and that his resultant conviction was unlawful and unconstitutional for failing to comply with the law and in contravention of the

Constitution. He however faulted the Judge for failing to set aside his conviction and urged this Court to interfere with the said finding.

[29] Lastly, the appellants submitted that the Judges of Appeal misinterpreted the test for appropriate relief as provided in Article 23(3) of the Constitution since liability for the violation was admitted by the Attorney General and the only issue was that of quantum of damages. Consequently, the appellants urged us to allow the appeal as prayed.

b. The Attorney General's

[30] The Attorney General in their submissions dated 29th January 2018, admitted that liability was determined in favour of the appellants by consent of parties dated 10th December 2012, and that the Attorney General was adjudged 100% liable for acts visited upon the appellants except for the issue of quantum of damages and the setting aside of the conviction of 1st appellant.

[31] In response to the Appeal, the Attorney General argued that the Court of Appeal's determination on the issue of damages was proper as the Judges considered the relevant principles as encapsulated in the following cases; *Butt v. Khan* [1981] KLR 349, *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] eKLR, *Gicheru v. Morton and Another* [2005].

[32] Further, the Attorney General submitted that the Court of Appeal was correct in observing that damages arising out of the constitutional violations also known as constitutional tort of actions are public law remedies and different from the common law damages for tort under private law. To support this contention, the Attorney General relied on the cases of *Rumba Kinuthia and 6 Others v. Attorney General* [2019] eKLR; and *Harun Thungu Wakaba & 16 others v. Attorney General* [2009]eKLR. The Attorney General also relied on the case

of *Obongo and another v Municipal Council of Kisumu* [1997] EA 91, where the principles for award of exemplary and aggravated damages were set out.

[33] Additionally, the Attorney General agreed with the Court of Appeal's finding that the award of damages in constitutional violations cases is an exercise in rationality and proportionality. Reliance was placed on the cases of *Dendy v University of Witwatersrand, Johannesburg and others* (2006) 1 LRC 291 291; *Peters v Marksman and another* (2001) 1 LRC; and *Doucet-Boudreau v Nova Scotia (Ministry of Education)*, 2003 SCC 62.

[34] The Attorney General agreed with the learned Judges of Appeal's finding that the claim for compensation suffered by the Nairobi Law Monthly, the Finance Magazine and the People Daily were unsustainable because the proper entities which ought to have been sued were those companies or the businesses themselves. To this end, he urged this Court to dismiss the appeal.

D. ISSUES FOR DETERMINATION

[35] Having considered the respective pleadings, written, and oral submissions in the instant appeal, the following issues emerge for determination:

- i. *Whether the appeal before this Court meets the constitutional threshold under Article 163(4) (a) of the Constitution?*
- ii. *Whether the Court of Appeal erred in interpreting Article 23 (3) of the Constitution specifically, on the available remedies once liability had been admitted.*
- iii. *Whether the 1st appellant's conviction was unlawful, if so, should it be set aside?*

E. ANALYSIS AND DETERMINATION.

[36] Before this Court can delve into delineated issues for determination, it takes judicial notice of the fact that the clamor for the second liberation was marred by extra-judicial repression, in which oppression and suppression of freedoms such as liberty, expression, association and assembly were stifled at every instance. Sedition, treason, foreign exchange restrictions, and other laws were used to subdue the populace into submission. Detention without trial, torture, and prosecutions on trumped-up charges characterized the regime. Through various amendments to the repealed Constitution, presidential declarations and decrees, the President had control over Parliament, the Judiciary, and the Electoral Commission.

[37] That consolidation of power by the Executive weakened institutions such as the Judiciary and the Police Force, thereby eroding the protection and enforcement of human rights. Security agencies backed this system and spying agencies acquired notoriety not only in conducting surveillance in the interest of State security but also using the excuse of State security to harass, apprehend, detain, and torture real or perceived enemies of the Government at that time. The infamous prominence acquired by Nyayo House (torture chambers) and Nyati House in the 1980s and early 1990s is a reflection of how extra-judicial means were used to asphyxiate civil society discourse.

[38] Therefore, the constitutional amendments that began in 1990 marked a paradigm shift from the dark days of struggle for democracy into the culmination of the promulgation of the Constitution 2010. The Constitution 2010 enshrines vital elements of democracy such as good governance, integrity, transparency, human dignity, equality, human rights, and non-discrimination among other national values and principles as set out in Article 10 of the Constitution. As such, and as the apex Court, we are called upon to interpret the Constitution in a manner

that advances the rule of law, human rights and fundamental freedoms, and in looking into this matter, we proceed so to do.

i. Does the appeal before this Court meet the constitutional threshold under Article 163(4) (a) of the Constitution?

[39] It is the appellants' argument that this Court has jurisdiction to determine the appeal under Article 163(4) (a) of the Constitution. They submitted that the subject matter before the High Court and the Court of Appeal did involve interpretation and application of Articles 28, 29, 31, 33(1), 34(1) & (2), 37,39 & 40(1) of the Constitution (previously, Sections 72(1), 72(2), 72(3), 72(5), 74(1), 75(1), 76(1), 77(1), 77(2), 79(1), 80(1) and 81(1) of the repealed Constitution). The appellants also urged that right from the High Court through to the Court of Appeal, they sought reliefs for constitutional violations anchored on interpretation and application of Article 23(3) of the Constitution. We note, the Attorney General did not contest the jurisdiction of the Court to entertain this matter.

[40] Under Article 163(4) (a) of the Constitution, this Court has jurisdiction to entertain appeals as of right in any case involving the interpretation and application of the Constitution.

[41] This Court set guiding principles for admitting a matter under Article 163(4) (a) of the Constitution in the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC. Petition No. 3 of 2012; [2012] eKLR, where it stated that an appeal must originate from a Court of Appeal case where the issues in contestation revolved around the interpretation or application of the Constitution. An appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.

[42] Similarly, in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* SC. Petition No. 10 of 2013; [2014] eKLR, this Court

reiterated that an appeal before it involving interpretation and application of the Constitution ought to have progressed through the normal appellate mechanism so as to reach the Court by way of appeal.

[43] Therefore, a perusal of the record and determinations of the two superior courts judgment is necessary. The issues canvassed before the two superior courts were firstly, the remedies available to the appellants under Article 23(3) of the Constitution and secondly, the setting aside of the unlawful conviction of the 1st appellant. We note that, at the High Court, the parties recorded a consent on 11th January 2012, where the Attorney General admitted liability on constitutional violations of fundamental rights and freedoms of the appellants but not on the conviction of the 1st appellant.

[44] From the foregoing, we are satisfied that the matter before us for consideration has progressed through the normal appellate mechanisms to reach this Court, and involves interpretation and application of Article 23(3) of the Constitution. It is, therefore, our finding that this Court is well clothed with jurisdiction to determine the Appeal.

ii) Whether the Court of Appeal erred in interpreting Article 23 (3) of the Constitution, specifically, on the available remedies once liability had been admitted?

[45] The central issue for determination is whether the Court of Appeal erred in interpreting Article 23 (3) of the Constitution specifically, on the available remedies once liability had been admitted. In that context, the appellants submitted that the compensation awarded by the trial court and affirmed by the Court of Appeal was manifestly low, and that the learned Judges of Court of Appeal erred in declining to disturb the quantum. It is also their submission that the two

superior courts ought to have considered the KPMG Report in awarding the quantum of damages.

[46] Conversely, the Attorney General submitted that the trial Judge's determination on the issue of damages was correct. Regarding the appellants' claim for damages and losses to their companies and businesses, it was submitted that the trial Judge correctly found that those claims were unsustainable because the proper entities which ought to have sued were those companies or the businesses themselves. The Attorney General further urged that the law does not allow a shareholder of a company to bring claims on behalf of the company. The Attorney General also urged that the appellants had failed to discharge the burden of proof, in particular, it was argued that the 2nd appellant's claim of 950,000 copies of the Finance Magazine was not proved as the only evidence he provided were media reports. In any event, the award of damages of Kshs. 7 million, Kshs. 10 million, and Kshs. 15 million to the appellants was adequate compensation for the violations suffered.

[47] Having perused the record, we note that each of the appellants recorded a consent on liability on 11th January 2012, on the following terms;

“Liability is not contested save in respect of any lawful conviction, which issue is left for the adjudication by the court on the basis of the parties’ written submissions, evidence, authorities and highlighting by the parties.”

[48] We therefore agree with the trial court's observation that the only issue for determination was the assessment of damages for the constitutional violations. Article 23(3) of the Constitution is the launching pad of any analysis on remedies for constitutional violations, it provides that:

“In any proceedings brought under Article 22, a court may grant appropriate relief including:-

- (a) A declaration of rights;**
- (b) An injunction;**
- (c) A conservatory order;**
- (d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) An order for compensation; and**
- (f) An order of judicial review”.**

[49] This Court interrogated the scope of Article 23(3) in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No. 3 of 2018; [2021] eKLR where the case of *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*; Petition No. 14, 14A, 14B and 14C of 2014 (Consolidated) was cited with approval. The Court stated:

“... a close examination of these provisions (Article 23 (3) and 165 (3) (d) of the Constitution) shows that the Constitution requires the Court to go even further than the U.S Supreme Court did in the Marbury case, and that Article 23 (3) grants the High Court powers to grant appropriate relief “including” meaning that this is not an exhaustive list.”

[50] In the instant case, the appellants’ prayers for compensation for damages under Article 23 (3) of the Constitution is two-pronged; compensation available to the appellants for gross violation of their fundamental rights and freedoms, and

compensation for losses suffered by the appellants' companies as a result of the violation of the appellants' rights. We shall determine the issues simultaneously.

a. 1st appellant

[51] At the High Court, the 1st appellant claims can be summarized as follows; *a declaration of violation of his fundamental rights and freedoms; a declaration that he was entitled to payment of damages and compensation for violations of his fundamental rights and freedoms and in particular full indemnity from the Government arising out of suits filed against him by the National Bank of Kenya, the Deposit Protection Fund on behalf of Eurobank and the National Council of Churches of Kenya; general damages, exemplary damages under Article 23(3) of the Constitution (previously Section 84 (2) of the repealed Constitution); and a declaration that his trial was a mistrial and quashing of the conviction thereof.*

[52] The trial Judge found that the 1st appellant's fundamental rights had been violated and awarded him general damages of Kshs 15 million, costs, and interest thereon. Although the learned Judge declared that his trial was a mistrial due to admission of liability by the Attorney General, he did not set aside the conviction. However, the 1st appellant's claim for payment of damages and compensation for violations of his fundamental rights, and freedoms and in particular, full indemnity from the Government for claims arising out of suits filed against him by the National Bank of Kenya, the Deposit Protection Fund on behalf of Eurobank, and the National Council of Churches of Kenya was not awarded. Likewise, the trial court did not award him aggravated damages and exemplary damages. These findings were not challenged at the Court of Appeal.

[53] At the Court of Appeal, the 1st appellant through a joint memorandum of appeal with the other appellants sought the following prayers from the Court of Appeal: that the award of Kshs 15 million was grossly inadequate redress for the

admitted breaches of the Constitution; that the court grants an order setting aside the said award and substituting it with a reasonable award; and that his conviction be set aside.

[54] The Court of Appeal affirmed the award of general damages of Kshs. 15 million and dismissed his prayer for setting aside his conviction; and exemplary and aggravated damages. The justification of the Court of Appeal for not disturbing the award was that as a court of law, they were constrained to apply the law based on the evidence presented before it.

[55] Having perused the Appeal, we do note that the 1st appellant seeks this Court to set aside or vary the judgment of the Court of Appeal, and enhance the award of damages and compensation for gross human rights violations and losses suffered by his company, the Nairobi Law Monthly as per the KPMG Report amounting to Kshs 146,603,604.15, and costs of the professional fees paid to KPMG of US\$68,701.00.

[56] It is not lost to us, that the 1st appellant did not specifically plead for the amount of Kshs. 146,603,604.15 in the High Court, as enumerated in the instant appeal. Further, he did not specifically claim any reliefs in regard to the losses suffered by the Nairobi Law monthly as a result of the violation of his fundamental rights.

[57] This Court has had occasion to express itself as to the specificity of pleadings in the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others* S.C Presidential Petition No. 1 of 2017 [2017] *eKLR*, we quoted with approval, *Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R, where the Supreme Court of India which held at paragraph 59:

“[52] Further, the Court went on and observed that:

“In absence of pleadings, evidence if any, produced by the parties, and cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.” (emphasis added).

[58] We agree with the reasoning adopted in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission supra*; that in the absence of specific pleadings, evidence if any, produced by the parties cannot be considered. Therefore, KPMG’s Report produced by the 1st appellant cannot be considered as there was no specific prayer for the award of damages for losses suffered by the Nairobi Law Monthly at the High Court. We further reiterate that this claim has not gone through the appropriate appellate mechanisms. Therefore, we are constrained not to interrogate the same.

[59] It is our considered view, that the only issue available for us to determine is, whether the Court of Appeal erred in upholding the award of the trial Judge for general damages for Kshs 15 million to the 1st appellant.

[60] The learned Judges of the Court of Appeal in this matter rationalized the non-interference of general damages, aggravated damages and exemplary damages as follows:

“It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for the award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy”.

[61] The question of whether or not an appellate court ought to interfere or to disturb quantum of damages by a trial court has been extensively dealt with in case law. In *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another* (No 2) [1985] eKLR the court held that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an

irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

[62] Similarly, in *Robert Perekebena Naidike vs The Attorney General of Trinidad and Tobago*, [2004] UKPC 49 the Supreme Court stated;

“A court of appeal must be satisfied that: the trial judge either misdirected himself/herself on the relevant facts of law (took irrelevant facts into consideration or ignored relevant (emphasis added) one or misinterpreted or misapplied some relevant legal principle), or the trial judge’s assessment of damages is a ‘wholly erroneous estimate.’”

[63] This Court has acknowledged the difficulty in awarding damages in constitutional violations in *William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others*, SC. Petition No. 2 of 2018; [2021] eKLR where it noted:

“.....that the questions and issues that a Court has to consider in order to make an award of damages with regards to a constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straightforward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the

appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries.”

[64] Notwithstanding the difficulty, Article 23(3) of the Constitution mandates this Court to grant appropriate relief for violations of the Constitution. While we note that Constitution clothes the High Court with the *jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights*, that duty does not lie solely upon the High Court in the judicial set-up, as was held in **Martin Wanderi & 106 others v Engineers Registration Board & 10 others, SC**. Petition No. 19 of 2015; [2018] eKLR.

[65] This Court, in addition to exercising its jurisdiction under Article 163(4) (a) of the Constitution, is also mandated under Article 23 (3) of the Constitution, and Section 21 of the Supreme Court Act to grant the appropriate reliefs to remedy a violation of the fundamental rights and freedoms.

[66] The case of *Fose v. Minister of Safety and Security* (CCT 14/96) 1997, ZACC 6, 1997, defines appropriate relief as:

“Relief that is required to protect and enforce the Constitution depending on the circumstances of each case. The relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights as enshrined in the constitution are protected”.

[67] In the Indian case of *Rudul Shah vs State of Bihar and Another*, [1983] 4 SCC 141, the Supreme Court of India held that:

“One of the telling ways in which the violation of the right to life and liberty can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the state as a shield. Respect for the rights of individuals is the true bastion of democracy. Therefore, the state must repair the damage done by its officers to their rights....therefore refusal to pass an order for compensation in favour of the Petitioner will be doing mere lip-service to his fundamental right to liberty which the state government has grossly violated.”

[68] In the case before us, liability was admitted and a consent recorded, in essence, the Attorney General acknowledged willful and intentional violation of the 1st appellant’s rights. In the circumstances, it is our considered view that a remedy, even where it is not considered compensatory, and particularly when there is a willful and intentional violation of constitutional rights, needs to meaningfully vindicate the rights and freedoms of a claimant.

[69] In assessing appropriate reliefs for detention, the European Court of Human Rights in the case of *Shilbergs vs. Russia* (Application No. 20075/03) observed that:

“In this connection, the Court considers that the duration of the applicant’s detention in the Neman town detention unit and the reasons given by the domestic courts in making an award in respect of that detention are among the factors to be taken into account in assessing whether the domestic award could be

considered as adequate and sufficient redress..... It further notes that on 6 April 2004 the Neman Town Court took into account a number of factors in making an award of RUB 1,500. Those factors were: the duration of the applicant's detention, "the level of physical and mental suffering" endured by him, the degree of responsibility of the unit management for the suffering caused to the applicant and the lack of financial resources." (emphasis added).

[70] Also in the case of *Mamedova v. Russia* (Application No. 7064/05), the European Court found:

"The Court notes that it has found a combination of grievous violations in the present case. The applicant spent a year in custody, in inhuman and degrading conditions. Her detention was not based on sufficient grounds. Her appeal against the initial detention order was examined in her absence. Finally, on various occasions, she was denied the right to have the lawfulness of her detention examined speedily. In these circumstances, the Court considers that the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation...." (Emphasis added)

[71] From the foregoing, we are persuaded that the above-quoted decisions offer a good guide on the parameters to be considered in assessing damages for constitutional violations. They are:

- i. *The duration of the claimant's detention;*
- ii. *The level of physical and mental suffering endured by the claimant;*
- iii. *The degree of responsibility of the individual(s) responsible for the suffering caused to the claimant;*

- iv. The extent of the action or inaction complained of, and any other incidental rights that may have been violated as a consequence of the first breach(es);*
- v. Award is discretionary and will depend on the facts and the circumstances of each case; and*
- vi. Award is not compensatory or punitive but a vindication of the violated rights.*

[72] In applying the foregoing principles to the instant matter, we note that the Government, through the Attorney General admitted 100% liability for violating the appellants' fundamental rights and freedoms. We further note the gravity of the admitted constitutional breach and violations, and the amount of time and expense, it has taken to prosecute the matter before court. In the peculiar circumstances of this case, referring the matter back to the trial court for purposes of assessing general damages while this Court has the power to grant appropriate reliefs for constitutional violations as set out above, would further delay access to justice. We also find that the issue of general damages has been the subject of determination by both the High Court and the Court of Appeal and therefore, nothing impedes this Court from making such orders for general damages, as it deems fit.

[73] It is the 1st appellant's case that he was held at various prisons including Kamiti Prison. Unlike other political detainees, he was held in solitary confinement where insane prisoners were held for about 3 years; denied basic rights for instance lack of proper medical care; tortured at Nyayo House, where he was held in a waterlogged underground cell for ten days, his chest and ears were blocked as a result, the toenails fell off and he was paraded naked before 20 masked security officers. We are of the considered opinion that these extreme circumstances ought to have been taken into account when crafting appropriate remedies.

[74] In assessing the quantum of damages, we have looked at the case of *Velásquez Rodríguez vs Honduras* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) where the Inter-American Court of Human Rights found a violation of the victim's rights to liberty, right to humane treatment, and right to life and awarded the wife for psychological damage and loss of income of her husband, and also to the victim's children for psychological harm and loss of income.

[75] We note the quantum of damages awarded by the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR, (*Kariuki Case*) was Kshs. 15,000,000/= for violation of his constitutional rights, and Kshs. 22,965,460 being salary arrears.

[76] Similarly, we note the award in *Michael Rubia v Attorney General* [2020] eKLR, (*Rubia Case*) in the High Court was Kshs. 17,000,000/- to his estate as general damages for the violation of his fundamental rights and freedoms.

[77] While we agree with the reasons advanced by the Court of Appeal for non-interference with the trial's court finding on general damages, we are persuaded that the amounts awarded to the 1st appellant by the trial court and affirmed by the Court of Appeal was manifestly low to justify interference. We have taken into account other awards given by the domestic courts, the level of physical and mental suffering endured by the appellants, the duration of the violation of the appellants' rights, the duration since the High Court pronounced its judgment on the issue, inflation and all factors affecting the money market. Therefore, in applying the principles above and stated case law, we are convinced that the Court of Appeal erred in affirming the decision of the trial court's assessment of general damages. Taking into account the lapse of time since the cited authorities were determined, inflation and all factors affecting the money market, we do award the 1st appellant a sum Kshs. 25 million in general damages for violation of his constitutional rights. Unfortunately, we are unable to consider his prayer for compensation for loss of

business, as it was neither specifically pleaded nor particularized in the superior courts below us.

b. 2nd appellant

[78] The 2nd appellant's claims can be summarized as follows: *a declaration that his fundamental rights and freedoms under the Constitution were violated by the then Kenyan Government, a declaration that he is entitled to payment of damages and compensation arising out of the Kenya Police impounding 950,000 copies of the Finance Magazine worth Kshs. 95,000,000 in addition to damages for constitutional violations, general damages, exemplary damages, and aggravated damages under Article 23(3) of the Constitution.*

[79] The High Court declared that the 2nd appellant's rights and freedoms had been violated and proceeded to award him general damages of Kshs. 10 million and costs of the petition. However, the court did not allow his claim for exemplary damages and aggravated damages, payment of damages and compensation arising out of the Kenya Police impounding 950,000 copies of Finance Magazine. The court stated, that having disallowed the compensation for losses suffered to the Finance Magazine it could not interrogate the KPMG Report. With regard to the losses to the Finance Magazine, the High Court concluded as follows;

“[65] In any event, a separate claim by the correct legal entity should be made in that regard and proper evidence to prove the loss. I am unable to decide on the issue for the above reasons.”

[80] Dissatisfied with the Judgment, 2nd appellant appealed to the Court of Appeal and sought; *a declaration that the award of Kshs. 10 million was grossly inadequate for the admitted breaches of the Constitution; and an order setting aside the awards and substituting it with reasonable awards.*

[81] The Court of Appeal upheld the trial court's award of Kshs. 10 million for gross violation of his fundamental rights and freedom. However, it dismissed his claim for exemplary and aggravated damages and his claim for losses of Kshs. 95 million by the Finance Company associated with him. In agreeing with the trial court the Court of Appeal stated:

“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 vs. Salomon, 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.”

[82] Like the 1st appellant's case, the claim by the 2nd appellant is two-pronged, he seeks damages suffered as a result of gross constitutional violations of his fundamental rights, and losses suffered by the Finance Magazine as a result of the violation of his fundamental rights and freedoms.

[83] Having extensively deliberated on the issue of general damages in 1st appellant's case above, we look at the claim for general damages and the specific circumstances therein of the 2nd appellant.

[84] A perusal of the record reveals that the 2nd appellant was severally arrested, and held in remand prisons unlawfully, often kept in-communicado for 18 days. He further pleads that over a period totaling to 18 years, prosecution cases were filed against him including charges of sedition, incitement to violence, and a trumped-up murder charge. We are persuaded that the amounts awarded to the appellants by the trial court and affirmed by the Court of Appeal cannot stand. In

applying the principles and case laws we have enunciated in our analysis above and taking into account the severity of the abuses and the number of times the 2nd appellant was unlawfully arrested and persecuted, we award him general damages of Kshs. 20 million.

Has 2nd appellant made a case to warrant an award of special damages?

[85] As previously stated, the 2nd appellant sought a declaration that that he was entitled to payment of damages and compensation of 950,000 copies of the Finance Magazine directly impounded by the Kenya Police and CID Officers amounting to Kshs. 95,000,000/= from the High Court.

[86] In rejecting the damages for loss of business, the High Court observed that a separate claim by the correct legal entity should have been made, and proper evidence adduced to prove the loss claimed. The trial court proceeded to dismiss the claim for special damages.

[87] The Court of Appeal agreed with the finding of the trial court and added that a company is a separate legal entity from its owners which has a right to sue and be sued as a separate and distinct personality. The court applied the principle enunciated in the *Salomon vs. Salomon Case*. It held that the law does not allow the shareholder of a company to bring an action for losses and damages suffered by the company, as the proper plaintiff in an action arising out of losses and damages suffered by the company was the company itself.

[88] The 2nd appellant's appeal to this Court seeks setting aside and varying of the judgment of the Court of Appeal and an award of damages and compensation for losses of Kshs. 799,515,675.59 together with costs of the KPMG Report at US\$77,626.00. However, we do take note that the amount sought by 2nd appellant in the High Court was Kshs. 95,000,000/- for compensation for losses due to the

Finance Magazine and neither the claim for Kshs. 799,515, 675.59 nor costs of US\$ 77,626.00 were specifically pleaded.

[89] Against this background, we reiterate the position taken by this Court in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* supra. We are instructively persuaded that there was no claim for Kshs. 799,515, 675.59 and costs of US\$77,626.00 at the trial court. The amount subject of determination by the two superior courts was Kshs. 95,000,000/- and as such, we can only limit our analysis to Kshs. 95,000,000/=.

[90] Before delving into the issue of special damages, we shall interrogate the import of the consent filed in court on 11th January 2012, in regard to damages. The consent stated that:

“Liability is not contested save in respect of any lawful conviction, which issue is left for the adjudication by the court on the basis of the parties’ written submissions, evidence, authorities and highlighting by the parties.”

[91] A reading of the above-quoted consent leaves us with no other interpretation other than that, the Attorney General admitted liability for the losses suffered by the Finance Magazine as a result of the constitutional violations meted against 2nd appellant. As such, the only duty due to the trial court was to assess quantum.

[92] Be that as it may, we agree with the finding by both the High Court and the Court of Appeal to the extent 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, and that an action for losses and damages suffered by the company should be brought by the company. For the avoidance of doubt, this Court does *not* depart from the principles in the *Salmon case*. However, we *do* find that there are circumstances under which a party can claim for losses suffered by the company

as a result of constitutional violations visited upon that party. There is sufficient case law to support this proposition.

[93] In *Chiranjit Lal Chowdhuri vs The Union Of India And Others*, 1951 AIR 41, 1950 SCR 869, the Indian Supreme Court held that:

“An incorporated company, therefore can come up to the Supreme Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but as the company and its shareholders are in law separate entities, it would not be open to an individual shareholder to complain of a law which affects the fundamental right of the company except to the extent that it constitutes an infraction to his own rights as well”. [Emphasis added]

[94] Also in *Maharaj vs. Attorney General of Trinidad and Tobago* [(1978) 2 All E.R. 670] Lord Diplock delivering the majority decision stated;

“Finally, their Lordships would say something about the measure of monetary compensation recoverable under s. 6 (of the Independence Constitution, now section 14 of the Republican Constitution) where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and

distress suffered by the appellant during his incarceration.”

(Emphasis added)

[95] In *John Atelu Omilia & another v Attorney General & 4 others* [2017] eKLR the Court held that:

“I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.”

[96] In *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:

“...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.”

[97] Further, in the case of *Bellingham v Dhillon and another* (1973) 1 ALL ER 20 Forbes J, observed on special damages that the company's loss was the plaintiff loss for the purpose of the plaintiff’s action, where a plaintiff who owned 500 out of 501 shares in a company and he was the managing director, had claimed that because of his injuries, he was not able to devote his energies to expanding the company as quickly as it should have expanded.

[98] The above-quoted decisions were relied on by the High Court in the case of *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR where the court (*Lenaola J*), found that:

“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.”

[99] In *Peter M. Kariuki v Attorney General* [2014]eKLR the Court of Appeal awarded the petitioner Kshs 22, 965,460/- being salary benefits due to him during the period when his fundamental rights and freedoms were violated.

[100] Flowing from the above decisions, it is our considered view that the 2nd appellant’s claim for special damages suffered by the Finance Magazine is based on violations that constitute an infraction to his own right to property. Further, his claim is not a claim in private law for damages but **a claim in public law for compensation for the deprivation of fundamental rights, and freedoms** and compensation can include loss of earnings consequent due to the constant police harassment and incarcerations.

[101] Having extensively done a comparative analysis above, we find that the 2nd appellant's claim is a public law claim for infractions to his rights under the Constitution, and therefore, the principles enunciated in *Salmon case* do not apply. We are persuaded that the 2nd appellant is entitled to damages for loss of income, arising from the losses incurred by the Finance Magazine, if he can prove and quantify that his losses are *personal and distinct losses* which are directly linked to a 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 their personal loss.

[102] It is common factor that to prove his loss, in terms of the authorities cited above, the 2nd appellant sought to rely on a report prepared by KPMG. It is equally true that the trial court made no finding at all on the report, explaining that having disallowed the claim by the Finance Magazine, it was of no consequence to interrogate the report. This was clearly a misdirection as the 2nd appellant's claim was premised on the report. We do therefore find that the losses suffered by the Finance Magazine was as a result of an infraction of the 2nd appellant's fundamental rights and freedoms. Consequently, we will allow his prayer but subject to the matter being referred back to the trial court to determine the 2nd appellant's claim and quantum for special damages based on the evidence on record.

[103] Cognizant of the period it has taken for this matter to be prosecuted, and in order to do justice for all the parties involved herein, we direct that the High Court hears and determines this matter on a priority basis.

c. 3rd appellant

[104] The 3rd appellant claims at the High Court can be summarized as follows: *a declaration that his fundamental rights and freedoms under the Constitution had*

been violated, a declaration that he was entitled to payment of damages, and compensation for violations of his rights, general damages and exemplary damages and aggravated damages under Article 23(3) of the Constitution.

[105] The trial court found that his fundamental rights and freedoms had been violated and awarded him Kshs. 7 million and costs of the petition. However, his claim for aggravated damages, exemplary damages and losses suffered by the Beyond Magazine and the People Daily companies were never awarded by the trial court.

[106] At the Court of Appeal, the 3rd appellant sought a declaration that the award of Kshs. 7 million general damages was grossly inadequate for the admitted breaches of the Constitution and an order setting aside the awards and substituting it with a reasonable award.

[107] In the same way as the 1st appellant did, the 3rd appellant failed to specifically claim losses suffered by the Beyond Magazine and the People Daily at the trial court. Therefore, this claim must fail. This is because the claim has not progressed through the appropriate appellate mechanism as contemplated in ***Hassan Joho Case*** and the guiding principles as set out in the ***Raila Amolo Case*** as laid down by this Court.

[108] Having extensively deliberated on the issue of general damages for the 1st appellant, so as to avoid being repetitive, we proceed to quantify damages for the 3rd appellant for violation of his fundamental rights and freedoms. Like the first two appellants, the 3rd appellant was severally arrested and detained without trial at various police cells, Kamiti Maximum Prison, Mbagathi Prison, and Manyani Maximum Prison on trumped-up charges. As a result, he together with his family suffered mental anguish, loss of income, humiliation, shame, degradation, loss of

social position and his reputation injured. Taking into account the severity of the violations and considering the lapse of time and the fluctuation in the Kenya shilling over time, we award the 3rd appellant Kshs 15 million.

Whether the 1st appellants' conviction was unlawful, and if so, should it be set aside?

[109] It was the 1st appellant's case at the High Court that his right to a fair trial was violated by the influence of the then Attorney General's presence during his criminal trial and at the appeal. He sought *a declaration that the conduct of Attorney General, Mathew Guy Muli, at his trial and conviction on account of alleged theft by agent was a mistrial amounting to a gross miscarriage of justice and an order quashing the same and restoring his record.*"

[110] On this issue, the trial court rendered itself as follows:

"On issue No. (ii). it seems to me that once liability is admitted, then it means that the Respondent also admits that the Hon. Mathew Guy Muli acted improperly as Attorney General and therefore to that extent, it can also be surmised that he instigated Imanyara's arrest. I say this because the Respondent is the present Attorney General and if he admits past misconduct on the part of his predecessor, surely this court cannot but accept that admission".

[111] On its part, the Court of Appeal held that:

"In the appeal before us, and as stated above the 1st appellant's grievances were directed at the Attorney General and not the trial court and/or the 1st appellate court. The record is completely silent on how the 1st appellant's trial and a subsequent appeal was an unfair trial, either in the trial court and/or in the 1st appellate court... It is for these reasons that we

dismiss the 1st appellant's ground of appeal seeking to set aside his conviction".

[112] It was the 1st appellant's submission before this Court that his conviction was part of a violation of his constitutional rights. In this regard, reliance was placed in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where the Court of Appeal accepted that unlawful conviction was part of a political violation of constitutional rights, and it could be remedied through a constitutional petition. Senior Counsel Muite for the 1st appellant urged this Court to set aside the conviction as it was part of political persecution, and it affected the 1st appellant's professional life and reputation.

[113] In response, Counsel for the Attorney General submitted that there was no evidence tendered by the 1st appellant that the then Attorney General, Mathew Guy Muli, intimidated and/or compromised the trial magistrate in convicting, and sentencing the 1st appellant for 5 years imprisonment. He further submitted that the Court of Appeal also found that there was no evidence that the Attorney General had interfered with the appeal.

[114] We have reviewed the record and observed that the 1st appellant filed an appeal arising from the said conviction being Criminal Appeal Number 1762 of 1984.

[115] This Court agrees with the reasoning adopted by the Court of Appeal where the court observed that:

".. the particulars and extent of the interference in the trial court and in the appeal court was not explained and the record is completely silent on this and as pointed above it is not lost to us that this ground of appeal was directed at the Attorney-General and not at the trial court nor the 1st appellate court."

[116] The 1st appellant's claim having undergone the rightful appellate channel as anticipated in our laws and there being no evidence tendered to show that his trial and the subsequent appeal was unfair or violated his rights, we do hereby dismiss the appellants claim seeking to set aside his conviction.

[117] In conclusion, and apart from the 1st Appellant's claim with regard to his conviction, we do find for the 1st, 2nd and 3rd appellants, and allow this appeal.

[118] As to the issue of costs, and in accordance with this Court's decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*, SC. Petition No. 4 of 2012; [2013] eKLR, costs follow the event, therefore the appellant shall have costs of the appeal.

F. ORDERS

[119] In Consideration of the foregoing, we issue orders as follows:

- i. The appellants are awarded general damages as follows;***
 - a. Gitobu Imanyara Kshs 25,000,000 (Twenty-five million)***
 - b. Njehu Gatabaki Kshs 20,000,000 (Twenty million)***
 - c. Bedan Mbugua Kshs 15,000,000 (Fifteen million)***

- ii. That the Proceedings herein be remitted to the High Court, in terms of paragraph 102 above. In view of the period that has lapsed since the violations, the filing, hearing and determination of this matter before all the three courts, it is ordered that the Principal Judge of High Court, on priority basis allocates a judge to finalize it.***

iii. The 1st appellant's claim for quashing of the conviction and sentence by the Magistrate's court is hereby dismissed

iv. ii. The appellants shall have the costs thereof.

[120] Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE & OF THE SUPREM COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA