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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

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CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 1 OF 2016

IN THE MATTER OF: ARTICLES 19, 20, 21 (1), 22(1), 23(1) & (3) AND 165 AND (a), (b), (d) (i), (ii), (6), (7) OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70(a), 72(3), 74(1) & 77 OF THE FORMER CONSTITUTION (EQUIVALENT ARTICLES 27(1), (2), 28, 29(a),(d),(f), 31(c),(d) & 49(1)(f) OF THE CONSTITUTION OF KENYA, 2010)

IN THE MATTER OF: THE ARMED FORCES ACT (CAP 199, LAWS OF KENYA) [REPEALED]

IN THE MATTER OF: THE EXTRADITION (CONTIGOUS AND FOREIGN COUNTRIES) ACT (CAP 77, LAWS OF KENYA)

IN THE MATTER OF: THE CONVENTION RELATING TO THE STATUS OF REFUGEES

IN THE MATTER OF: THE CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA

IN THE MATTER OF: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

=BETWEEN=

- 1. HENRY WAFULA WANYONYI
- 2. SAMUEL OGOTI GICHABA.....PETITIONERS

=VERSUS=

- 1. THE CHIEF OF THE KENYA DEFENCE FORCES
- 2. THE HON. ATTORNEY GENERAL.....RESPONDENTS

PETITION

(Pursuant to Article 19, 20(1), (2),(3),(4), 21(1), 22(1),(3), 23(1),(3) & 165(3)(a),(b),(d)(i) & (ii) of the Constitution of Kenya and Rules 4(2)(i), 10 and 11 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013

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NAIROBI

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TO:-

The Deputy Registrar
High Court of Kenya
Constitutional & Human
Rights Division
Milimani Law Courts

Nairobi.

The humble petition of HENRY WAFULA WANYONYI and SAMUEL OGOTI GICHABA whose address of service for purpose of this petition is C/o MBUGUA MUREITHI & CO. ADVOCATES, 4TH FLOOR, JOSEM TRUST HOUSE (housing Barclays Bank), Next to N.I.C BANK, MASABA ROAD, off BUNYALA ROAD, LOWERHILL, P.O. BOX 52969-00200 NAIROBI is as follows:-

A. DESCRIPTION OF THE PARTIES

1. The petitioners herein are male adults citizen of Kenya by birth and of sound mind, resident in London, United Kingdom and Gothenburg, Sweden respectively and former service officers of the Kenya Air Force (hereinafter "the KAF").
2. The 1st Respondent is the Chief of the Kenya Defence Forces in-charge of, *interalia*, the command, operations and discipline of the Kenya Defence Forces under the Kenya Defence Forces Act, 2012. His address of service is c/o Attorney General's Chambers, State Law Office, Sheria House, Harambee Avenue, Nairobi.
3. The 2nd Respondent is the Honourable Attorney General of the Republic of Kenya, the Principal Legal Advisor to the Government of Kenya and in that capacity vested by the Constitution with the legal authority to defend any civil suit against the national Government and is cited herein on behalf of the Department of Defence (DoD). The Attorney General's address of service is c/o Attorney General's Chambers, State Law Office, Sheria House, Harambee Avenue, Nairobi.

B. THE FACTS OF THE CASE

4. At the time of the failed military coup of 1st August 1982 the petitioners herein were serving officers of the KAF based at Eastleigh KAF Headquarters.
5. Several KAF officers were killed in the course of crushing the coup and the petitioners fearing for their lives and fearing being tortured if arrested fled the country to the United Republic of Tanzania.

6. While in Tanzania the petitioners applied for and were granted refugee status by the office of the United Nations High Commissioner for Refugees (UNHCR) in Dar es Salaam.
7. Sometime in August 1983 while on refugee status, the petitioners applied to the Government of Tanzania for alien residence and work permits and they were granted the work permits and Tanzanian residents' passports.
8. Sometime in early November 1983, apprehensive that an unlawful swoop of suspects who had fled to the opposite countries following the August 1982 coup attempt in Kenya and the January 1983 coup attempt in Tanzania was imminent the petitioners visited the Swedish Embassy in Dar es Salaam and applied for and were granted political asylum status and relocation to Sweden.
9. Sometime in mid-November 1983, before the petitioners could relocate to Sweden, the petitioners were arrested by Tanzanian police, detained in custody in Dar es Salaam for 6 days and subsequently handed over to Tanzanian military officers who, in connivance with Kenyan authorities, without any judicial or due process of law escorted the petitioners to the airport in Dar es Salaam in handcuffs and leg manacles and put them in a flight (Presidential Aircraft) to Arusha from where they were escorted by road and renditioned to Kenya through Namanga Border Point.
10. Between Namanga and Nairobi the petitioners were escorted by a convoy of Kenyan military and prison vehicles. Upon arrival in Nairobi, the petitioners were received by a contingent of Kenya Army officers, immediately placed under arrest and subjected to untold brutalities by the army soldiers being stripped naked in public, frog marched on their knees on concrete floors, whipped, kicked and bludgeoned all over their bodies whilst naked.
11. After the brutal arrest by the Kenya Army officers the petitioners were detained *incommunicado* in various prison custody where the wanton brutalities continued including being assaulted with buttons, whips, *rungus*, gun butts, fists, slaps and kicks, locked up naked in solitary filthy cells in the same block with fulltime noisy insane inmates intermittent with solitary confinement in tiny, permanently lit, filthy cells, deprived of sleep, rest, food, drinking or cleaning water, medical attention for wounds inflicted by army and prison officers and toilet facilities for days and continuously interrogated whilst being coerced and cajoled to confess plotting and participating in the failed coup and attendant crimes.
12. The petitioners were frequently moved from one place of detention to another whilst being detained *incommunicado* without access to any persons from the outside world that could render assistance to them.

- 13. The petitioners were held in *incommunicado* pre-arraignment detention for the unlawful duration of 6 months and 2 days between 08.11.1983 and 10.05.1984. They were arraigned at the Court Martial charged with the offences of mutiny, failing to suppress a mutiny and desertion from the Armed Forces and coerced and cajoled to plead guilty to the offence of desertion from the Armed Forces after the offences of mutiny and failing to suppress a mutiny were dropped, convicted and sentenced to 2 years imprisonment and dismissal from the Armed Forces.
- 14. The KAF Unit of the Armed Forces to which the petitioners belonged was disbanded on 12.08.1982 and replaced with the "82 Air Force" to which officers were recruited a fresh and issued with new service numbers but the petitioners did not join the "82 Air Force" and the petitioners were effectively civilians from the said 12.08.1982.
- 15. The petitioners were unlawfully arraigned and tried by the Court Martial when their presence before the Court Martial had been unlawfully secured in violation of non-refoulment provisions of Article 33 of the 1951 Convention on the Status of Refugees and Article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa while they held refugee status with the UNHCR and despite the fact that they had not been re-admitted to the new 82 Air Force and the [repealed] Armed Forces Act did not apply to them at the time of arraignment.
- 16. For much of the period of the said unlawful inordinate pre-arraignment detention, the petitioners were held in legally designated prisons despite not having been charged and arraigned before any court of law with any criminal offence and without orders of court committing them to remand in such prisons.
- 17. While serving their sentences the petitioners were subjected to cruel, inhuman and degrading prison conditions by being locked up in overcrowded, permanently lit cells, without any beddings or sanitary toilet facilities and subjected to hard labour.
- 18. The petitioners were without any hearing, notice or any lawful justification deprived of their statutorily entitled remission of sentence and continued to be unlawfully imprisoned for a period of one (1) month in deprivation of the said remission of sentence.
- 19. After the petitioners were released from prison after serving their sentences they were subjected to constant harassment being required to report to their area Chiefs and always being monitored by the police and they could not secure jobs and lost all means of earning a livelihood.
- 20. As a consequence of the matters in paragraph 19 above the petitioners again fled the country to Tanzania from where they applied through the Swedish Embassy in

Dar es Salaam and were granted political asylum in Sweden where they first relocated. 5

C. PRAYERS


21. Your Petitioners therefore humbly pray for:-

- i) A declaration that the arrest and detention in Tanzania and the enforced extrajudicial removal and rendition from Tanzania to Kenya with covert and active connivance of the Government of Kenya and particularly her Armed Forces and handing over of the petitioners to officers of the Armed Forces of Kenya while the petitioners held refugee status with the UNHCR was unconstitutional in violation of the petitioners' fundamental rights to equal protection of law, human dignity, security and integrity of the person and personal liberty guaranteed by sections 70, 72 and 77 of the former Constitution and a violation of the petitioners' right to the prohibition forced repatriation under Article 33 of the 1951 Convention on the Status of Refugees and Article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa.
- ii) A declaration that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted on the petitioners on being taken into custody by officers of the Armed Forces of Kenya; the violence, brutalities, deprivation of basic necessities of life and the extreme, inhuman and degrading prison conditions that the petitioners were subjected to in *incommunicado* pre-trial detention constituted violations of the fundamental rights and freedoms of the petitioners to human dignity, equal protection and benefit of the law and prohibition against torture, cruel, inhuman and degrading treatment contrary to sections 70(a), 74(1) and 77 of the former Constitution (now Articles 27(1), 28 and 29(c) and (d) of the Constitution of Kenya, 2010) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).
- iii) A declaration that the period of 6 months and 2 days that the petitioners were detained in pre-arraignment *incommunicado* detention from 08.11.1983 to 10.05.1984 when they were arraigned before the Court Martial constituted a period of arbitrary, unlawful and illegal detention in violation of the petitioners' fundamental rights to inherent human dignity, equal protection and benefit of the law, personal liberty and fundamental freedom from servitude and from torture, cruel, inhuman and/or degrading treatment or punishment contrary to sections 70(a), 73(1), 74(1) and 77 of the former Constitution (now Articles 27(1), 28, 29(c)

and (d) and 30(1) of the Constitution of Kenya, 2010) and Articles 7 and 9(3) of the ICCPR. 6

- iv) A declaration that the trial of the petitioners by the Court Martial for the offence of desertion from the Armed Forces was an abuse of the court process and null and void *ab initio* the petitioners having been unlawfully availed before the jurisdiction of the Court Martial in violation of Article 33 of the 1951 Convention on the Status of Refugees and Article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa while they held refugee status with the UNHCR and the KAF having been disbanded soon after the failed coup rendering them civilians *ipso facto* their trial for desertion from a disbanded Unit of the Armed Forces when they were civilians not subject to the [repealed] Armed Forces Act was a violation of the petitioners' fundamental right to the protection of the law and the right to a fair trial guaranteed by sections 70(a) and 77(1) and (4) of the former Constitution.
- v) A declaration that the period of between one (1) month that the petitioners continued to be imprisoned in deprivation of their remission of sentence constituted a period of arbitrary, unlawful and illegal detention in violation of the petitioners' fundamental rights to equal protection and benefit of the law, personal liberty and fundamental freedom from servitude contrary to sections 70(a), 73(1) and 77 of the former Constitution (now Articles 27(1), 29(a) and 30(1) of the Constitution of Kenya, 2010) and Articles 8(3) and 9(1) of the ICCPR.
- vi) General and exemplary, vindictory and/or punitive damages consequential to the declarations of violations of fundamental rights and freedoms of the petitioner in prayers (i) to (v) above as may be assessed by this Honourable Court.
- vii) Costs of the petition
- viii) Interest on all monetary awards.

DATED AT NAIROBI THIS 30th DAY OF December 2016


MBUGUA MUREITHI & CO.
(ADVOCATES FOR THE PETITIONERS)

DRAWN & FILED BY:

MBUGUA MUREITHI & CO. ADVOCATES

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NAIROBI.

TO BE SERVED UPON:-

THE HON. ATTORNEY GENERAL

ATTORNEY GENERAL'S CHAMBERS

STATE LAW OFFICE

SHERIA HOUSE

NAIROBI.

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