REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION NO. 41 OF 2018

—BETWEEN—

GITONGA MWANGI MURIITHI

suing as the legal representative of the estate of

MWANGI STEPHEN MURIITHI..... PETITIONER

—AND—

ZEHRABANU JANMOHAMED SC,

suing as the executrix of the estate of

HON. DANIEL TOROITICH ARAP MOI .....1ST RESPONDENT

RAYMARK LIMITED .....2ND RESPONDENT

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*(Being an appeal against the Judgment and Orders of the Court of Appeal at Nairobi (**Musinga P, Mwera, & Ouko (as he then was), JJ.A)** delivered in Civil Appeal No. 240 of 2011 on 9th May 2014)*

Representation

Paul Muite, SC
Dr. John Khaminwa, SC
Mr. Kithinji Marete
Ms. Winnie Wakaba
(Paul Mwangi and Company Advocates)
— for the appellant

Mr. James O. Oduol..... for the 1st respondent
(TripleOK Law Advocates LLP)

Mr. Evans Ondiek.....for the 2nd respondent
(Wanjiru, Chepkwony and Associates LLP)

JUDGMENT OF THE MAJORITY

A. INTRODUCTION

[1] Before this Court is the Petition dated 2nd November 2018 and lodged on even date. It is brought pursuant to the provisions of Article 163 (4) (b) of the Constitution, Section 15 (1) of the Supreme Court Act, 2011 and Rules 9 and 33 of the Supreme Court Rules, 2012 (*repealed*). The appeal challenges the decision of the Court of Appeal *(Musinga P, Mwera, & Ouko (as he then was) JJ.A)* delivered in Civil Appeal No. 240 of 2011. On 9th May 2014, the impugned decision overturned the finding of the High Court (*Gacheche, J.*) in *Constitutional and Judicial Review Petition No.625 of 2009*.

[2] While certifying this appeal as one involving a matter of general public importance pursuant to Article 163(4) (b) of the Constitution, this Court delineated two issues for determination, namely:

> ***(i) whether or not a*** *habeas corpus* ***application bars proceedings for the enforcement of fundamental rights and freedoms; and***
>
> ***(ii) whether a court order in a*** *habeas corpus* ***application could determine the legality of a detention under the provisions of the Preservation of Public Security Act*** *(now repealed).*

B. BACKGROUND

(i) At the High Court

[3] On 22nd May 1982, Mwangi Stephen Muriithi *(deceased)*, was arrested by the police while at his residence. Unable to trace him for three days, his wife took out a writ of *habeas corpus* in ***Miscellaneous Criminal Application No. 88 of***

1982, against the Director of Criminal Investigations Department (CID) pursuant to Section 389 of the Criminal Procedure Code and Rule 3 of the Criminal Procedure (Directions in the Nature of *Habeas Corpus*) Rules (herein referred to as *Habeas Corpus* Rules). The application sought the production of the body of the deceased before the High Court or cause to show why the deceased could not be released forthwith.

[4] The *ex parte* application was heard and granted by *Chesoni, J.* (*as he then was*). The Learned Judge issued summons to the Director of Criminal Investigations, requiring him to appear before the Court and show cause why the deceased could not be released. The summons was copied to the Attorney General in compliance with Rule 4 of the *Habeas Corpus* Rules.

[5] Subsequently, on 28th May 1982, the date set for the hearing of the application, the Principal State Counsel, Mr. Chunga, produced in court a copy of a Detention Order issued pursuant to the *Preservation of Public Security Act (Cap 57, Laws of Kenya)*, placing the deceased under preventive detention. He informed the Court that the original Order had been served upon the deceased. Upon the direction of the Court, the original orders, duly signed by the then Minister of State in the President's Office, were presented in Court and service acknowledged by the deceased.

[6] However, in response, the deceased invited the Court to examine and satisfy itself with the validity of the Detention Order. He urged that the *Public Security (Detained and Restricted Persons) Regulations 1978 (L.N. 234 of 1978)* under which the orders had been issued were inapplicable and of no effect. In support of this assertion, it was contended that the National Assembly had not preserved or extended the application of the said Regulations, upon the lapse of the first twenty-eight (28) days from the date of their issuance, as was mandatory under Section 85 (2) of the retired Constitution.

[7] In a Ruling delivered on 29th May 1982, *Chesoni, J.* (as he then was) determined that the police had discharged their burden and had shown cause why the deceased could not be set at liberty. The learned Judge reasoned that the Director of CID had answered the Court Summons and had satisfactorily shown that he was unable to produce the deceased or release him because the latter had been detained in lawful custody under the Preservation of Public Security Act and Regulations. Consequently, the High Court dismissed the *habeas corpus* application.

[8] On 23rd October 2009, twenty-seven years later, the deceased filed before the High Court, ***Constitutional and Judicial Review Petition No. 625 of 2009*** against H.E the late Daniel Toroitich Arap Moi, who at the time of the deceased's detention was the President of the Republic of Kenya. The deceased alleged violation of his right to personal liberty and to property enshrined under *Sections 72, 75 and 84(1)* of the repealed Constitution. It was his contention that his detention was illegally orchestrated by President Moi, who was his business partner, for the sole purpose of dispossessing him of his proprietary rights.

[9] He particularly pleaded the violation of his proprietary rights in *Fourways Investments Limited* wherein he had a 40%, President Moi 19% and James Kanyotu and Sadru Alibhai a combined total of 41% shareholding. The company was the registered proprietor of properties situated in Nairobi Central Business Centre known as L.R No. 209/4383, No. 209/2464 and L.R No. 209/2385; *Sheraton Holdings Limited* wherein he had a 40%, President Moi 19%, and James Kanyotu and Sadru Alibhai a total of 41% shareholding. The company was also the registered proprietor of properties situated in Nairobi Central Business Centre, known as L.R No. 209/1846; and *Mokamu Limited*, wherein the deceased, President Moi and James Kanyotu had a 33% shareholding each. In addition, the company was the registered proprietor of a farm situated in Solai Nakuru known

as L.R No. 11793, measuring approximately 1020 acres. These properties are hereinafter referred as the *Suit Properties*.

[10] He further submitted that during the time of his detention and thereafter, President Moi caused to be sold the suit properties without an account of the proceeds. President Moi, it was submitted, had also prevented the deceased from accessing any information concerning the suit properties and as a result, had violated his fundamental rights. The deceased therefore sought the following orders, *inter alia:*

(a) a declaration that his detention was caused by the 1st respondent for the achievement of ulterior commercial advantages and was illegal, unconstitutional and contravened his rights under Section 72 of the Constitution;

(b) a declaration that the sale of the subject properties, which belonged to the said companies was illegal and an infringement of his Constitutional right to property under Section 75 of the Constitution;

(c) an order for compensation for the properties the 1st respondent had allegedly deprived him of.

[11] Subsequently, the 2nd respondent was joined to the petition as an interested party on grounds that it was and had always been the registered proprietor of one of the subject properties, *to wit*, L.R. No. 11793. It was the 2nd respondent's argument that the said suit property had never been the property of Mokamu Limited as was alleged by the deceased.

[12] In response to the Constitutional Petition, President Moi raised a preliminary objection seeking to strike out the petition in *limine* on grounds that it was bad in law and was an abuse of the court process. He relied on the following grounds; *the petition sought constitutional redress against an individual; failed to join the Attorney General as the representative of the State which is the custodian of individual rights and freedoms; had not raised any constitutional issues; failed*

to set out particulars of contravention or the Sections of the retired Constitution that were infringed; failed to disclose material facts with an intent to mislead the court; raised issues of company law which ought to be adjudicated upon by the Commercial Division of the High Court; and which in any event, were time-barred under the Limitations of Actions Act and the Public Authorities Limitations Act.

[13] It was also his argument that the deceased's detention was legal as it was underpinned in law and in particular, Section 4(2)(a) of the Preservation of Public Security Act as read with Regulation 6(1) and (2) of the Public Security (Detained and Restricted Persons) Regulations (now repealed).

[14] The trial court identified the following eight issues for determination: *whether it had jurisdiction to determine the matter before it; whether the appellant was guilty of material non-disclosure; whether fundamental rights apply vertically or horizontally; whether there was a limitation period in constitutional litigation; whether the appellant's claim was a constitutional or commercial matter; what was the nexus between the appellant's detention and sale of the subject properties; whether the proceedings were defective for want of particulars of the alleged infringement; and who should bear costs.*

[15] In a Judgment delivered on 6th April 2011, the court, *Gacheche, J*, allowed the petition with costs to the deceased against President Moi and 2nd respondents. On the issues of *jurisdiction*, it was the trial court's finding that by dint of Sections 60 (1) and 84 (1) of the repealed Constitution, the High Court had jurisdiction to adjudicate on issues of constitutional contravention more so in matters where an aggrieved person had alleged infringement of his or her fundamental rights and freedoms.

[16] As pertains to the issue of *material non-disclosure*, particularly whether the deceased had failed to disclose full facts or pertinent issues in the *habeas corpus* application, the trial court found that the issue of the legality of the deceased's

detention was not before it, and as a result, he could not be said to have withheld any material facts. On whether *fundamental rights apply vertically or horizontally*, the court found that fundamental rights apply both vertically and horizontally, save that the horizontal application would not be invoked as a rule, but rather as an exception that would demand the court's examination of the circumstances of each case before it.

[17] On whether the suit *was time-barred*, it was the court's finding that in constitutional matters under Section 84 of the retired Constitution, there was no limitation period. Nevertheless, it acknowledged that to circumvent abuses of the court process, any inordinate delays must be explained to the satisfaction of the court. In this case, the trial court was satisfied that at all material times, President Moi was protected under Section 14 of the retired Constitution and the deceased would only move the court against him upon his retirement as the President.

[18] As regards substantive issues, the Court addressed the question whether the deceased's claim was constitutional or commercial. It determined that his case was hinged on claims of unlawful detention and disposal of the suit properties while he was in detention, abrogating his constitutional rights to liberty and property. Accordingly, it held that the claims for the infringement of the deceased's right to liberty under Section 72 and to property under Section 75 of the retired Constitution were certainly constitutional issues.

[19] On the issue of *who had detained the deceased*, it was the court's finding that the deceased had proved to the required standards that President Moi had detained him. The trial court opined that the detention was not only oppressive, arbitrary, and unconstitutional, but was also orchestrated by President Moi, with the sole purpose of interfering with the deceased's personal liberties and his proprietary rights in the aforesaid companies and the suit properties thereof. Moreover, it noted that President Moi, did not rebut the deceased's assertions and evidence, and therefore as a rule of evidence under Section 3 (2) of the Evidence

Act and Order VI Rule 9 of the Civil Procedure Rules, President Moi had admitted the evidence raised in the deceased's affidavits.

[20] As pertains to the 2nd respondent's claim, the trial court found that apart from the contestation that one of the suit properties, that is, LR No. 11793 in Solai Nakuru belonged to the 2nd respondent, it failed to adduce any evidence in support of this argument or at least rebut the deceased's evidence that the said property formed part of the suit properties. In view of the foregoing, the Court made a finding that this property formed part of the suit properties.

[21] Arising from the foregoing, it was the trial court's finding that President Moi was liable to compensate the deceased for unlawful detention and loss of property. Ultimately, it awarded the deceased a sum of Kshs. 50,000,000/- as punitive damages against President Moi's unlawful acts, at an interest rate of 12% per annum from the date of the Judgment till payment in full, and Kshs. 80,161,720/- at an interest rate of 12% per annum on a compounded basis for what would have been the deceased's share of the proceeds of sale from the suit properties.

(ii) At the Court of Appeal

[22] Aggrieved by this Judgment, President Moi filed **Civil Appeal No. 240 of 2011**. Both the 2nd respondent and the deceased filed cross-appeals against part of the Judgment. The appeal cited seventy-five (75) grounds which the Court of Appeal condensed into six broad grounds namely: *jurisdiction; non-disclosure of material facts; legality of detention; failure to plead particulars of the breach; limitation of actions and res judicata; and assumption of facts*.

[23] In a Judgment delivered on 9th May 2014, the Court of Appeal, *(Musinga P, Mwera, & Ouko* (as he then was) *JJ.A*), allowed the appeal, consequently overturning the High Court's decision. Beginning with the issue of *jurisdiction*, the appellate court upheld the High Court by holding that it had unlimited original jurisdiction to hear and determine claims of violations of fundamental rights, pursuant to Section 84 of the repealed Constitution. The learned Judges also

upheld the High Court's finding on the limitation of time to seek redress for constitutional violations.

[24] On whether the deceased was *illegally detained*, the appellate court determined that the legality of the detention was settled in the *habeas corpus* application as was heard and determined by *Chesoni, J*. It further opined that, without a subsequent appeal from that decision, the deceased's detention was lawful under the then-existing law and remained lawful. Moreover, it was the Court's finding that the issue of the unconstitutionality of the Preservation of Public Security Act and the Regulations therein was not properly before *Chesoni, J*.

[25] In any event, the appellate court noted that the detention order was issued by the Minister in Charge of Internal Affairs in the Office of the President, and not President Moi himself, hence was an act of State. It therefore overturned *Gacheche, J's* findings and instead found that President Moi was not responsible for the deceased's detention. In totality, the appellate court found that the legality of the detention was *res judicata* and could not be reopened before another Judge of the High Court. Consequently, the learned Judges of appeal set aside the declaration that President Moi had violated the deceased's rights under Section 72 of the repealed Constitution.

[26] On the issue of *deprivation of property*, the appellate court determined that the deceased, as a shareholder, had the right to vote at meetings but lacked ownership or rights over properties owned by a company, that was a legal entity, separate and distinct from its shareholders. Besides, it was the Court of Appeal's finding that the burden of proof was not satisfied by the deceased as is required under Sections 107 to 109 of the Evidence Act. This, it noted, was the law notwithstanding President Moi's failure to refute the deceased's assertions by way of a replying affidavit.

[27] Particularly, the appellate court found that evidence ought to have been adduced on what properties were sold, to whom they were sold, at what consideration, and when the sales took place. Additionally, it was the appellate court's finding that the deceased ought to have produced the certificates of incorporation of the three companies together with their respective Articles and memoranda of Association, the names and addresses of the shareholders and shareholding of each shareholder and documents of title to show that each of the companies owned the suit property as pleaded.

[28] As regards the 2nd respondent's case, it was determined that the deceased did not adduce any evidence to support the claim that LR No. 11793 was owned by Mokamu Limited. It concluded that the burden of proof does not change even in the absence of a rebuttal from the opposing party.

[29] On *the question of damages, costs and interest rate*, the court held that having found the deceased had failed to discharge the burden of proof, the general damages were simply lifted from its submissions and awarded in error. Consequently, the learned Judges set aside the award of Kshs. 80,161,720/ awarded as share proceeds from the sale of the Suit Properties and the punitive damages of Kshs. 50,000,000/.

(iii) At the Supreme Court

[30] Aggrieved by the entire Judgment, the appellant, on behalf of the estate of the deceased, filed the instant appeal, citing several grounds of appeal summarized as follows, that the Judges of Appeal erred and misapprehended the Constitution by:

(i) holding that the consideration of a habeas corpus application bars proceedings for the enforcement of fundamental human rights and freedoms against persons demonstrated to be responsible for the breach of such fundamental rights and freedoms;

(ii) *holding that the outcome of habeas corpus application determined the legality of a detention under the provisions of the Preservation of Public Security Act (now repealed);*

(iii) *misapplying and misconstruing the law on habeas corpus vis-a-vis the enforcement of fundamental rights and freedoms;*

(iv) *misapplying the Constitution as pertains to the exercise of the powers conferred on the Office of the President in holding that the Petition at the High Court was against the wrong person;*

(v) *in interpreting and applying the Constitution on the question of liability by holding that the appellant's detention was occasioned by the State as opposed to the 1st respondent and that the 1st respondent enjoyed immunity for his actions as the then President and could not incur liability for his actions or directions as the President;*

(vi) *in interpreting and applying the principle in regard to the burden of proof in petitions pertaining to violation of fundamental rights and freedoms;*

(vii) *taking into account matters which they ought not have, and failing to take into account matters which they should have; and*

(viii) *setting aside the finding of the High Court on quantum of damages and interest awarded to the appellant.*

[31] The appellant seeks the following reliefs:

(a) *THAT this appeal be allowed.*

(b) *THAT a declaration be issued to the effect that a habeas corpus Application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention.*

(c) *THAT a declaration be issued to the effect that failure by a respondent to file an Affidavit in rebuttal of the issues raised by a petitioner in a suit for enforcement of fundamental rights and*

freedoms is uncontroverted proof that the petitioner has proven his/her case on a balance of probabilities.

(d) *THAT a declaration be issued to the effect that a President does not enjoy immunity from personal omissions and illegalities attributed to him during his tenure of office, once he/she ceases to be a president and he/she is liable.*

(e) *THAT a declaration is issued to the effect that the petitioner was and is entitled to damages and interest at commercial rates owing to the loss of business incurred as a result of his detention.*

(f) *THAT an order does issue setting aside the whole of the judgment rendered by the Court of Appeal on the 9th day of May, 2014.*

(g) *THAT the Judgment and Order of the High Court of Kenya at Nairobi (Gacheche, J.) be reinstated.*

(h) *THAT the costs of the High Court and the Court of Appeal proceedings be awarded to the appellant herein and be borne by the respondents.*

(i) *THAT the costs of the instant proceedings be awarded to the appellant herein and be borne by the respondents.*

C. PARTIES RESPECTIVE SUBMISSIONS

(i) The Appellant's Case

[32] The appellant's submissions are dated 11th October 2019 and were filed on even date. He addresses two issues as delineated by the Court. On the first issue, *whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms,* the appellant submits in the negative. He contends that the *habeas corpus* application was narrowly limited to compelling the state to produce the deceased in Court and that the narrow purpose neither addressed the resulting violations nor foreclosed the deceased's right to file a subsequent lawsuit to enforce his fundamental rights.

[33] To support this argument, he submits that under the repealed Constitution and provisions of the Preservation of Public Security Act (repealed), detention without a trial was not a judicial but rather an administrative action by the Executive, which involved neither a judicial inquiry nor provided procedural safeguards necessary for the protection of fundamental rights and freedoms. He states that the purpose of a *habeas corpus* application is to produce a detainee before a court and not to initiate a trial or inquiry into the lawfulness of the state's reason for holding such a detainee.

[34] He maintains that the *habeas corpus* application was filed by the deceased's wife and as a result, the application did not and could not have dealt with the violation of his fundamental rights resulting from his detention. He argues that fundamental rights such as the presumption of innocence; the right to a fair trial within a reasonable time; the right to be tried by a competent, independent and impartial tribunal established by law; and the right to be compensated in the event of unlawful deprivation of liberty, were violated and could not be exhausted by the *habeas corpus* application to which the only question for determination was whether the deceased had been detained pursuant to a valid detention order.

[35] Besides, the appellant has also urged that the *habeas corpus* application was not an inquiry into whether the State's reasons were legally meritorious or whether the detention itself had violated the deceased's constitutional rights. In this context, he submits, the Court of Appeal misapprehended the effect and extent of a *habeas corpus* writ. He relies on the case of ***Ooko v. Republic HCCC No. 1159 of 1966 [unreported] (the Ooko Case)***, and contends that at the *habeas corpus* stage, the court has the duty to merely inquire into the formal validity of a detention order and not the lawfulness of the detention or possible violation of the fundamental rights. Similarly, it is the appellant's argument that the constitutionality of the Preservation of Public Security Act was not at issue in the *habeas corpus* application, and could also not be raised in a subsequent appeal as held by the Appellate Court.

[36] On the second issue, *whether a court order in a habeas corpus application could determine the legality of detention under the provisions of the Preservation of Public Security Act (now repealed),* the appellant submits that the purpose of a [writ of *habeas corpus,* is narrowly limited to production of a detainee in court and consequently legally incapable of determining the legality or otherwise of detention under the Preservation of Public Security Act.

[37] The Appellant faults the Court of Appeal's finding that the detention was lawful as no appeal was preferred against *Chesoni, J.'s* decision. It is his case that such a finding was self-defeating, as any such appeal could not have addressed the lawfulness of the deceased's detention. Furthermore, it is urged that in so far as the legal merits of the detention did not, and could not have been raised in the *habeas corpus* application, the question of the lawfulness of the detention or violation of rights, could not be settled in the said application or subsequent appeal.

[38] Likewise, he submits that the Court of Appeal's finding that the detention was lawful for reasons that the deceased did not challenge the constitutionality of the Preservation of Public Security Act, was made in error, as the validity of the aforesaid Act was not at issue before *Chesoni, J.* He submits that the constitutionality of the Preservation of Public Security Act was a cause of action independent from the *habeas corpus* application.

[39] In any event, the appellant urges that even with a successful appeal, very limited remedies would be available to the deceased. He contends that this is so, as the only remedy available was an order compelling the State to issue the deceased with a rectified detention order and not a determination on the lawfulness of such detention or the breach of his fundamental rights. He cites the ***Ooko Case*** to buttress this assertion.

In conclusion, it is the appellant's submission that the Appellate Court erred in its interpretation of the facts before it, its understanding of the nature of a *habeas corpus* application, and the legal effect of a court's decision on *a habeas corpus*

application. He reiterates that President Moi misused his powers and had been allowed to keep the benefit of his abuse.

(ii) The 1st Respondent's Case

[40] In opposing the appeal, the 1st respondent, on behalf of President Moi's estate, filed her submissions dated 25th January 2019 and 30th October 2019. In addition to the two questions delineated by the Court, the 1st respondent raises a jurisdictional question. She challenges the Court's jurisdiction to hear the appeal on grounds that the appeal is frivolous, vexatious and an abuse of the Court process.

[41] To support this assertion, it is the 1st respondent's case that the appeal has exceeded the parameters of leave granted by this Court. As a result, she disputes the appellant's grounds of appeal pertaining to the exercise of the powers conferred on the Office of the President in relation to detention; the question of liability of the State as opposed to the President; the question of Presidential immunity for his actions as President; the question of burden of proof in constitutional matters; and the question of quantum of damages and interest. In that regard, the 1st respondent anchors her submissions on this Court's finding in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** [2012] eKLR, and ***Okiya Omtatah Okoiti v. Central Bank of Kenya & 7 Others*** [2019] eKLR. She urges the Court to strike out the appeal in *limine*.

[42] On the substantive issues, specifically, the first issue as delineated by this Court, *whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms,* the 1st respondent submits in the affirmative. She urges that the High Court is seized of jurisdiction under Section 60 of the repealed Constitution to hear and determine all constitutional questions ensuing or raised within a *habeas corpus* application including breaches of fundamental rights. The 1st respondent relies on the High Court Decision in ***Masoud Salim Hemed & Another v. Director of Public Prosecution & 3 Others*** [2014] eKLR to persuade the Court that a writ of *habeas corpus* is

intended for the protection of fundamental rights particularly the right to liberty and due process of law as was protected under Section 72 of the retired Constitution.

[43] Furthermore, she urges that the *habeas corpus* application before *Chesoni, J*, determined all the issues presented before him, including the legality, validity and the cause or reasons for the deceased's detention. Therefore, it is submitted that as the resulting decision stands to date, the deceased was barred, from seeking before the same court, a declaration that his detention was illegal or that his right to liberty under the repealed Constitution was violated.

[44] On the second issue, *whether a court order in a habeas corpus application could determine the legality of detention under the provisions of the Preservation of Public Security Act (now repealed)*, the 1st respondent adopts her submissions on the first issue. She emphasizes that the High Court is clothed with original unlimited constitutional jurisdiction under Section 60 of the repealed Constitution and statutory jurisdiction pursuant to Section 389 of the Criminal Procedure Code, to pronounce itself on the rights of a subject as well as substantive issues of legality, lawfulness or impropriety of detention. To persuade the Court, she cites the High Court Decision of ***Mariam Mohamed & Another v. Commissioner of Police & Another*** [2007] eKLR wherein the court directed that pursuant to Section 60 of the retired Constitution, the High Court could properly determine all constitutional questions on the issue of the deceased's detention without trial.

[45] Moreover, the 1st respondent urges that the legality or lawfulness of the deceased's detention was raised and formed the substance of the *habeas corpus* application. She agrees with the Court of Appeal's finding to the extent that pursuant to the Order of *Chesoni, J.* in the *habeas corpus* application, the deceased's detention was and remains lawful. She categorically contends that this determination was not challenged and, in this regard, the issue of legality of the deceased's detention could not be re-opened before another Judge of the High Court as it was *res judicata*.

[46] On the *remedies available,* the 1st respondent argues that as the appeal is premised on the issues of legality of the deceased's detention under Section 72 of the repealed Constitution, Section 72 (6) provided for compensation as a remedy. She submits that should this Court find in favour of the deceased, the only remedy available would be an order for compensation against the Attorney General. It is however noted that as the Attorney General is not a party to these proceedings, no such order can issue in the circumstances.

[47] In conclusion, the 1st respondent opposes the appellant's invitation to the Court to grant the remedies and standards set out in the 2010 Constitution. It is urged that reference to the 2010 Constitution would amount to a retrospective application of the Constitution contrary to this Court's finding in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others***, SC Application No. 2 of 2011; [2012] eKLR ***(Samuel Kamau Macharia Case).*** Consequently, she urges the Court to uphold the decision of the Court of Appeal and dismiss the instant appeal with costs.

(iii) 2nd Respondent's Case

[48] In response to the appeal, the 2nd respondent filed its submissions dated 27th February 2019 and 24th October 2019 respectively. It adopts the 1st respondent's submissions on jurisdiction. In addition, it submits that the appeal is *re judicata* having been adjudicated by a court of competent jurisdiction. It is its argument that the decision by *Chesoni, J.* was conclusive and binding on the parties.

[49] Furthermore, the 2nd respondent maintains that it owns L.R No. 11793 and that the matter was conclusively determined by the Court of Appeal hence no weighty constitutional issue arises to warrant this Court's intervention. It adds that to open up the case before this Court would be contrary to Articles 10, 27 (1), 25 and 50 (1) of the Constitution. The 2nd respondent cites several cases to support the foregoing submissions namely: ***Peter Oduor Ngoge v. Francis Ole***

Kaparo & 5 Others, SC Petition No. 2 of 2012; [2012] eKLR, the ***Samuel Kamau Macharia Case***; and ***Board of Governors, Moi High School, Kabarak v. Malcom Bell & Another***, SC Petition No. 6 &7 of 2013; [2013] eKLR.

[50] Similarly, the 2nd respondent supports the 1st respondent's argument that the issues being raised by the appellant in the instant appeal were never pleaded at the trial stage and that the appellant is bound by his pleadings. It cites the cases of ***Ferdinand Ndungu Waititu v. Independent Electoral Boundaries Commission & 8 Others*** [2013] eKLR, and ***Independent Electoral Boundaries Commission & Another v. Stephen Ndambuki Muli & 3 Others***, Elections Petition No. 2 of 2013 to support its argument.

[51] In conclusion, it is the 2nd respondent's case that the deceased neither appealed against the decision of *Chesoni, J.* nor filed a constitutional petition challenging the constitutionality of the Public Security (Detained and Restricted Persons) Regulations, 1978. In that respect, it urges this Court to uphold the Judgment of *Chesoni, J.* It relies on the case of ***Hadkinson v. Hadkinson*** [1952] AC 285, ***Manji v. Arusha General Store*** [1970] EA 137, ***Equity Building Society v. Nathaniel Ngure Kihiu*** Nairobi Milimani HCCC No. 1647 of 2000 (unreported) to urge that where a judgment or an order has been issued by a court of competent jurisdiction, a party is stopped from litigating on a similar issue in subsequent proceedings in the absence of an appeal.

D. ISSUES FOR DETERMINATION

[52] The issues for determination in this appeal, became self-evident at the stage when this Court certified the same, as involving a matter of general public importance, pursuant to Article 163 (4) (b) of the Constitution. Towards this end, the questions deemed by the Court as being of general public importance were;

(i) whether or not a *Habeas Corpus* ***application bars proceedings for the enforcement of fundamental rights and freedoms; and***

(ii) whether a court order in a *Habeas Corpus* ***application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (now repealed).***

E. ANALYSIS

[53] Before considering the issues as set out above, we are constrained to pronounce ourselves on the question as to whether this Court has jurisdiction to entertain this appeal in the first place. This would not have been necessary, had the issue not been raised by the respondents in the course of the main hearing. It is the 1st respondent's argument that the appeal is frivolous, vexatious and an abuse of the process of court. The appeal, argues the 1st respondent, exceeds the parameters of leave granted by this Court. In support, the 2nd respondent submits that the issues raised in the appeal were never part of the pleadings at the trial stage. Furthermore, he argues, the appeal does not raise any weighty constitutional questions to warrant this Court's further intervention.

[54] In considering the foregoing arguments, we must emphasize the fact that this appeal, is before the Court having been certified as one involving a matter of general public importance under Article 163 (4) (b) of the Constitution. The delineated issues for determination derive from what the Court considered as matters of general public importance. Needless to say, the jurisdiction of this Court to entertain the appeal was conclusively determined at the stage of certification. The respondents cannot therefore be heard to argue that the appeal does not raise any weighty constitutional questions to warrant this Court's further intervention. Whether the appeal exceeds the parameters of leave granted by the Court, is a

matter for us to decide as we dispose of the same. We therefore reserve the question regarding the scope of the appeal to a later stage in this judgment.

(i) Habeas Corpus as a bar to further Proceedings

[55] A pertinent question in this appeal is whether the appellant herein, having taken out proceedings seeking a writ of *habeas corpus***,** is by that fact barred from initiating any other proceedings alleging violation of his fundamental rights and freedoms. On the one hand, the respondents submit that indeed, once a person makes an application for *habeas corpus* and the same is determined, he/she cannot commence other proceedings in the same court seeking recompense for violation of his/her fundamental rights and freedoms. The respondents contend that the decision of the High Court following the *habeas corpus* application was conclusive as it determined all the issues regarding the legality, validity, and reasons for the deceased's detention. The Judgment of the trial court, argue the respondents, renders any other proceedings relating the deceased's detention *res judicata*.

[56] On the other hand, the appellant submits that the writ of *habeas corpus* is narrow in its reach and application. The writ is mainly sought to ensure the production in court of a person who is missing and suspected to be in the custody of the State. In the instant case, submits the appellant, the application was made by the deceased's wife, whose main objective was to oblige the Government to produce her husband, who had gone missing. In the circumstances, contends Senior Counsel Muite for the appellant, there is no way the trial Court could have determined whether the fundamental rights and freedoms of the deceased had been violated.

[57] In order for us to dispose of the first question in the face of the two contrasting viewpoints, it is important that we review albeit briefly, the nature, scope, and rationale of the writ of *habeas corpus***.** This is a Latin maxim which simply translates to "*you have the body*" and by extension, "*produce the body*". The Black's Law Dictionary describes it as:

*"A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal (**habeas corpus ad subjiciendum**) in addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence."*

[58] In ***Secretary of State for Home Affairs v. O'Brien, (1923)*** A.C 603, 609), the Court had this to say about the writ:

"***The writ of*** *habeas corpus,* ***by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the*** *habeas corpus* ***Act of 1679. Today, it is said to be 'perhaps the most important writ known to the constitutional law of England…"***

[59] The *Habeas Corpus* Act to which the Court made reference above, is described in Black's Law Dictionary as *one of the four great charters of English Liberty, securing to English subjects, speedy relief from all unlawful imprisonments."* The U.S Constitution (Art. 1, 9, cl.2) provides for the suspension of the writ of habeas corpus only when necessary to protect the public in times of rebellion or invasion. Our Constitution of 2010 does not countenance any limitation of the writ of *Habeas corpus*. Article 25 thereof provides that:

"***despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-***

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) ***the right to an order of habeas corpus."***

[60] The essence of a writ or order of *habeas corpus* is to secure the production of a person in a court of law by the State so as to facilitate a judicial inquiry into the reasons for his/her incarceration. The application for such an order, is usually directed at an agency of the State, where the applicant has reason to believe that the missing person, is in the custody of the former. The reason the writ of *Habeas Corpus* is celebrated by human rights defenders in common law jurisdictions, is that for many centuries of yore, it has provided succour to those unjustly incarcerated. To this day, it is continually regarded as a fountain of liberty. A bulwark against illegal confinement of those, who would otherwise be free. It liberates the oppressed from the dungeons of those who wield authority over the citizenry.

[61] Before the promulgation of the 2010 Constitution, the writ of *habeas corpus* applied in Kenya as a common law doctrine by virtue of Section 3 (1) (c) of the Judicature Act, Cap 8 of the Laws of Kenya. The jurisdiction to issue the writ vested as it still does, in the High Court. It is a special and supervisory jurisdiction which empowers the Court to oversee, safeguard and uphold the liberty of a citizen in the event of an illegal incarceration. The writ of *habeas corpus* is now enshrined in the Constitution as a fundamental right from which there can be no derogation (***Article 25 (d)).*** Article 51 (d) of the Constitution provides that *"a person who is detained or held in custody is entitled to petition for an order of* ***habeas corpus.***"

[62] Section 389 (1) of the Criminal Procedure Code provides that the High Court may issue the following directions under *Habeas Corpus* jurisdiction:

> ***(a) that any person within the limits of Kenya be brought up before the court to be dealt with according to law;***
> ***(b) that any person illegally or improperly detained in public or private custody within those limits be set at liberty;***
> ***(c) that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;***
> ***(d) that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;***
> ***(e) that any prisoner within those limits be removed from one custody to another for the purpose of trial; and***
> ***(f) that the body of a defendant within those limits be brought in on a return of*** *cepi corpus* ***to a writ of attachment.***

[63] Pursuant to Section 389 (2), the Chief Justice promulgated the ***Criminal Procedure (Directions in the Nature of habeas corpus) Rules,*** 1948; which provide that an application shall be made by way of *chamber summons* supported by an affidavit. If not summarily dismissed, the Judge directs that summons be issued to the person alleged to be holding the detainee to show cause why the detainee should not be released. The summons and its supporting affidavit must be served upon the Attorney General.

[64] Against the foregoing background, we now turn to the first question before us, i.e, *whether or not a habeas corpus application, bars proceedings for the enforcement of fundamental rights and freedoms*. It is important to restate at the outset, the limited nature of the writ of *habeas corpus*. It was, and has always been meant, to secure the release of a person from unlawful custody. A long line of judicial authority from across the Commonwealth and beyond, has cemented the rationale and scope of *Habeas Corpus*. It is all about the liberty of the citizen or any other person found within the borders of the respondent state.

In ***Grace Stuart Ibingira and Others v. Uganda (1966) EA 445*****,** the Court held;

> ***"The writ of*** *habeas corpus* ***is a writ of right granted*** *ex debito justitiae,* ***but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained."***

[65] The pronouncement in ***Grace Ibingira*** *(supra),* which accurately echoes the origins and nature of the writ of *habeas corpus*, has long been embraced by Kenyan superior courts, including those in other jurisdictions within the East African region. In ***MA. Estrelita D. Martinez v. Director General and Ors.*** *GR No.153795 of 17th August 2006, the Supreme Court of the Philippines set out the object of habeas corpus as follows:*

> *"Habeas corpus* ***generally applies to 'all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody***

of any person is withheld from the person entitled thereto."

Similarly, the same court in ***Ngaya-an v. Balweg****, 200 SCRA 1489, 154-5, August 5, 1991 per Jaris, J. stated;*

"The ultimate purpose of the writ of *habeas corpus* ***is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority."***

[66] Given its limited scope, can the writ of habeas corpus be said to operate as a bar to any further proceedings, once it has been granted or denied? The answer to this question must be in the negative, given the fact that, what it is meant to secure without more, is the release into liberty, of a person from unlawful custody. As observed by *Scrutton L. J.* in ***Ex P O'Brien*** [1923] 2 K.B 361, 391; ***"The object of the writ is not to punish previous illegality and it will only issue to deal with release from current unlawful detention."***

[67] We are therefore in agreement with the appellant's submission, that the writ of habeas corpus was never fashioned to grant relief beyond release of a person from unlawful custody. The grant or denial of the writ does not deprive an applicant from pursuing recompense from the court for violation of his right to liberty occasioned by the unlawful detention. Such a claim for compensation cannot be filed contemporaneously with a petition for a writ of *Habeas Corpus*. Recognizing the limited nature of a *Habeas Corpus* application *Ojwang, J.* (as he then was) in ***Mariam Mohamed & Anor v. Commissioner of Police & Anor*** Misc. Crim. Appli. No. 732 of 2007 [2007] eKLR***;*** opined as thus:

"That the Subject should always have access to the safeguards of the Constitution of Kenya, is a right, and so the person who made it impossible for the subject to enjoy those rights, committed a constitutional and legal wrong against him. Legal wrongs are always actionable, in any common law system such as that which applies in this country ...

A wrong, therefore, has been committed against the Subject herein, both in terms of the general law (i.e. the common law), and the specific provisions of the Constitution. *This, however, is not the question which has been placed before this Court, by the Corpus application of 18th October 2007; and it is for that reason, that a different application would have to be made before the High Court."* [Emphasis added].

[68] We are indeed in agreement with the learned Judge's pronouncement above, in so far as it signifies the fact that, the pursuit of compensation for a violation occasioned by the unlawful incarceration of a person, cannot be extinguished by his release through a writ of habeas corpus.

(ii) Legality/Validity of detention under the Preservation of Public Security Act

[69] This brings us to the second question, that is, ***whether a court order in a*** *Habeas Corpus* ***application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (now repealed).*** The 1st respondent contends that the determination by the High Court affirming the legality of the deceased's detention was never challenged and therefore could not be re-opened before another judge. He submits that the *habeas*

corpus application before *Chesoni, J.* (as he then was), determined all the issues presented before him, including the legality, validity and reasons for the appellant's detention.

[70] The appellant on his part, submits that the constitutional validity of the Preservation of Public Security Act was not in issue before the Court. It is his argument that given the contents of the aforesaid Act, it could not have been possible to question the legality/validity of the deceased's detention. Towards this end, he faults the Court of Appeal's interpretation of the facts before it, its understanding of the nature of *habeas corpus* application, and the legal effect of a court's decision consequent upon such an application. The appellant reiterates the argument that the purpose of the writ of *habeas corpus* is limited. The Court of Appeal held that the detention of the appellant, was lawful both at the time of the deceased's incarceration, and at the institution of these proceedings. This in the view of the Appellate Court, was due to the fact that the detention was grounded upon the Preservation of Public Security Act, a statute whose validity had never been challenged.

[71] What then was the effect of the Preservation of Public Security Act *vis a vis* the writ of *Habeas Corpus*? On the one hand, *Habeas Corpus* has always been intended to secure the production of a person, who is held in custody before a court of law, so as to determine whether his incarceration is lawful or not. On the other hand, the Preservation of Public Security Act empowered the Minister responsible for internal security, to issue an Order for the detention without trial, of a person who in the opinion of the Minister, was a danger to public security. Hence, the objective of the writ of *Habeas Corpus* is to secure the liberty of a person, while that of the Preservation of Public Security Act was to achieve the opposite; that is, to limit the liberty of a person. The procedure under the former, is judicial while the one under the latter, was administrative. The effect of the aforesaid Act therefore, was to render the writ of *habeas corpus* inoperable. At the time of the deceased's detention, what was produced before the Court following an application

for *Habeas Corpus,* was not a body, but of a Copy of an Order, ousting the Court's authority to inquire into the legality of the deceased's detention.

[72] The harsh reality of the inoperability, hence the ineffectiveness of the writ of *Habeas Corpus*, in the face of the applicability of the Preservation of Public Security Act, is to be seen in the proceedings. Upon being invited to examine and satisfy himself regarding the validity of the Detention Order, *Chesoni J,* stated that *'the Director of CID was unable to produce the applicant or release him because the latter had been detained in lawful custody under the Preservation of Public Security Act and Regulations'*. The Court was acknowledging the fact that the writ of *Habeas Corpus* was no longer available to the applicant in the face of this Act. This was a classic case of "***rule by law***" as opposed to "***rule of law***". Indeed, it was during this dark period in the history of our Country, that many citizens who dared find fault with the Government of the day, got detained without trial for indeterminate terms, at the pleasure of their tormentor.

[73] In view of the foregoing, we find it difficult to answer the question before us in the affirmative. How would it be possible for a court to determine the lawfulness of a detention, when the entire process of inquiry had been frozen by a Detention Order? The learned Judge stopped short of stating that his hands were tied by the production of the detention Order. In other words, the body could neither be produced, nor could an inquiry into the legality of the detention be conducted given the ouster of the Court's authority to do just that. Where then does this conclusion leave us, in terms of determining whether any relief is due to the estate of the deceased?

[74] The appellant has all along claimed that the deceased's fundamental rights and freedoms as guaranteed under Section 72(1) of the retired Constitution were violated due to his unlawful detention. The said Section provided that "*no person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases"*. Subsection (6) thereof provided that "*a person who is unlawfully arrested or detained by another person shall be entitled to*

compensation therefor from that other person". The retired Constitution also guaranteed the right to a fair trial, and the right to property. The appellant claims that the deceased's right to personal liberty and property were violated. The appellant submits that the motive for the detention by former President Moi was to pave way for the latter to sell all the shares the two held in Fourways Investments Ltd, Sheraton Holdings Ltd, and Mokamu Ltd.

[75] It is at this stage, that we must consider the scope of the appeal before us, within the context of this Court's jurisdiction. Towards this end, the respondents have submitted that the appeal before us, exceeds the parametres pursuant to which it was admitted. It is her argument that the reliefs being sought by the appellant cannot be available to the deceased's estate as the same have never been in issue before the superior courts. She submits that this Court is limited to determining the matters of general public importance which informed its decision to admit the appeal and not more. This appeal was admitted pursuant to Application Number 45 of 2014 between ***Stephen Murithi v. Daniel Toroitich Arap Moi & Raymark Ltd.*** The Applicant sought a review of the Court of Appeal's decision (*Nambuye, Gatembu, & M'Inoti JJA)* which had declined to certify the intended appeal as one involving a matter of general public importance.

After considering the submissions of the parties to the application, this Court stated:

> "***As this Court stated in the case of*** *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone****.... an applicant seeking such certification*** *must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case..."* ***if it is a point of law, he*** *"must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest".* ***The question is***

whether or not this threshold has been satisfied in this case."

In answer to the foregoing question, the Court held that the issues of

(1) Whether or not a *Habeas Corpus* application bars proceedings for enforcement of fundamental rights and freedoms; and

(2) A court order in a *Habeas Corpus* application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (now repealed) to be matters of general public importance, which transcend the circumstances of this particular case.

[76] It is clear that the appeal before us was admitted on the basis of these two issues as formulated by the Court under Article 163 (4) (b) of the Constitution. The appellant was allowed to canvass these two issues because the Court considered them to be of general public importance. We are therefore in agreement with the respondents that the appellant is not at liberty to reopen his appeal beyond the parameters pursuant to which it was admitted.

[77] That the deceased was detained without trial under the regime of former President Moi is undeniable. We have already declared that an application for *habeas corpus* cannot operate as a bar to further proceedings by the deceased seeking compensation for violation of his fundamental rights. By the same token, we have also determined that it would not have been possible to inquire into the legality of one's detention under the Preservation of Public Security Act.

[78] This Court, not to mention other superior courts, has had occasion to pronounce itself on how detention without trial, orchestrated by the State, against its critics amounted to the egregious violation of the personal liberties of the detainees. The victims of the said detentions have over the years, successfully sought recompense from the courts long after the reign of the aforesaid regime came to an end. See for example, ***Gitobu Imanyara& 2 Others v. Attorney***

General, SC Petition No. 15 of 2017; ***Koigi Wamwere v. Attorney General,*** Civil Appeal No. 86 of 2013; [2015] eKLR, and ***Peter M. Kariuki v. Attorney General,*** Civil Appeal No. 79 of 2012; [2014] eKLR; High Court decisions in the cases of ***Kenneth Stanley Njindo Matiba v. Attorney General,*** Constitutional Petition No. 94 of 2014 [2017] eKLR, ***Denish Gumbe Osire v. Cabinet Secretary, Ministry of Defence & Another,*** Constitutional Petition No. 572 of 2013; [2017] eKLR, ***Captain (Rtd) Frank Mbugua Munuku v. Kenya Defence Forces & Another,*** Constitutional Petition No. 497 of 2012; [2013] eKLR, ***David Gitau Njau & 9 Others v. Attorney General,*** Constitutional Petition No. 340 of 2012, [2013] eKLR and ***Peter Tonny Wambua & 17 Others v. Attorney General,*** Constitutional Petition No. 427 of 2008; [2017] eKLR. The intervention by the courts, serves as a reminder to current and future regimes that the Bill of Rights enshrined in our Constitution is a covenant non-negotiable. It cannot be legislated away or ousted by Parliament.

[79] Specifically, we must distinguish the ***Matiba decision*** from this one. In ***Matiba,*** the petition was filed against the Attorney General representing the State whose action of detaining the petitioner led to the collapse of his massive business empire. The High Court was also satisfied that there was a clear nexus between the act of detention and the resultant loss of property. And whereas President Moi was alleged to have been the author of the detention, no claim against him was made directly as was the case here. We have explained why such an approach does not meet the favour of the law.

[80] In view of the foregoing observations, we are in agreement with the High Court, that the deceased's right to personal liberty was violated consequent upon his detention without trial through the now infamous Detention Order signed by the Minister responsible for internal affairs. This violation was an act of State, for which compensation should ideally be awarded to the estate of the deceased against the State. This explains why a Copy of the Detention Order was served on the Attorney General by the Minister. However, for reasons unknown to us, the

appellant has never sued or even sought to join the Attorney General or any other State Organ to these proceedings. We are therefore faced with considerable difficulty on how to apportion liability, hence compensatory relief, against a person or agency that has never been a party to these proceedings. It is a trite Principle of legal procedure that a party is always bound by his pleadings. We must therefore restrict ourselves within the four corners of the parties' pleadings.

[81] The foregoing dilemma leads us to consider the liability of the estate of President Moi. The Court of Appeal, in re-evaluating the evidence tendered in support of the claim of fraudulent sale of shares by President Moi, held that such claim was not proven to the adequate standard. In addition, the appellate court was of the view that such claim ought to have been founded in company as opposed to public law. Be that as it may, this being an appeal under Article 163 (4) (b) of the Constitution, we must focus on the two issues that the Court delineated for determination. We have already discharged this obligation. In ***Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KL) we held,

> "*This Court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under Article 163 (4) (b) of the Constitution… We may however not delve into the factual findings of the Trial Court and Court of Appeal ….Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of the evidence cannot not bring up an appeal within the ambit of Article 163 (4) (b).*"

[82] This pronouncement remains the authoritative statement regarding the scope of an appeal under Article 163 (4) (b) of the Constitution. Consequently, we are not able to sanction any other form of compensation against the estate of

President Moi based on the claims of fraudulent sale of company shares; claims that have been discounted by the Court of Appeal for insufficiency of evidence. Apart from the fact that this issue was not before us, such a claim, as rightly held by the Appellate Court, would be well founded not in public law, but company law, where the principle in ***Salomon v. Salomon*** still holds sway. In ***Gitobu Imanyara & 2 Others v. Attorney General,*** SC Petition No. 15 of 2017, [Unreported] wherein the 2nd appellant had sought a declaration that he was entitled to an award of damages and compensation as result of the impounding of copies of his company's Publication, this Court held that such a claim, was a claim in public law for infractions to his rights under the Constitution, and therefore, the principles in ***Salomon v. Salomon*** were inapplicable. This decision is however distinguishable from the current appeal, on grounds that in that case, the petitioner had all along sued the Attorney General. He had also been able to establish a clear nexus between the state action of his detention and the actions of state agents in impounding copies of his Company's publication, resulting in financial loss. The Court also cautioned that the petitioner had to be careful so as not to fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. The petitioner was also able to establish that he was personally and inextricably linked to the day to day management of the company. The only issue before the Court and which was referred to the High Court was the issue of quantum.

[83] Having disposed of the twin issues that were the basis for the assumption of jurisdiction, and having reached the conclusions we have, regarding apportionment of liability and compensatory relief, we are left with no option but to dismiss the Appeal.

DISSENTING OPINION OF JUSTICE MOHAMMED K. IBRAHIM, SCJ

[84] I have had the advantage of reading the majority decision in this appeal. I agree with the factual background, the summary of the submissions advanced by the parties and the issues for consideration and determination as framed. I do not therefore intend to reiterate them here in detail save in limited aspects for purposes of clarity of any point I will be making.

[85] While certifying this appeal as one involving a matter of general public importance pursuant to Article 163(4) (b) of the Constitution, this Court delineated two issues for determination, namely:

> ***(i) whether or not a*** *habeas corpus* ***application bars proceedings for the enforcement of fundamental rights and freedoms; and***
>
> ***(ii) whether a court order in a*** *habeas corpus* ***application could determine the legality of a detention under the provisions of the Preservation of Public Security Act*** *(now repealed).*

[86] I fully agree with the majority on the first issue that the sole purpose of the writ of *habeas corpus* is to free persons from impermissible detention. A person may still seek compensation from the court for a violation of their right to liberty brought on by the illegal imprisonment whether the writ is granted or not. A petition for a writ of *habeas corpus* cannot therefore be filed concurrently with such a claim for compensation.

[87] On the second issue, I, in part, agree with the majority. I join the majority in taking note that on the one hand, the purpose of *habeas corpus* has always been to ensure that a person in custody is brought before a court of law so that it can be decided whether or not his detention is legal. The rights to personal liberty has always been guaranteed under the Constitution. With Independence, a Bill of Rights was entrenched in the 1963 Independence Constitution to facilitate the

protection of Individual rights. Section 16 guaranteed the right to personal liberty. Section 29 of the same constitution however provided for declaration of emergency during which derogation from Section 16 was permitted if passed under the authority of an Act of Parliament.

[88] In 1966, Section 83 and 85 of the repealed Constitution (previously Section 16 and 29 respectively of the independence Constitution) were amended through Act No. 18 of 1966. The Preservation of Security Act was also amended to wit; the term *emergency* was replaced by the term *public security;* the period for parliamentary review of the emergency order was increased from two months to eight months; and greater and wider derogations from the rights guaranteed in the Bill of rights were permitted.

[89] The Constitution (Public Security) Order, L.N. 211 of 1966 brought Part III of the Preservation of Public Security Act into operation, and the executive invoked the powers granted to it by Section 4 (2) (a) and (b) of the Act. Significantly these sub-sections provide for the detention of persons, the registration of persons and restriction of movement and the compulsory movement of persons, including the imposition of curfews. Detailed Rules governing the detention of persons were made, being the Preservation of Public Security (Detained and Restricted Persons) Regulations, 1978. The President delegated his power of detention to the Minister of Home Affairs under Rule 6 of the Preservation of Public Security (Detained and Restricted Persons) Regulations. Act No. 10 of 1997 deleted the provisions of Section 4 (2) (a). See Mumma, A. O. ***"Preservation of Public Security Through Executive Restraint of Personal Liberty: A Case Study of the Kenyan Position"*** (1988) *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 21(4), 445–463.

[90] The Preservation of Public Security Act No. 18 of 1996 and the Public Security (Detained and Restricted Persons) Regulations 1978 were applicable at the time of the Appellant's detainment. Before *Chesoni J*. the Deputy Prosecutor produced a detention Order signed by the Minister of State in the President's office in Charge of Internal Security. A reading of Section 3 of the Public Security Act and the

provisions of the Public Security (Detained and Restricted Persons) Regulations 1978 gives an overview of the Powers of the President and that of the Minister under the Act and the Regulations.

[91] The Preservation of Public Security Act gave the Minister in charge of Internal Security the authority to order the detention of anyone who, in his or her judgment, posed a threat to public safety. Juxtaposing this to the purpose of the writ of *habeas corpus* fashioned to protect an individual's right to liberty, the net result was that the Preservation of Public Security Act was intended to do the exact opposite by arbitrarily restricting an individual's freedom. The former involves a judicial process, whereas the latter involves an administrative one. The aforementioned Act therefore had the effect of invalidating the *habeas corpus* writ. When the deceased was being held in custody, the only thing that was presented to the court in response to a request for *habeas corpus* was a copy of a detention order that barred the court from considering whether the deceased's detention was lawful.

[92] Ultimately, this finding resolves the second issue framed by the Court that the *habeas corpus* could not determine the legality of a detention under the provisions of the ***Preservation of Public Security Act.*** I firmly agree with the majority that the writ of *habeas corpus* application by the Appellant did not operate as a bar to further proceedings. This would in turn mean that the Court of Appeal erred in setting aside the declaration by the High Court (*Gacheche, J.*) that the Appellant's detention violated his rights under Section 72 of the repealed Constitution.

[93] After this conclusion, I find myself at my first point of departure with the majority. The majority have found that beyond the two issues framed and considered to be of general public importance, the Appellant was not at liberty to reopen his appeal beyond the parameters pursuant to those admitted.

[94] Turning back to the present Appeal, I agree with the majority that it is beyond dispute that the Appellant was held without a trial during the administration of former President Moi. Further, the majority have rightly pointed out that other superior courts have upheld the Bill of Rights enshrined in our Constitution

(former and current) as a non-negotiable covenant that cannot be legislated away. The superior courts have had occasion to pronounce themselves on how detention without trial, orchestrated by the State against its critics amounted to the egregious violation of the personal liberties of the detainees. The victims of the said detentions have over the years, successfully sought recompense from the courts long after the reign of the aforesaid regime came to an end. This raises the question, why should the appellant's case be any different? Should the Court shut the Appellant out from getting effective reliefs because he elected to pursue the appeal as a matter of general public importance and not one of application or interpretation of the Constitution? I think not.

[95] Ordinarily, once a party elects to file their appeal under Article 163(4)(b) as concerning general public importance then the they would not have the option of arguing matters under Article 163(4)(a) as raising the application or interpretation of the Constitution.

[96] However, I take note that what instigated the appeal before this Court, was the Appellant's ***High Court Constitutional and Judicial Review Petition No. 625 of 2009.*** Having resolved the second issue in the negative and in favour of the Appellant, then it is for the Court to relook at the viability of the High Court Petition that stood dismissed by the Court of Appeal. I must revisit the locus classicus on certification of matters, ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone;*** SC Appl No 4 of 2012 [2013] e KLR wherein, the Court stated, (para 60):

> *"For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest." [Emphasis mine]*

[1] [97] What the Court looks out for before certification is whether an issue transcends the circumstances of a case and has a bearing on the general public or public interest. Though the Court owes the general public resolution of the issue of

general public importance, the Court, as the apex and the court of last resort, still bears a duty to the parties before it to help them resolve their issues and grant effective remedies. I find myself of a contrary opinion from that expressed by the majority, more so in light of the fact that this Court has previously resolved and issued reliefs in the following cases certified as involving matters of general public importance; ***Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party),*** SC Petition No. 12 of 2016; [2019] eKLR***, JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)*** (Petition 11 of 2020) [2023] KESC 4 (KLR) and ***MNK v. POM; Initiative for Strategic Litigation In Africa (ISLA) (Amicus Curiae),*** Petition No. 9 of 2021; [2023] KESC 2 (KLR). In order to arrive at justiciable and appropriate remedies, the Court may reexamine factual findings by the Superior courts to determine their suitability. It is my humble opinion that this duty is ever more pertinent where there are historical human rights violations. To reiterate the words of this Court in the case of ***Wamwere & 5 others v Attorney General*** (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR):

> *"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."*

[98] However, unlike the myriad of cases quoted in the majority decision as examples of the Court compensating victims of illegal detentions under the Moi Regime, the Appellant in the present appeal elected to sue only the late President Moi in his capacity as not only the former president but also his former business partner. He failed to enjoin the Attorney General or the State in whatever capacity. I join the majority in faulting the Appellant for failing to do so. The Appellant's detention order was signed by the Minister of Internal Security in the Office of the President and served on the Attorney General. Why, the Appellant and his Counsel elected not to enjoin the Attorney General or the State, is best known to them. However, it is by now well settled by precedent that parties are bound by their pleadings and the Court is bound to resolve the case as presented by the parties.

[99] Nevertheless, in contrast with the majority, I am of the considered opinion that this failure to enjoin the State or the Attorney General was not fatal to the Appellant's claim. I say so for two reasons. First, according to the ***Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006*** it was not a requirement that in Constitutional cases the Attorney General had to be a respondent. Rule 15 under Part III on enforcement jurisdiction provides as follows:

> *"The petition shall, in a criminal case, be served on the Attorney General and in a civil case, on the respondent, within seven days of filing."*

[100] Secondly, as evident in Rule 15 above, remedies for violation of fundamental rights and freedoms under the repealed Constitution were available against private individuals. There was nothing in law that barred the Appellant from suing the later former President as a private citizen.

[101] My third point of departure from the majority decision concerns whether the Appellant's case was founded in public law or company law where the principle

of ***Salomon v. Salomon*** was applicable. To answer this, I am of the opinion that the cases of ***Gitobu Imanyara & 2 Others v. Attorney General,*** SC Petition No. 15 of 2017, and ***Kenneth Stanley Njindo Matiba v Attorney General*** [2017] eKLR are instructive on the matter.

[102] In ***Gitobu Imanyara*** this Court held that such a claim, was a claim in public law for infractions to his rights under the Constitution, and therefore, the principles in ***Salomon v. Salomon*** were inapplicable. While in the ***Matiba Case*** the Court (*Lenaola J.*(as he then was)) held that that it was irrelevant whether the claim and evidence by the Appellant possesses the characteristic of a commercial nature as long as the claim before the Court seeks to protect or enforce the Bill of Rights. It was held as follows:

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

[103] I resonate with the above decisions, as such, it is my considered opinion that the issue before the superior Courts was whether the Appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. The two are so intricately interconnected that it is my

considered view, to apply the principle of ***Salomon v Salomon*** would be to defeat the purpose and intent of the Bill of rights guaranteed in the Constitution.

[104] My final point of departure from the majority concerns the sufficiency or otherwise of evidence concerning the fraudulent sale of company properties. In response to the Constitutional Petition filed before the High Court, the 1st Respondent raised a preliminary objection seeking to strike out the petition in *limine* on grounds that it was bad in law and was an abuse of the court process. The 1st Respondent did not file pleadings challenging the factual basis of the Appellant's case. The High Court proceeded on the strength of Order VI Rule 9 of the Civil Procedure Rules which provide that any allegation of fact not traversed by the opposing party is deemed to be admitted. The Court of Appeal noted that the Petition proceeded by way of affidavit, as is the nature of constitutional petitions. The learned Judges of appeal faulted the High Court for failing to apply Sections 107, 108 and 109 of the Evidence Act.

[105] Be that as it may, I take cognizance that commonly where there are human rights violations by the state, or by persons utilizing state machinery, what frequently happens is that victims of such violations have their access to vital information hampered. This is often done in order to curtail the victim's ability to effectively pursue challenges in court. It is why several international human rights bodies have recognized, in a general sense, the merits of allocating the burden to the state where the state has greater access to information. For instance, the Inter-American Court held that the state's defense cannot rest on the impossibility of the complainant to procure evidence, when it is the State that controls the means of clarifying facts (***Bamaca-Velasquez v. Guatemala,*** Case No. 11,129, IACtHR, Merits (Nov. 25, 2000), para. 152). The European Court in the case of ***Betayev and Betayeva v. Russia***, App. No. 37315/03, ECtHR (May 29, 2008) held that where the applicant makes out a *prima facie* case and the Court is prevented from reaching factual conclusions owing to the lack of documents, the burden shifts to the government to provide a satisfactory and convincing explanation of how the events occurred.

[106] This inequality in access to information is what informed the need for this Court in the case of ***Wamwere & 5 Others v. Attorney General*** (***supra***) to elect to take judicial notice of the events of 3rd March, 1992 of police officers storming freedom corner where the mothers of political prisoners who had been detained by the then regime, had congregated since 28th February, 1992 and went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. The Court took the view that since the incident had drawn widespread press coverage nationally and internationally as well as condemnation across the globe, it was a matter that it could comfortably take judicial notice of as a matter of general notoriety. Consequently, it may be time to have the discussion regarding strictly holding petitioners to the burden and standard of proof in cases of human rights violations where the state actor or persons using state machinery deliberately ensure that their victims' access to information and evidence is severely curtailed. Nevertheless, in the present case it is my considered view that it would be illogical to strictly hold the Appellant to the burden and standard of proof, given that the alleged realization of various properties was carried out during the time he was held in detention. All the more, in view of the fact that the 1st Respondent elected not to contest the Appellant's factual claims. Further, even after being released, admittedly he was not able to gain access to all the necessary documents to prove his claim. However, the Appellant was able to gather and submit to the High Court vide Affidavit sworn on 14th May, 2010 proof of sale of various properties during his detention. The relevance of this evidence shall be apparent shortly.

[107] The Appellant's detention order was issued by the Minister in Charge of Internal Affairs. During the time the 1st Respondent was the President of Kenya, the office of the Minister of Internal Security was domiciled in the office of the President. The Appellant's detention did not attract as much press coverage as that of the freedom corner incident. That notwithstanding, I take judicial notice that during this time, it is well recorded that President Moi was all powerful and had control over branch of government. His was a dictatorial state. Further, it is well documented that Former President Moi used arrests and detention without charge

to repress his opponents and deemed adversaries in the years following the attempted coup in 1982 as well as throughout the struggle for multiparty politics. Many people have shared accounts of being subjected to cruel treatment, humiliation, and appalling conditions. One of these accounts is 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 20 the Commission records as follows:

> *"In June 1982, after popular calls for an open political system, President Moi pushed through the single party parliament a constitutional amendment making Kenya a de jure one-party state. Several months later, an aborted coup by a section of the Kenya Air Force produced in President Moi a determination to crush all dissent and concentrate all power in his hands. From then on, President Moi worked to perfect the repressive state crafted by President Kenyatta. Thereafter, the Party and the state became one. Through the government and KANU, he exercised extensive and deep control over civic groups, trade unions, the press, the parliament, and most critically the judiciary. Political murder, politically-instigated ethnic clashes, detention without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents, both real and imagined, became the business of the state."*

[108] This history is further checkered with the powers that the President had under the Act. In Section 3 of the act the President had authority to bring into force the provisions of the Act through issuance of a gazette notice. Further to this the provisions of Section 4 of the Act provided as follows:

> "*(1) Where an order under section 29 of the Constitution (which relates to the bringing into operation of this Part of this Act) has been made by the President, and so long as the order is in force,* ***it shall be lawful for the President,*** *to the extent to which the provisions of this Part is brought into operation and subject to the provisions of Constitution, to make regulations for the preservation of public security." [Emphasis mine]*

[109] From this recorded history it would be reasonable to believe the Appellant's account that the former President was not only involved but was the author of his detention for a period over three (3) years.

[110] The appellant had sought to dissolve his business entities with the former President but the former President was opposed to the idea. Any disputes regarding the business relations between the appellant and the 1st respondent could have been resolved in civil court as civil matters. However, before the matter could be resolved, the appellant was detained under the Preservation of Public Security Act, without trial and for an indefinite period of time. During which time, the properties of the various companies were sold off without the appellant's involvement and without accounting for the same.

[111] The appellant's detention order was signed by the Minister of Internal Security. However, there is no reason to believe that the said detention was carried out for the purposes laid down in the Preservation of Public Security Act. This was an office domiciled in the Office of the President. I refer to the Court's decision on the role of a sitting president in ongoing processes in ***Attorney-General & 2 Others v. Ndii & 79 others; Prof. Rosalind Dixon & 7 others*** *(Amicus Curiae)* ***(Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR).*** Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. This means that once a person ceases to be a president, they lose immunity and become liable for their actions and omissions. This position was no different from Section 14 (2) of the repealed Constitution. Further the Court was able to find that it was difficult to explicate the President's hand in commencing the constitutional amendment process and the use of the powers of the office to do so. So too in the present case, it is difficult to explicate the role of former President Moi in the appellant's detention in 1982 and subsequent realization of various properties in companies both he and the appellant were shareholders during the time of the appellant's detention. I find great difficulty in seeing how the Minister

of Internal Security could have detained the appellant, the former President's business partner, for three years and the former President to have not been aware. More so, given that several properties were realized in that time. The authority the President had at the time, the nexus created by the detention Order, the resultant interference of the appellants person liberty and the deprivation of his right to property are too glaring for me sitting on this Bench to turn a blind eye.

[112] The appellant had particularized the violation of his proprietary rights in Fourways Investments Limited wherein he had a 40%, the 1st respondent 19% and James Kanyotu and Sadru Alibhai a combined total of 41% shareholding. The company was the registered proprietor of properties situated in Nairobi Central Business Centre known as L.R No. 209/4383, No. 209/2464 and L.R No. 209/2385; Sheraton Holdings Limited wherein he had a 40%, the 1st respondent 19%, and James Kanyotu and Sadru Alibhai a total of 41% shareholding. The company was also the registered proprietor of properties situated in Nairobi Central Business Centre, known as L.R No. 209/1846; and Mokamu Limited, wherein the appellant, the 1st respondent and James Kanyotu had a 33% shareholding each. In addition, the company was the registered proprietor of a farm situated in Solai Nakuru known as L.R No. 11793, measuring approximately 1020 acres.

[113] The appellant stated that due to his detention, he was not able to gain access to all the necessary documents to prove his case. However, what he was able to acquire, he put together in an affidavit sworn on 14th May, 2010 filed before the High Court annexing documents demonstrating sale of various properties and compensation he received. Of the particularized sales, he was able to prove the sale of L.R. 209/4383 for Ksh.25 million and I.R. 10580/30 for Ksh.36 million by Fourways Investments Limited in October of 1982; sale of L.R. 209/1846 for Ksh. 20,354,300/- by Sheraton Holdings Limited sometime in the year of 1982. He also admitted to receiving Ksh.5 million from Sheraton Holdings Limited as his part-payment. Meaning his claim for compensation amounted to a net of Ksh.27,541,720/-.

[114] In the case of ***Gitobu Imanyara***, this Court acknowledged how difficult it is to award damages in cases of constitutional violations, noting that it is not as straightforward as in tortious or civil liability claims. The Court thus set out parameters for consideration when assessing damages for constitutional violations which include:

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 circumstance of each case; and*

vi. *Award is not compensatory or punitive but a vindication of the violated rights.*

[115] With these parameters in mind and further taking into consideration the evidence tendered by the Appellant together with past decisions by this and other superior courts, including ***Gitobu Imanyara & 2 Others v. Attorney General,*** SC Petition No. 15 of 2017, [Unreported], the Court of Appeal decision in ***Koigi Wamwere v. Attorney General,*** Civil Appeal No. 86 of 2013; [2015] eKLR,; High Court decision in the case of ***Kenneth Stanley Njindo Matiba v. Attorney General,*** Constitutional Petition No. 94 of 2014 [2017] eKLR, ***Denish Gumbe Osire v. Cabinet Secretary, Ministry of Defence & Another,*** Constitutional Petition No. 572 of 2013; [2017] eKLR, ***Captain (Rtd) Frank Mbugua Munuku v. Kenya Defence Forces & Another,*** Constitutional Petition No. 497 of 2012; [2013] eKLR, ***David Gitau Njau & 9 Others v. Attorney General,*** Constitutional Petition No. 340 of 2012, [2013] eKLR and ***Peter Tonny Wambua & 17 Others v. Attorney General,*** Constitutional

Petition No. 427 of 2008; [2017] eKLR, I would have for the aforestated reasons partially allowed the appeal and issued the following orders:

a) *a declaration be issued to the effect that a habeas corpus Application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention under the Preservation of Public Security Act*

b) *a declaration be issued to the effect that a President enjoys immunity from personal omissions and illegalities attributed to him during his tenure of office, once he/she ceases to be a president and he/she is liable.*

c) *a declaration is issued to the effect that the petitioner was and is entitled to damages and interest owing to the loss of business incurred as a result of his detention*

d) *an order does issue setting aside the whole of the judgment rendered by the Court of Appeal on the 9th day of May, 2014.*

e) *an order partially reinstating the Judgment and Order of the High Court of Kenya at Nairobi (Gacheche, J.) to the effect of awarding compensation for the deprivation of the Appellant's liberty a sum of Ksh. 5 million and for the deprivation of his property a sum of Ksh. 27,541,720/- as against the 1st respondent's estate.*

f) *Interest on the awards of Ksh. 5 million and Ksh. 27,541,720/- at court rates of 12% p.a. from the date of the Judgment of the High Court issued on 6th April, 2011.*

[116] In accordance with this Court's decision in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate & 4 Others*** SC Petition No. 4 of 2012 [2013] 2013 e KLR costs ordinarily follow the event. I would therefore have issued an order for the 1st Respondent to bear the Appellant's costs in the High Court, Court of Appeal and this Court.

[117] However, as these views are in the minority, the decision of the court is that of the majority.

DISSENTING OPINION OF LADY JUSTICE NJOKI NDUNGU, SCJ

[118] I have read in detail the majority decision in this appeal. The factual background, the summary of the submissions advanced by the parties as well as the two issues for consideration and determination as framed need no repetition having been properly captured by the majority. I find no need to restate them here save to the extent that I will refer to them to expound my opinion.

[119] This Court had certified this cause as one of General Public Importance and outlined two issues for determination:

> ***(i) whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms; and***
>
> ***(ii) whether a court order in a habeas corpus application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (now repealed).***

[120] I do agree with the majority's determination on the first issue. The writ of *habeas corpus* has always been meant to secure the release of a person from unlawful custody. In other words, it aims to ensure that the person under detention is being held only under lawful authority. In addition, given its limited scope, it cannot be said to bar any further proceedings once it has been granted or denied.

[121] Further, I concur with the majority finding that indeed the *Preservation of Public Security Act* did give the Minister responsible for internal security, the power to issue an Order for detention without trial, where in the opinion of the Minister, the person to be so confined, was a danger to public security. Indeed, the

objective of the writ of *habeas corpus* is to secure the liberty of a person, while that of the Preservation of Public Security Act was to achieve the opposite; that is to limit the liberty of a person. It is worth pointing out here that a person detained pursuant to Regulations 6(2) of the *Public Security (Detained and Restricted Persons) Regulations 1978* was deemed to be in lawful custody no matter the (questionable) circumstances. This, therefore, means that even when a person was in custody, where a detention order pursuant to the *Preservation of Public Security Act* was produced before the court, the court could not, under the then existing legal regime, enquire as to the lawfulness of the detention.

[122] Nonetheless, a writ of *habeas corpus* cannot bar any further proceedings once it has been granted or denied, and I am of the same mind with the Majority, that the finding by High Court (*Gacheche J.*), that the appellant's detention violated his rights under Section 72 of the repealed Constitution, was proper. The Court of Appeal therefore erred by finding otherwise.

[123] I concur further, with the finding of the Majority, that it was impossible for a court to determine the lawfulness of the said detention and that it is undeniable that the deceased was detained without trial under the regime of former President Moi.

[124] However, the majority, even when coming to the above conclusion, could not grant the appellant the reliefs sought. The reasons given for this are firstly that the appeal before us was admitted only on the basis of the two issues outlined above, formulated by the Court, under Article 163 (4) (b) of the Constitution. Secondly, because it was determined that the appellant elected to sue only the late President Moi in his capacity, as not only the former president but also as his former business partner, and that he failed to sue or seek joinder of the Attorney General or the State in the suit. As such, says the Majority, it is difficult to apportion liability and compensatory relief, against a person or agency that has never been a party to these proceedings. It is at this juncture, and on this finding that I disagree with the majority.

[125] I do not think that this Court ought to deny the appellant effective reliefs because he elected to pursue the appeal as a matter of General Public Importance (GPI) as opposed to one of application or interpretation of the Constitution. Having agreed with the High Court, that the deceased's right to personal liberty ***was*** violated consequent upon his detention without trial, this Court ought to find a viable relief. In this regard, I am entirely in agreement with similar views expressed by my brother, Mohammed Ibrahim, *SCJ* in his separate dissenting opinion.

[126] This Court certified this matter as one of GPI. Rightly so because it touches on the conduct, culpability, and liability of a former head of State for matters (detention) arising in the course of his term and is therefore of immense public interest. In addition, it has ramifications on the rights of persons to pursue redress on the legality or otherwise of detentions, especially under applications for *habeas corpus*.

[127] Further, noting that in ***Town Council of Awendo v Nelson Oduor Onyango & 13 others,*** Sup. Ct. Misc. Application No. 49 of 2015 [2015] eKLR this Court added another criterion to matters of GPI as follows:

> ***"[35] From the content of paragraphs 32 and 34, it emerges that while this Court did, in the Hermanus Phillipus Steyn and Malcolm Bell cases, set out an elaborate set of criteria for ascertaining "matters of general public importance" for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of "matters of general public importance".*** [emphasis mine]

[128] It is my considered opinion, therefore, that in this matter, this Court, as the apex and the Court of last resort, bears a duty to the parties before it to help them resolve their issues and grant effective remedies. This is especially so in circumstances where a litigant is disadvantaged by factors outside his or her control. I am of the view that it is not in the interests of justice to deny effective remedies to an appellant who has exercised all due diligence in pursuit of his cause and led the Court to the finding that his/her rights to personal liberty have been violated.

[129] In my concurring opinion in the matter of ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*** [2014] eKLR, albeit a matter concerning electoral disputes, I made the following observation at paragraphs 217 & 218:

> ***"[217] Is this Court powerless, as suggested by counsel for the Appellant, in the exceptional circumstances where a litigant is disadvantaged by factors outside his or her control? The history of electoral dispute settlement in Kenya negates any argument that the Court is powerless in such circumstances. For many years, the courts were part of the problems impeding electoral justice, where potential petitioners were unable to serve their powerful opponents, or where they did, files would mysteriously disappear or reappear after the required filing deadlines had already passed. These issues are well documented in several reports by the International Commission of Jurists (Kenya) and other election monitoring groups, where they list the judicial system in this country, in the past, as having committed several electoral injustices including "courts insisting that Petitions must be personally signed by the Petitioner; where the Court held that a petition must be served personally upon the Respondent, such as the controversial case***

of Mwai Kibaki v. Daniel Toroitich Arap Moi, Civil Appeal No. 172 of 1999 as consolidated with Civil Appeal No. 173 of 1999; or courts requiring high security for costs to the detriment of those who are unable to raise this amount; or courts taking inordinate amount of time to dispose Petitions; or unreasonable delays, resulting in ineffectual decisions and dismissal of petitions on grounds of technicality".

[218] And therefore a case such as the one before us, begs the question, are these misadventures and misapplications in our past - eradicated by our transformative Constitution, or are they still lurking menacingly, within the corridors of justice? If the latter is the case, then should a judicial officer down his or her tools mechanically, citing procedural technicality in the face of administrative unfairness? I respectfully think not. The entire judicial machinery including its administrative arm ought to respond to the impetus of judicial authority, which, aside from emanating from the people of Kenya, imposes certain guiding principles, under Article 159 (2): that justice shall be done to all, irrespective of status; justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities and the purpose and principles of the Constitution shall be protected and promoted. These principles manage the exercise of judicial authority and indeed call upon all Judges to exercise managerial judging to suit the demands of Kenya's transforming charter. This duty is exercised in the discretionary powers of the Court to extend statutory timelines where a convincing case, geared towards the protection of fundamental rights and freedoms is made out".

[130] Similarly in the instant case before us, Kenya's darkest days in our political history shows itself again. The repressive nature of an autocratic and powerful presidency and authoritarian regime in the late 1980's, led to many arbitrary arrests, detentions, and other related constitutional violations. However, now under the new transformative Constitution of Kenya 2010, can we as courts of justice, say we are powerless to rectify past transgressions of the State and restore dignity and justice to those who suffered in the past?

[131] In my opinion, this Court cannot shut its eyes to the fact that the detention as evidenced, violated the deceased's right to personal liberty. In addition, such detention causes a huge financial, social, and emotional cost to family members of such incarcerated people. It is without doubt that illegal detention has a negative impact on society. This Court must recognize and ensure that the general welfare of the public is protected. In my considered view therefore, seeing as there was a clear nexus between the act of detention and the resultant loss of property, I would have adopted the plethora of precedent set by the superior courts, to name but a few, ***Gitobu Imanyara & 2 Others v. Attorney General,*** SC Petition No. 15 of 2017; ***Koigi Wamwere v. Attorney General***, Civil Appeal No. 86 of 2013; [2015] eKLR, and ***Peter M. Kariuki v. Attorney General,*** Civil Appeal No. 79 of 2012; [2014] eKLR; High Court decisions in the cases of ***Kenneth Stanley Njindo Matiba v. Attorney General,*** Constitutional Petition No. 94 of 2014 [2017] eKLR, ***Denish Gumbe Osire v. Cabinet Secretary, Ministry of Defence & Another,*** Constitutional Petition No. 572 of 2013; [2017] eKLR, ***Captain (Rtd) Frank Mbugua Munuku v. Kenya Defence Forces & Another,*** Constitutional Petition No. 497 of 2012; [2013] eKLR, ***David Gitau Njau & 9 Others v. Attorney General Constitutional*** Petition No. 340 of 2012, [2013] eKLR and ***Peter Tonny Wambua & 17 Others v. Attorney General,*** Constitutional Petition No. 427 of 2008; [2017] eKLR, to extrapolate the parameters for consideration when assessing damages for the deceased's constitutional violations.

[132] In my view, once established that the deceased's right to personal liberty was violated consequent upon his detention without trial, this Court ought to have come to his aid whether or not Attorney General or the State in the suit were parties to the suit, and provided effective remedies. This view is also buttressed by the legal regime pre-2010: Remedies for violation of fundamental rights and freedoms under the repealed Constitution were available against private individuals.

[133] I must point out at this juncture that I am not in consonance with the majority decision findings on whether the appellant's case was founded in public law or company law, where the principle of ***Salomon v. Salomon*** was applicable. I fully adopt my brother Mohammed Ibrahim's reasoning on this issue and reiterate that the issue before the superior Courts was whether the appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. These two are so intricately interwoven that to apply the principle of ***Salomon v. Salomon*** would be to defeat the purpose and intent of the Bill of rights guaranteed in the Constitution.

[134] I also note that the appellant aptly particularized the violation of his proprietary rights in Fourways Investments Limited, Sheraton Holdings Limited, and Mokamu Limited. From the record, his shareholding of these properties was 40%, 40%, and 33% respectively. He deponed to several properties that were sold during his detention. The record also reveals that he deposed that the properties Ruprani House, Kenwood House belonged to Fourways Investments Limited. It was his testimony that Corner House belonged to Sheraton Holdings Limited and that all these were disposed of for specified sums. He also deposed that the land in Solai, which belonged to Mokamu Limited at the material time, and whose acreage was 1020 acres, was then valued at approximately Ksh. 100,000 an acre and that on it were 800 heads of cattle each valued at about Ksh. 65,000, as well as various miscellaneous assets then valued at about Ksh. 20,000,000.

[135] He was able to prove, at the High Court, to some extent, the sale of various properties and compensation he received and what was owed. In my view, therefore, this allows the Court to compute and award him what would have been his share of the proceeds.

[136] Finally I wish to affirm that it is important for the State to be consistently aware that past conduct of its officials and agents will no longer remain unpunished. Kenya must not return to those dark days. This Court should always be a temple of justice for victims of historical injustices and justice must be seen to be done in the eyes of the victim, Having so concluded, I would therefore have given similar orders as has my brother Ibrahim, SCJ in his separate dissenting opinion, to the following extent:

a) *A declaration is hereby issued that a habeas corpus application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention under the Preservation of Public Security Act (repealed).*

b) *A declaration is hereby issued that the petitioner was and is entitled to damages and interest owing to the loss of business incurred as a result of his detention.*

c) *The entire judgment of the Court of Appeal dated 9th day of May 2014 is hereby set aside.*

d) *The Judgment and Order of the High Court of Kenya at Nairobi (Gacheche, J.) dated 6th April 2011, is partially reinstated awarding compensation for the deprivation of the appellant's liberty at a sum of Ksh. 5 million and for the deprivation of his property a sum of Ksh. 27,541,720/.*

e) *Interest on the awards of Ksh. 5 million and Ksh. 27,541,720/- at court rates of 12% p.a. from the date of the Judgment of the High Court issued on 6th April, 2011 is hereby granted.*

[137] As regards costs, in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, SC Pet No 4 of 2014; [2014] eKLR, this Court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs shall follow the event. I would therefore have issued an order for the 1st respondent to bear the appellant's costs in the High Court, Court of Appeal, and this Court.

[138] However, as my views are in the minority, the decision of the Court shall be that of the majority.

F. FINAL ORDERS OF THE COURT

(i) The appeal dated 2nd November 2018 is hereby dismissed;

(ii) Each party shall bear its own costs; and

(iii) We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellant.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th Day** of **June**, **2023.**

.....	.....
P. M. MWILU	**M. K. IBRAHIM**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE-PRESIDENT OF THE	
SUPREME COURT	
.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR,
SUPREME COURT OF KENYA