



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

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

**PETITION NO. E051 OF 2025**

**-BETWEEN-**

**JUSTUS OCHIENG.....APPELLANT**

**-AND-**

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

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*(Being an Appeal from the Judgment and Order of the Court of Appeal at Kisumu (Asike-Makhandia, Omondi & Nyamweya, J.J.A.) delivered in Civil Appeal No. E108 of 2021 on 7<sup>th</sup> November 2025)*

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**Representation:**

Mr. Owino Kojo for the Appellant  
*(Owino Kojo & Co. Advocates)*

No appearance for the Respondent

**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

[1] Before us is the petition of appeal dated 15<sup>th</sup> December, 2025, invoking the Court's appellate jurisdiction under Article 163 (4) (a) of the Constitution. The

substratum of the appeal is the question whether the respondent violated the appellant's rights under Articles 25, 29, 33, 48, 49, and 51 of the Constitution during his arrest and subsequent detention at Kisumu Central Police Station. The appellant, in that regard, challenges the Court of Appeal's decision delivered on 7<sup>th</sup> November, 2025, which upheld the High Court's decision dated 30<sup>th</sup> January, 2020, that partially found a violation of the appellant's constitutional rights and awarded general damages of Kshs. 100,000/- in respect of that breach.

## **B. FACTUAL BACKGROUND**

[2] The appellant, on 9<sup>th</sup> October 2014, while working for the Star Newspaper, received a complaint from a member of the public who alleged that he had been robbed by an individual identified by a single name. The appellant conducted journalistic investigations into the matter and established that the alleged robber was a Criminal Investigations Officer (CID) officer attached to Kisumu Central Police Station. On 1<sup>st</sup> October 2014, the appellant published a story titled "*Mystery over return of cop's stolen money,*" and a follow-up on 2<sup>nd</sup> October 2014 in the Star Newspaper editorial titled "*Arrest robber with CID day job*".

[3] The appellant, soon after the above publications, started receiving threats to his life from known persons, forcing him to go into hiding and stop his job as a journalist. He reported the threats at Kisumu Central Police Station *vide* OB No. 53/08/10/2014. On 29<sup>th</sup> October 2014, he visited the Police Station to inquire about the progress of his complaint, but was instead arrested, detained, tortured, and treated in a cruel, inhuman, and degrading manner. He inquired about the reason for his arrest but was not given any explanation. On 30<sup>th</sup> October, 2014, he was released at 1:00 am after signing a personal bond under the condition that he appear before the OCS Kisumu Central at 8:00 am the same day. He complied with the bond terms, only to be rearrested for five hours and subsequently released without being charged.

[4] The appellant thereafter made a formal report recorded in OB No. 34/30/10/2014 at Nyando Police Station against the police officers from Kisumu Central Police Station who had allegedly tortured him, but no charges were preferred against the said officers.

## LITIGATION HISTORY

### *i. Proceedings at the High Court*

[5] Based on the foregoing facts, the appellant filed a constitutional petition at Kisumu High Court, being **Constitutional Petition No. 9 of 2015**, seeking the following reliefs reproduced verbatim:

- a) *A declaration order be issued that the actions of the Police Officers were in breach of the petitioner's constitutional rights, and the petitioner was unlawfully arrested, detained, and tortured by police officers from Kisumu Central Police Station;*
- b) *This Honourable Court be pleased to order that the Petitioner be paid general damages for breach of his constitutional rights;*
- c) *Special damages of Kshs. 1,000/-;*
- d) *The costs of the petition be granted.*

[6] In summary, the appellant maintained that he was lawfully exercising his constitutional right to freedom of expression when, on 1<sup>st</sup> October 2014, he authored and published a story titled "*Mystery over return of cop's stolen money.*" He contended that his arrest and subsequent detention at Kisumu Central Police Station constituted a grave violation of his fundamental rights and freedoms and therefore sought a declaration that the respondents' actions infringed his constitutional rights under Articles 25, 29, 33, 48, 49, and 51 of the Constitution.

[7] On the issue of torture, degrading and inhuman treatment, the appellant averred that during his detention, he was subjected to physical assault, as a result

of which he sustained bodily injuries. These injuries were documented in a medical document (P3 form), which was produced in evidence as PEXH4.

[8] Consequently, and as a result of the aforementioned circumstances, the appellant sought an award of general damages in the sum of Kshs. 15,000,000/- for the alleged violation of his constitutional rights, together with special damages and the costs of the petition.

[9] In reply, the respondent's witness C.I. Calleb Natha, the Deputy DCIO Kisumu, deponed that at the time of his arrest, the appellant was duly informed of the reasons thereof, namely, that he had been accused of linking one Mr. Oswago to fraudulent conduct. He further stated that, while being held in the police cells, the appellant became unruly, screaming and hurling insults at police officers. He acknowledged that the appellant was released the following day, at which time he alleged that he had been assaulted by a known police officer. According to C.I. Natha, the complaint was investigated and found to be unsubstantiated.

[10] C.I. Natha maintained that the appellant's arrest on 29<sup>th</sup> October 2014 was lawful and that he had been informed that it was predicated on allegations of criminal libel arising from his purported linkage of Mr. Oswago to fraud. He further asserted that the appellant's right to freedom of expression, being a right qualified by the obligation to respect the rights and reputations of others, was not infringed.

[11] All in all, the respondent categorically denied that the appellant's rights and fundamental freedoms had been violated as alleged, and, moreover, that the appellant was not entitled to the damages sought for the alleged violation.

[12] The High Court (*Cherere J.*), in a judgment delivered on 30<sup>th</sup> January 2020, identified the sole issue for determination as whether the respondent had violated the appellant's fundamental rights and freedoms under the Constitution. *With regard to the appellant's arrest*, the court observed that the bundle of documents

produced by the respondent, together with an extract of OB No. 39 75/29/10/14, demonstrated that the appellant had been arrested for libel following a complaint lodged by one Mr. Oswago. The court consequently found that the arrest was lawful and that the appellant had been duly informed of the reasons thereof. On that basis, it rejected the appellant's contention that his rights to freedom and security of the person under Articles 29 and 49 of the Constitution had been infringed.

**[13]** The court also determined that the appellant failed to adduce precise evidence *demonstrating how his right to freedom of expression under Article 33 had been violated*, and his claim under that provision accordingly failed. On the *alleged infringement of his right of access to justice under Article 48*, the trial court noted that the evidence showed that his advocate had been informed of the arrest and had sent a representative who was granted access to the appellant at Kisumu Central Police Station. In the absence of specific evidence to the contrary, the court declined to find that his right of access to justice had been violated.

**[14]** With respect to the *allegations of torture under Article 25*, the court considered the medical examination form (PEXH. 4), which documented physical injuries consistent with the appellant's account of having been assaulted while in police custody. This evidence was corroborated by eyewitness testimony. On that basis, the court was satisfied that force had been used to inflict pain on the appellant, amounting to torture, and held that he was entitled to appropriate relief.

**[15]** In the end, the court issued a declaration that the respondent had violated the appellant's constitutional rights under Article 25 of the Constitution by subjecting him to the use of force that inflicted pain on his body. The court consequently awarded the appellant Kshs. 100,000/- in general damages for the generalised aches sustained to his cheeks, chest, and abdomen. Although special damages had been pleaded, they were not proved and were therefore declined. Consequently, the petition was partially allowed with costs.

## **ii. Proceedings in the Court of Appeal**

[16] Aggrieved by that outcome, the appellant preferred an appeal vide **Civil Appeal No. E108 of 2021** on 11 grounds, reframed and summarized as follows for precision, faulting the learned Judge for:

- a) *Failing to find that he proved special damages;*
- b) *Failing to find the arrest unlawful;*
- c) *Failing to appreciate the serious extent of the violation of his various fundamental rights and freedoms under the Constitution; and*
- d) *Awarding the appellant a paltry Kshs. 100,000/-.*

[17] At the hearing, learned counsel, Mr. Kojo, appeared for the appellant and relied entirely on his written submissions. There was no appearance for the respondent.

[18] The Court of Appeal (*Asike-Makhandia, Omondi & Nyamweya, JJA*), in a judgment delivered on 7<sup>th</sup> November 2025, the court identified two issues for determination. On the question *whether the award of general damages was so inordinately low as to warrant interference by the court*, it observed that, upon re-evaluating the medical report and the nature of the injuries sustained, the appellate court agreed with the learned trial Judge that the injuries were not severe and did not occasion any temporary or permanent disability. In the circumstances, the court held that the award of Kshs. 100,000/- in general damages was not inordinately low and therefore did not justify interference.

[19] On the question *whether the trial court erred in declining to award special damages*, the court observed that the record plainly showed that the appellant failed to particularise in his petition the special damages allegedly incurred. Although the appellant contended that such damages had been both pleaded and proved, the record indicated that he merely prayed for Kshs. 1,000/- without setting out the specific particulars constituting that claim. In the court's view, the appellant did not state his claim for special damages with the requisite precision,

and as such, the same could not be awarded. In the result, the appeal was found to be wholly without merit and was dismissed in its entirety, with no order as to costs.

**iii. Proceedings in the Supreme Court**

**[20]** Undeterred, the appellant has now filed the instant appeal challenging the decision of the Court of Appeal on nine grounds, reframed and summarized as follows for precision, faulting the learned Judges of Appeal for:

- a) *Failing to appreciate the serious extent of the violation of his various fundamental rights and freedoms under Articles 25 (a), 28, 29, 33 (1) (a), 35, 47, 48, 49, and 51 of the Constitution; and*
- b) *Upholding the trial court's assessment of damages in the modest sum of Kshs. 100,000/- in respect of the violations of the appellant's constitutional rights and freedoms.*

**[21]** Accordingly, the appellant seeks the following reliefs reproduced verbatim:

- a) *The petitioner's arrest and detention was arbitrary, unlawful, and unconstitutional, and his rights as an arrested person held in custody under Articles 49 and 51 of the Court were violated;*
- b) *The arrest and detention of the petitioner on 29.10.2014 and on 30.10.2014 without being subjected to the jurisdiction of the court amounted to unlawful detention;*
- c) *The petitioner's right to freedom and security of the person under Article 29 of the Constitution was breached;*
- d) *The petitioner's right to access to justice under Article 48 of the Constitution was violated;*
- e) *The petitioner's freedom of expression under Article 33(1)(a) of the Constitutional was violated;*
- f) *The petitioner's right to Fair Administrative action under Article 47 of the Constitution was breached;*

- g) *The petitioner's right of access to information under Article 35 of the Constitution was breached;*
- h) *The petitioner's right to human dignity under Article 28 of the Constitution was breached;*
- i) *Re-assessment of damages in respect of breach of the petitioner's constitutional freedom from torture and cruel, inhumane and degrading treatment under Article 25(a) of the Constitution; and*
- j) *The petitioner be and is hereby awarded damages of Kshs. 15,000,000/- for breach of his constitutional rights and freedoms as above declared.*

[22] There was no response to the appeal from the respondent, neither was there representation at the hearing before us.

### **C. PARTIES' SUBMISSIONS**

#### ***i. The Appellant's Submissions***

[23] At the hearing, learned counsel, Mr. Kojo, appeared for the appellant and relied entirely on his written submissions.

[24] Having read the appellant's written submissions dated 1<sup>st</sup> February 2026, the appellant reiterates the claim that his *arrest and detention was unlawful and a violation of his rights under Articles 29, 49, and 51 of the Constitution*. The appellant maintains that he was not informed of the reasons for his arrest and that he was detained twice without being arraigned in court. He contends that this constituted unlawful detention and a violation of his liberty and rights as an arrested and detained person.

[25] On the *denial of access to justice under Article 48*, he submits that the State failed to investigate his complaints of assault and threats and did not forward investigation files to the prosecutorial authorities. He contends that access to justice entails effective investigation and accountability, not merely access to legal representation.

[26] Regarding *the violation of his freedom of expression under Article 33 of the Constitution*, the appellant maintains that his arrest was retaliatory and intended to intimidate him for publishing a journalistic exposé. He argues that reliance on criminal libel was a pretext and constituted unconstitutional interference with press freedom. On *breach of Fair Administrative Action under Article 47*, he contends that the police failed to provide reasons for his arrest or to process his complaints expeditiously and lawfully, amounting to procedurally unfair administrative action.

[27] Regarding the *denial of access to information under Article 35*, the appellant submits that he was denied access to official information concerning his complaints and arrest records, thereby impairing his ability to protect and enforce his rights. On *torture and violation of human dignity under Articles 25(a), 28, and 29*, he asserts that he was assaulted while in custody, the claim supported by medical and eyewitness evidence, in breach of the absolute prohibition against torture and his right to dignity. He further questions the adequacy and independence of the police investigation into the assault.

[28] Lastly, on the *assessment of damages*, the appellant submits that the award of Kshs. 100,000/- was inordinately low given the multiplicity and gravity of the constitutional violations and seeks a substantial reassessment of damages. In light of the foregoing, the appellant urges the Court to set aside the appellate judgment, declare violations of the enumerated constitutional rights, and award enhanced damages commensurate with the harm suffered.

#### **E. ISSUES FOR DETERMINATION**

[29] Upon consideration of the pleadings, the impugned judgment, and the appellant's written submissions, we have identified the following issues for our determination in this appeal:

- a. *Whether this Court has jurisdiction to entertain the appeal, and if so;*
- b. *Whether the appellants' rights under Articles 25, 29, 33, 48, 49, and 51 of the Constitution were violated; and*
- c. *Whether the appellant is entitled to enhanced damages of Kshs. 15,000,000/=.*

## **F. ANALYSIS AND DETERMINATION**

### **a. Whether this Court has the Jurisdiction to entertain the appeal**

[30] Although the parties have not raised the issue of jurisdiction as a primary question for our determination, we must, however, satisfy ourselves that jurisdiction exists. The appellant has approached this Court under Article 163(4)(a) of the Constitution, where the appeal lies as of right in a case involving the interpretation and or application of the Constitution. In ***Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** [2012] KESC 9 (KLR), this Court clarified the threshold to be met under Article 163(4)(a), stating:

***“...the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such an interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a).”***

**[31]** Similarly, in *Abidha Nicholus Vs Attorney General & 7 Others: National Environment Complaints & Committee & 5 Others (Interested Parties)* [2023] KESC 113 (KLR), the Court stated that mere assertion by a party that an appeal is founded on constitutional interpretation or application is not sufficient to invoke our jurisdiction under Article 163 (4)(a) of the Constitution. An appellant must demonstrate that the constitutional issues were both raised and determined in the courts below.

**[32]** From our examination of the record, including the pleadings, submission, and impugned judgments of the superior courts, in considering and determining the dispute, the superior courts were called upon to interpret and apply Articles 25, 29, 33, 48, 49, and 51 of the Constitution. These provisions of the Constitution. These provisions of the Constitution were central to the reasoning and disposition by the courts below and remain the basis of the arguments advanced by the appellant before this Court.

**[33]** In light of the foregoing, we are satisfied that the constitutional question has been properly developed through the judicial hierarchy and the appeal is properly before this Court.

**[34]** Before we delve into the merits of the appeal, we must address the issue of the respondent's representation. The record before us confirms that the respondent herein, the Attorney General, was present in the proceedings before the High Court but failed to enter an appearance at the Court of Appeal. Before this Court, on 16th January 2026, during the mention of this matter before the Deputy Registrar, Learned State Counsel Mr. Allan Kamau, who was present on another matter, held brief and respectfully sought the Court's indulgence, undertook to follow up on the matter and file a response within seven (7) days. Notably, the Deputy Registrar, while granting the request, expressly cautioned the Learned State Counsel against the recent pattern of the Attorney General abrogating their

duty to the Court and the public. Notwithstanding the Court's indulgence and direction, the respondent did not file a response and failed to attend the subsequent mentions and the plenary hearing of the matter.

**[35]** We reiterate the respondent's critical role under Article 156 (4)(a) and (b) of the Constitution as the Chief Legal Advisor to the government, empowered to represent the government in court or in any other legal proceedings to which the national government is a party. The respondent's failure to attend Court and participate in the proceedings, despite being served, amounts to neglect of duty and denies this Court the information necessary to arrive at a fair and just decision. We disapprove of such conduct.

**[36]** From the foregoing, the petition of appeal dated 15<sup>th</sup> December, 2025, is therefore uncontested; however, under Rule 34 (1)(b) of the Supreme Court Rules, 2020, where a party fails to attend a hearing, the Court may proceed as it deems fit. Notwithstanding the lack of opposition, this Court has a duty to consider the facts and determine the appeal on its merits. That is why in ***Konchellah Vs Sunkuli & 2 Others*** [2018] KESC 58 (KLR), this Court observed as follows:

***“Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course (sic) grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any interferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.....”.***

[37] Turning to the merits of the appeal, the appellant raises two issues for the first time before this Court. First, he claims a violation of Article 35 of the Constitution concerning access to information, contending that he sought official records relating to his complaints and arrest but was denied access. Second, he alleges a breach of Article 47 on fair administrative action, asserting that he requested reasons for his arrest and the charges he was to face, but was told “it was yet to be decided,” thereby infringing his right to be furnished with reasons for administrative action.

[38] From our examination of the record, particularly the judgments of the High Court and the Court of Appeal, it is apparent that no determination was made on any of the two issues arising from alleged violations of Articles 35 and 47 of the Constitution. Specifically, the superior courts addressed issues of Articles 25, 29, 33, 48, 49, and 51 of the Constitution. The appellant is, however, now calling upon this Court, for the first time, to give a detailed consideration on Article 35 of the Constitution and the Access to Information Act, No. 31 of 2016, and Article 47 and the Fair Administrative Action Act, No. 4 of 2015, formulating grounds and seeking reliefs that were never considered before the superior courts below and thus have not risen through the judicial hierarchy to warrant our intervention. This Court, in *Joho & Another Vs Shahbal & 2 Others* [2014] KESC 34 (KLR), noted that it cannot engage in an academic exercise by delving into matters that were neither considered nor determined by the superior courts below. Doing so would amount to this Court assuming the role of a court of first instance, a jurisdiction it does not possess. Consequently, we decline the invitation to pronounce ourselves on the aforementioned issue.

**b. Whether the appellants' rights under Articles 25, 29, 33, 48, 49, and 51 of the Constitution were violated.**

**[39]** *On Articles 29, 49, and 51 of the Constitution, the appellant's contention is that his arrest and subsequent detentions at Kisumu Central Police Station on 8<sup>th</sup> and 9<sup>th</sup> October, 2014, were unlawful and arbitrary to the Constitution. He maintains that he was detained twice without being informed of the reasons for his arrest and without being arraigned in court. Thus, in his view, the respondent's conduct violated his rights and fundamental freedoms protected under the Constitution.*

**[40]** *Articles 29, 49, and 51 of the Constitution respectively state as follows:*

***29. Freedom and security of the person***

***Every person has the right to freedom and security of the person, which includes the right not to be -***

- (a) .....***
- (b) .....***
- (c) Subjected to any form of violence from either public or private sources***
- (d) Subjected to torture in any manner, whether physical or psychological;***
- (e) Subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner.***

***49. Rights of an Arrested Person***

- (1) An arrested person has the right-***
  - (a) to be informed promptly, in a language that the person understands, of-***
    - (i) the reason for the arrest;***

- (ii) the right to remain silent; and*
- (iii) the consequences of not remaining silent;*
- (b) to remain silent*
- (c) to communicate with an advocate, and other persons whose assistance is necessary;*
- (d) not to be compelled to make any confession or admission that could be used in evidence against the person;*

***51. Rights of persons detained, held in custody or imprisoned***

***(1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.***

[41] As stated above, the right of an arrested person to be informed of the reason for arrest is a constitutional obligation on the part of the arresting authority and also an international requirement under Article 9 of the Universal Declaration of Human Rights (UDHR, 1948), which states:

***Article 9: “No one shall be subjected to arbitrary arrest, detention, or exile.”***

[42] We have examined the Record of Appeal (pp. 156–176), including the extract from Occurrence Book (OB) No. 39/75/29/10/14, which records that the appellant was arrested on allegations of criminal libel following a complaint by Mr. Oswago. We have also considered the written statements of police officers attached to Kisumu Central Police Station, who were on duty at different intervals during the appellant’s arrest, detention, and release. Notably, C.I. Caleb Natha, then Deputy

DCIO Kisumu, who deponed that the appellant was duly informed of the reason for his arrest, that the arrest was formally recorded in the Occurrence Book, and that he was subsequently released on a personal bond.

**[43]** Additionally, the appellant concedes that during his detention, he was visited by a representative of his advocate, members of his family, fellow journalists, a civil society organization, and the Media Legal Defence Initiative, an international organisation whose objective is to defend journalists. These individuals and organisations were likewise apprised of the reasons for the appellant's arrest and participated in negotiating his release.

**[44]** From the foregoing, we are satisfied that the appellant's arrest was lawful. The appellant was duly and promptly informed of the reasons for his arrest, in compliance with Article 49 of the Constitution. His rights as an arrested person, including the right to legal representation and other custodial rights under Article 51, were observed. The record discloses no procedural impropriety, denial of due process, or violation of constitutional safeguards during the period of arrest and detention.

**[45]** In the premises, we reject the appellant's contention that his arrest and subsequent detention contravened Articles 49 and 51 of the Constitution, and accordingly find that the same was lawful and constitutionally compliant.

**[46]** *On the allegation of violation under Article 25 of the Constitution*, the appellant asserts that he was assaulted while in police custody and sustained injuries in his cheeks, chest, and abdomen. He further contends that a police officer held his waist and forced him into the office on the first floor of the Kisumu Central Police Station building. Four police officers present in the room started beating him indiscriminately with their bare hands, slapped him on the cheeks, and waist. The appellant's claim of torture was supported by medical evidence and two eye-witnesses, namely Shaban Opiyo and Dickson Odhiambo, who testified that they

were present at the Kisumu Central Police Station when the appellant was roughed up by police officers.

[47] Article 25 of the Constitution stipulates as follows:

***25. Fundamental rights and freedoms that may not be limited***

***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.***

[48] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in Article 1, provides:

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

***official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.”***

[49] The trial court found that the pain inflicted on the appellant amounted to torture so did the appellate court. We find no reason to interfere with those findings and are satisfied that the appellant has established the use of force that resulted in the infliction of physical pain upon his person. Such conduct by the police officers, public officials, in the circumstances of this case, meets the constitutional threshold of torture as contemplated under Article 25(a) of the Constitution. In the premises, the Court finds that the respondent violated the appellant’s non-derogable right to freedom from torture by subjecting him to beatings while in police custody. Consequently, the appellant is entitled to appropriate relief for the infringement of his constitutional rights.

[50] *On the alleged violation of Article 33 of the Constitution*, the appellant maintains that his arrest was retaliatory and intended to intimidate him for publishing a journalistic exposé on a police officer. That the respondent’s reliance on criminal libel was a pretext and constituted unconstitutional interference with press freedom.

[51] Article 33 of the Constitution states as follows:

***33. Freedom of expression***

***(1) Every person has the right to freedom of expression, which includes***

- a) freedom to seek, receive or impart information or ideas;***
- b) Freedom of artistic creativity; and***
- c) Academic freedom and freedom of scientific research.***

[52] We find that the appellant has failed to adduce sufficient evidence to establish a violation of his right to freedom of expression under Article 33 of the Constitution. The evidence on record demonstrates that *The Star Newspaper*, the appellant's employer, successfully published and circulated two articles, one authored by the appellant and another an editorial concerning the subject matter in issue. The appellant did not demonstrate that the respondent interfered with, restricted, or otherwise curtailed the publication of the said articles or the distribution of the newspaper. In the absence of such evidence, the essential elements of a violation of the right to freedom of expression have not been established. Accordingly, the appellant's claim alleging infringement of Article 33 of the Constitution is unsubstantiated and must fail.

[53] *On alleged infringement of his right of access to justice under Article 48 of the Constitution*, the appellant alleges that his right to access to justice was infringed during his arrest and detention.

[54] Article 48 of the Constitution states as follows:

***48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.***

[55] From our examination of the record, the appellant's advocate was informed of his arrest and detention and sent a representative, who was granted access to the appellant while in custody. From the appellant's own admission, he was soon after visited by fellow journalists, family, friends, and civic organizations. Further, the appellant confirms that on 29<sup>th</sup> October, 2021, at 1:00 am, he was granted a personal bond, released from custody, and informed to report to the station at 8:00 am. From the foregoing, in the absence of specific evidence to the contrary, having found that his reason for arrest was known, and that he was later released on a

personal bond without being subsequently charged, the Court declines to find that the appellant's right of access to justice was infringed.

**c. Whether the appellant is entitled to enhanced damages of Kshs. 15,000,000/-**

[56] The trial court, exercising its discretionary powers and upon assessment of the evidence before it, awarded the appellant general damages of Kshs. 100,000/. On appeal, the appellant prayed for enhancement of the damages, and when addressing the issue, the Court of Appeal stated as follows:

**“Upon re-evaluation of the medical report and the nature of the injuries sustained, we agree with the learned trial Judge that they were not severe and did not occasion any temporary or permanent disability and thus maintain the damages at 100,000/-.”**

[57] Before this Court, the appellant prays for enhancement of damages and urges this Court to enhance the award to Kshs. 15,000,000/- on the grounds that the superior courts failed to consider relevant factors and comparable authorities. The appellant further contends that the award of Ksh. 100,000/- by the High Court and sustained by the Court of Appeal does not adequately compensate for the violation of his fundamental rights and freedoms while in police custody.

[58] This Court in *Imanyara & 2 Others Vs Attorney General* [2022] KESC 78 (KLR) set the principles on enhancement of award of general damages and stated thus in that regard:

***“77. While we agree with the reasons advanced by the Court of Appeal for non-interference with the trial court’s finding on general damages, we are persuaded that the amounts awarded to the 1st appellant by the trial court and affirmed by the Court***

*of Appeal were manifestly low to justify interference. We have taken into account other awards given by the domestic courts, the level of physical and mental suffering endured by the appellants, the duration of the violation of the appellants' rights, the duration since the High Court pronounced its judgment on the issue, inflation and all factors affecting the money market. Therefore, in applying the principles above and stated case law, we are convinced that the Court of Appeal erred in affirming the decision of the trial court's assessment of general damages. Taking into account the lapse of time since the cited authorities were determined, inflation and all factors affecting the money market, we do award the 1<sup>st</sup> appellant a sum Kshs 25 million in general damages for violation of his constitutional rights. Unfortunately, we are unable to consider his prayer for compensation for loss of business, as it was neither specifically pleaded nor particularized in the superior courts below us."*

[59] Similarly, in *Wamwere & 5 Others Vs Attorney General* [2023] KESC 3 (KLR) this Court held as follows:

*"93. In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case. In the present case, we are of the view that the damages we award should not only serve to enhance the dignity of the appellants but also be a public recognition of the wrong done to them given the historical context of this case. We have considered comparable awards previously awarded in the cases we cited in the opening paragraphs of this judgment involving other persons who were*

*at the freedom corner, which awards were made several years ago ranging from Kshs 750,000 to 3,000,000. We have also taken into account the circumstances of each case bearing in mind the violations that were proven in those cases and our findings in this matter and the fact that counsel for the appellant urged us to award Kshs 3,000,000/= to each of the appellants. In our considered view, we assess damages of kenya shillings two million, five hundred thousand (Kshs 2,500,000/-) payable to each of the appellants as an appropriate remedy.”*

[60] Having agreed with the superior courts below that there were no violations other than for torture, the question for our determination, therefore, is whether the award of Kshs. 100,000/- is inordinately low, in relation to comparable cases, and the extent of the violation thereby warranting this Court's interference by way of enhancement of the award. Upon perusing the appellant's written submissions, the appellant has not brought to the attention of this Court any cases of comparable facts and the ultimate awards to aid the Court. We, however, find persuasion in the High Court's decision in *Daniel Waweru Njoroge Vs Attorney General*, [2015] 89 (KLR). In this case, the High Court was satisfied that from the evidence adduced, the plaintiffs were arrested, taken to the police station, confined, and released the next day without any charges being preferred against them. The court found the respondent's action high-handed and awarded the petitioners damages of 100,000/-.

[61] Similarly, in *Erastus Maina Karanja Vs Machakos County Government* [2021] KEHC 4757 (KLR), the petitioner claimed unlawful arrest, detention, and prosecution, alleged that the respondents breached his fundamental rights and freedoms guaranteed by the constitution, and sought compensation. The High Court awarded the petitioner 100,000/-, highlighting

that damages for unlawful arrest and detention should be exemplary and punitive to deter the respondents. `

[62] From the foregoing cases of comparable facts, it is evident that the trial courts in exercising the discretionary power awarding damages, they consider what is just, fair, and reasonable in the circumstances of each case: in the appellant's case, he was arrested and released the next day; the arrest was lawful, the nature of injuries sustained was not severe and did not occasion any temporary or permanent disability.

[63] The appellant's case is distinguishable from *Imanyara* (supra) and *Wamwere* (supra), particularly with respect to the issues of prolonged detention and sustained torture resulting in permanent physical injury, which in those authorities warranted the awards. In the present matter, such circumstances are not established. Accordingly, we concur with the Court of Appeal and uphold the award of damages at Kshs. 100,000/-.

#### **COSTS**

[64] As regards the award of costs, we reiterate the principles enunciated in *Rai & 3 Others Vs Rai & 4 Others* [2013] KESC 20 (KLR) that the Court, on the need to accommodate the special circumstances of each case in the exercise of discretion on costs and noting that the appeal is uncontested, we are inclined to a determination that there shall be no orders as to costs.

[65] CONSEQUENTLY, we make the following orders:

- i. The petition of appeal dated 15<sup>th</sup> December, 2025, and filed on 16<sup>th</sup> December, 2025, is hereby dismissed;*
- ii. The award of general damages of Kshs. 100,000/- is hereby upheld;*

- 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 depositor; and*
- iv. There shall be no orders as to costs.*

It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>TH</sup> day of MAY 2026**

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

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

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

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

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

**I certify that this is a true copy of the original.**

**REGISTRAR,**  
**SUPREME COURT OF KENYA**