REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki, & Ouko, SCJJ)

PETITION NO. 26 OF 2019

(CONSOLIDATED WITH PETITION NOs. 34 & 35 OF 2019)

–BETWEEN–

MONICA WANGU WAMWERE ..... 1ST APPELLANT

PRISCILLA MWARA KIMANI ..... 2ND APPELLANT

LUCY WATURI KIMANI ..... 3RD APPELLANT

ESTHER GATHONI GICIMU ..... 4TH APPELLANT

MICHAEL MAINA KAMAMI ..... 5TH APPELLANT

KOIGI WAINAINA ..... 6TH APPELLANT

–AND–

THE ATTORNEY GENERAL ..... RESPONDENT

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*(Being an appeal from the Judgments of the Court of Appeal (**Warsame, Kiage & Murgor, JJ. A**) delivered on 28th June, 2019 & 6th August, 2019 in Civil Appeal Nos. 188 of 2017, 189 of 2017 and 190 of 2017 respectively)*

Representation:

Mr. Gitau Mwara for the appellants
(*Instructed by Gitau J. H. Mwara & Co. Advocates*)

Ms. Deborah Robi for the respondent
(*Instructed by the Office of the Attorney General*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] It is obvious to state that recognition, promotion and protection of human rights is an integral part of a democratic state. It is precisely for that reason that the 2010 Constitution not only proclaims that human rights constitute a fundamental cog in the Country's system of national values and principles of governance, but also expressly decrees and entrenches the Bill of Rights. The crux of this consolidated appeal revolves around the Bill of Rights and more specifically, two broad issues; namely, whether there is time limitation for seeking redress for historical human rights violation and the requisite threshold for establishing a claim of violation of a right or fundamental freedom.

B. BACKGROUND

(i) Factual History

[2] Kenya's pre-independence and post-independence history is littered with incidences of gross violation of human rights, most of which went without redress under the previous constitutional dispensation. Of significance to the matter at hand, is the period between the late 1980s and early 1990s that was characterized by agitation for political pluralism in the then one-party state. At that time, quite a number of persons were incarcerated for politically instigated offences ranging from treason, sedition, to being members of unlawful organisations. As a result, on 28th February, 1992 a group of women, most of whom were related to persons incarcerated for those offences, referred to as "mothers of political prisoners" together with their supporters congregated and camped at a section of Uhuru Park, popularly dubbed "Freedom Corner". The mothers and their supporters participated in a demonstration by going on a hunger strike to urge for the release of the then political prisoners. All of the six appellants herein contended that they were amongst the said demonstrators.

[3] According to the appellants, they alleged that, to their utter surprise on 3rd March, 1992 while still going on with their peaceful demonstration, they were brutally attacked and assaulted by over 100 police officers and General Service Unit (GSU) officers. They claimed that they were harassed, arrested, taken to various police stations and thereafter, ferried to their rural homes with a warning not to go back to Nairobi. The caution, as per the appellants, fell on deaf ears as the demonstrators were determined to see their cause through. About one to five days later, all the demonstrators found their way back in Nairobi. This time around, they continued with their demonstration at All Saints Cathedral Church where they were holed in a bunker, until 19th January, 1993 when the last lot of the political prisoners were released. However, the appellants contended that from time to time between 4th March, 1992 and 19th January, 1993 police officers continued to brutally assault them.

[4] As far as the appellants were concerned, the brutality unleashed upon them was unwarranted because firstly, prior to the demonstrations a petition had been presented to the Attorney General for the release of the political prisoners. Secondly, they were unarmed and remained peaceful throughout the demonstrations. Furthermore, the brutality resulted in serious physical and psychological injuries to the appellants.

[5] In addition, the 1st appellant averred that prior to the aforementioned demonstrations, she had declined to accede to the then government's demand to persuade her son, Koigi Wa Wamwere, who had then sought political refuge in Sweden to return to Kenya. As a result, in June 1986, her house which was situated at Bahati Forest Settlement was razed to the ground by police officers in the company of the then councillor of the area. Later, in October 1987, another house she had erected on her parcel of land described as Plot No. 308 at Migogo Chonjo was also demolished and the parcel re-allocated to a senior government

official. Likewise, in August 1988, her other house, situate on a parcel of land at Mboroni was similarly demolished.

(ii) Litigation History

(a) At the High Court

[6] Though the appellants were convinced that their rights and fundamental freedoms had been violated, they opted not to seek judicial redress at the material time. This, they claimed, was because they lacked confidence in what they referred to as 'the old judiciary' under the previous constitutional dispensation. Consequently, after the promulgation of the current Constitution they filed constitutional petitions in the High Court being; Petition No. 196 of 2013, at the instance of the 1st appellant; Petition No. 197 of 2013 at the instance of the 2nd, 3rd and 4th appellants; and Petition No. 209 of 2013 at the instance of the 5th and 6th appellants. All of the three petitions were dated 15th April, 2013 and substantially identical in content and prayers sought.

[7] The appellants contended that their fundamental right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Article 25(a)) as well as their right not to be, deprived of freedom arbitrarily or without just cause (Article 29(a)) were violated. Equally, their right not to be subjected to any form of violence from either public or private sources (Articles 29(c)), tortured in any manner whether physical or psychological (Article 29(d)), and treated or punished in a cruel, inhuman or degrading manner (Article 29(f)) were infringed by police and GSU officers. As for the 1st appellant she added that her right to own property in any part of Kenya (Article 40(1)(a) and (b)) and to reside anywhere in Kenya (Article 39(3)) was violated by government officers and/or agents. They further urged that the aforementioned rights and freedoms were previously protected under Sections 74 and 75 of the repealed Constitution. In support of their claims, the appellants averred that they would rely on Reports published in

the "Society Magazine" of 23rd March 1992, which covered what had transpired prior to and during the demonstrations.

[8] Towards that end, the appellants in their respective petitions sought substantially similar orders, *inter alia*: -

i. *A declaration that the appellants fundamental rights and freedoms were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and time from 3rd March, 1992 up to 19th January, 1993.*

ii. *A declaration that the appellants are entitled to payment of general damages, exemplary and moral damages and compensation for the violations and contravention of their fundamental rights and freedoms under Article 23(3) of the Constitution.*

iii. *General damages, exemplary damages for the torture of each appellant.*

In addition, the 1st appellant in her petition prayed for-

i. *A declaration that her fundamental rights and freedoms were contravened and grossly violated by Police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and time when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.*

[9] In response, the Attorney General filed a replying affidavit sworn by one Philip Ndolo, the then Deputy Director of Operations in the Kenya Police Service,

in all of the three petitions. Similarly, all the affidavits, essentially denying the appellants allegations, were copied and pasted. It was deposed that since the Constitution did not apply retrospectively, the appellants could only rely on the repealed Constitution; that the appellants were neither taken into police custody nor did they disclose the identities of the police officers who allegedly contravened their rights; that the newspaper articles that the appellants relied on were not admissible; and that there was no evidence of the alleged torture. In any event, it was deposed that the Attorney General would be prejudiced in defending the petitions since the alleged events took place more than 20 years prior to filing of the petitions.

[10] All three petitions were disposed of by way of affidavit and oral evidence as well as written submissions. It is useful to note, for reasons that will become clear in the subsequent portions of this judgment, that only the appellants tendered oral evidence while the Attorney General called no witnesses. Ultimately, the High Court, *Lenaola, J., (*as he then was) rendered three separate judgments, all of which were dated 15th April, 2016, and dismissed the three petitions. In doing so, the High Court identified two key issues for determination; whether the appellants' fundamental rights and freedoms had been violated; and if so, what remedies were available. In addition, the High Court observed that there was a preliminary issue that had to be addressed; that is, whether the petitions were time barred having been lodged over 20 years after the alleged incident in question occurred.

[11] Beginning with the preliminary issue, the learned Judge observed that the general consensus in judicial pronouncements was that limitation of time cannot be imposed in matters where violation of rights has been alleged. The learned Judge also took cognisance of the historical anomalies in addressing past human rights violation during the volatile period of one-party rule. However, the learned Judge expressed the view that it was imperative for a petitioner to demonstrate

justification for any prolonged delays in filing a petition seeking redress for past violations. Especially, in light of the fact that avenues and mechanisms for addressing such violations were already in existence as early as the year 2003 after the oppressive regime was removed from power. In that regard, the learned Judge found that none of the appellants gave any reasonable explanation or justification for the delay in filing their petitions. Nonetheless, the learned Judge went on to hold that the newspaper articles the appellants relied on were inadmissible by virtue of Section 35 of the Evidence Act, Cap. 80 Laws of Kenya. The appellants had not established their allegations of torture; and more so, since there were no medical records or treatment notes to substantiate their claim of being tortured over a long period of time. Equally, the 1st appellant had not proved ownership of the properties she claimed had been demolished.

(b) At the Court of Appeal

[12] Aggrieved with the High Court's decision, the appellants filed three appeals in the Court of Appeal, that is, Civil Appeal Nos. 188, 189 and 190 of 2017. The three appeals were premised on the same 16 grounds of appeal. The grounds are frolic and repetitive. We therefore summarize them as follows: the learned Judge erred by, imposing time limitation in matters relating to violation of human rights and fundamental freedoms; finding that there was insufficient evidence to establish violation of the appellants' freedom from torture, inhuman and degrading treatment as well as the 1st appellant's right to property; and declining to award damages sought by the appellants.

[13] The appellants argued that they had given a reasonable explanation for the delay in lodging their petitions. Besides, neither the repealed nor the current Constitution prescribes a time limitation for lodging claims seeking redress for violations of rights. As such, the appellants submitted, the High Court in imposing limitation acted contrary to the Constitution and International Human Rights Law. As far as the appellants were concerned, the fact that the Attorney

General did not call any witness to contradict their affidavit or oral evidence and failed to cross examine them, rendered their evidence uncontroverted. They claimed that their evidence comprised of eye witness accounts corroborated by the Reports in the Society Magazine, which had equally not been challenged or rebutted.

[14] Furthermore, the appellants faulted the learned Judge for not taking guidance from similar decisions/precedents relating to the Freedom Corner incident. In that, courts therein had found that there were violations of human rights and awarded damages to the respective petitioners. The appellants cited one of the said precedents as ***Milka Wanjiku Kinuthia & 2 Others v. Attorney-General***, HC Petition No 281 of 2011 as consolidated with Petition Nos. 282, 283 and 337 of 2011; [2013] eKLR, which apparently had been determined by the same learned Judge.

[15] In opposing the appeals, the Attorney General maintained his position as postulated in the High Court save to add that, the appellants had misinterpreted the learned Judge's finding on the issue of limitation of time. According to the Attorney General, the learned Judge categorically held that no limitation could be imposed in matters where violation of rights has been alleged. Rather, the learned Judge expressed the view that determination of whether delay in lodging a claim for violation of rights is inordinate is on a case by case basis.

[16] The three appeals were heard by the same bench of the Court of Appeal (*Warsame, Kiage and Murgor, JJ.A.*) which delivered separate judgments in respect of each appeal. Upon considering the grounds of appeal, the arguments in support and opposition thereof, the Court of Appeal held that firstly, the appellants had misapprehended the learned Judge's finding on the issue of limitation of time. Secondly, there was no justification for interfering with the learned Judge's finding that no reasonable explanation had been given for the appellants delay in lodging their petitions. The Court of Appeal concluded that

the learned Judge had properly addressed his mind regarding the requisite burden of proof in finding that the appellants had not adduced any tangible evidence to support the allegations of torture or violation of the 1st appellant's right to property. In the end, the Court of Appeal dismissed the three appeals.

(c) At the Supreme Court

[17] Unrelenting, the appellants filed Petition Nos. 26, 34 and 35 of 2019 challenging the Court of Appeal's judgment. Invoking the Court's appellate jurisdiction under Article 163(4)(a) of the Constitution and Section 15(2) of the Supreme Court Act, 2011, the appellants urged that their appeals involved interpretation and application of the Constitution. Subsequently, the three appeals were consolidated by a ruling of this Court delivered on 19th May, 2022

[18] In the consolidated appeal the appellants sought the following reliefs: -

i. *Setting aside of the High Court and Court of Appeal judgments.*

ii. *A declaration that the appellants fundamental rights and freedoms from torture under Article 29(a), (b), (c), (d) and (e) of the Constitution were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and times from 3rd March, 1992 up to 19th January, 1993.*

iii. *A declaration that the 1st appellant's fundamental rights and freedom under Article 40(1)(a) and (b) of the Constitution were contravened and grossly violated by police officers and GSU officers who were Kenyan government servants, agents and employees on diverse dates and times when her houses were demolished and she was evicted from her plots in 1986, 1987 and 1988.*

iv. *A declaration that the appellants are entitled to the payment of general, exemplary and moral damages for the violation and contravention of their fundamental rights and freedom from torture under Article 23(3) of the Constitution.*

v. *General, exemplary and moral damages for torture, violence, cruel, inhuman and degrading treatment.*

vi. *Any further orders, writs, directions as the Court may consider appropriate.*

vii. *Costs of the suit and interest.*

[19] In opposing the appeal, the Attorney General filed grounds of objection dated 31st July, 2019. The effect of the objection was that the consolidated appeal did not meet the threshold of what constitutes matters of law as espoused in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Petition No. 2B of 2014; [2014] eKLR. Moreover, that the consolidated appeal did not demonstrate substantive errors of fact and/or law by the Court of Appeal. All in all, in the Attorney General's view, the consolidated appeal was fatally defective and unmeritorious.

C. PARTIES SUBMISSIONS

(i) Appellants' submissions

[20] All the appellants were represented by Mr. Gitau Mwara. The appellants called upon the Court to address its mind firstly, on whether there is time limitation for lodging claims for historical human rights violations. Secondly, whether claims alleging violations of rights could be dismissed by dint of Article 159(2)(d) of the Constitution on unreasonable procedural technicalities and limitation of time, as had been done, in their opinion, in this matter. Further, the appellants urged that there were two competing schools of thought with regard to

the aforementioned issues based on decisions which had been rendered by the two superior courts below. As such, there was need for the apex Court to harmonise the divergent schools and give proper direction on the issues in dispute.

[21] The two schools of thought alluded to were first, what the appellants referred to as, the minority technical justice judgments. In that regard, the appellants contended that the impugned decisions of the superior courts below fell under that category. The second was termed as the majority substantive justice judgments. It is noteworthy that out of the several cases listed by the appellants as falling under the second category, three of them were in respect of the events that took place at Freedom Corner and All Saints Cathedral namely:

a. ***Milka Wanjiku Kinuthia & 2 Others v. Attorney General*** *(supra).*

b. ***Irene Wangari Gacheru & 6 Others v. Attorney General***, HC Petition No. 376 of 2014; [2017] eKLR.

c. ***Kennedy Kinuthia & 3 Others v. Attorney General***, HC Petition No. 375 of 2014; [2017] eKLR.

[22] According to the appellants, the common thread that ran through the aforementioned majority substantive justice judgments was that-

a) There was no express limitation of time with respect to claims of gross human rights violations.

b) Torture in all its substantial forms, that is, physical or psychological can be proved by affidavit and oral evidence even in the absence of medical records or treatment notes.

c) Newspaper articles as independent historical records of events of past historical injustices can corroborate affidavit and oral evidence.

d) Uncontested or uncontroverted affidavit and oral evidence is sufficient to establish human rights violations on a balance of probabilities.

[23] Consequently, the appellants claimed that the impugned superior courts' decisions contradicted the above-mentioned majority substantive justice decisions. Besides, the appellants were convinced that the impugned superior courts' decisions were discriminatory as they subjected them to a different standard of proof other than on a balance of probabilities.

[24] Expounding further, Mr. Mwara submitted that the pleadings in the consolidated appeal were almost a replica of the pleadings in the majority substantive justice judgments. Likewise, the evidence tendered by the appellants was similar to what was adduced in the majority substantive justice judgments. In addition, courts in the said majority substantive judgments, some of which were determined before the appellants' claims, found that there was torture at Freedom Corner; and awarded the petitioners therein compensation for violation of their rights. Learned counsel was emphatic that his own mother who is very advanced in age has been wondering why some of the victims were compensated while she has not. Therefore, in their own words, the appellants wondered if there were two court systems in Kenya based on the above divergent positions.

[25] Counsel for the appellants went on to fault the superior courts below for finding that the appellants petitions were time barred. Stating that the appellants were not able to lodge their claims at the material time because firstly, of the then oppressive regime. Secondly, due to their impecuniosity, they were not in a position to afford the services of a legal representative at the time. It is however

instructive to note that, the justification based on impecuniosity was raised for the first time before this Court.

[26] In any event, the appellants submitted that there is no limitation of time for filing claims of violation of rights in the Constitution. In their view, the Constitution had envisaged this state of affairs when it introduced a period of transitional justice wherein past human rights violations which took place under the repealed Constitution could be redressed. In their view, the prescribed minimum transitional period was 5 years from the date the Constitution was promulgated. Therefore, they argued that as at the time they filed their claims in the High Court on 15th April, 2013 the said transitional period had not lapsed. They went on to contend that some of the majority substantive justice judgments related to claims of violation of rights which had been filed after 19 to 38 years of the alleged violation. In that regard, they cited as examples, ***Zipporah Seroney & 5 Others v. Attorney General***, HC Petition No. 500 of 2013; [2020] eKLR and ***Jane Nduta Koigi v. Attorney General***, HC Petition No. 115 of 2018; [2019] eKLR.

[27] As to what amounts to torture, the appellants relied on the definition given in the **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**. They urged that they had established their claim of torture to the required standard through their affidavit and oral evidence which was uncontroverted. To them, the absence of medical or treatment notes did not diminish their evidence of torture. Moreover, they urged that torture is not just physical but also psychological which usually is not visible. They submitted that the Reports in the Society Magazine corroborated their eye witness accounts of what had transpired at Freedom Corner. To bolster this line of argument, they cited ***Milka Wanjiku Kinuthia & 2 Others v. Attorney General*** *(supra)*, ***Irene Wangari Gacheru & 6 Others v. Attorney***

General *(supra)* and ***Kennedy Kinuthia & 3 Others v. Attorney General*** *(supra).*

[28] The appellants submitted that victims of human rights violations should not be shut out from seeking redress on account of technicalities and time limitation. Otherwise, the effect would be that human rights litigation in the country would revert to the pre-2010 Constitution days when victims perceived that courts were hostile to such litigation. Consequently, they urged the Court to set aside the impugned judgments of the superior courts below and substitute the same with judgments in their favour, which would be in consonance with the majority substantial justice judgments relating to the Freedom Corner incident.

[29] We also understood the appellants' counsel to argue that the learned trial Judge's prejudice against his clients was evident in his judgments. Particularly, where the learned Judge faulted the appellants for not filing their claims at the same time as the political prisoners they had agitated for their release and who included their advocate on record.

(ii) Attorney General's submissions

[30] Ms. Deborah Robi appeared for the Attorney General. According to the Attorney General, contrary to the appellants' contention, the superior courts below did not dismiss their claims on account of being time barred but on merit. The Attorney General contended that the appellants' continued to misconstrue that the superior courts below imposed time limitation for filing claims of past human rights violations. Nonetheless, the Attorney General submitted that even in cases where there is no time limitation, a litigant should give a plausible explanation for the delay in commencing court proceedings before the same is admitted for hearing. In addition, the explanation should as of necessity be limited to the question of whether justice would be served. To buttress that position, reference was made to ***Wellington Nzioka Kioko v. Attorney***

General, HC Petition 517 of 2013; [2016] eKLR and the East African Court of Justice decision in ***Attorney General of the Republic of Uganda & Another v. Omar Awadh & 6 Others***, EACJ Appeal No. 2 of 2012; [2013] eKLR.

[31] On the contention that the appellants' evidence was uncontroverted, the Attorney General argued that the record bore witness to the fact that not only were affidavits sworn by Philip Ndolo, the then Deputy Director of Operations in the Kenya Police service, but also written submissions were filed in opposition to the appellants' petitions. Further, upon cross examination of the appellants, it became evident that their assertions of torture were not established.

[32] Expounding further, the Attorney General submitted that firstly, even though medical reports would have sufficed to prove the appellants' allegations, none were produced at the trial. Secondly, in the Attorney General's opinion, the reading of Sections 35, 107 and 109 of the Evidence Act together with Rules 15 and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 reveals that newspaper articles are inadmissible as evidence in law. This is because facts contained in newspaper articles are merely hearsay. In that regard, he relied on ***Laxmi Raj Shetty and Another v. State of Tamil Nadu*** 1988 AIR 1274, 1988 SCR (3) 706. Besides, he claimed that the newspaper articles that the appellant sought to rely on were irrelevant.

[33] As for the claims relating to the Freedom Corner incident which were successful, the Attorney General asserted that they were determined on the basis of their own peculiarity and were distinguishable from the appellants' claims. More specifically, he reiterated that in the matter at hand, the Attorney General challenged the appellants' claims through filing affidavits in response as well as cross examination. Nevertheless, the Attorney General submitted that even in

cases where a respondent does not file a response, the petitioner still bears the burden to prove his/her case to the required standard.

[34] Last but not least, the Attorney General argued that the appellants were not entitled to exemplary damages as the said damages represent an importation of a criminal law principle of punishment into civil law. Further, the Attorney General submitted that exemplary damages are only available where the offending party has had a propensity of repeating the same violations, which was not the case in the matter at hand. In that regard, reference was made to the Court of Appeal decision in ***Njuguna Githiru v. Attorney General***, Civil Appeal No. 253 of 2017; [2020] eKLR.

D. ANALYSIS

[35] It is well settled that the mere invocation by a party that an appeal to this Court is premised on Article 163(4)(a) of the Constitution does not automatically clothe the Court with jurisdiction to entertain the same. A litigant must demonstrate how such an appeal involves interpretation and application of the Constitution; and that the issue(s) relating to the interpretation and application was subject of adjudication before the superior courts below. At the very least, where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, a litigant must demonstrate that the Court of Appeal's reasoning and the conclusion(s) which led to the determination of the issue in dispute took a trajectory of constitutional interpretation and application. See ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Petition No. 2 of 2014; [2014] eKLR. Having appraised ourselves of the matter at hand, we are satisfied that the consolidated appeal does involve matters of constitutional interpretation and application. In other words, the consolidated appeal, as we stated in the opening paragraph, revolves around the interpretation and application of the Bill of Rights.

[36] Upon deliberation on the consolidated appeal, it is our view, that its determination will turn on four issues namely:

i) *Whether there is limitation of time in filing claims for human rights violation.*

ii) *Whether there was unexplained inordinate delay by the appellants in filing their petitions in the High Court.*

iii) *Whether the appellants proved on a balance of probabilities that their fundamental rights and freedoms were violated.*

iv) *If the answer to (iii) is in the affirmative, what is the appropriate remedy in the circumstances of the consolidated appeal?*

We now turn to the determination of these issues.

i. *Whether there is limitation of time for filing claims of human rights violations.*

[37] Perhaps, the starting point under this issue should be a consideration of whether the two superior courts below in their impugned decisions imposed limitation of time as alleged by the appellants. Having perused the decisions in question, we are satisfied that the two courts did not impose the limitation alluded to. In point of fact, the two superior courts affirmed the position that the Limitation of Actions Act, Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the Constitution which are evaluated and decided on a case by case basis.

[38] Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights. See the persuasive decision of the Court of Appeal ***Safepak Limited v. Henry***

Wambega & 11 Others, Civil Appeal No. 8 of 2019; [2019] eKLR. It is on that basis that the two superior courts held that claims of violation of human rights must be filed in court within reasonable time. Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. This takes us to the consideration of the next issue.

ii. Whether there was unexplained inordinate delay by the appellants in filing their petitions in the High Court

[39] The appellants' urged that their claims related to questions of 'transitional justice'; and as such, the two superior courts should have found there was no unexplained delay in filing the petitions. The appellants were also troubled with what they perceived as an unequal protection and benefit of the law given that the High Court had adjudicated petitions by other similarly situate persons without raising concerns over undue delay in lodging the said petitions. Crucial to the determination of the framed issue, the appellants' explanation for the delay before the two superior courts was that they lacked confidence in what they referred to as the 'old judiciary' under the previous constitutional dispensation. The appellants also proffered an additional explanation of impecuniosity for the first time in this Court.

[40] The determination of this issue demands that we interrogate whether the subject claims are in the nature of "transitional justice" claims. Therefore, the appropriate starting point is to understand what is meant by transitional justice. The idea of transitional justice has been described in Jeremy Webber, **'Forms of Transitional Justice'** (2012) 51 *Nomos* 98 thus:

> ***"Transitional justice is about situations in which a society is moving from a state of injustice to justice, from oppressive government to government that respects the rule of law, from authoritarianism to democracy."***

[41] Similarly, Colleen Murphy in **'The Conceptual Foundations of Transitional Justice'** (Cambridge University Press, 2017) at page 1 notes as follows:

> ***"The term transitional justice is generally taken to refer to formal attempts by post-repressive or post-conflict societies to address past wrongdoing in their efforts to democratize."***

[42] What emerges from the foregoing is that the idea of transitional justice connotes the broad range of mechanisms, means or mode through which a society confronts the wrongdoings from its past. Its objective being to obtain truth and justice regarding the past so as to ensure promotion and protection of the rule of law and durable peace going into the future.

[43] The need to confront and silence the ghosts of past wrongs or historical injustices is relevant in the Kenyan context. This is in light of Kenya's history which is littered with incidences of gross violations of human rights and other atrocities that occurred during the colonial era and continued in the post-independence era. Further, victims of such abuses were never granted an opportunity to obtain redress and justice during that period. In this regard, an official report of the Government of the Republic of Kenya, **Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission** (Government Printer, 2003) at page 19 records as follows:

> ***"The political history and governance of the Kenyan state is a catalogue of gross human rights violations, the arrogance of power, and the commission of mind-boggling economic crimes. Constitutionalism and the rule of law, which are the central features of any political democracy***

that respects human rights, have been absent in Kenya's history… Since its creation by the British in 1895, the Kenyan state has largely been a predatory and illiberal instrumentality, an ogre defined by its proclivity for the commission of gross and massive human rights violations. Little need be said of the colonial state, which was specifically organized for the purposes of political repression to facilitate economic exploitation… The post-colonial state has engaged in the most abominable human rights violations and economic crimes known to humanity. Not even the re-introduction of multi-partyism in 1991, and the two general elections in 1992 and 1997, the first of their kind in decades, brought relief from state-directed human rights violations and the wanton and shameless theft of public coffers and property, evils that became the trademark of the Kenya government."

The report lists the incidences of gross abuse of human rights in the pre-2003 period to include torture, detention, and persecution of the critics of the government of the day, amongst others.

[44] The golden thread that connects the appellants' claims of violation of their rights is that they are alleged to have taken place during a period which has been recognized as repressive. In that, during the period in question the state grossly abused the rights and freedoms of the critics of the government of the day. By their nature, these claims are founded on alleged past wrongs that call upon the law and courts to provide a transformative response. We therefore have no hesitation in finding that the appellants' claims qualify as falling within the category of transitional justice claims.

[45] What then is the implication of transitional justice claims on the question of the delay of over twenty (20) years in filing the claims in court? We have taken note of the fact that the Court of Appeal endorsed the High Court's view that the appellants had not offered a reasonable explanation for the delay in filing their claims in court.

[46] In considering whether the delay of twenty (20) years was inordinate, we are of the considered opinion that transitional justice claims are context sensitive. It follows that courts ought to be particularly sensitive to the reasons adduced for the delay. At the same time, courts should balance the reasons for delay with the likely prejudice a respondent may face in defending the claim in line with the right to fair trial. Such an approach emerges from the comparative lesson as can be gleaned from jurisprudence from Kenya's superior courts and other jurisdictions.

[47] In ***Mutua and Others v. The Foreign and Commonwealth Office*** [2012] EWHC 2678 (QB), a group of elderly Kenyan victims of human rights abuses, including torture, inflicted by colonial administration on prisoners in Kenya between 1952 and 1960 filed a case before the High Court of Justice, Queen's Bench Division on 23rd June, 2009. The United Kingdom's government in objecting to the competency of the suit argued that the survivors' claims were time-barred under English law, and thus should be struck out. The other issues raised were whether a fair trial was still possible notwithstanding the unavailability of material witnesses; and whether there were compelling reasons for the court to exercise its discretion by allowing the claims to proceed for hearing and determination. In dismissing the objection to the suit, Justice McCombe held that the ***"public interest in the claims being tried out"*** and ***"what is fair"*** in the circumstances of the case are relevant considerations in the exercise of the court's discretion as to whether the subject claim should be

heard on its merit. The court found that the claimants had established a proper case for the exercise of its discretion in their favour.

[48] In another English decision, arising from allegations of historic sexual abuse perpetrated upon children in an institutional setting, the House of Lords in ***A v. Hoare*** [2008] 1 AC 844, observed that the court ought to take into account the fact that the alleged abuse might have contributed to the delay in pursuing justice. In particular, Baroness Hale of Richmond noted at para. 60 of the judgment that:

> ***"Then the injustice to a claimant who may be deprived of his claim, perhaps as a result of the very injuries which gave rise to it, can be balanced against the injustice to a defendant who may be called upon to defend himself a long time after the event when important evidence may no longer be obtainable. I fully support the more generous approach to the exercise of discretion which is adopted in particular by Lord Hoffmann. The reasons for the delay are highly relevant to that exercise, as of course are the prospects of a fair trial. A fair trial can be possible long after the event and sometimes the law has no choice. It is even possible to have a fair trial of criminal charges of historic sex abuse. Much will depend upon the circumstances of the particular case."*** [Emphasis added]

[49] With respect to the consolidated appeal, the decisions of the two superior courts largely turned on the failure by the appellants to file their claims immediately after two critical transitional moments in Kenya's recent democratization history. This being after the 2002 transition when President Moi left office or immediately after the 2010 transition to a new constitutional dispensation. The two superior courts observed that as a matter of fact many

other similarly situate victims of past abuses filed their claims in court immediately after these transitional moments. This leads us to pose the question; given the nature of transitional justice claims, was it fatal for the appellants to have filed their claims in 2013?

[50] It has been recognized that transitional moments can be long-drawn and there are no clear-cut dates when a transition can be said to have run its full course. Especially, taking into account the tendency for re-irruptions in the form of renewed quests for justice. This is poignantly brought out in Cath Collins, '**Post-Transitional Justice: Human Rights Trials in Chile and El Salvador'**, (The Pennsylvania State University Press, 2010) at pages 21 and 22 as follows:

> ***"... the persistence of the justice question into the post-transitional period, or periodic "re-irruptions" of it in the form of renewed accountability pressure, can be viewed as positive signs of democratic institutional health rather than as crises or breakdowns of transition. It is not only conceivable but logical to expect that private actors and even future democratic governments might pursue accountability more vigorously than transitional administrations ... certain dimensions of post-transition polities can be expected to particularly affect the emergence of post-transitional justice activity. One is the quality and depth of subsequent democratization, particularly progress toward rule of law. The health and vigor of civil society organization in general and its ability to access the justice system, in particular, will also be relevant... The passage of time is a factor that can have varied and sometimes counter-intuitive effects. It may***

seem set to eventually consign the memory of victims and the concerns of survivors to irrelevance or even oblivion, but a look at the currently observable cases of post-transitional justice change suggests that other outcomes are also possible. <u>The passage of time can serve to make the addressing of accountability more possible, perhaps less politically costly, even as it sometimes reduces both the personal (victim/survivor) and institutional (social) benefits</u>." [Emphasis added]

[51] What we deduce from the above is that late or recurring pursuit for justice are a distinctive motif of the quest for justice in transitional contexts. In other words, renewed or late quest for accountability and justice after the initial burst of efforts for justice is a phenomenon that is inherent in transitions. It follows that the persistence of the appellants and other litigants to get justice after other claimants had lodged similar claims is not something that is unique to the appellants herein as it is a universal phenomenon that is evident in the quest for transitional justice and accountability.

[52] The appellants claim that they did not have faith in the pre-2010 judiciary, ought to be interrogated from the overarching context of the transition from the repressive to the post-2010 era. It is important to take into account the fact that courts during the repressive era were generally notorious for their abject failure to provide protection to victims of human rights violations. Though the process of judicial reforms and making the Kenyan state human rights friendly began in 2003, this process was not concluded until the constitutional reforms in 2010. This included the process of vetting of Judges and Magistrates which was a transitional justice mechanism to make the Judiciary fit as a custodian of the rule of law, democracy and human rights. Indeed, this partly explains why the clamour for judicial reforms was part of the larger constitutional reform package.

[53] An additional factor to take into account is the fact that the Constitution explicitly envisages redress for historical injustices that occurred during the repressive era. For instance, Article 67(2)(e) vests the National Land Commission with functions that include "***to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress***". Section 15 of the National Land Commission Act No. 5 of 2012, as amended vide the Land Laws (Amendment) Act No. 28 of 2016, operationalized the above constitutional directive for redress for historical land injustices. It gave the National Land Commission the mandate to admit, investigate and recommend appropriate redress for historical land injustice complaints received within a five-year timeline/period. In light of the dictate of Article 27(1) of the Constitution on equal protection and equal benefit of the law, we are inclined to the view that all victims of historical injustices must be treated equally and afforded an equal opportunity for redress. This chimes with the demands for harmonious interpretation of the Constitution as already endorsed by this Court in ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone***, SC Appl. No. 4 of 2012; [2013] eKLR where we held at para. 33 that:

> ***"... One of the fundamental rights under the Constitution is access to justice for all, and non-discrimination. Consequently, all litigants are to be accorded equal right of access to the Court."***

[54] In that regard, *Lenaola, J.*, as he then was, held the following persuasive view in ***Gerald Juma Gichohi & 9 Others v. Attorney General***, HC Petition 587 of 2012; [2015] eKLR at paras. 94-95:

> ***"[T]he history of this Country would lead a reasonable man to state that it was almost impossible a few years ago to sue the regime and get away with it especially on***

matters of human rights. In that regard, the recent public apology by President Uhuru Kenyatta for violations of human rights by past regimes is an affirmation of that fact. In the same breath, it was also the Petitioners' claim that the Judiciary has affirmed that it is vindicating past violations of fundamental rights and freedoms in order to secure the Country's future…

[It] is true that the State today in a reconfigured Kenya, cannot shut its eyes from the failings of the past neither can it claim innocence for the excess of past regimes. It must pay, the price for its historical faults and I must also agree with the Petitioners submission that the instant Petition should be approached in the context of transitional injustices especially now that there is a new dispensation under the Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past and the citizenry must not fault the Courts for doing justice, albeit belatedly because delayed justice is indeed justice denied."

[55] Based on the context of Kenya's democratic transition, we find, unlike the two superior courts below, that the appellants' explanation for the delay to the extent that it was attributed to lack of faith in the pre-2010 judiciary plausible. This is because the 2010 transition required the Kenyan state and society to undertake a great transformation, involving the creation of new institutions and anchoring them in a new set of values and principles, which were in total contrast to those that so far had prevailed. The scope of this transformation, including with respect to institutional reforms, was arguably deepened due to the fact that the earlier transition in 2002 to a new government was largely seen as not 'deep

and far reaching' enough. Indeed, with respect to the Judiciary, the institution had to undergo a transitional justice process in the form of the vetting of Judges and Magistrates, to restore public confidence in its ability to act as a custodian of the rule of law and human rights. Therefore, the appellants' contention that they had no faith in the pre-2010 judiciary to render justice regarding alleged violation of rights attributed to the state cannot be faulted in light of this history. As for the additional explanation of impecuniosity, we are unable to entertain the same since it was raised for the first time before this Court and the superior courts below did not have an opportunity to address their minds on the same.

[56] In our view, there is also a public interest element in allowing victims of alleged past gross human rights violations to access courts; that is, serving justice is the most effective insurance against future repression. To us, a judicial trial serves to send strong expression of formal disapproval of gross abuse of human rights. It also functions to re-commit state institutions and persuade the general citizenry of the importance of human rights in a polity. On the other hand, failure to ensure access to justice could send the wrong signal that judicial imprimatur has been given to these historical wrongs. Such a stance will encourage not deter potential violators of rights. It would also send the signal to the public that they can be complicit in violation of rights without consequences attaching to the perpetration of such atrocities. This is informed by the reality that failure of enforcement of freedoms and rights vitiates their authority, sapping their power to deter proscribed conduct.

[57] We find support for the above approach in the persuasive jurisprudence by the Inter-American Court of Human Rights in the case of ***Barrios Altos v. Peru, Merits, Judgment***, Inter-Am. Ct. H.R. (ser. C) No. 75, (Mar. 14, 2001). The case was about the infamous Barrios Altos massacre of fifteen civilians during one single incident by members of the Peruvian army; and the subsequent attempt by the Fujimori regime to enact amnesty laws to shield the perpetrators

from prosecution. In emphasizing the need to allow victims of gross human rights abuses to access justice, the Inter-American Court of Human Rights held that all amnesty laws and provisions designed to prevent the identification, investigation, and punishment for human rights abuses violate non-derogable human rights. This is because they obstruct victims' access to justice, prevent victims from knowing the truth, and block victims' access to adequate reparations.

[58] Before concluding on this issue, we must also address another limb of argument by the appellants relating to unequal protection and benefit of the law. Their claim is to the effect that other similarly situate claimants who filed their claims after more than twenty (20) years were granted their day in court. In particular, they made reference to ***Milka Wanjiku Kinuthia & 2 Others v. Attorney General*** *(supra)*, ***Irene Wangari Gacheru & 6 Others v. Attorney General*** *(supra)* and ***Kennedy Kinuthia & 3 Others v. Attorney General*** *(supra)* relating to the Freedom Corner incident.

[59] Save for ***Milka Wanjiku Kinuthia & 2 Others v. Attorney General*** *(supra)*, in the other two cases, the Attorney General, who was the respondent therein, urged that there had been inordinate delay in lodging the same. Both cases had been filed 22 years after the alleged violation. Our reading of the High Court's decisions reveals that the court was alive to the fact that there is no time limitation for filing claims for violation of human rights. Nevertheless, the High Court in the said cases appreciated that it was required to look into whether there was unreasonable delay in lodging the cases in question. Equally, the High Court properly addressed its mind by holding that whether or not there is inordinate delay is dependent on considerations such as, the explanation proffered and whether justice will be served in entertaining such a claim. In both cases, the High Court was convinced with the explanation advanced and took into account the dictates of transitional justice in finding that there wasn't inordinate delay in lodging the same.

[60] The position taken by the High Court in the above-mentioned cases is what has generally been adopted by the courts of this country and which we approve as the correct position in law. It follows therefore that whether a claim for violation of rights has been instituted within a reasonable time is to be determination based on the peculiar circumstances of each case.

[61] In the end, we find that the delay in filing the appellants' claims was understandable given the circumstances of the matter as discussed above.

iii. Whether the appellants proved on a balance of probabilities that their fundamental rights and freedoms were violated.

[62] The issue as framed gives rise to a number of sub-issues, being:

a) *Which Constitution is applicable to the circumstances of the consolidated appeal?*

b) *Whether violation of the 1st appellant's right not to be arbitrary deprived of property was proved.*

c) *Whether violation of the appellants' rights and freedom from torture, and inhuman and degrading treatment was proved.*

a) Which Constitution is applicable to the circumstances of the consolidated appeal?

[63] It is noteworthy that the appellants in contending violation of their fundamental rights and freedoms cited both the current and repealed Constitution. In particular, they urged violation of their rights and freedom not to be subjected to torture, inhuman and degrading treatment, and arbitrary

deprivation of property under Articles 25(a), 29(a), (c), (d), (f), 40(1)(a) and (b); and that the said rights were also protected under Sections 74 and 75 of the repealed Constitution. Equally, it is important to point out that the allegations in the consolidated appeal relate to events that are said to have occurred in 1986, 1987, 1988 with regard to the 1st appellant; and between 3rd March, 1992, and 19th January, 1993 with regard to all the appellants.

[64] Constitutions, like other legal instruments, are generally prospective in application unless there is a clear textual marker indicating that retrospective application of a provision is contemplated. See ***Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 Others***, SC Appl. No. 2 of 2011; [2012] eKLR. Consequently, since the events in issue are alleged to have taken place before the current Constitution came into force, we find that it is the repealed Constitution which is applicable. Moreover, the rights and freedoms alleged to have been infringed are protected in both the repealed and current Constitution albeit with some minor variations in formulation. It follows that we will proceed to determine the question as to whether the appellants proved violation of their fundamental rights and freedoms to the requisite standard based on the repealed Constitution.

b) Whether violation of the 1st appellant's right not to be arbitrary deprived of property was proved

[65] Section 75 of the repealed Constitution provided protection from deprivation of property except where stipulated conditions for compulsory acquisition were satisfied. This constitutional provision embodied the fundamental principle that a person's property could not be expropriated or taken away arbitrarily. In addition, as we held in ***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]

KESC 34 (KLR) the right to property also extends to protection of the structures erected in land regardless of the ownership status of the land.

[66] The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See ***Deynes Muriithi & 4 Others v. Law Society of Kenya & Another***, SC Application No. 12 of 2015; [2016] eKLR.

[67] In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of Section 107 of the Evidence Act on the burden of proof. The provision stipulates:

> ***"107***
>
> ***1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

In addition, Section 109 of the Evidence Act elaborates on the onus of proof by stipulating that:

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,***

unless it is provided by any law that the proof of that fact shall lie on any particular person."

[68] Unfortunately, aside from bare allegations, the 1st appellant did not adduce even an iota of evidence to back her claims. We particularly agree with the observation by the High Court that this limb of the 1st appellant's claim was pursued in a context of an "evidential vacuum". The trial court aptly observed thus:

"Regarding the allegation that various parcels of land belonging to the Petitioner were taken by the State, no evidence was produced pertaining to her ownership of the said parcels of land. In fact, nothing was placed before this Court to indicate that she indeed owned or had claim to the alleged parcels of land. How then can … the Petition be interrogated in such a** [sic] **evidential vacuum."

[69] It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See ***Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others***, SC Petition No. 12 of 2019; [2020] eKLR.

[70] All in all, the 1st appellant's evidence or lack of it, for that matter, could not be the basis of a finding that it was more probable than not that her right not to be deprived of property was infringed. To put it differently, in the words of Lord Denning J. in ***Miller v. Minister of Pensions*** (1947) 2 ALL ER 372 –

> ***"Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, … the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

We therefore see no reason to interfere with the superior courts' findings on this issue.

c) Whether violation of the appellants' rights and freedom from torture, and inhuman and degrading treatment was proved

[71] On this issue, we begin our consideration from the premise of uncontested historical facts. On 28th February, 1992 mothers of political prisoners, who had been detained by the then regime, together with their supporters convened at Freedom Corner. They went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. It is common ground that on 3rd March, 1992 police officers stormed Freedom Corner and dispersed the demonstrators. This incident drew widespread press coverage nationally and internationally as well as condemnation across the globe. It is a matter that we can comfortably take judicial notice of as a matter of general notoriety.

[72] For instance, the distinguished historian, Prof. Tabitha Kanogo of the Department of History of the University of California Berkeley, in her book **'Wangari Maathai'**, (Ohio University Press, 2020) at pages 128 – 135 captures the material events at Freedom Corner elaborately. We quote her at length:

> ***"Maathai adopted novel methods to deal with the concerns raised by the mothers of political prisoners. Significantly, a segment of Uhuru Park dubbed "Freedom Corner"***

became the site for anti-government rallies demanding the release of the fifty-two detainees and imprisoned political dissenters. The struggle lasted for close to one year, from February 28, 1992, to early 1993. Maathai's ideas and strategies for moving forward included the use of a hunger strike ...

The hunger strikers drew large crowds of supporters but did not change official thinking. On the fourth day of the strike, March 3, 1992, the government moved to break the strike, unleashing a violent assault on the strikers and their supporters ...

Smoked out of the Freedom Corner, the protestors moved to the basement of a church adjacent to Uhuru Park—the All Saints Cathedral of the Anglican Church of Kenya—where they remained holed up and were joined by many supporters from all walks of life, ..."

See also Daniel Branch, **Kenya: Between Hope and Despair**, **1963- 2011** (Yale University Press, 2011) at page 189.

[73] In taking the above approach, we are fortified by the provisions of Sections 59 and 60 of the Evidence Act which stipulate circumstances in which courts can take judicial notice of facts requiring no proof. Section 60(1)(o) of the Evidence Act stipulates that:

"The courts shall take judicial notice of the following facts–

...

(o) <u>all matters of general or local notoriety</u>."
[Emphasis added]

Section 60(2) of the Evidence Act proceeds to stipulate that:

> ***"In all cases within subsection (1) of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference."***

[74] Further, in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***, SC Petition 23 of 2014; [2015] eKLR this Court observed at paras. 71-75:

> ***"The Oxford Dictionary of Law (ed. Jonathan Law and Elizabeth A. Martin), 7th ed. (Oxford University Press, 2009) (at page 306) thus defines "judicial notice":***
>
> > ***'The means by which the court may take as proven certain facts without hearing evidence. Notorious facts...may be judicially noticed without inquiry.'***
>
> ***Judicial notice is important to the effective discharge of the judicial mandate, as contemplated by the Constitution of Kenya, 2010. Vindication of this perception is crystal-clear, from the case-law experience worldwide.***
>
> ***In Commonwealth Shipping Representative v. P. & O. Branch Service [1923] A.C. 191 at p. 210, Lord Sumner in the English House of Lords thus observed:***
>
> > ***'Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either***

> ***from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.'***
>
> ***...***
>
> ***There are many cases in which judicial notice has commended itself to Kenya's Courts. Here is a typical example. In Republic v. Simon Wambugu Kimani & 20 Others, HC Criminal Revision No. [2015] eKLR, the learned Judge observed:***
>
> > ***'In my view, the Court was fully entitled to take judicial notice of notorious prevailing facts in the public domain, even where the same were not formally brought to the attention of the Court by either the prosecution or the defence.'"***

[75] Based on the foregoing historical accounts, there is no doubt that the Freedom Corner incident took place. A fact which in no way was disputed by the two superior courts. Nonetheless, the burden of proof still lay with the appellants to prove on a balance of probabilities that they were not only at Freedom Corner but were also subjected to torture, inhuman and degrading treatment during the demonstrations.

[76] Looking at the evidence before the trial court, the record shows that the 1st appellant adopted her affidavit as her evidence in chief. During cross-examination by learned counsel, Mr. Moimbo, she maintained that she was at Freedom Corner on the material day. It is noteworthy that the Attorney General closed his case without calling any witness. Indeed, the trial court in its judgment

found that "***there is no doubt from the evidence before me that she was at Freedom Corner on that day***".

[77] Similarly, the 2nd, 3rd and 4th appellants adopted the contents of their affidavits as their evidence in chief. What stands out from their cross-examination is that it focused on three concerns: whether they had permission to hold the subject protest/assembly; whether they had records of their arrest; and whether they had medical records for their alleged injuries. In all these areas of focus, the appellants conceded that they did not have permission to hold the subject meeting; they did not have records of their arrest (the 2nd appellant indicated that she was not arrested); and they did not have medical records proving the injuries they allegedly sustained. Yet again, the Attorney General did not call any witness and proceeded to close his case.

[78] Lastly, the 5th and 6th appellants on cross-examination by learned counsel, Mr. Obura, were adamant that they participated in the demonstrations at Freedom Corner. Despite alleging, they had suffered injuries they conceded that they did not have any medical documents to that effect. Like in the other matters, the Attorney General did not call any witness.

[79] Having painstakingly gone through the record of the proceedings before the trial court, we note that the appellants' evidence of having been at Freedom Corner was not displaced during cross-examination. In addition, the Attorney General did not call any witness(es) to challenge the evidence of their participation in the subject protest/assembly. Consequently, weighing the evidence adduced before the trial court, we come to the conclusion that the appellants' proved their participation in the subject protest/assembly at Freedom Corner to the requisite standard. See ***Miller v. Minister of Pensions*** (*supra*)

[80] Section 74(1) of the repealed Constitution provided as follows:

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

As a starting point, the Court has to interrogate the normative content and the obligation that the provision imposed on duty bearers. This entails construing the meaning of the concepts of ***"torture"*** and ***"inhuman or degrading punishment or other treatment"***.

[81] It has been the position of this Court that we should strive to interpret and develop constitutional concepts from an indigenous prism based on our country's historical experience. However, sight cannot be lost of the fact that we are interpreting prohibitions recognized in international human rights law and other comparable constitutions. Therefore, we can draw valuable insight from their interpretation in the body of international human rights law and comparative jurisprudence.

[82] The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")**, offers the following authoritative definition of the concept of "torture" at Article 1(1):

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

It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Therefore, the 'essential elements' of what constitutes torture as can be identified from Article 1 of "CAT" include: a) the infliction of severe mental or physical pain or suffering; and b) for a specific purpose, such as gaining information, punishment or intimidation.

[83] Likewise, Article 16 of "CAT" is relevant in determining the contours of '***prohibition against inhuman or degrading punishment or other treatment'***. It provides:

"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

[84] It is evident that the exact boundaries between 'torture' and other forms of 'inhuman or degrading punishment or other treatment' are often difficult to identify; and may depend on the particular circumstances of the case as well as the characteristics of the particular victim. Nonetheless, both terms cover mental and physical ill-treatment that has been intentionally inflicted by or with the consent or acquiescence of state authorities.

[85] The European Court of Human Rights (ECtHR) has in the ***Ireland v. United Kingdom***, judgment of 18th January 1978, Ser. A, No. 25 held that the intensity of the pain or suffering inflicted upon the victim is the decisive criterion in distinguishing torture from cruel, inhumane, and degrading treatment. It was

that court's opinion that cruel, inhuman or degrading treatment or punishment requires a lower threshold than severe pain or suffering.

[86] We find that "inhuman or degrading punishment or treatment" refers to ill-treatment which does not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which amount to or result in the ill-treatment has to exist. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Further, degrading treatment may involve less severe pain or suffering than torture; and will usually involve humiliation and debasement of the victim. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or physical pain or suffering.

[87] Having fleshed out the normative requirements of Section 74(1) of the repealed Constitution, did the appellants establish that they were subjected to either severe or significant mental or physical pain or suffering?

[88] The determination of the above question by the two superior courts below largely turned on evidential assessment. In particular, the two superior courts' position was that the appellants neither produced any medical reports proving physical or psychological torture nor records for their arrest. Moreover, the appellants seemed to be in good health when they appeared before the High Court. In addition, the two superior courts found that the Reports in the Society Magazine which they sought to rely on were inadmissible.

[89] On our part, we agree with the two superior courts below to the extent that there was an evidential gap which was not surmounted by the appellants regarding whether they were arrested and subjected to torture.

[90] However, taking into account the violent nature of the disruption of the subject protest/assembly, it is more likely than not that the whole episode had a psychological traumatic effect on the appellants, who we have held were at the locus in quo. Although the appellants did not exhibit any physical injuries or medical reports, we are persuaded that the whole incident had a psychological/traumatic effect on them. This in our view can be equated to inhuman treatment which was a violation Section 74(1) of the repealed Constitution. This is because the respondent did not give any justifiable reason(s) whatsoever why it was necessary to violently disrupt and disband the protests by the appellants who were harmless. To that extent and unlike the two superior courts below, we find that the appellants' right to freedom of association and assembly was interfered with and due to the violent methods employed by the police, this amounted to a violation of their human rights which were duly protected under Section 74(1) of the repealed Constitution.

iv. What is the appropriate remedy in the circumstances of the present appeal?

[91] Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the Court to vindicate and affirm the importance of the violated rights.

[92] The foregoing rational is buttressed by the reasoning of the Supreme Court of Canada in ***City of Vancouver v. Ward*** [2010] 2 SCR 28. In that matter, the court held that damages may be awarded if at least one of three objects is served: individual compensation; vindication, in the sense of addressing harm to 'society as a whole'; and deterrence, in the sense of 'influencing government behaviour in

order to secure state compliance with the Charter in the future', which would promote 'good governance'. At para. 30 the Court recognized that:

> ***"... the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."***

[93] In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case. In the present case, we are of the view that the damages we award should not only serve to enhance the dignity of the appellants but also be a public recognition of the wrong done to them given the historical context of this case. We have considered comparable awards previously awarded in the cases we cited in the opening paragraphs of this judgment involving other persons who were at the Freedom Corner, which awards were made several years ago ranging from Kshs. 750,000 to 3,000,000. We have also taken into account the circumstances of each case bearing in mind the violations that were proven in those cases and our findings in this matter and the fact that counsel for the appellant urged us to award Kshs. 3,000,000/= to each of the appellants. In our considered view, we assess damages of Kenya Shillings two million, five hundred thousand (Kshs. 2,500,000/-) payable to each of the appellants as an appropriate remedy.

[94] Before we conclude, the appellants' counsel alluded to the fact that the learned trial Judge exhibited bias or prejudice against the appellants. We cannot help but note that this issue was neither raised at the Court of Appeal nor did it form the grounds of appeal to this Court. It was raised for the first time in counsel's oral submissions before the Court. As such, this Court is devoid of jurisdiction to entertain the same.

E. CONCLUSION

[95] Based on the foregoing, the consolidated appeal succeeds in part to the extent that we find that firstly, the appellants adequately explained the delay in instituting the petitions in the High Court. Secondly, the appellants' freedom from inhuman treatment as protected by Section 74(1) of the repealed Constitution were violated. Thirdly, the appellants are entitled to damages of Kshs. 2,500,000 each for violation of their freedom from inhuman treatment.

F. COSTS

[96] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others***; SC Petition 4 of 2012; [2013] eKLR, we see no reason to depart from the general position that costs ought to follow the event. Consequently, we award the appellants costs for the proceedings in the High Court, Court of Appeal as well as before this Court.

G. ORDERS

[97] In the premise, the consolidated appeal is allowed to the following extent:

a) The Judgments of the Court of Appeal dated 28th June, 2019 and 6th August, 2019 in Civil Appeal Nos. 188, 189 and 190 of 2017 are hereby set aside.

b) The Judgments of the High Court dated 15th April, 2018 in HC Petition Nos. 196, 197 and 209 of 2013 are hereby set aside.

c) A declaration hereby do issue that the appellants' petitions in the High Court were lodged without

inordinate delay due to the historical context under which the violations claimed occurred.

d) A declaration hereby do issue that the appellants rights and freedom from inhuman treatment as protected under Section 74(1) of the repealed Constitution were violated by the Government of Kenya through the actions of its agents and/or servants (police officers and GSU officers).

e) The Government of Kenya shall pay damages assessed at Kshs. 2,500,000.00/- to each of the appellants in this consolidated appeal.

f) The Government of Kenya shall bear the costs in the High Court, Court of Appeal and this Court.

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this 27th day of January 2023.

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT OF KENYA

.....

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

.....

S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....	.....
NJOKI NDUNGU **JUSTICE OF THE SUPREME COURT**	**W. OUKO** **JUSTICE OF THE SUPREME COURT**