Neutral Citation Number: [2017] EWHC 2145 (QB)

Case No: HQ13X02162

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2017

Before :

MR JUSTICE STEWART

- -

Between :

Kimathi and ors	**Claimants**
- and -	
Foreign and Commonwealth Office	**Defendant**

- -
- -

Simon Myerson QC & Mary Ruck & Stephen Flint (instructed by **Tandem Law**) for the **Claimants**
Guy Mansfield QC, Niazi Fetto, Mathew Gullick, Jack Holborn & Stephen Kosmin (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 19 July 2017, 15 & 16 August 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE STEWART

Mr Justice Stewart :

Foreword

This judgment is in two parts for this reason. Part 1 deals with proposed amendments to the claims made by the Test Claimants ("TC") numbered 5, 9, 10, 12, 13, 14, 18, 21, 22 and 39. The hearing took place on 19 July 2017 and the draft judgment including a Schedule dealing with the rulings on individual amendments, was sent out on 21 July 2017. At that time it was known that the Claimants would serve proposed amendments for another 11 TCs later that day. Rather than await the end of the long vacation for a ruling on those further amendments, the Court agreed to sit during the week commencing 14 August 2017 and to hand down one comprehensive judgment. That draft is now Part 1 of this judgment. Part 2 of the judgment briefly refers to the further amendments but the detail of the rulings, based largely on the same background and reasoning as Part 1, is to be found in the Schedule to Judgment (Part 2). That said, Part 2 of the Judgment also includes supplementary paragraphs dealing in particular with some overarching points first made, or further developed, by the Defendant at the second hearing. At this stage, I mention one issue in particular, relating to Statements of Truth. My draft judgment on this for the first tranche of 10 Amendments is in paragraph 19. I have not changed this, but I revisit the issue in Part 2 in the light of further submissions and evidence.

Apart from one small addition to paragraph 23, to make brief reference to the case of Patel which was additionally cited to me on 15 August, Part 1 is essentially unchanged. In this way I have attempted to limit the need for re-writing and re-checking, given the exigencies of time available – judgment is scheduled to be handed down on Friday 18 August, the submissions having been completed after an extended day's sitting on Tuesday 15 August and sitting from 9.30am to about 12.15pm on Wednesday 16 August. It also better reflects how the submissions were deployed.

JUDGMENT PART 1

Introduction

1. This judgment deals with two matters:

   (i) The Defendant's objections to some amendments made to the Individual Particulars of Claim (IPOCs) served by the Claimants pursuant to Order sealed on 5 June 2017.

   (ii) It incorporates some history of the proceedings relevant in part to these amendments, but also to consideration which I will have to give to the future timetabling of the action.

The IPOC Amendments Background

2. On 27 April 2017 I gave judgment in relation to an application made by the Claimants on 9 March 2017 seeking an order granting permission to amend the Generic Particulars of Claim and the IPOCs. The neutral citation number is [2017] EWHC 938 (QB).

3. The consequential Order was made on 19 May 2017 (sealed 5 June 2017). The relevant provisions are:

> "2. The Claimants have permission to amend the Individual Particulars of Claim and Schedules of Loss of Test Claimants 1 (NK), 27 (Maina Ngaari), 30 (HM) and 31 (Robert Ngethe), in the form of the drafts appended to this order.
>
> …
>
> *Further amendment of Individual Particulars of Claim*
>
> 4. The Claimants shall:
>
> a. by **4pm on 16 June 2017** serve on the Defendant all further draft (re-) amended individual particulars of claim which they intend to amend on issues of liability, showing those amendments in their final draft form;
>
> b. by no later than **4pm on 15 September 2017**, and earlier if and to the extent practicable, serve on the Defendant their final draft further (re-) amended individual particulars of claim and schedules of loss, showing both the aforementioned amendments on liability and those on all other issues.
>
> 5. The parties have liberty to apply in the event that any of the amendments are disputed.
>
> 6. Where all proposed further amendments in any individual particulars of claim and schedule of loss are agreed, the Lead Solicitors shall formally file and serve the relevant (re-) amended individual particulars of claim and schedule of loss within 7 days of such agreement, unless this step is dispensed with by agreement between the parties."

4. It is pursuant to the Liberty to Apply disputing amendments that the Defendant brings the matter before the Court. The Defendant relies on evidence in the sixth witness statement of Andrew Robertson, a senior lawyer in the Government Legal Department.

5. To put the matter in context it is useful to set out a chronology:

24 February 2017 - Claimants first gave notice of their proposed application to amend the IPOCs

24 February 2017 - Defendant wrote to Claimants expressing concern, given that the application was made 1½ years after the medical

	reports had been obtained, a number of months after the conclusion of the oral evidence of the TCs (June/July 2016) and shortly after the conclusion of the oral evidence of the medical experts (January/February 2017).
9 March 2017 -	Claimants' application to amend. The application notice also covered proposed amendments to the Generic Particulars of Claim. It did not include proposed specific amendments to the IPOCs. In Mr Martin's witness statement in support he said (paragraph 7) "…certain aspects of the Claims required clarification and, where appropriate, concession." In paragraph 8 he said that there were three main areas of amendment. Apart from removing reference to section 14 Limitation Act 1980 these were "b) clarification in the light of the evidence: for example, to plead where an injury has been clarified by the medical evidence (for example, as the Particulars of the contents of flashbacks suffered or physical injury); c) concession in light of the evidence: for example, to adjust the claim for chattel/livestock, where it was established that there was ownership between husband and wife; or to provide concessions in physical/psychiatric injury in light of medical evidence." He said (paragraph 11) that the amendment to pleadings should be undertaken in the course of preparing final submissions and the process of review, preparation and drafting in full would be started after Easter.
13 March 2017 -	Mr Myerson QC said that the application
(First Day of CMC)	was "To amend the Individual Particulars of Claim to bring the injury position up to date". He also said that the Claimants might also want to mention other documentation that had been found to apply as the Claimants had gone through the opening. Essentially he said that would be evidence rather than pleading. There was then a discussion with the Court in which Mr Myerson proposed providing examples of the draft IPOCs and said that it would be easier to provide the draft IPOCs at the same time as the draft final submissions in respect of each TC.
14 March 2017 -	The Defendant raised concerns about the lack of
(2nd Day of CMC)	particulars to the proposed amended IPOCs and the effect on the Defendant's preparation if there was delay. The Court ordered three sample proposed amended IPOCs. In

fact four were provided by the Claimants, namely for TCs 1, 27, 30 and 31.

22 March 2017 – Mr Martin's ninth witness statement was served. In paragraph 16 he said that the four draft amended IPOCs were "indicative of the type of amendments that are likely to be made to the pleadings in other test cases." Mr Martin said that the Claimants wished to prepare the amended IPOCs at the same time as reviewing each of the test cases to prepare submissions and proposed that the remaining amended IPOCs be served by 22 September 2017 (i.e. within a period of some six months). It is to be noted that this witness statement and the evidence in support of the application constitute the evidence supporting the application to amend the IPOCs.

6. The above is the skeletal chronology in relation to the application to amend the IPOCs up to the date of the hearing of the application which took place on 6 April 2017. Judgment was handed down on 27 April 2017: [2017] EWHC 938 (QB). The material section of the judgment is in paragraphs 26-32. I do not propose to repeat it. The essentials are:

(i) In terms of the injuries, the proposed amendments updated the age of 4 Claimants and removed some alleged injuries in the light of the medical evidence. In relation to 3 other injury amendments, these were allowed on the basis that "the Claimants do not seek to amend so as to rely upon any specific injuries not already pleaded in the Particulars of Injury." (Paragraph 28)

(ii) In relation to TC1 and TC30 some amendments were permitted to specify particular dates in circumstances where the original IPOCs did not specify such dates. In paragraph 31 (iv) I allowed the amendments on the basis that the IPOCs were then open as to dates and the proposed amendments did no more than particularise the claim. I recorded "If the amendments as to dates are permitted, as they are, the Defendant accepts that there could be no proper objection to the amendments including the documents supporting those dates."

(iii) An amendment was allowed for TC27, alleging that his electrocution which had been pleaded to have taken place at Kangema camp could be alternatively pleaded as Murang'a Police Station. This was to bring the pleading in line with an answer he gave in Evidence in Chief on 19 July 2016. There was no alleged specific prejudice arising from the amendment.

(iv) Finally an amendment was allowed in respect of TC30 so as to plead that she was forced to leave <u>her family's</u> livestock behind, whereas the original pleading said that she was forced to leave <u>her</u> livestock behind. The

Defendants objected on the basis that the livestock owned by her family was not a loss that she could claim. The Claimants clarified that it was not a claim for special damage but only for loss of amenity. On that basis the amendment was allowed.

7. After the hand-down of the judgment on 27 April 2017 there was discussion between the Court and counsel, particularly in relation to the proposed timetabling of the service of Amended IPOCs and consequential orders. In the course of that I said the following:

- (In respect of medical evidence) "They're (i.e. the Claimants) very severely constrained. They can't go outside their pleadings. There is obviously a bit of sort of wiggle room, like the one where there's specific evidence about scrotum but he said he had been beaten all over his body, but subject to that very bit of wiggle room, they are limited by their present pleadings. They can't expand it…."

- "…I can see there's potentially, a problem, it's perhaps a bit remote, but I can see there's perhaps potentially a problem and you need to know what the individual Claimants' final case is on what I call liability issues, in other words where they were, dates, things like that, anything that's not in the particulars of injury/medical evidence. It seems to me that (a) they should be able to provide, because it is a tidying up process where Ms Ruck was in, and (b) that meets actually any real prejudice you're going to have because the medical evidence, they're very constrained anyway."

It was for this reason that paragraph 4 of the Order of 19 May 2017 provided for all further draft amendments to be served in relation to the liability issues by 16 June 2017, and to medical issues and schedules of loss by 15 September 2017.

8. On 15 June 2017 the Claimants indicated they would not be able to meet the deadline expiring on that date and asked the Defendant to agree an extension to 21 July 2017. The Defendant agreed. On 16 June 2017, 10 further proposed amended IPOCs were served. Mr Robertson says (paragraph 128) "Had the Defendant known the nature of the amendments now proposed in those 10 cases, which differ markedly from those in the 4 "sample" IPOCs addressed in the 27 April judgment and which have therefore had a considerable impact on the Defendant's legal team's work, its decision to agree that extension may have been different."

The Relevance of the IPOCs

9. It is important that there be some background on this point before addressing objections to the IPOCs.

10. The TCs are at the heart of this litigation. The Claimants say that the Defendant's focus on the TCs is a relatively new position on the part of the Defendant. I do not accept that. 40 TCs were selected by September 2014. Some have died. Some have been kept as reserves. All are represented by the lead solicitors. The IPOCs were

filed by the end of November 2014, prior to the conclusion of disclosure. Witness statements and Part 18 Responses were substantially provided by the end of May 2015, though there were certain extensions to later in 2015 for some of them. In late 2015 some IPOCs were amended by agreement with the Defendant. The basis of the amendments was said to have been because it had become apparent that they were required following service of witness statements and Part 18 Responses (Letter Tandem Law 13 August 2015). Supplemental witness statements were to be served by the Claimants by April 2016.

11. Mr Robertson's evidence goes into substantial detail as to the fact that the Defendant relied upon the IPOCs in its approach to cross-examination of the TCs and of the medical experts. Further, he explains the following in respect of work done since the IPOCs were filed in November 2014:

- Disclosure was an enormous task. Documents were categorised by occasions and names and particularity in the IPOCs was critical to the document search. The Defendant says it raised the lack of particularity hampering this process in correspondence in 2015.

- Pleading an individual defence was very labour intensive and the initial drafts took between 30 and 100 hours. The Defendant says it went to great lengths to try to ensure that these defences reflected what had been revealed by the Defendant's document research. By October 2015 the number of documents had risen to nearly 39,000.

- Since early 2015 the Defendant says it has been heavily engaged in identifying and proofing witnesses. The Defendant says that the lack of particularisation in the Claimants' cases and variation in accounts put forward by the same Claimants impeded the Defendant's efforts to identify its witnesses and the proofing of the witnesses identified. These witnesses all gave evidence in May/early June 2017. Hard copy pleadings had been sent to individuals proofed by the Defendant.

12. In paragraphs 41-60 and 64-84 of Mr Robertson's witness statement he complains of problems arising from the Claimants' disclosure and approach to documentation. He says that the Defendant's preparations for trial and presentation of its case have been continually hampered by this. It is important to remember that by paragraphs 31 and 32 of the Order of 11 December 2014 the duty was on the Claimants provide standard disclosure by 4pm on 31 July 2015. The Defendant was to provide standard disclosure by list in 3 tranches between 27 February and 18 December 2015, limited to documents presently in its possession and any other documents on which the Defendant relied. A brief summary of Mr Robertson's evidence on disclosure/documentation is:

    (i) Prior to January 2014 the Defendant had disclosed approximately 1800 documents.

(ii) By 31 July 2015, the date for their disclosure, the Claimants disclosed 1204 documents, of which only 80 or so had not already been provided to the Claimants by the Defendant.

(iii) By 18 December 2015 the Defendant disclosed the vast bulk of the documentation used in this litigation which now runs to more than 45,000 documents. Most of the disclosed documents were held in publicly available archives in the UK and Kenya (The National Archives [TNA] and the Kenya National Archive [KNA]).

(iv) On 9 May 2016, over 9 months after the due disclosure date, the Claimants served the first version of their written opening of the case and notified the Defendant that they were disclosing more than 900 new documents. Over the following 2 months, nearly 300 further documents and nearly 200 images of maps and associated material were disclosed at a time when the test claimants were giving evidence during June and July 2016. Further material was sought to be disclosed by the Claimants in August/September 2016. This late disclosure has been ruled upon by the Court where it has not been agreed by the Defendant. There are however outstanding issues as to documents which I shall turn to later.

(v) During the Claimants' opening the Court had to deal with a disputed matter as to which documents were in evidence. During a hearing on 22 December 2016 I indicated that documents had to be properly adduced. This was subject to some elasticity because there were so many documents and the fact that the Claimants were not required to set out their detailed submissions during their opening. I reiterated this approach on 26 April 2017.

(vi) The Claimants' opening had been estimated by them to be 3-4 weeks. On that basis it would have been completed prior to Christmas 2016. In fact it took some 10 sitting weeks. It finished by the end of April 2017 and, because of prior witness planning, it had to be fitted in during available slots in the Hilary term. This opening is (fortunately, so far) the only part of the trial which has really overrun. The Defendant says that this overrunning materially disrupted their planned preparation. This was because members of the legal team allocated to this work were required to attend court between January and April 2017, when otherwise they would have been able to prepare (without substantial interruption) the case the Defendant was going to present.

(vii) By Order dated 31 March 2017, following a CMC earlier that month, it was provided:

> "20.The Claimants shall identify the documents on which they rely in respect of their Generic case by the close of their case, and in any event by 4pm on 28 April 2017.

> 21. The Claimants do file and serve a list of documents upon which they rely in respect of the individual cases by 4pm on 2 June 2017.
>
> 22. Subject to paragraph 23, the Claimants shall not be permitted to rely upon further documents without the permission of the Court save in response to documents adduced by the Defendants.
>
> 23. The criteria and timetable for the parties adducing documents in response to documents adduced, and for the Defendant adducing documents, be considered further by the Court in the week commencing 24 April 2017."

It is right to record, however, that along the way the Claimants have agreed to a substantial number of extensions of time for the Defendant, for example in serving Individual Defences and witness statements.

13. Since the completion of the Claimants' opening on 27 April 2017 there have been further issues as to documents which the parties are seeking to resolve but which, in any event, the Defendant says has caused and will cause a substantial knock-on effect in terms of its preparations. Prior to this date, during the Claimants' opening about 1890 documents were adduced by the Claimants from the extensive bundles or handed up. Further:

    (a) On 11 April 2017 Lists of Documents were provided by the Claimant to accompany notices served under CPR 33.5 challenging the credibility of the Defendant's hearsay witnesses. There are 160 such documents, but the Defendant has begun to analyse them and so far believes that about 90 are truly additional.

    (b) Since Easter 2017 the Claimants have sought to introduce 2500 further documents via two schedules, one of Hansard material and the other of Colonial communications. The parties are seeking to address these documents, which together amount to some 2500 in total, so as to ascertain the reliance sought by the Claimants upon them (there are also possible issues as to Parliamentary Privilege in respect of the Hansard documents). Mr Myerson says (skeleton para 68j(ii)) that in terms of substantive content, these 2500 will be whittled down to a much smaller number, estimated not to exceed 120.

    (c) The Defendant's witnesses gave evidence in May/June 2017. The Claimants provided a bundle of documents for each witness. In the first week of cross-examination, counsel for the Claimants informed the Court that the Claimants regarded all the documents contained in the index as adduced in evidence, including those which had not been put to the witness during cross-examination. The Defendant objected to this approach. After discussion, a way forward was found and, also, the

number of documents sought to be adduced was reduced to 669. Only a proportion of these had been put to the witnesses in cross-examination. Discussions are continuing, so that the true figure of additional documents is not as yet known.

(d) The requirement of the Claimants to file and serve a List of Documents upon which they rely in respect of the individual TCs by 4pm 2 June 2017 (paragraph 21 of the Order of 31 March 2017) was extended by agreement to 6 June 2017. On that date the Claimants served lists for 15 TCs saying that it had "not been possible for the Claimants to complete all research as a result as of other competing priorities." From those lists the Defendant deduced that the Claimants were relying on an average of 114 documents per Test Claimant, resulting potentially in another 3000 documents being adduced. A further extension to 30 June 2017 was agreed for the remaining lists for 10 TCs. Those lists were provided on that date. Following discussion between the parties, it now appears that 1155 individual documents are relied upon in relation to all TCs, of which some 921 have not previously been adduced. It is not clear how many of these are documents new to the Defendant.

(e) Finally, on 29 June 2017, the Claimants served a list of approximately 700 documents disclosed since the initial 2015 disclosure date which the Court has yet to consider or rule on. The Claimants have indicated they intend to rely on about 380 of those, almost all of which are said to have been disclosed in 2017 and more than 50% in May 2017. These documents are still under consideration.

14. In summary, the Defendant says the Claimants have sought to adduce some 6500 documents since November 2016, 1890 of which were adduced during the opening in November 2016 – Easter 2017 (though the Claimants say that 721 of these were in the reading list served in October 2016). In reality, the Claimants estimate that the number of documents with which the Defendant has had to grapple is more in the region of 1500-3000. This does not however, take into account time taken in initial consideration and discussion about the potential whittling down process. The parties are still considering the issues raised by these documents and whether and to what extent they have already been disclosed and may be relied upon, and/or have been previously adduced during the Claimants' opening and/or in accordance with the Order of 31 March 2017; further, in respect of the Hansard and Colonial communications schedules, the purposes for which the Claimants are relying on the documents.

15. Mr Robertson's witness statement at paragraph 83 says:

> "83. Since the end of April 2017, members of the Defendant's legal team have spent, literally, days considering issues relating to documents adduced in the Schedules of Hansard and Colonial Communications, the cross-examination bundles and the CPR Part 35.5 notices, and also substantial amounts of time

corresponding with and meeting the Claimants' legal team to try to resolve these issues. This has affected in particular Mr Mansfield QC and Mr Holborn, both of whom would otherwise have been preparing the Defendant's presentation of the documents (and in Mr Holborn's case on researching the response to the 'dilution' amendment), and Mr Fetto and Mr Gullick, both of whom would otherwise have been heavily engaged in preparing the Defendant's case. The Defendant has considered these matters sufficiently serious to have raised them in Court on three occasions (17 May, 15 June and 29 June…)"

16. I have set out in some detail the Defendant's submission on what has happened as regards disclosure of documents. This is not directly relevant to the question of amendment. It provides a context as to how the Defendant says that further disclosure has hampered its operation and to consider, against that background, whether and to what extent the proposed amendments may disrupt the trial. Mr Myerson's skeleton at paragraph 68 responds to the Defendant's complaints. Points which I regard as of particular significance in that response are:

    (i) Some documents do no more than represent the volume of communication e.g. the Hansard and Colonial Communication schedules.

    (ii) It is said that the parties are not still discussing documents which were put to the Defendant's witnesses as that was resolved on 28 June 2017.

    (iii) The Defendant is said substantially to overstate the position in relation to documentary disclosure primarily because:

        (a) It is not said how many of the 6500 documents are new to the Defendant;

        (b) 721 were in the October 2016 reading list.

        (c) The Hansard and Colonial Communications documents are estimated, once whittled down, to be no more than 120 rather than 2500.

17. Finally, the Defendant relies on the procedural background as relevant to the Court considering the Claimants' application to amend the IPOCs. The Defendant has to address the substance of the draft amendment to the IPOCs and the further documents. It has also yet to search the documents which it may plead in amended Individual Defences or adduce as evidence in reply. Meanwhile, the Defendant is still preparing the presentation of documents on which it relies to support its own case, which was due to start on 17 July 2017, but has now had to be put back because of this application.

Legal Principles on Late Amendment

18. I address these principles in paragraphs 6-8 of my judgment of 27 April 2017. I do not repeat them here. Further the Defendant relies upon:

    (a) Ali v Siddique [2015] EWCA Civ. 1258, paragraphs 45-47, and in particular Kitchin LJ's statement that where an amendment is sought at trial a Court "will not only consider the prejudice that would be caused to the party seeking the late amendment if it were refused but will also have to have careful regard to the prejudice that would be caused to the party faced with the amendment if it were allowed." This has to take into account the need for corresponding amendment to the other party's pleadings, further disclosure, fresh evidence or adjournment.

    (b) Credit Suisse AG v Arabian Aircraft and Equipment Co [2013] EWCA Civ. 1169 where Moore-Bick LJ said:

> "17. Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said that the facts give rise to a right to the remedy being claimed…"

The Defendant has consistently said that its researches and the massive resources which it has used in making the researches and responding to the claim has been based on the TCs' pleaded cases.

The 10 Draft Amended IPOCs – served 16 June 2017

19. A matter arose from the Defendant's Speaking Note which was served at 7.11pm the day before the hearing. It was said that CPR 22 PD 3.7 and 3.8 make it clear that a statement of truth signed by a solicitor refers to the belief of the client not that of the solicitor and that the signature of a statement of truth by a solicitor means that:

    (a) The Claimant has authorised the particular pleading.

    (b) The solicitor has explained to the client that the solicitor is confirming the truth of the pleading.

    (c) The solicitor has explained to the client the possible consequences of the pleading not being true.

Therefore, on that basis, each Test Claimant must be taken to be saying that since the date of the previous IPOC, he or she has changed his or her belief as to the events, places and timings in question.

This gave rise to a witness statement by Tracey Ann Greatorex which was served over the short adjournment on the day of the hearing. In her statement she says that in relation to the 10 IPOCs she is the solicitor who signed the statement of truth. She then continues:

> "3. I know from my own knowledge and from enquiries made that the amendments therein are based on the documentary record and not based on instructions from the Test Claimant."

In other words these are solicitors' amendments which do not have instructions from the Test Claimants themselves.

In Binks v Securicor Omega Express Limited [2003] EWCA Civ. 993 the Court of Appeal considered this point. In the particular circumstances the Claimant did not seek to amend because of the provisions of CPR 22.1 which require a statement of case to be verified by a statement of truth (including amendments) and the statement that the facts stated in the documents are true. The Claimant's own evidence was wholly inconsistent with the evidence and therefore no amendment was sought. The Court said that an unduly narrow view should not be taken of Part 22. In this regard it relied upon what Sedley LJ said at paragraph 21 in Kelly v Chief Constable of South Yorkshire Police [2001] EWCA Civ. 1632, namely:

> "It is not uncommon for a version of the facts to emerge as a possible deduction from the evidence which has so far been neither side's pleaded case but which one side wants now to plead as an alternative basis, either of liability or of defence. In my experience it is normal and proper practice in the County Courts, and in the High Court too, to allow an amendment to such effect at the conclusion of the evidence if, on any terms which are appropriate as to costs or recall of the witnesses, this can be done without injustice to the other party or parties."

In Binks, attention was drawn to the fact that rule 22.1(2) enables the Court to dispense with verification by a statement of truth when a statement of case is amended, and (on the facts of that case) Mr Justice Maurice Kay said:

> "It does not specify circumstances in which the power of dispensation might arise but I take the view that amendment to plead in the alternative a case derived from an opponent's documents, pleadings or evidence is capable of being such a case."

Mr Myerson QC made an application that I should allow all the amendments and dispense with the statement of truth based on those two cases. Mr Mansfield QC said that there was a problem in that the individual Test Claimant may stand by the old evidence and there is a danger that, had the amendment been made in respect of an individual Test Claimant prior to him or her giving evidence, they may have adopted the amendment or may have disavowed it, for example on the basis that whatever the

documents say they were confident of the originally pleaded dates. In my judgment this is a matter which goes to consideration of the alleged prejudice arising from the amendments. This I will deal with subsequently in this judgment. I accede to the Claimants' application that, in respect of the amendments which I do allow, they be allowed dispensing with a statement of truth as to those amendments.

20. In relation to TC12 the amendments are agreed. I understand that the parties have had discussions about the basis of this.

21. In the other 9 draft amended IPOCs there are objections, though the Defendant does not take issue with a very substantial number of the proposed amendments. The Defendant provided a schedule containing the names of the 9 TCs, the amendments to which it did not object and the amendments to which it objected, giving reasons for the objections. I attach to this judgment a revised version of that schedule. It omits the vast majority of the amendments to which there is no objection and adds columns showing the Claimants' response to the objections and my decision in respect of each disputed amendment.

22. In considering the schedule, there are a number of matters which I have taken into account.

23. First and foremost, are the legal principles to which I have already referred and the application of the overriding objective informed by those legal principles. Although prejudice to the Defendant, if present, is an important factor militating against an amendment, lack of prejudice is insufficient to allow an amendment. The Defendant drew particular attention to the passage in Su-Ling (paragraph 38(b)) as to the burden on a party to show the strength of the new case and why justice to him, his opponent and other court users require him to be able to prove it. I do not read the judge as there saying that the proposed amendment has to have more than a real prospect of success – see para 36 of her judgment for the relevant principles. (See also para 23 of Patel v National Westminster Bank [2015] EWCA Civ. 332). I wish also to stress her first principle, namely that the overriding objective is of the utmost importance and that the court has to strike a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general if it is permitted.

In respect of each amendment, it is the case put on behalf of the TC involved that it will not be possible properly to present the case in the light of the evidence as a whole, documentary as well as oral, if the amendments are not permitted. The Defendant does not accept that the evidence leads necessarily to that conclusion. Subject to that, the Court accepts that that adverse consequence to the TC may well result from a refusal to allow the amendments sought. That must be weighed in the balance.

24. Secondly, although the amendments allowed in the April 2017 judgment in relation to the IPOCs are of assistance to the Court and (I hope) to the parties, and the matters therein set out are relevant when determining the application here, each disputed amendment has to be scrutinised and dealt with on its merits. The IPOC amendments

allowed, particularly in para 31 of that judgment, were allowed notwithstanding the delay in the application and the lack of explanation.

Some points need to be made in this regard:

24.1 The individual decisions in that judgment are no more than a guide. They are not a precedent.

24.2 (a) although on those individual amendments there was no explanation for the delay, that could not be interpreted as the Court dispensing with that requirement generally. It was a favourable exercise of the discretion, having regard to the overriding objective in those cases. This is of even more importance where amendments go beyond those in the April 2017 cases e.g. by proposed change of a pleaded date (TCs 14, 21, 22) or some other material change (TC18). Amendments to TC13's IPOC have been permitted because of the particular circumstances.

(b) At one stage in submissions, Mr Myerson QC suggested the possibility of adjourning the hearing of the application so that the Claimants could deal with this by way of further evidence. I refused. This application had already occupied days of preparation for both sides and for the Court. The application was made well into the afternoon (the hearing lasted from 10.30am to approximately 05.45pm). The effect of this hearing has been to lose a week of court time which would otherwise have been used dealing with the Defendant taking the Court through documentary evidence. The hearing had to take place before the end of term so that the parties know where they stand and so that consequential timetabling can be dealt with, so far as possible. The amendments which I am permitting (albeit absent an explanation) will cause some disruption. In the cases where amendment is refused, the absence of explanation is one of a number of factors which result in the overriding objective not being favourable to the Claimants.

(c) Nor do I accept Mr Myerson's submission that, in the absence of an evidential explanation, the Court can/should speculate as to what the least (or most) favourable explanations might be. There is no explanation and that is a fact. I must take it into account.

24.3 There are dangers in dealing with the proposed amendments incrementally i.e. in 3 stages, (1) the April 2017 judgment (4 IPOCs), (2) this judgment (10 IPOCs) and (3) 11 IPOCs' amendments ordered to be served by 21st July 2017. This piecemeal approach has been required because the Claimants needed a number of months to serve the proposed amendments and because it was deemed sensible to try to deal with the issue as expeditiously as possible so that everybody knew the outcome. The main danger is, to use/invent a jargon term, "amendment creep". By that I mean that if an amendment is allowed

and that is used to be extended little by little, the end point achieved may well be a long way in retrospect from the start point. This is particularly important in the need not to lose sight of the cumulative effect of the number of amendments permitted. In permitting the 5 in this judgment, I have accepted there will be some disruption. That may already have consequential effects on the 11 outstanding IPOCs to be considered. That I cannot know at this stage. The exercise of that discretion in the Claimants' favour on these 5 cases, therefore contains some risk, especially with regard to CPR. Rule 1.1(2)(d) and (e) of the Overriding Objective. In the circumstances of the 4 I have refused, this factor has, in combination with the others in this judgment and schedule, had to be given weight.

25. Thirdly, as has been stressed on a number of occasions during this litigation, the Defendant has been entitled to know clearly when cross-examining the TCs and the other Claimants' witnesses, and also in terms of the presentation of its own evidence, the case it has to meet in respect of the claims by the TCs. This includes not only the pleadings but also relevant documents. Mr Robertson (paragraph 133) says that the Defendant has reviewed the documents relied upon in the amendment to the IPOCs and 37 documents are referred to of which:

- 23 were disclosed to the Claimants in July 2013.
- 2 were disclosed in January 2014.
- 3 were disclosed in July 2015.
- 7 were disclosed in November or December 2015.
- 2 were disclosed in 2016 (1 in March and 1 in May).

There has been no explanation as to why these documents were not considered when the IPOCs were served in November 2014, at the service of the TCs' witness statements in 2015, when some amended IPOCs were served at the end of 2015, or in the period during which up to April 2016 the Claimants had permission to serve supplemental witness statements. The Claimants say that the Part 18 responses could not have referred to documents. Insofar as the documents may contradict the Claimants' memory that is correct. However, it is precisely those cases where the Defendant needed to know as soon as possible by amended pleading that the pleaded case and the witness statements are not the case upon which the Claimants actually rely.

Further, on 23 May 2016 prior to any of the Test Claimants giving evidence, there was discussion in court in relation to documents relevant to cross-examination of the TCs. Leading counsel for the Defendant, Mr Skelton QC, said that the Defendant wanted to see the documents that backed up the cases "particularly if aspects of their evidence are going to be disavowed in light of them."

Subsequently the hearing continued:

"Mr Myerson:…this is not disavowing a case and this is not changing the evidence. The Claimant will give the evidence he gives. It is perfectly possible to give the evidence and be right about part of it and therefore a conclusion to be that the dates must be wrong, which is what happened in the incident I gave.

Mr Justice Stewart: Yes I think they want to know if you are saying that so they know what the case is in relation to that Claimant. The Claimant may say it was 1953 but your case may be "well we think he is wrong about that. We think it is 1954 because of this document". What they are saying is that anything like that they are entitled to know about.

….

Mr Myerson: I understand that and I do not anticipate it happening in the vast majority of cases. There are no plans to ambush anybody…

…

Mr Justice Stewart: As I understand it, Mr Myerson, what you are saying is, the Claimants may say something in their witness statement. The Claimants will give their evidence. In certain cases, and perhaps not very many, your case may be that in some of the detail they have got it wrong?

Mr Myerson: Yes.

Mr Justice Stewart: Which I think here and there has been pleaded in the Reply….

Mr Myerson: Yes.

Mr Justice Stewart: Are you saying you may not yet have picked them all up?

Mr Myerson: Yes.

Mr Justice Stewart: Right. What the Defendants say is ….so they cannot be facing that sort of matter very easily without knowing in advance.

Mr Myerson: I am bound to say I just do not understand that proposition. If one takes the issue we have just raised, nobody is suggesting that Mr Gatutu should have it suggested to him, before he gives evidence, that he may wish to re consider his evidence because we have found a document that says this. It

> is part of the general assessment of his credibility and reliability that we do not.
>
> Mr Justice Stewart: They are not suggesting that you do it but they may want to. To take that example, let us assume they did not know it was coming, they may ask no question about the date at all on the basis that that date is nailed down as best as it can be. If, however, they know it is coming that you are saying that because of the documents, because of the bracelet, it was 1954, they may wish to ask – and this may be a very bad example but illustrates the principle – they may wish to nail it down, whether by documents or whether by asking of the individual Claimant, it was indeed 1953 and therefore, for whatever reason, your explanation is wrong. If they do not know there is an issue about this, where you are actually saying, then they do not know how to approach it. They may do nothing but they may, depending on the individual circumstances, go on to ask questions or put the document which nails down them being correct because, on their case, 1953 is very different from 1953 (?1954) for limitation purposes –
>
> Mr Myerson: Absolutely."

After further discussion:

> "Mr Justice Stewart:…The way I see it is this, to the extent that you know that you are going to be saying that a Claimant has got it wrong, they should have advance notice of that.
>
> Mr Myerson: I agree.
>
> Mr Justice Stewart: So you agree on that?
>
> Mr Myerson: Absolutely. We will certainly do that.
>
> Mr Justice Stewart:…In (a) piece of litigation like this, it is bound to be the case that people make mistakes. I do not mean Claimants, I mean lawyers and judges. Therefore, of course either they do not put something because buried somewhere there was something which may have made a difference, and they want to put it as a submission later, I would have to hear that and make of it what I will. Similarly, if on a rare occasion you say "we have now found this document about the case but we had not appreciated its significance", neither side can be taken as giving an undertaking that every possible document for every possible Test Claimant has been examined. So I do not actually see what the problem is. To the extent that you

> have done as careful an exercise as you can, you will tell the Defendants –
>
> Mr Myerson: Yes we will.
>
> Mr Justice Stewart: - rapidly to what extent you say there are documents which you may rely on as saying the Claimants have got it wrong, and whether you seek to amend your pleadings that is up to you, on the basis that "whatever he says that is not right", or he or she says. But we will never achieve perfection, I appreciate that.
>
> Mr Myerson:…I am certainly prepared to adopt everything Your Lordship has just said. There will not be any difficulty…"

In fact the Defendant says that no indication was given before any TC gave evidence that the Claimants might wish to refer to documents as being relevant to dates, places or events (save in relation to TC13 (Mr Gatutu) – see schedule). Further, no proposed amendment to the pleadings on the basis of documents or relating to injuries was indicated prior to the end of February 2017.

The Claimant refers to the hearing on 22 December 2016 which dealt with documents predominantly relating to the generic issues. However, there is nothing which detracts from the points made about the TCs in the above extract which pre-dated the TCs' giving evidence. How to evaluate the proposed amendments depends on the substance and potential effect of them.

26. <u>Fourthly</u>, any amendment which would require recalling a Test Claimant so as to do justice to the Defendant is very likely to be disallowed at this stage of the proceedings. I accept that this cannot be excluded as a matter of principle, but in the circumstances of this case, to allow recall would almost certainly not accord with the overriding objective.

27. <u>Fifthly</u>, real disruption of the trial timetable as a result of amendments is of importance so as to be consistent with the overriding objective. [*cf* On this paragraph and the last paragraph the reasons for disallowing the false imprisonment proposed amendment as summarised in paragraph 18 of the judgment at [2017] EWHC 938 (QB).]

28. <u>Sixthly</u>, albeit that in the above extracts from transcript of 23 May 2016, I accepted that mistakes might be made, the fact that the documents now relied upon were in the Claimants' possession from 2013 up to the date prior to the Claimants giving evidence, is a factor against permitting an amendment of substance especially at this stage, in accordance with the overriding objective. See in this regard the statement of Waller LJ in <u>Worldwide Corporation Limited v GPT Limited</u> (Court of Appeal, Unreported, 1 December 1998): "Where a party has had many months to consider

how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?...We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequence indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it." Further, and in particular, where proposed amendments are to plead different dates, there were part 18 Requests in a number of cases where the response was that the TCs could not assist. This may have been the Test Claimants' personal position but, for those acting on their behalf, it was incumbent upon them as soon as possible in pleadings to clarify their case on dates based on the documents, and not to do it by way of proposed amendments served in the summer of 2017.

29. Seventhly, the Claimants in many circumstances dispute that the Defendant would suffer prejudice by my allowing contentious amendments. In that regard I make the following comments:

- So as to deal with averments of prejudice the Court must scrutinise what is said. Where there is evidence from a solicitor who relies not only on his own knowledge of litigation but also on what he is told by the Defendant's counsel team, then that must be given weight. The prejudice may not be specific but based on the averment that there would have been more cross-examination of a TC and, if allowed, there will need to be further documentary research.

- I have when dealing with matters in the schedule said when I accept that there is prejudice and, on occasions, when I have not so accepted. However, the Court must not lose sight of the central legal principles as to the purpose of the pleading, proper reliance on pleading and the law in relation to the informed use of the overriding objective in relation to late amendments.

- On occasions the Claimants suggest that because the Defendant may have had documents in its possession, then they cannot be prejudiced. I do not accept that. A party is entitled to focus on the pleaded case in its utilisation of documents. Also, in relation to further searches of documents which may be necessary, again these are primarily informed by pleadings. This is particularly the case where there are thousands of documents many of which are in the public domain in the TNA or KNA.

- Nor do I accept the Claimants' criticism in relation to the Defendant's need to find new documents because dates are now being specified (or changed). The Claimants say that the evidence from the Defendant's procedural witnesses is that documents were searched for by location and name and there is almost no mention of searches by date. They say that the reason appears to be that so few dates were given and the closest the Defendant came in evidence to searching by dates was in evidence not referred to by Mr Robertson. This was recently given

by Mr Murphy, who said that when a date was mentioned the Defendant would search six months either side. He also described substantial cross-checking and double and triple searching based on name and location. The Defendant points to earlier references to searching by date, for example in Ms Howard's 3rd statement paras 47-50, Ms Lohia's' 1st statement paras 12-18 and Mr Murphy's 2nd statement of December 2014. In my judgment the previous lack of dates does give rise to potential for prejudice. If a date is now specified as a result of documents relied upon by the Claimants, it is not illogical or unreasonable for the Defendant to have to carry out further searches based on the new reasons given by the Claimants for the date/position/decision. This is particularly the case where the un-amended pleading/oral evidence gives rise [on the authorities binding on this court] to an absolute bar because it pre-dates the Arnold v CEGB cut-off date.

- Mr Myerson criticised lack of particularity from the Defendant regarding the effects of document searches based on the proposed amendments in terms of the extent of the disruption to the Defendant and to the Court. Yet it is not easy for a Defendant to give any real forecast before it starts the process. It should not, therefore, be too harshly judged on this basis, especially when, as Mr Mansfield said, this is not a problem of their making, and when the Claimants themselves have needed a number of months to serve draft amended IPOCs, even once they put the Court and Defendant on notice of potential amendments in February 2017.

- In paragraph 24e of the Claimant's skeleton, in relation to the Arnold time bar, it is said that it was in the Defendant's interests not to firm up dates because it allowed it to assert prejudice and it is only later that it has become clear that the documents overcome these difficulties; further that this is not because of the pleadings. Therefore, the Claimants say, the Defendant made a strategic choice and in hindsight at least it was a poor choice which is why there is prejudice (if indeed there is). I reject this argument. I reiterate that if the case of a TC is pleaded either on the basis that the TC did not know dates and/or the relevant dates pre-dated the Arnold cut off, it was perfectly proper for D not to firm up those dates. If because of documents now relied upon by the Claimants, it is the Claimants' case that the dates can be firmed up and, in particular, if they post-date the Arnold cut-off date, the Defendant is perfectly entitled to allege prejudice by the amendment. Whether I accept that there is real (risk of) prejudice depends on the individual circumstances.

- Mr Myerson submitted that any document prejudice alleged by the Defendant was exaggerated. He said that, by the use of the Document Management System (Caselines) employed in this case, all one had to do was type in (e.g.) a place and references and the documents are then listed chronologically. This was not based on evidence, but I heard the submission and the Defendant's response. That response was convincing. In round numbers there are available at present 45,000 documents, only 18,000 of which are on Caselines. The remainder need to be seen in the light of the evidence of Mr Murphy in his 7th witness statement, particularly in paragraph 6 where he adopts evidence from Samantha Howard

about the difficulty in searching non-electronically generated documents from the 1950s.

- I have taken on board in the balancing exercise that where an amendment now pleads villagisation at a materially later date than previously had been pleaded, or left imprecise, the Defendant may wish to re-visit the TNA to conduct further research. Though taken into account, it has not necessarily (e.g. TC5) led to a refusal of the amendment.

30. Eighthly, I remind myself that it is incumbent upon a party seeking the indulgence of the Court to be allowed to raise a late claim to provide a good explanation for the delay. No specific explanation has been provided by way of evidence. I can well understand that in this massive litigation it is extraordinarily difficult properly to plead cases and take account of relevant documents. In the passage from 23 May 2016 which I have cited above I accepted that mistakes would be made in a case such as this. In the passage near the end of the citation, I said that if mistakes were made on a rare occasion then the Claimants would tell the Defendant rapidly to what extent they may wish to amend their pleadings if a Claimant had got matters wrong. What the Defendant and the Court is now faced with is not insubstantial amendments proposed to virtually all the IPOCs. Further, these amendments are of recent provenance, a year after the TCs gave evidence. More amendments are expected by service on 21 July 2017. Whilst I have considerable sympathy for the Claimants' legal team and the TCs where I have not allowed amendments, that sympathy cannot be allowed to prevail over the overriding objective applied in accordance with the relevant legal principles.

31. Ninthly, it is a plain fact, and I am not at this juncture making any criticism of either or both parties, that this litigation has now been running for over a year. Each Test Claimant is estimated to take one week of submissions. On present estimation those submissions would start sometime in the Michaelmas term of 2017. A reasonable estimate is that they will not finish much (if at all) before the long vacation 2018. There will then be enormous submissions on the generic issues and then a period of judgment writing. I have tried to give certain flexibility to both sides and an understanding of the problems which they face. However I have also attempted, as is my duty, to keep as much discipline as possible in the progress of this litigation. That must continue and I must attempt to avoid substantial disruption to the present very extended timetable.

JUDGMENT PART 2

The 11 Draft Amended IPOCs – served 21 July 2017

32. As referred to in the Foreword to this judgment, the hearing in relation to the proposed amendments of the IPOCs of TCs 16, 17, 19, 20, 23, 24, 25, 26, 29, 33 and 34 took place on 15 and 16 August 2017. Again, there were a substantial number of amendments to which the Defendant did not object. The parties also took into account as guidance, I understand, the April 2017 judgment and Part 1 of this judgment which they had received in draft on 21 July 2017. After both parties had

completed their sections of the schedule, and on the afternoon before the hearing on 15 August 2017, the seventh witness statement of Mr Robertson was served in support of the Defendant's objections. The rulings in respect of the remaining contested amendments are to be found in the Schedule to Judgment (Part 2).

33. Fresh Evidence.

33.1 The Claimants objected to the late service of Mr Robertson's seventh witness statement, but the parties agreed that reference could be made to the exhibits and to the matter below.

33.2 In that witness statement Mr Robertson carries out a similar analysis in relation to the second tranche of the 11 amended IPOCs as he did in relation to the first tranche of 10 (*cf* paragraph 25 of this judgment). He said (paragraphs 25-32) that the amendments refer to 39 unique documents in support of them. 23 of the 39 are contemporaneous documents of which 17 were disclosed to the Claimants in July 2013, 1 in January 2014, 3 in July 2015 and 2 in November 2015.

33.3 The remaining 16 documents are transcripts of hearings, 15 of which are of TC23's evidence given on 27 June 2016. The other 1 is of TC20's oral evidence given on 22 June 2016.

33.4 My comments made in paragraph 25 above are repeated as to the significance of this in terms of lack of explanation and the relevant chronology.

34. Additional matters.

34.1 At the second hearing fresh emphasis was put by Mr Mansfield QC on the lack of explanation for the lateness in the application to amend. He submitted that on this basis none of the amendments should be permitted (save, presumably, those which were agreed). He said that all the documents relied on for amendment were in the Claimants' possession before the Claimants gave evidence.

34.2 Mr Myerson QC responded that the TCs were not selected until September 2014 and the IPOCs were served by January 2015. The Defendant was given extensions of time and served the individual defences in tranches from September 2015 to early 2016. It was only then that the Claimants were aware of the issues joined. [There have been subsequent amended and re-amended defences to which the Claimants have not objected]. The Claimants had to provide a detailed written opening of their case for May 2016 and the TCs' evidence was heard in June/July 2016. Therefore the timeframe permitting review of pleadings prior to the TCs giving evidence was more restricted than is the case if one merely considers dates by which documents were in the Claimants' possession. Further, some amendments arise from the evidence which the TCs gave in June/July 2016 (see above).

34.3 Mr Myerson QC also said that there had been a massive amount of work all the way through this case i.e. both before and after June/July 2016. That is undoubtedly so, as I know first hand.

34.4 It is correct that there is no evidence explaining the delay, particularly the delay since the summer of 2016. I have read the passages in the Authorities relied on by the Defendant: i.e. Swain-Mason v Mills and Reeve [2011] EWCA Civ 14 at paragraphs 72 and 106, Worldwide Corporation v GPT Limited [1998] Unreported and Ali v Siddique [2015] EWCA Civ 1258 at paragraph 55. There is a heavy burden on a party seeking an amendment to justify it and Swain-Mason at paragraph 106 states that where seeking to raise a new and significantly different case at the (opening of) the trial, to show why the change is sought so late and was not sought earlier.

34.5 A number of the amendments I have allowed do not raise a new and significantly different case. Many which I have disallowed have been disallowed because they do so.

34.6 Nevertheless, I do not read the Authorities as requiring, as a precondition to the Court granting a late amendment, evidence showing why the change is sought so late and was not sought earlier. It is a factor to be weighed in the balance, but a properly informed application of justice to all litigants is the key to the Court's power to grant an amendment – see in particular Swain v Mason at paragraphs 68-74 and the principles distilled in Su-Ling at paragraph 38 and in particular paragraph 38(a).

34.7 I have had regard to all the relevant factors which I should consider in seeking to apply conscientiously the overriding objective, both in allowing and refusing proposed amendments. I have had to draw on my detailed knowledge of this case in trying to strike a balance of justice in respect of each amendment individually. It has been an enormous and demanding task, especially when done under pressure of time because of the need to give clear direction to the case as soon as possible and so that work can continue during the long vacation. I must further note that many of the amendments in the 21 recently served IPOCs go much further than was envisaged in the original evidence in support and what Mr Myerson said on 13 March 2017 (see para 5 above).

35. Statements of Truth.

35.1 I now return to the matter of statements of truth referred to in paragraph 19 above.

35.2 Further developments took place on this matter on the morning of Wednesday 16 August 2017. Mr Robertson produced an eighth witness statement dated 15 August 2017 and the Defendant provided the Court with a submission note setting out a detailed position on the points.

35.3 On 15 August 2017 I expressed surprise to Mr Myerson QC that (a) the 11 IPOCs had no statement of truth and (b) there was no application to dispense with statements of truth. Mr Myerson offered an explanation, based on correspondence between the parties. However, I said the Claimants had to provide either (a) or (b). Ms Greatorex produced after the short adjournment on that day, a witness statement in essentially the same terms as her witness statement in respect of the 10 previous IPOCs. On that basis the Claimants sought an order that the statements of truth be dispensed with.

35.4 It was clear from the exchange in Court on the first hearing that the Claimants' legal representatives were muddled about the requirements of CPR 22. That is not an excuse and statements of truth are a very important matter – see Adams v Ford [2012] 1 WLR 3211. That apparent "muddle" and the reasons for it have not been explained in evidence. The Defendant submits that no contested amendments should be permitted in those circumstances and in circumstances where the Claimants' lawyers suggested they may go to Kenya to obtain the TCs' signatures.

35.5 As to the latter point, I fail to see how the Claimants can sign those amendments which are based on the lawyers' submissions on the documents, especially where it is contrary to the TC's own evidence. In some cases I have refused amendments because of the evidence and the lack of the statements of truth (see schedule part 2). If, however, the lawyers do revisit the Claimants and the TC does not support amendments or purports to change his or her evidence, I agree that the Defendant and the Court must be informed. What happens then is a matter for further consideration.

35.6 However I must rule on what I have before me. On this point I am faced with a wholesale refusal of all disputed amendments or, taking the above matters into account, again attempting to apply the overriding objective to each proposed amendment individually.

35.7 My ruling remains as set out in paragraph 19 above. In respect of the 11 further IPOCs, I accede to the application that, in respect of the amendments permitted on the schedule: Part 2, they be allowed, dispensing with a statement of truth as to those amendments.

36. The Defendant submitted that I should consider the points in paragraphs 34 and 35 above both individually and together in exercising my discretion. I agree and I have so done.

37. For the above reasons and for the reasons given in the Schedule I allow some of the amendments and refuse others. A summary will appear in the Order to be sealed by the Court once the parties have agreed a draft.

SCHEDULE TO JUDGMENT (PART 1)

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants Response	Judge
5 – Nyambura Kanuthu Kang'ang'ira	9	**Summary of Detentions** The Claimant was detained at Kairiua Camp for about 6 months. The Claimant was allowed home for a short time but then removed to and detained at Mbaaini Village for about one year before being transferred to Mecha Village for about 6 months, from where she was allowed to return home to Thunguma. ~~The Claimant was later detained in Kairiua Camp for about 6 months.~~	**No.** **1) The justification for the proposed amendments is unclear. No explanation has been given.** **2) The content of the paragraph, i.e. the sequence of locations and periods at each, is not consonant with TC5's account in oral evidence.** **3) If the amendment were allowed, D would need the opportunity for further XX of TC 5.** **4) This would greatly delay the already elongated trial timetable.** **5) To refuse the amendment would not be unfairly prejudicial to TC 5. Specific requests for further particulars as to her factual account were made by Part 18 request. TC 5, assisted by her legal representatives, said she could not answer – see [4-80 to 4-85]. She had more than ample opportunity to represent the sequence and timing of events in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 1 July 2016. The delay in seeking to amend has not been explained. TC 5 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for her to do so.**	See §22 of the Skeleton Argument. 1) Cs cannot locate an order requiring this. However, it reflects the overall evidence as Cs see it. 2) Timings given at §6 agreed. TC corrected the sequence in examination in chief [33-2454] - first time she left her village, she was taken to Kiariua. 3) Given that clarification given in chief evidence is required of why D did not cross-examine on the point. None is provided. 4) Given that clarification to D's advantage, because, it puts part of case outside limitation, further cross-examination would be disproportionate. This is a threat. 5) This is an argument advanced in April. There is no sense in which this falls outside the guidance already available.	Allowed. Not now objected to.
	29	**Forced Labour and assaults**	**No.**		Allowed.

		During her detention at Mbaii-ini village, the Claimant was forced to dig a deep trench that was about 8 feet deep to surround the village. Wooden spikes were put up next to the trench. Work at the trench started at about 8am and finished at about 5pm. a. The Claimant was probably forced to move to Mbaa-ini Village in 1955; b. The digging of a trench specifically to surround the village probably commenced in or around May1955; c. The Claimant will refer to documentation in support of her claim for its full terms and effects in due course; by way of example, the inhabitants of Mbaa-ini village were ordered to dig a ditch around itself as a punishment measure [32-34364].	**The proposed amendment renders TC 5's case hopeless. It substantially changes the dates and circumstances of the events alleged, contrary to TC 5's sworn oral evidence that:** **1) She was removed from her home village about 2 weeks [33-2476 to 33-2477], or 2 months [33-33-2466 to 33-2469], following the start of the Emergency (i.e. late 1952 or January 1953).** **2) She was then in Kiariua camp for 6 months [33-2471].** **3) She was then a month at Thunguma [33-2471].** **4) She was then about one year at Mbaa-ini [33-2472].** **Her oral evidence is therefore to the effect that she would have been at Mbaa-ini between mid-1953 and mid-1954.** **The timings are of critical importance to limitation, to the role/relevance of TC 5's account, and to its testing. Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 5, with the help of a professional legal team throughout, did not present a critical aspect of her case in her original pleadings, Pt18 responses, first and second statements, then did address it on two occasions in oral evidence, and now invites the court to accept a case which contradicts that oral evidence.**	Case now puts some of the injuries outside limitation, on the documents. Otherwise this is merely a submission. It has nothing to do with amendment. The evidence includes the documents. Why D seeks to assert the primacy of one part of the evidence over another is both unknown and unargued. It is unfair to prevent her and the other TCs relying on documents. Where the document supports a change in the date, Cs have not just pleaded the date, but the document to explain the change. The limitation argument is available to D, if the facts (from whatever source) do not support the TC. The amendment is a separate issue. By conflating the 2 D seeks an advantage – that it does not have to make a submission because TC cannot rely on the evidence. This was argued as strongly as D wished in April. Moreover, D assume a disadvantage, rather than adducing evidence to prove it.	(i) This goes little if at all further than the scope of the amendment allowed in the April 2017 judgment. There (para 31.1) it was D's case that TC1's and TC30's oral evidence was consistent with the incidents complained of being pre June 1954. (ii) On the pleadings and Part 18 Request TC5 could not give any dates. (iii) The Claimants do not take issue with the effect of TC5's sworn oral evidence. They rely upon the documents as changing the effect of that evidence. (iv) The evidence from TC5 which was said to be that she would have been at Mbaaini between mid 1953 and mid 1954 arose in cross-examination. (v) There is nothing inconsistent with TC5's IPOC at paragraph 5, 9 or 29 by virtue of the proposed amendment. (vi) It is a matter for submissions as to what extent the Court should accept TC5's oral evidence or the documentary evidence on which the Claimants rely. (vii) As to the effect of the documentation and whether it supports what the Claimants aver, this a matter for final submissions. (viii)I do not accept that the Defendant would need the opportunity further to cross-examine TC5 if the amendment is allowed. She was carefully cross-examined as to dates. If there is any merit on scrutiny in

			Further or alternatively, the justification for the proposed allegation that TC 5 'probably' arrived at Mbaa-ini village in 1955 (§29.a) is unclear, as is the assertion that the digging of a trench commenced in or around May 1955 (§29.b). Neither follows from the document cited at §29.c and no other explanation has been given. **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC 5 informed by further documentary research. She was not asked about details that may have confirmed her evidence re: timing and/or cast doubt upon the amended case. E.g. the proposed amendment at §29.c assumes that TC 5's evidence about trench-digging refers to the digging of a single trench around the village, referenced in a document dated May 1955. In her oral evidence, TC 5's chosen description of the work was that it entailed 'digging trenches' at Mbaa-ini over the course of a year [33-2472]. She was not asked for further details about that work (e.g. whether it may have been irrigation work), or its timing, the significance of which is only now suggested by way of the proposed amendments.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. The amended case now**	D cannot seriously have mistaken the argument here. The date comes from the document ordering the digging of the trench. To pretend that the 2 issues are separate and therefore there is no connection between the arrival and the digging of the trench (which TC5 has always pleaded) is unfair. The doc is dated August 1955. It records events that that happened since January 1955. It records the digging of the ditch at Mbaaini. The assertion that the pleading does not flow from the document indicates that the document has not been read in any detail. As to prejudice: 1) It is obvious from the unamended IPOC that TC5 was describing the moat round a punitive village. If D was really going to ask whether a trench with wooden spikes might be for irrigation then it could have done so. However, Cs do not accept that this would sensibly have happened. D is casting around for a reason to object, rather than arguing a serious point. As made clear in the substantive Skeleton Argument, Cs do not accept	final submissions that the Defendant might be at any disadvantage by not having cross-examined TC5 about digging trenches at Mbaaini, the Court can take into account the fact that the amendment post dated the Claimant's evidence. (ix) Nor is the Court persuaded that because of this amendment there will be extra work in relation to documents which cannot be properly and timeously done by D. There may be some, but I do not accept that it is consistent with the overriding objective to refuse the amendment on this basis.

			seeks to tie TC 5's time at a particular place to a particular task, with implications for the timing of the entirety of the remainder of her case. The original searches are of limited usefulness. **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 5. Specific requests for further particulars as to dates were made by Part 18 request. TC 5, assisted by her legal representatives, said she could not answer – see [4-82]. She had more than ample opportunity to date events in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 1 July 2016. The delay in seeking to amend has not been explained. TC 5 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.**	that D was unaware of the document until recently and D has not adduced evidence that this was so. Indeed, the reference to 'significance' suggests that D may actually have known about the document. 2) The evidence of Ms Howard (3rd witness statement relied upon by Mr Robertson) (§31) was that D searched by name and location. Ms Howard does not mention dates in §31 and the explanation appears to be given at §50 where she says D could not search by date because dates were not given. The closest D gets to a search on dates is Mr Murphy's oral evidence that *when* a date was identified the search was for 6 months either side [33-14732]. However, it is clear other searches were used as well (location and names). There is no evidence that D is prejudiced. Mr Murphy's 7th witness statement does not deal with dates [49-4132 §§10; 12], presumably for the same reason as Ms Howard provides. Mr Robertson simply avoids reference to this evidence. 3) this is a threat. 4) these are arguments advanced in April.	

	30	She was required to work during her detention at Mbaa-ini. The Claimant and other detainees were supervised by Home Guards when digging the trenches around the village. The Claimant was beaten routinely causing pain to her ribs. The Home Guards would hit the Claimant on the back with sticks if she stopped walking.	**No.** **D objects to the word 'routinely'.** **1) The justification for that proposed amendment is unclear. No explanation has been given. It does not reflect TC 5's oral evidence.** **2) If the amendment were allowed, D would need the opportunity for further XX of TC 5.** **3) This would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 5. She had more than ample opportunity to set out her allegations of assault in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 1 July 2016. The delay in seeking to amend has not been explained. TC 5 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for her to do so.**	Whether "routinely" reflects the evidence is a submission. D can challenge it. There is no prejudice in the amendment. 1) There is no requirement for justification. However, the evidence [33-2485 – 2486] shows the TC would be beaten when she stopped working on the trenches TC5 said "I was hit on a few occasions but it was not worth much …. Compared to the beatings we would receive elsewhere this was not worth reporting but if you stopped working you would be hit once but not as hard as it used to happen in the other areas." Cs will submit that people were routinely hit and beaten but if it didn't leave an injury or a mark they didn't think that much of it. 2) – 4) as above	Allowed. (i) I accept the Claimants' submissions here. (ii) I do not accept that allowing this amendment would entitle the Defendant further to cross-examine TC5.
9 Anonymised	11	On arrival at Mung'aria village the Claimant discovered houses had already been built. They were made of mud and had thatched roofs of grass. The Claimant was moved into one house, which she had to share with four other families which caused cramped living conditions with no privacy. The Claimant was forced to live in this house for approximately three months until she was allowed to build her own individual family	**No.** **D has not had the opportunity to XX TC 9 as to the alleged dates. D was entitled to assume that TC 9 would not be advancing a more specific case as to dates, especially given TC 9's Pt18 responses to the effect that she was unable to remember any relevant dates. No questions were put to TC 9 during XX as to dates. D would wish to XX on the dates which TC9 now expressly alleges she was moved to**	TC 9 cannot remember dates. D cannot be prejudiced by not cross-examining her about what she cannot remember. Cs also refer to §51b of their Skeleton Argument. The documents assist TC9. It would be entirely prejudicial to a vulnerable elderly TC who cannot remember dates to prevent her advancing a case where the documents help her.	Allowed. (i) This is not a case where the document essentially contradicts the oral evidence of TC9. (ii) TC9's evidence and Part 18 responses were that she was unable to remember any relevant dates. She was therefore not questioned as to dates. (iii) I am not persuaded that allowing the amendment would disrupt the trial and/or require TC9 to be further cross-

		home with help from others. The village held approximately one hundred people. a. The said village was probably built as part of the villagisation programme in Fort Hall; b. The Claimant was probably removed to the village after June 1954; c. The Claimant will rely on the documentation in support of her claim for its full terms and effects in due course; for example, that relating to the progress of villagisation in the Fort Hall area including the report of the Fort Hall District Commissioner dated 8 January 1955 [32-28517], telegram February 1955 [32-29589] and Handing Over notes.	**Mung'aria.** **Further:** **1) This is a general point not fully canvassed at the hearing of 6 April 2017. In a case where a TC has not specified a date as to when an incident occurred, it may be possible within the scope of the pleading for a Court to find that a matter occurred on a specific date. However, D would submit that in the circumstances a Court could not fairly reach a conclusion (and therefore time should not equitably be extended under s.33 Limitation Act 1980) where a TC is unable to specify such a date. D may therefore fairly take the view that it need not XX in any great detail upon the date of alleged events – the uncertainty is a matter that goes to show that the Court cannot fairly reach a conclusion. If, on the other hand, a TC specifies a date within a pleading, D may well take a very different view as to what questions need to be asked.** **2) That is precisely the case here. D did not ask detailed questions of TC 9 upon the dates of relevant events. Had TC 9 specified dates, further questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date rather than relying upon the lack of evidence as to relevant dates.** **3) This is different from TC 30, who did, at least, give some indication as to the date of relevant events**	1) This argument is a second bite of the cherry. TC1 was permitted to amend dates. D does not appeal that decision. D's submission is that because a document in evidence may provide a date, it would be unfair to accept that evidence unless the witness can also specify the date. No authority is advanced to support that contention. It is a bad point. This is not a guessing game. Moreover, what D may fairly do in cross-examination is a matter of professional judgement. There is no evidence here that D was *unaware* of the date. Mr Robertson does not say so. The opening actually set the position out. 2) D fails to acknowledge that TC9 could not specify dates. Had the matter been pleaded as the amended IPOC sets out, D could have asked whether the TC could specify dates. The answer was no. D has specified no documents, nor adduced any evidence to justify the mere assertion that questions "could have asked as to various factual matters which might assist". The whole issue is simply speculation.	examined. I understand the principle that the Defendant, in a given situation, may fairly take the view that it need not cross-examine in any detail upon the date and that it may be different if a TC specifies a date within a pleading. Also that it may have wished to cross-examine on dates by reference to documents. However, I have heard the witness here and I am un-persuaded that any further cross-examination as to date would have made any difference of real significance. (iv) In those circumstances it seems to me that this is very similar, though not identical, to the amendments allowed in respect of TC1 and TC30 in paragraph 31 of the April 2017 judgment. (v) See (ix) above re TC5 for the position re documents.

			(namely after the Lari massacre) and was cross-examined on that issue and the dates of subsequent events by reference to that – see 33-3109 to 33-3110. **4) This is also somewhat in contrast to TC 1, who was asked on a number of occasions either her age or to attempt to specifically date incidents - see 33-1633 & 33-1689 – albeit the questions as to events may have still been somewhat different. 5) That being the case, if the amendment were to be allowed, D would require to XX TC 9 following research and production of an Amended Individual Defence.** **6) To refuse the amendment would not be unfairly prejudicial to TC 9. Specific requests for further particulars as to dates were made by Part 18 request. TC 9, assisted by her legal representatives, said she could not answer – see [6-75]. She has had more than ample opportunity to set outdates in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 17 June 2016. The delay in seeking to amend has not been explained. TC 5 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.** **7) Allowing the amendment means that D for good reason did not ask what are now necessary**	3) This is an argument as to why it is just to permit the amendment. Otherwise, D's submission is no more than that those TCs with a poor memory for dates (not the primary focus of D's preparation) should be treated differently from those with a good memory for dates. That may be a submission. It is not a basis for disallowing the amendments. 4) Cs refer to §51d of their Skeleton Argument. 5) this is a threat. There is not even a hint of a suggestion of what the research might produce. How on earth can D say it *would* require to cross-examine TC9. It has not the first idea of whether that is true or not. 6) as above.	

			questions of TC9 as to the date of the events. D has relied upon the lack of direct evidence as to the date of alleged incidents and the pleaded case. **8) Even if the Claimants were to be debarred from making any such complaint, it would not change the fact that TC 9 was advancing a positive case as to the dates of certain events** **that D has not been able properly to test. The potential practical impact of that upon the Court's view of the evidence would be unknown but potentially profound.**	7) There is no pleading to this effect. Rather, D says that the matters are not admitted. This argument would require a pleading that because C cannot give dates, she should not be entitled to rely on documents, even though the matter was Opened. Further, there is no definition of direct evidence here. The documents are direct evidence. 8) This is merely the same argument rephrased. D could not test the dates with TC9. She has no memory of dates. The way D test the evidence is to adduce documentation that the incident was likely to be at another time, or by asserting that the evidence is insufficient. This is not an argument about amendment.	
10 – James Mugo Kibande	16	After the three weeks the Claimant was released and returned to his home. a. The Chief's camp referred to by the Claimant is probably near to Ishiara town; b. He was probably engaged in labour on an irrigation scheme in the area; c. Planned irrigation work in the Ishiara area probably became	**No.** **D does not object to the amendments at §§16.a and b.** **The justification for the amendment at §16.c is wholly unclear. If it were allowed, D would need the opportunity for further XX of TC 10 informed by further documentary research** **The other proposed amendments**	D has made no attempt to set out how its case would be advanced by cross-examination of TC10. He could not say when or why the irrigation work probably began. TC 10 gives no date for his 3 week detention. The only date he gives is 1954, when	Allowed. (i) In the IPOC at paragraph 6 it is said that the Claimant voluntarily took the oath in or around 1954. No other relevant date is pleaded. (ii) This date is repeated in paragraph 3 of the witness statement. The witness statement goes on to say that during that time his father

		operational once labour was available from local camps in the area. d. The Claimant will rely on documents in support of his claim and for its full terms and effects to support his case. For example: i. The "short rains" were, at the material time, autumnal [32-17953]; ii. Labour for the irrigation work probably became available in or about October 1954 [32-24586; 32-26284]; e. The events he complains of probably took place after the short rains ended in early 1955.	**render TC 10's case hopeless. They substantially change the dates and circumstances of the events alleged, contrary to: 1) TC 10's sworn oral evidence that he was at the camp in the fourth month of the long (not short) rains [33-2547 to 33-2548] – cf the proposed amendment at §16.d.i. 2) TC 10's references to relevant events having occurred in 1954 (with no reference to 1955) in his original IPOC (§6) and first statement (§§3, 18) – cf the proposed amendment at §16.e. The timings are of critical importance to limitation, to the role/relevance of TC 10's account, and to its testing. Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 10, with the help of a professional legal team throughout, failed accurately to present a critical aspect of his case in his original pleadings, Pt18 responses, witness statement and oral evidence, and now invites the court to accept a contradictory case. As to prejudice: 1) If the amendment were allowed, D would need the opportunity for further XX of TC 10 informed by further documentary research. He was not asked about details that may have confirmed his original account, which seemed to place all relevant events within 1954, or matters which supported that timing and/or cast doubt upon the**	he took the oath. Cs will submit that the oath was what made him liable to be detained i.e. a "person of interest". In his Part 18, he says he took the oath in the 4th month of the short rains [7-59]. D's reliance on the oral evidence founds a submission. It is not an issue for an amendment. The documents used place the short rains in the autumn. The time of his detention is linked to that and the fact that irrigation work, such as he describes, was ongoing in his area at that time. The translator confirms in RX that Ichiara is the same as Ishiara, thus confirming the link [33-2559]; and also confirming the Pt 18 response at [7-62] that Gathige Chief's camp is near Ishiara town. The documents found a submission that he is post limitation. A case is not hopeless if the documents assist it. If a C is so vulnerable and elderly as to be unable himself to be specific, it would clearly be prejudicial not to permit him to advance a reasonably arguable case based on documentation.	was living in a school and was arrested. He and his family then ran to the forest, stayed there for about 2 weeks and then went back home. There he was arrested and taken to dig canals. He stayed there for 3 weeks. (iii) TC10's oral evidence was that he was at the camp in the 4th month of the long rains. In his Part 18 response he said he took the oath in the 4th month of the short rains. Subsequently in his Part 18 response he says he was detained "on the 4th month, in the beginning of the rainy season." [See also reply 41]. D says that all this looks like 1954. It may do, but there is nothing specific on the pleadings that it was not 1955. (iv) I do not accept that the proposed amendments render TC10's case hopeless. The Defendant may well have good points to make on the pleadings and other documents, but these are matters for final submissions. (v) It may be also, as referred to in paragraph (2) of the prejudice allegation that the Defendant has documents which may assist it. (vi) Nevertheless I do not regard the proposed amendment as inconsistent with the present IPOC/Part 18 response. (vii) Nor am I persuaded that there is any realistic prejudice

			amended case. **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. The amended case now seeks to tie TC 10's time at a particular place to a different year from that pleaded originally. The original searches are of limited usefulness, because related to a single account rather than the relative merits of two rival accounts. At this stage D can observe that the documents indicate that the school referred to in §7 was destroyed in early 1954 and that in spring 1954 digging work was carried out to divert water to the Ishiara camp site from the local river.** **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 10. He had more than ample opportunity to date events in his original pleadings, Part 18 responses, first and second statements, and before the conclusion of his oral evidence, given on 11 July 2016. The delay in seeking to amend has not been explained. TC 10 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.**	1) This cannot be right. D's best point is the one it already has about the rains being the long rains. Cs rely on the points made in respect of other TCs above (no evidential basis for suggestion). 2) The issue is one of factual submission as D makes clear by referring to other documents. Nor is it clear what the value of the argument is, if the digging work began in spring 1954. TC10 gave evidence that he was in Ruiru in 1953 when the Queen visited [33-2527]. He went home after he joined the Mau Mau [33-2532]. He was arrested shortly after his father was killed [33-2543]. When he arrived Kainoko – in charge of prisoners – had been left in charge of digging trenches [33-2545]. That digging must, therefore, already have begun. The trench went from Gathigi to the scheme and he was released when the work was completed [33-2549]. D does not adduce any evidence of its propositions but, assuming them to be broadly accurate, it is unknown when the canal	which would be obviated by recalling TC10. (viii) The proposed amendments are similar though not identical to those allowed in respect of TC1 and TC30. (ix) See (ix) above re TC5 for the position re documents.

				was complete. 3) There is no basis for further cross-examination. 4) As above.	
13 – Ndogo Gatutu	7	In or about ~~January 1953~~ April 1954, the Claimant was arrested at his home in Bahati.	**No.** **The proposed amendment renders TC 13's case hopeless. It substantially changes the dates and circumstances of the events alleged, contrary to TC 13's sworn oral and written evidence. The timings are of critical importance to limitation, to the role/relevance of TC 13's account, and to its testing. Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 13 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not accurately present critical aspects of his case in his original pleadings, Pt18 responses, first and second statements or oral evidence. He now invites the court to accept a contradictory case, and D must respond.** **The fact that a change of case was intimated in submissions on behalf of TC 13 in late May 2016 does not affect the position. No change was made to TC 13's pleaded case or written statements prior to his oral evidence or at any stage thereafter until now. D could not fairly cross-examine him other than on his pleaded case and his evidence as confirmed under oath.**	It is more than arguable that TC13 is describing Anvil. See §51q of Cs' Skeleton Argument. D always knew TC13 was said to be describing Anvil. The Langata documents (see below) support a more precise timing. The lack of alteration in the SOL is an obvious mistake, and it should refer to 1954. If given permission, it will be corrected. This is a poor point. It would be singularly prejudicial to TC 13 to force him to maintain a case where evidence is available that makes an alternative case arguable, and where his own account fits that evidence save for a mistake in date. Otherwise, as above and in the Skeleton Argument.	Allowed (i) D's best point here is that there is a specific alteration of the date in paragraph 7. D can properly say that it is entitled to rely upon those pleadings. Nevertheless, in my judgment there are specific circumstances here which would make it contrary to the overriding objective not to allow the amendment. (ii) In the original opening served by the Claimants on 20 May 2016 it was specifically said that TC13 was arrested during Operation Anvil which was in April 1954. It was that that gave rise to the discussion on 23 May 2016, part of the transcript to which I referred to in the judgment. A passage not contained in the judgment is as follows: "Mr Myerson: In respect of that particular Claimant, they must know about it because I actually put that in the opening. Mr Justice Stewart: Yes, but if there are more like that." This was specifically by reference to TC13. The Defendant relies upon Mr Skelton QC saying, prior to any of the TCs giving evidence, that the focus of the Defendant's cross-

			The amended case is moreover inconsistent with TC 13's schedule of loss, which continues to assert that TC 13 was detained from about 1953. **As to prejudice:** **1) TC 13 was clear in evidence that he took a Mau Mau oath in December 1952 and was picked up very soon ('immediately') thereafter [33-1836 to 33-1838]. His statement (see §§4, 9 and 17) specifies that he was arrested, taken to Langata, then taken to Manyani, in each case in 1953.** **2) If the amendment were allowed, D would need the opportunity for further XX of TC 13 informed by further documentary research. He was not asked about details that may have confirmed his evidence re: 1953 and/or cast doubt upon the amended case re: 1954 (Anvil).** **3) D would also need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with the dating of relevant events/features of TC13's changed account. Recalled witnesses could include Messrs Gordon, Grounds, McKnight, Kearney and Nazer. D would wish to consider whether it is possible to obtain further witness evidence. D has not, for example, ascertained whether witness evidence as to events at Mackinnon Road in 1953 could be called (see below).** **4) Considerable additional searches within the documents would**		examination of the Test Claimants would be on their claims as pleaded in the individual Particulars of Claim. This is understandable. It was a position the Defendant was entitled to take. (*cf* Al-Medenni v Mars UK Limited [2005] EWCA Civ. 1041); nor was the Defendant required to clarify, in the light of what had happened in May 2016, whether the Claimants had overlooked the amendments. Nevertheless, I am entitled to take into account, in exercising my discretion in accordance with the overriding objective, what had gone before in May 2016. (iii) The evidential "hinterland" also supported the case now sought to be pleaded. I do not propose to go into detail about this. The Defendant responds that it is not necessarily the case that TC13 was detained during Operation Anvil and that it might have been during a prior detention in that area of Nairobi; further, it is possible he may have been in Langata prison in 1953 even though Langata camp and Manyani camp were constructed to take those people who were rounded up in Operation Anvil. These are points which the Defendant can make in final submissions based on the documentation.

			anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. At this stage D can observe that the documents suggest there were pick-ups in Nairobi during 1953, that Langata was operating as a prison during 1953, and that Mackinnon Road (if not Manyani) was operational in Coast Province in 1953 and may have had WWII buildings (see §17 of TC 13's statement). **5) Those matters would greatly delay the already elongated trial timetable.** **6) To refuse the amendment would not be unfairly prejudicial to TC 13. He ha more than ample opportunity to date his pick-up in his original pleadings, Part 18 responses, first and second statements, and before the conclusion of his oral evidence, given on 20 June 2016. The delay in seeking to amend has not been explained. TC 13 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.** **7) There are other test claimants who allege involvement in Op Anvil, with whom related points can be tested.**		I am not persuaded that the Defendant would be prejudiced by not cross-examining TC13 further and/or approaching/recalling any of its own witnesses. If it seeks to do the latter, an application to re-call or introduce a new witness on this basis may well be looked on favourably. In terms of dates, TC13's personal evidence as it stands is of assistance to the Defendant. (iv) I accept that the Claimants have made a mistake in not seeking to amend this date beforehand. Nevertheless, given the Claimants' May 2016 opening, the hearing of 23 May 2016 and the hinterland to which I have referred, it would be wrong to allow the Defendant to take advantage of what was an error and one which was apparent at the time as the very probable explanation. (v) The schedule of loss will also need amendment, as the Defendant has pointed out. (vi) See (ix) above re TC5 for the position as to documents.
	11	Once inside the hall, the Claimant was told to queue. He was made to walk past people whose heads were covered by sacks with holes cut out	See Above.	As above. D is not barred from saying he is describing an earlier pickup. Rather, D wishes to	See above.

		for eyes. One of the people nodded at the Claimant and he was put in a truck and taken to Langata camp. a. The events described by the Claimant probably took place in 1954; b. It is probable that the events described by the Claimant were during Operation Anvil in April 1954. The Claimant will rely on documentation in support of his claim and refer to its full terms and effects at trial, in particular, documentation that demonstrates that Langata camp was under construction as of February 1954 [32-13987] and, as to the progress of screening in general and the movement of those screened to Manyani camp, 32-22011 by way of example.		avoid having to make a submission by seeking a procedural advantage, in circumstances where it always knew Cs case was that the witness had made a mistake.	
	12	The Claimant remained in Langata for a period of about 2 ~~weeks~~ months in 195~~3~~4.	**No. Even if the amendment above were allowed, this one does not follow. It is not only contrary to TC 13's sworn oral and written evidence (see 33-1841 and §9 of his first statement), but also: The justification for this amendment from the documents or otherwise is unclear. If it relates to the use of bracelets at Manyani, the Defendant notes that: 1) TC13 gave evidence that bracelets were given to detainees (§19 first statement), but did not specify that bracelets were given to detainees on arrival at Manyani; 2) Cs have not adduced any evidence as to the use of bracelets at Mackinnon Road. This is a**	D's have not read the Reply [10-131] (which attaches a statement of truth]; his supplemental witness statement [10-187] and what was said to Professor Abel. In those parts of the evidence, TC13 says that on reflection he thinks he was at Langata for about 2 months. It is extraordinary that D should make this submission without providing a fair picture of the evidence. 1) This question could have been asked by D. The issue was canvassed before TC13 gave evidence, because he was the example used by D	Allowed. Essentially for the reasons given by the Claimants. [The amendment from weeks to months was not objected to.]

			matter D would have to investigate were the amendment allowed. Were the amendment allowed, D would wish to have the opportunity to XX following further documentary research. D would also wish to seek out witnesses as to the system used at Mackinnon Road.	to complain about changes of case. 2) There is no evidence as to why this is relevant. D says it would "have" to investigate this matter. That is an improper approach to take. The proper approach is to explain why the system at a different camp is relevant, adduce the documents relied upon, set out what research is referred to, explain why it has not been carried out in the 15 months since D knew about this issue, and justify the contention.	
	17	In about 19534	**No. See objection to § 7 amendment above.**	Same points as above.	Allowed. As above.
	29	The Claimant was taken to Gathigiriri prison in Mwea in about 19567.	**No. See objection to §7 amendment above. D's research as to Gathigiriri prison also related to a different time and further research would be required.**	This is a logical consequence of a finding that the C was detained later at Langata and Manyani. Documents already exist and D should already have done this work. Cs note that D's evidence was that any factual averments were investigated at length. Here, D's actually had a precise date. It is noteworthy that Mr Robertson neither acknowledges the fact, nor explain why D has done nothing. D is the author of any misfortune it may prove.	Allowed. As above. I am un-persuaded that there would have to be further substantial research in relation to this change of date.
	31	**Detention and assault during forced labour in Kangema Post**	**No. See objection to §7 amendment above. D's research as**		Allowed. See above. It is the date which is objected to and not the allegation of

		At some point, in about 195~~7~~8	**to Kangema Post also related to a different time and further research would be required.**		assault during forced labour.
14 – James Njuguuna Mwaura	7	In ~~about 1952~~ the latter part of 1954 or early 1955 at the latest, when the Claimant was about 14 years of age, he was forced out of his home with his mother and his four siblings.	**No.** **The proposed amendment renders TC 14's case hopeless:** **1) The paragraph is self contradictory, since TC 14's date of birth is 1938 and the IPOC continues to assert that the removal happened when he was 14 years old, i.e. in 1952.** **2) It substantially changes the dates and circumstances of the events alleged, contrary to TC 14's sworn oral and written evidence (the former confirming his date of birth, the latter the year of birth, year of removal (1952), age at the time (14), period of residence (5 years) and date of departure (1957) – §§4, 30).** **3) The timings are of critical importance to limitation, to the role/relevance of TC 14's account, and to its testing.** **4) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 14 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not accurately present critical aspects of his case in his original pleadings, Pt18 responses, first and second statements or oral evidence. He now invites the court to accept a**	1) The pleading with respect to his age is "in or round 1938" and that he was "about" 14 years of age. D here treats the pleading as if the dates were literal, because it assists. There is no principled basis for doing so. D thought his date of birth was 1938 [33-2719] based on his age group and the time of circumcision when he was "about" 18. 2) This is an utterly partial reading of the evidence. For example, D put to him that he was present when Karatina village was constructed [33-2736]. TC14 said that was so. The documents demonstrate why Cs can put a date on that event. 3) Again, there is no evidence that D was unaware of this documentation. It would have come up on a search by location. Mr Robertson entirely avoids giving evidence about this, but the Court can rely on Ms Howard and Mr Murphy. 4) as above.	Refused. (i) Paragraph 5 IPOC says that the Claimant "was born in or around 1938." Paragraph 7 states "in about 1952, when the Claimant was about 14 years of age, he was forced out of his home with his mother and his four siblings." The Claimants complain that the Defendant is treating the pleading as if the dates were literal. That is not the point. The point is that the Claimants, by this amendment and by the further amendments in relation to this Claimant, now put more specific dates on the essential allegation. These more specific and very different dates are 2-3 years later than pleaded. (ii) The IPOC dates are substantiated by TC14's witness statement. See paragraph 4 and paragraph 30. (iii) In oral evidence TC14 confirmed his year of birth as 1938. (iv) From these pleadings, documents and TC14's evidence, it would have appeared to D that this was the best evidence as to dates available. They should not be faced a year later with what is in effect a change of case as to

			contradictory case, and D must respond. **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC 14 informed by further documentary research. He was not asked about details that may have confirmed his evidence re: removal in 1952 and associated dates in the sequence of events (e.g. regarding his strength of recollection, temporal yardsticks, etc) and/or tested the amended case re: 1954/5 (e.g. details in the documents at §29).** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts.** **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 14. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, first and second statements, and before the conclusion of his oral evidence, given on 13 July 2016. The delay in seeking to amend has not been explained. TC 14 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for him to do so.**	1) There is no evidence of prejudice. It depends entirely on what D knew – of which there is no evidence – or ought to have known – of which the evidence suggests that D must have known the date of building Kamiti village as now pleaded. There is no prejudice to D if it chooses not to ask questions in the hope that Cs will make a mistake. Until the research is completed D cannot properly say it needs to cross-examine further. 2) as above. It is not appropriate for D to make an unevidenced assertion that original searches were of limited usefulness when it refuses to say what those searches revealed and condescend to set out why it says new searches may reveal something else and what that may be. Indeed the question asked about a social hall in the new village [33-2758] suggests that D *did* have some information. 3) as above 4) as above.	date. See my comments on 23 May 2016 referred to in the judgment. (v) D would be entitled further to cross-examine TC14 in the light of these substantial amendments. (vi) The comments by the Claimants that "there is no prejudice to D if it chooses not to ask questions in the hope that Cs will make a mistake" is misguided. These are substantial amendments sought to be made over a year after TC14 gave evidence and by reference to documents the significance of which has not previously been advanced by the Claimants in relation to this TC. This is not a tightening up exercise. It goes further than was permitted by the April 2017 judgment. (vii) It is correct that during his evidence TC14 said that he had been in Karatina village for maybe 3 years and left in 1957. This is, in the light of the above, an insufficient base on which to allow the amendment. It is a potential internal inconsistency which will have to be grappled with in final submissions. (viii) I appreciate the potential serious prejudice to TC14's case by not allowing the amendment. (ix) It was floated as a possibility by Mr Myerson QC when I indicated that this amendment may not be allowed, that it may be

					proportionate to consider re-calling TC14. I have considered this carefully in the light of all the other reasons. I do not accept this. It would be disproportionate, given all the other real pressures on this trial, [a number caused by amendments I am permitting] to consider re-calling TC14 and for the Defendant and the Court to adapt to and accommodate a very different case on dates. (x) The points made in the main judgment about the cumulative effect of amendments is relevant. (xi) The points made in the main judgment about the lack of explanation for the amendment and the delay are also relevant. (xii) The fact that on its re-amended Defence (served in June 2016) the Defendant refers to Karatina village in 1955 does not affect the above points. It cannot be deduced that that would be the earliest reference in any document to Karatina village, nor does that have any necessary impact on how D would prepare its case and cross-examine TC14 re dates and surrounding circumstances.
	29	After Karatina Village was built, the Claimant was forced to move from Karatina Post to Karatina Village. He was	**No – see objection to §7 above.**	Same point as above.	Refused. See above.

		not allowed to return permanently to his homestead, although he and his family were allowed to return to their shambas/farms to gather food. The Karatina Village was probably completed as of around August 1955 and the Claimant moved to it shortly thereafter; the Claimant will rely on the documentation for its full terms and effects at trial, for example: a. There was no serious policy of villigisation in Kiambu prior to July 1954 [32-20432]; b. Karatina is not mentioned as a village under construction as of November 1954 [32-25073]; c. By February 1955, only 3 villages had been constructed, Karatina Village not being one of them [32-30795] d. By May 1955, 39 villages had been constructed in the Githunguri area [32-338971. e. November 1955 contains the first reference found by the Claimant to Karatina village [32-41268], referring to gangs in the area receiving assistance over the previous three months.			
	45	Added 'He left Karatina Village after being there for about 3 years and went to the Rift Valley.'	**No – see objection to §7 above. The justification for alleging that TC 14 was in Karatina Village for 3 years is unclear, save perhaps retrospectively to fit his evidence re: date of departure (1957) to the**	D asked how long TC14 was in the new village before he went to Rift Valley.. The reply was about 3 years [33-2762]. D has simply not read the	Allowed. Not now objected to.

			other proposed amendments. But TC 14's full relevant evidence is that he was at Karatina Village for 5 years, leaving in 1957 (first statement §30).	evidence properly.	
18 – Estate of Mwangi Macharia	9 (new para 12)	Added at end: a. It is probable that "Kwa Rubai" is a reference to "Kwa Lubai" or "Kwa Luvai", any difference in the phonetic spelling of a name being rendered from Kikuyu into English being of no assistance; b. "Kwa Rubai", "Kwa Lubai" or "Kwa Luvai" was a nickname for the K.E.M. Mau Mau Investigation Centre (MMIC), sited at Embakasi near Nairobi some time after July 1954; c. The nickname referred to Louvain T. Dunman who worked at the MMIC as of January 1955 and then transferred to Mombasa; d. Interrogations started in MMIC in about August 1954; e. Special Branch were involved in the work of MMIC as of September 1955 and the centre continued its operations until about June 1957; f. The MMIC was noted for its brutality in interrogation and screening. The Claimant will rely on documentation in support of his claim for its full terms and effects at trial, for example, concerning a proposed KEM Mau Mau Investigation centre, [32-	**No.** **This amounts to a wholly new location for the allegation, namely the MMIC.** **1) D has not investigated the MMIC for the purposes of TC18, nor in any great detail for the litigation more widely. None of the other test claimants allege that they were detained at the MMIC.** **2) Whilst one of the claimants in *Mutua* made allegations that he was at the MMIC, he specifically alleged assault by Mr Dunman, who appears to have left the MMIC by November 1954. D therefore did not research the period relevant to TC18's Amended Claim.** **3) The research to respond to such an allegation would be substantial.** **(a) D has identified 9 files that are likely to be of relevance and that it would certainly wish to review in order to answer the claim;** **(b) One of these files is an African Affairs file at KNA. However, the series was, as at October 2015, being substantially reorganised and weeded, so the file may be either unavailable or now destroyed.** **(c) D has identified a further 14 files of possible relevance that it is likely**	Cs have dealt with this at §§21b; 51e – l of their Skeleton Argument. 1) There is no evidence that D did not identify the MMIC as being the place in issue here. Indeed, on the evidence it should have done so. 2) D clearly already knows about the link between Dunman and the MMIC. This paragraph appears to *concede* that D *did* identify the MMIC as the detention c entre being referred to by TC1§8. The point about dates is irrelevant because D's evidence is that dates was not the principle (or perhaps any) basis of searching. 3) Unless D can establish it did not know the MMIC was the place referred to, this is irrelevant. If D can so demonstrate, then it is impossible to know why, what and how long the research will take, or to make any finding as to proportionality, because D has chosen not to provide evidence of any of the relevant facts.	Refused. (i) TC18 died on 28 May 2015. He did not therefore give oral evidence. (ii) The proposed amendments go into some detail as to why Kwa Rubai refers to the MMIC. (iii) In paragraph 21b of the Claimants' skeleton it says that the addition is that Cs can now identify the Kwa Rubai location as the MMIC. It is not explained why they did not identify it before or when they became aware of it and, if it was recently, why they did not become aware of it before. (iv) The Claimants criticise the Defendant on the basis that it should have realised it was MMIC because of TC's marking on a map and because the drive from Nairobi has been pleaded as taking some ½ hour. Again that begs the question as to why the Claimants did not plead their case properly in good time. It is not for the Defendant to guess/try to make inferences about the Claimants' pleaded case. In

		20309]; Handing Over Report, September 1955 [32-37804]; correspondence regarding closure [32-54950–32-55255].	**to wish to review. In addition, the documents may point to other files that need to be reviewed.** **4) In addition, D must seek to obtain relevant witness evidence. D has not checked that it has searched for all relevant witnesses mentioned in documents who were at the MMIC at therelevant time. There may well be witnesses that have not been searched for, or whose evidence was not obtained because they could not say anything relevant to the Test Case allegations. It may be that fresh searches need to be undertaken after documents have been obtained.** **5) As such, the task of responding to this allegation is very substantial, encompassing research in both TNA and Kenya, and would take many months.** **6) TC18 is, in any case, dead. D does not understand how instructions can have been obtained at this late stage as to what TC18's estate is now alleging, the timing and circumstances of the amendment having not been explained.** **7) D will therefore be unable to XX TC18 upon any of this new claim.** **8) It is submitted that in the circumstances, the claim is hopeless – there cannot possibly be a fair trial on such a substantial allegation only properly raised long after TC18 has died.** **9) In any event, to refuse the amendment would not be unfairly**	4) Again, D has not given evidence of which witnesses were proofed or what they were asked about. Absent this, D cannot simply assert prejudice. It must be evidenced. 5) as above. 6) the amendment is clear. If D is asserting that the legal representatives are acting without instructions it should say so. Otherwise, this is merely an irrelevant piece of prejudice.	the Individual Defence (paragraph 11a) the Defendant said it had no knowledge of any place for screening centre known as "Kwa Rubai". Nothing in the reply put them on notice as to the case now sought to be advanced. (v) In those circumstances the Defendant is fully entitled to say that it has not investigated the MMIC for the purposes of TC18 (or generally in the litigation because no other TC alleges they were detained at the MMIC). (vi) The extent of the research which would now have to be done as set out in the Schedule and supported by Mr Robertson's witness statement (paras 144-146) risks serious disruption of the trial. (vii) Further, in this case given the proposed amendment and the present state of the pleading, the Defendant is entitled to say that it would have to embark on a search for relevant witness evidence. I do not accept the Claimants' criticism that the Defendant has to give evidence as to which witnesses were proofed or what they were asked about. This is not an assertion of prejudice; it is sufficiently evidenced in Mr Robertson's witness statement (see paragraph

			prejudicial to TC 18's estate. He had more than ample opportunity to set out the location in his original pleadings, Part 18 responses and witness statement, all produced before he died. The delay in seeking to amend has not been explained. TC 18's estate can pursue the case previously advanced on the existing pleading/ evidence, insofar as it is proper for it to do so.	7) there is no new claim. The only question that could conceivably be asked as a result of the amendment is whether TC18 knew he was referring to the MMIC. His answer would make no difference. 8) This is a submission. It is irrelevant to amendment. 9) as above, although with the addition that it appears that D knew what the issue was here and chose to ignore it.	146). (viii) Mr Myerson QC submitted that D did not assert that it was unaware that Kwa Rubai was the same as MMIC. I had read the first four lines of para 144 of Mr Robertson's witness statement as doing just that. Mr Mansfield QC, after taking instructions and my having raised with D that that was how I was reading it, confirmed in open court that that was correct. (ix) Mr Myerson QC also submitted that it would have been open to him absent the amendment, to say in final submissions that Kwa Rubai was in fact MMIC. I disagree for the reasons set out above for refusing the amendment. Also, para 9(b) of the Reply may be taken as suggesting that Kwa Rubai was a remand centre. (x) The points made in the main judgment about the cumulative effect of amendment is relevant. (xi) The points made in the main judgment about the lack of explanation for the amendment and the delay are also relevant.
	Para 19 (new para 22)	The deceased Claimant was detained at five different locations from approximately 1956 to 1959/1960 as follows: a) Kwa Rubai industrial area for two weeks in or around June 1956.	**No.** **See objection to §9 (new §12) above.** **Also:** **1) The amended sequence of locations and timings contradicts TC18's Pt18 response at [14-86],**	1) There is no contradiction: §11 IPOC always pleaded removal in or around 1956 14-74 : Pt 18– removed June 1956 §14 IPOC always pleaded taken to Kwa Rubai for 2	Allowed. Not now objected to.

		b) Kianjiru village for three hours following the detention at Kwa Rubai and prior to being detained at Karaba detention camp; ~~and~~ c) Kianjiru for the second time for a week in 1958; d) Karaba detention camp for three months from about June 1956; e) Kangaita detention camp for three months in the latter part in 1956; and f) Kibirigwi village for three years from early 1957, save for a second period of about a week in 1958 when he was held at Kianjiru Village for a second time because it was alleged that he had taken an oath there.	**which avers that TC18 was detained:** **(a) In Karaba Camp for 3 months in June 1956; then** **(b) In Kangaita Camp for 3 months in 1956; then** **(c) At Kibirigwe Village for 3 years from 1957.** **2) The justification for that proposed amendment is unclear. No explanation has been given.** **3) D is unable to XX TC18 upon any of these matters.** **4) To refuse the amendment would not be unfairly prejudicial to TC 18's estate. He had more than ample opportunity to set out and/or clarify and/or correct his factual case about the sequence and timing of events in his original pleadings, Part 18 responses and witness statement, all produced before he died. The delay in seeking to amend has not been explained. TC 18's estate can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for it to do so.**	weeks 14-76: Pt 18 in the industrial area marked 144c on map §20 IPOC always pleaded taken to Kianjiru village for 3 hours; 14-86 Pt 18: Karaba camp for 3 months; 14-86: Kangaita Camp for 3 months also in 1956 14-86: Pt 18 Kibirigwe village from 1957 for 3 years save for: 14-85: in Kianjiru village for a second time in 1958; §22 IPOC always pleaded that was for a week. It was because he was alleged to have taken and oath [14-122 §14] 2) as above. 3) TC18 is dead. 4) as above.	

21 – Nelson Njao Munyoike	14	~~Towards the end of 1953 at~~ At Githiga, the Claimant was again arrested by two Home Guards at his father-in-law's farm for allegedly taking the Mau Mau oath. He was not charged or taken through any court process. The Claimant was forcibly taken toGithunguri Camp. He was severely beaten on the way to Githunguri camp and also once they arrived at the camp. The Home Guards had guns, one was short called John Kaara and the other one was called Karera. It is probable that the Claimant was arrested and taken to Githunguri camp in June 1954.	**No.** **The proposed amendment renders TC 21's case hopeless:** **1) It substantially changes the dates andcircumstances of the events alleged, contrary to TC 21's evidence (statement, §§15 & 16) and his accounts to Prof Mezey (17-162, §23) and Mr Heyworth (17-132).** **2) The timings are of critical importance to limitation, to the role/relevance of TC 21's account, and to its testing.** **3) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 21 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present a critical aspects of his case in his original pleadings, Part 18 responses, statement or oral evidence. He now invites the court to accept a contradictory case, and D must respond.** **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC 21 informed by further documentary research. He was not asked about the date of his arrest and removal to Githunguri (which were then asserted to be pre-June 1954), or associated details about those and other dates in the sequence of events (e.g. regarding his strength of recollection, temporal yardsticks,**	1) TC21 is content to amend the wording to "… in or around June 1954" The amendments take into account his oral evidence in order to reconcile inconsistencies. The transcript bears reading; the confusion that develops over placenames (Gatamaiyu has a different name, Gituamba [33-2019] and he regards them as the same place) leads to confusion later on when he is talking about where he was beaten [33-2066]. He says nothing happened at Gatamaiyu [33-2062], but later says it was where he received the beatings. Cs will submit that some of the confusion is caused by the manner of his cross-examination which does not follow the guidance on vulnerable witnesses. 2) Given the evidence that D searched locations, it must have known much of the evidence pleaded at §15. That being so, it always knew about timings. It simply chose not to ask. 3) as above. Prejudice: 1) TC21 was asked about when he moved to Rift Valley and how old he was [33-2011]. He was asked how long he worked in the Rift Valley 33-2013. He took the oath in 1952 at Limuru [33-2022-23]. He	Allowed in part. (i) This amendment is allowed save as to the change of date. The Claimant's statement (paragraph 15 & 16) was that he was detained from towards the end of 1953 for some 9 months-1 year at Githunguri camp. Professor Mezey's report (paragraphs 23 & 24) states that TC21 believed that the year he was arrested and taken to Githunguri camp was 1953 and he was held there for approximately 1 year. (ii) The development of the proposed amendments as to dates at Githunguri is set out in relation to paragraph 15 below. It relies upon documentation and inferences from documentation in support of the allegation now proposed that "It is probable that the Claimant was arrested and taken to Githunguri camp in June 1954" (or "as of August 1954."). These amendments are refused essentially for the reasons (iv)-(vi), (viii)-(xi) given in relation to TC14. The fact that Claimant was asked about other dates/times does not undermine these points that, had the pleading been clarified earlier, and in any event prior to TC21 giving evidence, D would have cross-examined him on the new dates informed by relevant documentation.

			etc), nor was there opportunity to test the new case now sought to be made. **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. (See further in relation to §15 below.)** **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 21. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 23 June 2016. The delay in seeking to amend has not been explained. TC 21 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for him to do so.**	was in the Rift Valley then [33-2015]. Then he left Rift Valley after the 2 men were shot [33-2034]. He then spent time in Gatamaiyu in hiding [33-2037]. He was shot and then treated [33-2043]. He went back to Gatamaiyu for a year and then to his father-in-law's house [33-2045]. He was arrested there [33-2046-7]. There is no basis for saying TC21 was not asked about dates. 2) as above. 3) as above 4) as above.	(iii) On some specific points: • D did cross-examine on whether TC21 may have been in a village rather than a detention/works camp. (Caselines 33-2055). TC21 said he was in the camp before being released into the village. • Mr Fetto said on this application, and it was he who cross-examined TC21, that his cross-examination would have been different had he been facing the amendments now proposed. • I do not accept Cs' point that because Mr Murphy said that D searched documents 6 months either side of any given date, therefore an amendment from 'towards the end of 1953' to '(in or around) June 1954' would cause no documentary consequences. Instead of searching from <u>about</u> June 1953 to June 1954, D's search would now in addition, have to be from June 1954 to December 1954, an extra 6 months. (iv) The amendment that TC21 "was not charged or taken through any court process" is permitted as mere clarification.

					(v) The allegation that the Test Claimant was "severely beaten on the way to Githunguri camp and also once they arrived at the camp" is permitted. It could be said that it is already sufficiently pleaded in paragraphs 28 & 29 IPOC. It is also consistent with the medical evidence.

	15	The Claimant was detained at Githunguri Camp for approximately nine months to one year, during which time he was made to work. The Claimant probably arrived when it was a Work camp; while there he was engaged upon, amongst other things, agricultural projects (see under Forced labour below). The Claimant will rely on documentation in support of his claim and on its full terms and effects at trial, for example: a. It is probable that the Claimant was taken to Githunguri Works camp after June 1954; b. Githunguri camp opened as a Works camp in February 1954 [32-203314]; there was a plan to move it to Githiga, but this was not effected until at least April 1955 [32-32808a] and the camp was still operating as Githunguri Works camp as of February 1955 [32-29821]; c. It is probable that the Claimant's arrival at the camp coincided with the need for labour on important agricultural projects which were being undertaken as of August 1954 [32-21122].	**No – see objection to §14 above. Further:** **1) The amendments at §§14 and 15 are mutually inconsistent. §14 asserts that TC 21 was probably arrested and taken to Githunguri 'in June 1954'; §15 asserts that he was probably taken to Githunguri both 'after June 1954' (§15.a) and in August 1954 (§15.c).** **2) The proposed amendment to the date of detention relies upon a document to the effect that Githunguri opened 'as a Works camp' in February 1954 (§15.b). That does not justify selection of a date of June 1954 or later, for which no explanation has been given.** **3) D can observe at this stage that there are documents showing that there was a Githunguri prison camp prior to the inception of the works camp. Further documentary searches will be required, extending searches of existing documents to cover later dates and rival accounts, and including a review of all files potentially relevant to Githunguri prison camp.** **4) D would have wished to XX TC 21 about the possibility that he was detained at Githunguri prison camp.**	1) TC21 is content to amend the wording to read "in or around June 1954" if permission is granted. 2) This is a submission on the evidence. 3) this is contrary to Ds evidence that numerous searches have been performed on location names. Even if that search was restricted by the date (against the weight of the evidence), D would have searched – per Mr Murphy – 6 months either side. It would, accordingly have searched for Githunguri up to at least June 1954. That limitation would depend on D assuming that the events described in §14 of the unamended IPOC followed from each other without interruption. There is no such evidence. 4) TC21 was asked about whether he was in Githunguri camp [33-2048]. That wording was chosen by D. TC21 said he was detained by the chief [33-2049]. That is incompatible with detention in a prison camp, which would have had a white commandant. The TC21 was specifically asked if it was a detention camp [33-2053], and then asked if it was possible that he was in a prison camp [33-2055]. This point is pure padding and it appears that D has not properly read	Allowed in part. (i) This amendment is refused save for the addition of the words "during which time he was made to work", though whether this is necessary is doubtful given paragraph 24 IPOC. (ii) Otherwise see above.

				transcript of TC21's evidence.	
	21	~~In or around the end of 1954~~ Around or after February 1955, the Claimant was forced by the Home Guard to construct a house at Gituamba village and thereafter he and his wife and children were forced to live there. The houses at the village were linear houses but were not surrounded by a trench. The Head man was in charge of the village and had three administrative officers called Tipi. The Gituamba Village was probably completed as of around February 1955 and the Claimant moved to it shortly thereafter; the Claimant will rely on the documentation for its full terms and effects at trial, for example: a. There was no serious policy of villigisation in Kiambu prior to July 1954 [32-20432]; b. Gituamba is not mentioned as a village under construction as of November 1954 [32-25073]; c. By February 1955, only 3 villages had been constructed in Githunguri, Gituamba Village not being one of them [32-30795]; d. By May 1955, 39 villages had been constructed in the Githunguri area [32-33897]. e. The villages were probably constructed as	**No – see objections to §§14 and 15 above. Further: 1) The proposed amendment re: date refers to and relies upon documentation about Gituamba village, yet TC 21's oral evidence was that on release from Githunguri he moved to his original home/location in Gituamba/Gatamaiyu [33-2062 to 33-2063]. 2) This would have been the subject of further questions in XX if the nature of the proposed amendment had been known when TC 21 was giving oral evidence.**	1) That is simply one interpretation of his evidence; he says he was at Gatamaiyu where nothing happened, it was peaceful, then he says he was in Gituamba in Gatamaiyu which is where his home had always been and where he bought a small house to stay in; he didn't stay there long, about 2 months and then he went to the Rift valley [22—2063]; Then in re-examination he says he was beaten after the Emergency at Gatamaiuyu, when doing the hard labour; and when he left Githunguri, he went to the village and there were HG there; the only reason he wasn't beaten was because the Head man said he'd been beaten enough already. [33-2066 – 2067] Cs are entitled to submit that he left Githunguri camp and was in a punitive village, in his home location. This is the most likely scenario as people were not generally let out of camps and just allowed back – and he had to wait for a passbook to go back to the Rift valley. 2) It is difficult to see what questions could have been asked about the dates derived from documents.	Refused. See above. The central issue relating to the amendment here is the change of date. The amendment is refused irrespective of the argument between the parties about the effect of TC21's oral evidence.

		a punitive measure; in any event, the villages in the area were regarded as penal and unpleasant by their inhabitants [32-33897].			
	Schedule 1	Addition of claim for 15 sheep and 2 donkeys, and substitution of 'the home in which he lived' for 'his home'.	**No – The amended case has no prospect of success: TC 21's oral evidence was that he did not know what happened to his animals [33-2035].**	This clarifies what he says his loss is in evidence [33-2035]; Recoverability of that loss is a matter of submission. He left them because he was worried about being arrested after the shooting incident; he didn't know what happened to them, but he never returned to his sheep and goats; given that it is our case that he ended up in a camp and then a punitive village, it is a reasonable inference that they were confiscated.	Allowed. The dispute here is whether what the Claimant said in the context of the evidence as a whole gives rise to an inference that the livestock was confiscated. That is properly a matter for submissions.
22 Margaret Wanjiru Kimani	11b-d	Detention: Karirau Village Camp 1. The Claimant arrived at Karirau village camp to discover that detainees had to build individual houses to stay in. This was a makeshift camp. Detainees were forced to sleep in huts, even when they were still unfinished and wet. Karirau camp had a trench around it that had spikes inside. This was to prevent people from leaving or entering the camp; those who tried would suffer serious injury. a. she was removed and detained to one place in Karirau; b. it is probable that the Claimant was detained in a punitive village under	**No. The Defendant has not had the opportunity to XX TC 22 as to either the specific allegation of being placed in a punitive village, nor as to the revised alleged dates. D was entitled to assume that TC 22 would not be advancing a more specific case as to dates, especially given her Pt18 responses to the effect that she could not remember dates beyond the year when she took the oath, her witness statement that she "*could not remember the year*" she was removed from her home (§4). Very few questions were put to TC22 during XX as to dates. D would wish to have the opportunity to XX on the dates which TC22 now**	In her evidence, this TC tends to use camp and village interchangeably. D acknowledged that at the very start of cross-examination [33-2075]. She cannot be expected to necessarily know the status of the place she was detained; the documents help establish it as a punitive village. She was cross-examined about the trench with spikes around the camp [33-2098]. It was up to D to cross-examine about dates if it wished to do so. If it chose not to do so in the hope that documents would not assist that was its own	(b) is refused. It is an unnecessary amendment, being a submission based on TC22's evidence. Whether it is accepted depends on final submissions. It is not expressly permitted, as doing so might give rise to an argument that, by giving permission, the Court in effect sanctioned a change of date from that pleaded in the Schedule of Loss. Amendment (c): not allowed • The Particulars of Claim state that the Claimant took the oath in or around 1952. No date is given for her forced removal save that it followed the declaration of the state of Emergency. She was asked about the date in the Part 18 and could not remember

		conditions of punitive detention: i. the punitive nature of the detention is why she refers interchangeably as being in a village and in a camp; ii. her detention at Karirau is best described herein, to reflect the Claimant's words and understanding, as a "village camp"; c. she was probably removed to the village camp in early 1955; d. The Claimant will rely on documentation in support of her claim and for its full terms and effects at trial, including documentation that identifies the nature and progress of villagisation in the Kangema District, Fort Hall: for example, the Emergency Administrative Policy from March 1954 [32-14928], notes for the Governor regarding priorities for Fort Hall from July 1954 [32-20470], Governor's directive from January 1955 [32-28517] and concerning discipline and punishment in Fort Hall in January 1955 [32-29332].	**alleges she was moved to Karirau. Further:** **1) The sole date given in TC22's original pleading was that she took the oath in 1952. Further, in her Schedule of Loss, TC22 claimed for loss of earnings from 1952 to 1960 (this corresponds with the 8-year claim in Cs' 'Summary of Special Damages Claimed' document) and in her statement TC 22 referred to being assaulted "*over 10 times between 1952 and 1960*" (§28)). As such, her case was that she was removed to Karirau in 1952. The amended allegation that she was removed in early 1955 is therefore a radically different date upon which D has not had the opportunity to XX.** **2) Even if no date had been pleaded, the point would be as for other similar TCs. In a case where a TC has not specified a date as to when an incident occurred, it may be possible within the scope of the pleading for a Court to find that a matter occurred on a specific date. However, D would submit that in the circumstances a Court could not fairly reach a conclusion (and therefore time should not equitably be extended under s.33 Limitation Act 1980) where a TC is unable to specify such a date. D may therefore fairly take the view that it need not XX in any great detail upon the date of alleged events – the uncertainty is a matter that goes to show that the Court cannot fairly reach a conclusion. If, on the**	choice at its own risk, particularly as it had searched by locations and ought, therefore, to have known the information pleaded in §11d of the amended IPOC. 1) This is a submission. D is entitled to argue that TC22 really meant to say she went to a village in 1952, but her evidence was that she was driven out of her house and did not see her husband again, and that this happened before she moved to the village [33-2086]. She was married when she took the oath [33-2091] so, on any basis, there must have been a period of time when she was not detained. D's submission is, accordingly, a poor one. 2) This is simply an attempt to re-argue the point argued in April. It is founded on a determination to ignore D's own evidence that there was a search by location and name when no dates were specified. D has adduced no evidence to support this proposition. 3) This is evidence of	which month, day or season it was. This is reflected in paragraph 4 of her witness statement. • TC22's personal memory as to dates is apparent elsewhere e.g. Professor Mezey's report paragraph 23. • In the case pleaded on her behalf, the date of TC22's removal is clearly stated to be around 1952: see paragraph 3 of the preliminary schedule of loss. In her statement at paragraph 28 the Claimant says she was "assaulted over 10 times between 1952 and 1960…" • The Test Claimant was cross-examined in relation to the assaults (see references 33-2126 and following), but not in relation to the reliability of the dates. • At that stage the case which the Defendant was facing was that there was uncertainty in TC22's evidence as to dates, that the pleading suggested that she was removed "around 1952" and suffered losses for "an approximate period of 8 years". It is insufficient for it to be stated (as it was) in submissions, that perhaps the Schedule of Loss with its statement of truth and paragraph 28 of her witness statement are in error. • There is now reliance upon specific documents to date the removal to "early 1955".

			other hand, a TC specifies a date within a pleading, D may well take a very different view as to what questions need to be asked. **3) That is precisely the case here. D did not ask detailed questions of TC 22 upon the dates of relevant events, both because of the uncertainty and because the allegations on their face largely predated June 1954. Had TC22 specified these dates, further research would have been undertaken and questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date rather than relying upon the existing pleading and the lack of evidence as to relevant dates.** **4) A similar issue arises as to the allegation of being placed in a 'punitive village'; TC22 may well have been XX in a different fashion had the allegation been put earlier.** **5) That being the case, if the amendment were to be allowed, D would require the opportunity to XX TC22 following research and production of an Amended Individual Defence.** **6) To refuse the amendment would not be unfairly prejudicial to TC22. Specific requests for further particulars as to dates were made by Part 18 request. TC 22, assisted by her legal representatives, said she could not answer – see [18-91].She had more than ample**	why questions were asked in cross-examination. No one has given that evidence and Cs do not accept it. It is bizarre that this submission is made only a few weeks after D's witnesses had given evidence of the endless searches done and saved regarding locations. 4) TC22 described a punitive village (with a trench and spikes) in cross-examination. If D did not realise what she was describing it had not read the May Opening which, at §§506-509 identified these moats as typical of punitive villages.	The Defendant says that it did not ask detailed questions of TC22 upon the dates of relevant events because of the uncertainty and because the allegations largely pre-dated June 1954. The Claimants do not accept this, but I am not prepared to disregard it. This amendment goes further than the ones permitted in the April 2017 judgment. It is not clear why the amendment is sought to be made at this stage. There is a real risk of prejudice because of the Defendant's approach to cross-examination based on the pleading before it. • See also points (iv)-(vi) and (viii)-(xi) re TC14 above. • As to amendment (d) this is evidential. To the extent that it supports amendment (c), it is not allowed.

			opportunity to set out dates and her allegation that she was detained in a punitive village in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 24 June 2016, and indeed did provide dates by reference to taking the oath, the period of 1952-1960 claimed in her Schedule of Loss and the reference in her evidence to assaults taking place during the period 1952-1960. The delay in seeking to amend has not been explained. TC 22 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for her to do so. **7) Allowing the amendment would mean that D had for good reason not asked what are now necessary questions of TC22 as to the dates of relevant events. D has relied upon the lack of direct evidence as to the date of alleged incidents and the pleaded case.** **8) Even if the Cs were to be debarred from making any such complaint, it would not change the fact that TC22 was advancing a positive case as to the dates of certain events that D has not been able properly to test. The potential practical impact of that upon the Court's view of the evidence would be unknown but potentially profound.**	5) As above 6) As above	

				7) As above. 8) As above	
	20	'The Claimant recalls that Chief Kingara Ngure or Ngure Kingaru (the two formulations of the name are referring to the same person and any difference arises out of translation difference and is of no assistance) and Headman Mina Kangara were in charge of the village camp.'	**No.** **(Save for the insertion of the word 'village'.)** **1) There is, so far as D is aware, no justification for the amendment. No explanation has been given.** **2) It does not arise from TC22's account in oral evidence.** **3) If the amendment were allowed, D would need the opportunity for further XX of TC 22.** **4) This would greatly delay the already elongated trial timetable.** **5) To refuse the amendment would not be unfairly prejudicial to TC 22. She had more than ample opportunity to identify/describe relevant personnel in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 24 June 2016. The delay in seeking to amend has not been explained. TC 22 can pursue the case previously advanced on the existing pleading/ evidence, insofar as it is proper for her to do so.**	1) At 33-2113 the names are given. At 33-2114 D confirms the position. 2) It appears that D has not properly read the transcript. 3) As above 4) As above 5) As above	Allowed. I do not accept there is any material difference here. In any event the transcript is as the Claimants state. Further, I do not accept there is any real risk of any prejudice. This is a tidying up exercise.
39 – Ann Watetu Nduhiu	11	Once the individual house was complete the Claimant was	**No.** **D has not had the opportunity**	TC39 was cross-examined on dates in terms. She said she could not remember.	(i) The amendment to alleged punitive village is allowed –

		forced to move into it. She was allowed to collect some belongings. She was unable to carry all of her belongings. Once villagers had moved out, their homes were burnt down and livestock confiscated by the Home Guards. The house in which the Claimant lived was not burnt down, but that of her sister was burnt. a. It is probable that the Claimant was forced to move from her village into a punitive village some time between July and November 1954. The Claimant will rely on documentation in support of her claim and will rely on it for its full terms and effects at trial; in particular, the Weekly intelligences reports of the North Tetu Division and documents describing the progress of villagisation in Nyeri in 1954, for example: showing the commencement of building villages: [32-20288a]; the progression of villagisation as of August 1954: [32-21328c]; as of October 1954: [3223435a] and as of November 1954: [32-24577].	**to XX TC 39 as to either the specific allegation of being placed in 'a punitive village', or as to the alleged dates. Few questions were put to TC 39 during XX as to dates. D would wish to have the opportunity to XX re: the time when TC39 now alleges she was moved to that village. Further:** **1) TC 39's schedule of loss asserts a claim for lack of remuneration for 'an approximate period of 6 years' from 1954 to 1960, which is consistent with (although not an averment of) arrival at the village in 1954, but TC 39 now seeks to allege for the first time that she was taken to the village after the June 1954 limitation cut-off date.** **2) Specific requests for further particulars as to dates were made by Part 18 request. D was entitled to assume that TC 39 would not be advancing a more specific case as to dates, given TC 39's relevant Pt18 response: 'Do not ask me about the dates because I cannot remember' [29-74].** **3) In a case where a TC has**	Her 3rd oath was taken after Kenyatta's arrest [33-1573]. The 4th oath was taken in Ichagachiru [33-1575]. D is now saying that it took a chance, and regrets it. 1) TC39 is clarifying a date that is wholly in keeping with the IPOC. D concedes it always knew this. Further, D pleaded that there was Mau Mau activity in Ichagachiru in 1954 and 1955 Defence §11]. It pleaded that villages in Nyeri were completed at end August 1955 [Defence §14a]. It was put to TC39 that she helped bring food to them [33-1579]. She agreed and said it was because they gave the Mau Mau food that she was told to build a new house at Wagitune [33-1582]. The evidence suggests that D has no need to ask further questions, because its own case was the same as Cs' case. 2) D elides the TCs inability to give dates (repeated in evidence) and a lack of documentary evidence – some of which D itself pleaded. D was not entitled to assume that the TC would not advance a case that she was within limitation because she could not remember whether she was or was not. The proposition is fanciful. 3) As above. In this case D	see amendment 11b in relation to TC22. (ii) The amendments as to dates are allowed: a. The dates are consistent with the dates pleaded so far. b. It is documentation which the Claimants rely upon to narrow down the start date in 1954. c. This amendment is similar to those permitted as a result of the April 2017 judgment. d. The Court is un-persuaded, given the evidence of TC39 herself, that the Defendant would have asked for any further questions as to dates had the amendment been made before she gave evidence and/or that in any event she could have given any further assistance whatsoever in her oral evidence. e. Nor, given the commencement period of 1954 from the schedule of loss, does the Court accept that the Defendant would have made any further documentary research and/or that any documentary research it makes as a result of the amendments would be substantial and/or would risk serious disruption of the trial. f. As to whether the Court, given the circumstances,

			not specified a date as to when an incident occurred, it may be possible within the scope of the pleading for a Court to find that a matter occurred on a specific date. However, D would submit that in the circumstances a Court could not fairly reach a conclusion (and therefore time should not equitably be extended under s.33 Limitation Act 1980) where a TC is unable to specify such a date. D may therefore fairly take the view that it need not XX in any great detail upon the date of alleged events – the uncertainty is a matter that goes to show that the Court cannot fairly reach a conclusion. If, on the other hand, a TC specifies a date within a pleading, D may well take a very different view as to what questions need to be asked. **4) That is the case here. D did not ask detailed questions of TC 39 upon the dates of relevant events, because of the uncertainty. Had TC 39**	advanced dates within a pleading and Cs look forward to hearing why this was done if the proposition advanced here is accurate. 4) as above. The evidence does not support a conclusion that D searched by date. 5) TC39 also gave reference dates. It was merely that they were further away from the event. The difference is minimal and irrelevant because dates were not D's primary search tool. 6) As above. 7) TC39 describes the village in her witness statement (§§13-18 p108). It was always open to D to cross-examine her about that. 8) as above 9) as above 10) as above 11) as above	"could not fairly reach a conclusion (and therefore time should not equitably be extended under section 33 Limitation Act 1980) where a TC is unable to specify such date" - that is a matter for the final submissions.

			specified these dates, further research would have been undertaken and questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date rather than relying upon the existing pleading and the lack of evidence as to relevant dates. D notes for example that the proposed amendments as to dates rely upon reports from 'North Tetu Division' and 'Tetu Location', but TC 39's Pt18 responses and oral evidence refer simply to 'Tetu'. D should have had the opportunity to explore those points and their potential significance with TC 39 in XX. **5) This is different from TC 30, who did, at least, give some indication as to the date of relevant events (namely after the Lari massacre) and was cross-examined on that issue and the dates of subsequent events by reference to that – see 33-3109 to 33-3110.** **6) This is also somewhat in**		

			contrast to TC 1, who was asked on a number of occasions either her age or to attempt to specifically date incidents - see 33-1633 & 33-1689 – albeit the questions as to events may have still been somewhat different. **7) A similar issue arises as to the allegation of being placed in a 'punitive village'; TC 39 may well have been XX'd in a different fashion had the allegation been put earlier. It is not moreover clear from the proposed amendment that TC 39 was moved into 'a punitive village' that this is confined to the village named as 'Wagitune' in the original (and current) wording of the remainder of TC 39's pleaded case.** **8) If the amendment were to be allowed, D would require the opportunity to XX TC 39 following research and production of an Amended Individual Defence.** **9) To refuse the amendment would not be unfairly**		

			prejudicial to TC 39. She had more than ample opportunity to set out dates and her allegation that she was detained in a punitive village in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 24 June 2016, and indeed did implicitly provide a date by reference to taking the oath and her Schedule of Loss. The delay in seeking to amend has not been explained. TC 39 can pursue the case previously advanced on the existing pleading/ evidence, insofar as it is proper for him to do so. **10) If the amendments were allowed it would mean that D for good reason had not asked what are now necessary questions of TC39 as to the date of the events. D has relied upon the lack of direct evidence as to the date of alleged incidents and the pleaded case.** **11) Even if the Claimants were to be debarred from making any such complaint, it would not change the fact that TC**		

			39 was advancing a positive case as to the dates of certain events that D has not been able properly to test. The potential practical impact of that upon the Court's view of the evidence would be unknown but potentially profound.		
	24	The Claimant was aware that some women were being sexually assaulted by the Home Guard. She heard of a woman called 'Wanjiru' being raped by members of the security forces ~~the Home Guard~~ whilst going to a farm in Kariua…	**No.** **1) The justification for the proposed amendments is unclear. No explanation has been given.** **2) The paragraph is inconsistent with TC5's account in oral evidence, which was that the alleged perpetrator was a 'policeman' [33-1591].** **3) The proposed amendment is embarrassingly wide. TC39 must commit to a positive case; alternatively permission should be refused.** **4) To refuse the amendment would not be unfairly prejudicial to TC 39. Her oral evidence was clear. She had more than ample opportunity to set out her case clearly in her original**	1) Cs are not obliged to explain, but the explanation is clear when the transcript is read: see 33-1591. 2) there is no inconsistency. 3) The amendment permits the Court to determine the matter on the evidence. 4) As above	Allowed. The Claimants' submissions are accepted.

			pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 14 June 2016. The delay in seeking to amend has not been explained. TC 39 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.		

SCHEDULE TO JUDGMENT (PART 2)

IPOC AMENDMENTS SERVED 21 JULY 2017

Test Claimant	**Para amended**	**Amendment**	**Agreed?**	Cs' Response: pursued/ not pursued	**Judge**
16 – Marion Nkirote M'Ichoro	8	One evening ~~in or around 1953~~ after June 1954, probably as a result of punitive measures being inflicted on populations in the Ruiri area (near to Ncoroiboro) [32-19232], the Claimant was forcibly removed from her home…	**No.** **The proposed amendment renders TC16's case hopeless:** **1) It substantially changes the dates of the events alleged, contrary to TC16's sworn oral and written evidence ([33-2973], §5 WS [12-95]). TC16's Pt 18 response clarifies**	Proposed amendment not pursued as to date following draft judgment, save for the purposes of any cross – appeal. 1) The date was led in evidence – 33-2973. Cs do not complain at that, but it diminishes the value of the reply. The documentation	**The amendment in relation to paragraph 8 is not pursued.**

			the pleaded case to say that she was removed in August (1953) [12-63], so the amendment seeks to bring events forward by around a year. TC16 **2) The timings are of critical importance to limitation, to the role/relevance of TC16's account, and to its testing.** **3) It also adds significantly to the alleged circumstances/context of TC16's alleged removal.** **4) The reference given is to a document which does not support the amendment. Also, TC16's Reply to Defence §8.b relies upon a document allegedly describing 'constant sweeps and patrol activity' in TC16's area 'as of <u>March</u> 1954' (i.e.**	suggests that the TC is likely to be wrong, because the events she describes are in keeping with forced villagisation, which was not – on the evidence – an issue in August 1953, but was in mid 1954. 2) It is admitted that the events are critical to limitation. But as the TC was not questioned on dates and said she did not know any, D's overstate the position on testing the evidence. 3) The description has never altered. It is obviously a description of villagisation. The issue is when it happened. D has adduced many documents showing that forced villagisation was not a policy in August 1953. It ought not to be allowed to	

			before June 1954). **5) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC16 effectively asserts, a year following her oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, she could not accurately present critical aspects of his case in her original pleadings, Pt18 responses, witness statement or oral evidence. She now invites the court to accept a contradictory case, and D must respond.** **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC 16 informed by further documentary**	disavow its own case. 4) The reference ought to be 32-19239 – apologies. The reference to the reply is unfair. The document was pleaded in response to D's pleading that it could not find any reference to Home Guard activity in 1953 (§9 Defence – 12-19). It did not focus on villagisation. 5) As before As before.	

			research. She was not asked about details that may have cast doubt upon the matters set out in support the proposed amended date, or about associated dates in the history/sequence of events (e.g. temporal yardsticks). **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts.** **3) Those matters would greatly delay the already elongated trial timetable.** **6) To refuse the amendment would not be unfairly prejudicial to**		

			TC16. She had more than ample opportunity to clarify the date of her removal in her original pleadings, Part 18 responses, witness statement and (had she made one) supplemental statement, and before the conclusion of her oral evidence, given on 18 July 2016. The delay in seeking to amend has not been explained. TC16 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.		
	13	During the attack the Claimant heard one of the Home Guard saying in Swahili "we've hit her, she's nothing, finish her". During this frenzied attack the Claimant's baby suffered a cut to her hand. The Meru Home Guard were operating in the Claimant's area in July 1954 [32-20303] around about the time of year recalled by her (August).	**No. This relates to the change of date. See objection to §8 above.**	Not pursued – as above.	**This amendment is not pursued.**

	18	The Claimant and her family had no home to return to; it having been burnt down. The Claimant avers it is reasonable to conclude the family home was intentionally destroyed by the Home Guard, there being documentary evidence, upon which the Claimant will rely, that demonstrated that Home Guard burnt houses and confiscated cattle in areas which were loyal to the administration, for example, in about November 1954 [32-25940] and December 1954 [32-27209].	**No. This relates to the change of date. See objection to §8 above.**	Pursued. Date is not the significant point. The documentary evidence demonstrates involvement of Home Guard in abuse against loyalists. TC evidence is that her family were part of the Methodist church [33-2971] and her family did not support Mau Mau [33-2972]. The documentation founds a submission.	**Amendment not permitted. This is a pleading of evidence not fact. There is nothing to stop the Claimant relying on any documentary evidence which has been adduced so as to support a pleading of fact. Therefore, absent the amendment, the Claimant can rely upon adduced documents, including those referred to in this proposed amendment, in an attempt to found the proposition of fact in paragraph 18. Whether documents evidencing what happened in late 1954 can support the otherwise unamended case is a matter for submission.**

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
17 - Mwangi Matheri	25	The Claimant probably stayed at Lang'ata for longer than about 6 months before being sent to Manyani Detention Camp. He was not required to work while at Lang'ata and was mostly required to stay in the tent.	**No.** **1) The proposed amendment changes the dates of (all of) the events alleged, contrary to TC17's written and sworn oral evidence (statement §21 [13-190] ('about 6 months'); t/s 33-1911 ('3 to 6 months')) and his account to Dr Davidsson ('about 6 months' [13-251]).** **2) The timings are of critical importance to the role/relevance of TC17's account, and to its testing.** **3) There is no evidence or explanation in support of the amendment. If, as appears to be the case, it is based upon the alleged presence of the 'cattle dip' at Manyani when TC17 was there, the documents to which those amendments refer (see §29 below) do not support it.** **4) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC17 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present an important aspect of his case in his original pleadings, Part 18 responses, witness statements or oral evidence. He now invites the court to accept a different case, and D must respond.**	Pursued. In accordance with draft judgment. 1) Permissible submission given TC is not precise as to dates. Moreover, D is interpreting "about 6 months" as if it precludes any longer period. That is illogical. 2) Cs do not agree but see above paragraph. 3) Cs have pleaded the documents consistent with their approach. Whether the documents support the position is a matter for submission. 32-62433 describes the tank and the procedure in the same terms as that used by D's witnesses. 4) As before 1) as before. D, again, is seeking to interpret "about 6 months" with	**Amendment refused.** **(i) Paragraph 8 of Particulars of Claim pleads that TC17 was removed to Langata in or about April 1954.** **(ii) In the Claimant's witness statement he says that he was arrested (and then taken to Langata) around April 24 1954. He confirmed that date in oral evidence and said it was during Operation Anvil which was broadcast on the radio. Operation Anvil commenced in April 1954.** **(iii) In paragraph (1) of the Defendant's comments is the summary of the evidence in the case which the Defendant had prior to TC17 being cross-examined. This was all consistent with paragraph 25 of the IPOC which was that TC17 stayed at Langata for about 6 months before being**

			As to prejudice: **1) If the amendment were allowed, D would need the opportunity for further XX of TC17 informed by further documentary research. Although he was asked about the period of detention at Lang'ata, he was not asked about associated details relating to that and other dates in the sequence of events (e.g. regarding his strength of recollection, temporal yardsticks, history of the 'cattle dip', etc – see further below), nor was there opportunity to test the new case now sought to be made.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts.** **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC17. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 21 June 2016. The delay in seeking to amend has not been explained. TC17 can pursue the case previously advanced on the existing pleading/ evidence, insofar as it is proper for him to do so.**	an unjustified degree of precision. The witness could not assist further. 2) There are not 2 rival accounts. 3) No delay would result. 4) As before.	**sent to Manyani.** **(iv) It appears from the proposed amendment to paragraph 29 IPOC that the Claimants now seek to say that TC17 "was probably at Langata for longer than the 6 months that he now recalls and he probably moved to Manyani in the latter part of 1955."** **(v) In other words the "about 6 months" is in effect sought to be changed to something like 18 months.** **(vi) Of course "about 6 months" does not preclude any longer period but in my judgment it cannot in the circumstances be extended at this late stage to something like three times as long.** **(vii) I repeat points (iv) – (xi) in relation to TC14.** **(viii) I agree that whether documents support a proposition is a matter for submission.**

	29	The detainees were required to squat while a further head count was undertaken after they had passed through the dip. The Claimant will refer to the documentation for its full terms and effects, but, by way of example, the cattle dip in Manyani was in operation in mid-1955 or later [see 32-62433]. Therefore, the Claimant was probably at Langata for longer than the six months that he now recalls and he probably moved to Manyani in the latter part of 1955.	**No. See the objections to §25 above.** **The document cited does not support the premise underlying the amendment, namely that the 'cattle dip' was not present at Manyani until 'the latter part of 1955'. It makes no comment on when the 'cattle dip' was introduced.**	Pursued. Permissible submission on the basis of documentation; D will have a permissible submission in response. No prejudice.	**Refused.** **See comments in relation to paragraph 25 above.**
	31	…The Claimant himself suffered diarrhea and typhoid.	**No.** **1) This amendment seeks to add a fresh claim for injury. It goes beyond issues established by the medical evidence and consistent with what is already pleaded (see §§28 and 29 of the judgment dated 27 April 2017). It**	Pursued. 1) Permissible submission based on his evidence. The issue of whether there was illness and typhoid in the camp is raised on the face of his pleading and falls for consideration in any event as to the nature of conditions and the care taken	**Refused.** **(i) Paragraph 31 IPOC refers to the living conditions at Manyani Camp being very poor etc. It says "The**

			is wholly unsupported by medical evidence: Mr Heyworth does not address, and was not asked about, whether TC17 suffered from typhoid. **2) Further and in any event, D would if this amendment were permitted require the opportunity further to cross-examine both TC17 and Mr Heyworth. Neither TC17 nor Mr Heyworth were asked about the detail of TC17's alleged symptoms, whether they were diagnostic of typhoid, and/or if so what may have caused that condition.**	(or the lack of it) by the authorities. The amendment is in accordance with his evidence [33-1919 line 8 – 11]; 2) TC's claim always indicated he was ill and in hospital. He clarified in XX that his illness was typhoid. That D did not ask him about his symptoms is a matter for D. The emergence of the evidence in cross-examination is in keeping with the medical evidence about how histories emerge. If D wishes to put further questions to the expert it can do so in writing, although Cs' position is that there is not much assistance to be had. No prejudice.	**Claimant himself suffered diarrhoea. He received treatment in a makeshift camp hospital. He received treatment for about 1 month. He was also aware that there was typhoid in the camp." Therefore, on the face of the pleading, he distinguishes the condition from which he suffered from that which was generally in the camp.** **(ii) In the medical report of Mr Heyworth it states, in relation to Manyani "The food hygiene was poor and there were consequent recurrent episodes of diarrhoea with associated weight loss." There is no suggestion that TC17 suffered from typhoid. In his oral evidence, when asked about the**

					diarrhoea, TC17 replied "Yes, a number of us were sick from the condition called typhoid because of the food we were eating." He was then asked about this and asked why he had not mentioned it before. He said he had been admitted in the hospital camp for typhoid and not just for diarrhoea. **(iii) In paragraph 34 of his statement TC17 said "I suffered diarrhoea and was hospitalised for about 1 month in the camp's dispensary." Later in that paragraph he says "I believe there was an outbreak of typhoid because of the conditions we were being kept in."** **(iv) I accept the Defendant's points in relation to this proposed**

					amendment. The Claimants are here seeking to amend so as to rely upon specific injuries not pleaded in the Particulars of Injury (see paragraph 28 of the April 2017 judgment). (v) **Given the pleaded case and the other documentation available at the time of cross-examination, there was no obligation upon the Defendant to ask further questions about typhoid, either from TC17 or from Dr Heyworth when he gave evidence in early 2017.** **I am not prepared to allow further evidence at this late stage by way of questioning of Dr Heyworth or TC17.** (vi) **In oral submissions the Claimants said that**

					they did not seek to claim for typhoid as an injury. In that case the amendment is unnecessary.
	66	While in Gachuku village the Claimant was forced to work on road construction, to dig terraces for agriculture, and to assist in land surveying and making land boundaries. He was not remunerated for this work. Conditions of curfew and detention continued in the area of Gachuku village as of July 1957 and "unsavoury elements" were required to attend roll calls and be subjected to visits by Kikuyu Guard and police patrols [32-5711a and 32-57290]. It is probable that the Claimant	**No.** **1) These proposed amendments expand TC17's factual allegations about Gachuku well beyond those made at the time that TC17 was cross-examined or beforehand when D was researching and drafting the Individual Defence.** **2) Those expanded allegations are moreover not supported by the documents cited. The first [32-5711a] is an incorrect CaseLines reference, and the second [32-57290] does not address the matters described. It moreover refers to bush clearing whereas TC17's oral evidence described different work [33-1928], and he told Dr Davidsson he had worked 'under a sous-chef' from 1957 [13-253].** **3) The allegation that TC17 'remained under such conditions until the end of the Emergency' is discordant with TC17's Pt18 response to the effect that at**	Pursued. 1) Permissible submission, arising from cross-examination amongst other matters, that TC would have been regarded as unsavoury element and thus subject to curfew and the restrictions indicated; in cross-examination he expressly gave evidence that if you did not do work you would go back to detention and that was not challenged – 33-1928. He also tied it in to a time that was "easier", which he timed by reference to the departure of Baring – 33-1931. No prejudice. 2) Typographical error: document reference is 32-57114a; Doc 32-57290 supports the range of work undertaken (as well as bush clearing in Gachuku) and founds a submission. 3) submission 4) as before. He gave evidence about how long he was there and about conditions. 5) Cs do not agree. D is being given information. The Defence pleads that D cannot admit anything about C's account of Gachuko (§44h 13-45). That does not require amendment unless D proposes to advance a positive case that something did not happen (not put in cross-examination), or to admit something (unlikely). 6) Cs do not agree.	**Refused.** **(i) The cross-examination in relation to Gachuku Village was short. The material part is as follows:** **"Q. What did you do while you were there?** **A. Well, we used to work under the area chief digging trenches, making roads, (inaudible) boundaries, circle boundaries, and digging those trenches where the land was hilly, and if the sub chief requested - - or it was requested by somebody, they would take us there to work there.** **…**

		remained under such conditions until the end of the Emergency.	Gachuku village he did communal work 'for about 6 months' [13-147] (although D accepts that TC17 referred to working for a 2-year period during re-examination [33-1938]). 4) If the amendment were allowed, D would need the opportunity for further XX of TC17 informed by further documentary research. Although he was asked about the period for which he carried out communal work at 'Gacuko' (the name given by T17 in oral evidence), he was not asked about the associated details now pleaded, nor about the period for which he was at 'Gacuko'. 5) Additional searches within the documents would anyway be necessary if the amendment were allowed. These would need to cover each individual fresh factual allegation made by way of this proposed amendment. 6) Those matters would greatly delay the already elongated trial timetable. 7) To refuse the amendment would not be unfairly prejudicial to TC17. He had more than ample opportunity to clarify the matters in this amendment, including the period	7) as before.	Mr Fetto Q. So was this work for the benefit of the community? A. Yes, but it was part of the punishment because I was not being paid. If you didn't work, the sub-chief would take you back for detention. It was not voluntary…" (ii) This evidence supports paragraph 66 IPOC as at present pleaded. Paragraph 64 and 65 plead that the village was guarded by the Home Guards at the entrance to the village and that entry and exit to the village was restricted. (iii) The proposed amendment is said to be based on documents. Insofar as those documents support the present pleaded

			spent at Gachuko, in his Part 18 responses, witness statements, and before the conclusion of his oral evidence, given on 21 June 2016. The delay in seeking to amend has not been explained. TC17 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.		**case, the Claimants can rely upon them. However the proposed further amendments alleging that conditions of curfew and detention continued and "unsavoury elements" were required to attend roll calls and be subjected to visits by the Kikuyu Guard and police patrols has not been pleaded and has not been the subject of investigation by the Defendant and/or cross-examination. These allegations are therefore new.** **(iv) As to the allegation that "It is probable that the Claimant remained under such conditions until the end of the Emergency", there is nothing in**

					paragraphs 64-66 of the IPOC which is inconsistent with this. However in the Part 18 response to paragraph 66 it is said "The Claimant states he believes he carried out this kind of work for around 6 months". As the Defendant accepts, in re-examination he said he undertook unpaid work in the village for "About 2 years". **(v) As to all the amendments under paragraph 66, I accept the Defendant's points numbered 1, 5, 6 and that the Defendant would need the opportunity for further cross-examination of TC17 informed by further documentary research.**

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
19 – James Irungu Gathunga	7	The Claimant was forcibly removed from Bahati, Nairobi, where he was living with his brother, Kafage Gathungu. It is probable that the Claimant was picked up in one of the Nairobi sweeps that followed Operation Anvil in April 1954.	**No.** **1) This amendment is not clearly expressed, but, from reading this paragraph together with the proposed amendments to §§22 and 26 (which need to be considered with it) it appears that Cs now propose to allege that the removal was in or about September 1954.** **2) That is highly significant in that it seeks to place the entirety of TC19's allegations beyond the June 1954 limitation cut-off date.** **3) TC19's current pleaded case is that he was removed 'in or around 1954 and on a Saturday morning', in circumstances suggestive of Operation Anvil. Operation Anvil commenced on Saturday 24 April 1954. Cs' pleaded case has for years therefore been strongly consistent with Anvil pickup. His witness evidence is to similar effect.** **4) In its Pt18 request in early 2015 D requested further particulars of the date**	Pursued. 1) He gives the year at §8 as "In or around 1954". Reference to being forcibly removed from Bahati clearly indicates Anvil; timing is a matter of submission as to the documentation as a whole; clarification given is within the year. Amendment is within the scope of the draft judgment. No prejudice. 2) It is not highly significant. C has never put any of his case as being before June 1954. 3) It is astonishing that D relies on a description of operation Anvil, whilst adopting a wholly different stance to TC14. D is invited to reflect on the inconsistency. Nor is Anvil limited to	**Refused.** **(i) It is true that the IPOC at paragraph 8 gives the date "In or around 1954". The Part 18 Request asked "What day, month and/or season did the forced removal occur?" The response was "The Claimant confirms it was a Saturday, but he is unable to give further details of the day, month or season."** **(ii) That therefore was the state of the pleaded case and the Defendant was entitled to rely upon the fact that the Claimant's case could not be more specifically pleaded. See in this regard the comments of Moore-Bick LJ set out in paragraph 18(b) of the**

			of TC19's removal. D was entitled to rely upon TC19's response: 'The Claimant confirms it was a Saturday, but he is unable to give further details of the day, month or season'. **5) There is no suggestion or explanation that TC19's evidence corresponds with a post-Anvil pickup during a Nairobi 'sweep', let alone for it matching up less well with an Anvil pickup. (TC19 gave oral evidence that his brother – not TC19 – was released when first arrested, but then subsequently arrested again and detained [33-2819].)** **6) There is no evidence or explanation in support of the amendment or its timing at all.** **7) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC19 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present an important aspect of his case in his original pleadings, Part 18 responses, witness statements or oral evidence. He now invites the court to accept a different case, and D must respond.**	April. D's own documents make clear that pick ups lasted until September. 4) That is C's account 5) This is a submission. As D knows, the foundation of the date is C's account of which compound he was placed in at Manyani. 6) as before 7) as before 1) Cs disagree. C gave evidence of the compound he went into. The documents make the position clear. D has been denied nothing save the opportunity to obtain a disagreement with the documents. 2) Cs disagree. D has not identified any evidence from those witnesses which would assist. They agreed with documents. The documents support the amendment. 3) D should have done this already. Cs did	**judgment.** **(iii) All parties were aware that being picked up at Bahati was consistent with Anvil which commenced in April 1954.** **(iv) This amendment, as built upon in the amendments proposed at paragraphs 22 and 26 (below) effectively says that TC19 was picked up in a sweep following the main Anvil operation and, having spent two weeks at Langata, arrived at Manyani in or about September 1954. This is the reason for the more precise particulars in relation to paragraph 26 below.** **(v) There is, therefore, here a proposed amendment which gives precise details of a date. That date is one which had never previously been communicated to**

			As to prejudice: **1) If the amendment were allowed, D would need the opportunity for further XX of TC19 informed by further documentary research. Although he was asked about his arrest, he was not asked about details regarding the date within 1954 that his arrest might have occurred. There was no opportunity to test the new case now sought to be made.** **2) D would also need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with the credibility of TC19's new account. Recalled witnesses could include Messrs Gordon, Grounds, McKnight, Kearney and Nazer.** **3) Additional searches within the documents would anyway be necessary if the amendment were allowed, addressing the specific features and plausibility of the case now sought to be made (i.e. post-Anvil pickup, by several months, during a Nairobi 'sweep').** **4) Those matters would greatly delay the already elongated trial timetable.** **5) To refuse the amendment would not be unfairly prejudicial to TC19. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 14 July 2016.**	not specify when the TC arrived. D specifically did not admit pick up during Anvil – §12 15-23). 4) as before 5) as before	**the Defendant, despite the request for particulars in the Part 18 questions. The Defendant was entitled to rely upon this lack of precision and the fact that, prima facie, TC19's case was consistent with the main Anvil operation. The Defendant was therefore dealing with a case which was that the relevant matters occurred "In or around 1954" as to which no further precision could be given. The amendment seeks to take the whole timeline out of the main Anvil operation to a period some weeks/months later. The particular relevance of this is the effect of the limitation period in the Arnold case.** **(vi) I accept the Defendant's points as to prejudice numbered 1-5.**

			The delay in seeking to amend has not been explained. TC19 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.		**(vii)The Claimant's point number 3 about the Defendant adopting a wholly different stance to TC14 (I assume this means TC13) is not well made. The Defendant is entitled to rely on the pleadings. In any event the Court has allowed the amendment in respect of TC13 because of the particular circumstances.** **(viii) The Claimants say that nothing really turns on when TC19 was picked up and the amendment is working back from the amendments at paragraphs 22 and 26. Nevertheless, I do not allow it.**
	22	The Claimant believes he was detained at Camp twenty one (probably Compound 21).	**No.** **This proposed amendment is highly significant in that it supports a major change of case, from strong consistency with pre-June 1954 removal, detention at Langata and movement to Manyani, to a positive case that**	As above. This amendment is not significant. It equates camp 21 (which never existed) with compound 21 (which	**Refused.** **(i) This may have been allowed were it not for the significance given to this**

			all of those things happened months after June 1954. See D's objections to the proposed amendments §§7 and 26 (which need to be considered together with this proposed amendment). **Further and in any event:** **1) Cs have given no evidence or explanation for the failure to make this change/clarification at any time before or during TC19's oral evidence, given over a year ago, or even subsequently until now. No application or attempt was made to correct or amplify TC19's witness statement (§§19, 20) to this effect when he gave oral evidence.** **2) Had D known of this change and the case it was intended to support, it would have cross-examined TC19 differently; in particular it would have focussed on the strength of TC19's recollection about where he was allegedly detained at Manyani, whether he was detained at different compounds, and timings (by reference to temporal yardsticks, historical details from documents, etc). Accordingly, if the amendment were allowed, D would need the opportunity for further XX of TC19 informed by further documentary research.** **3) If this amendment were permitted, D**	did). D should have known this from the outset. Permissible submission; amendment is within the scope of the draft judgment No prejudice. 1) as above 2) there is no change. D could always have cross-examined on this issue. The timings are apparent on the documents. 3) This is fanciful. D obviously agrees that the reference *is* to compound 21; otherwise it would want to ask whether there was a place known as *Camp* 21. In any event the documents provide the answer. 4) None are specified. What does D intend to do? Why has it not yet done it? How long would it take?	**point under paragraph 26 below. However it is not merely tidying up but a proposed amendment of substance.** **(ii) The refusal of this amendment and that at paragraph 26 does not stop TC19 alleging he was in Manyani.**

			would need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with TC19's new account and its alleged significance in relation to timing, by reference to the documents (e.g. D does not know whether there may have been a place at Manyani named 'Compound 21' prior to the building of Camp 3 – see the draft amendment to §26 below). Recalled witnesses could include Mr Burt and/or Professor Kahn. **4) Additional documentary searches would also (and anyway) be necessary if this amendment were permitted, not only to support further XX of TC19 if recalled, but also to give D a fair opportunity to respond to the specific case now being put.**		
	26	~~During his detention in Manyani Camp the Claimant was randomly assaulted and beaten. On occasions the Claimant was beaten as part of a collective punishment for the actions of a single detainee.~~ The conditions in the camp were harsh and life threatening. The <u>Claimant probably arrived in Manyani in or about September 1954, having spent two weeks at Langata camp. The</u>	**No.** **See the objections to the amendments to §§7 and 22 above, which should be considered together with this proposed amendment. D's reasons for objection include the following (in summary):** **1) This is a highly significant amendment, making up a change of case which seeks to put the entirety of TC19's allegations beyond the June 1954 limitation cut-off date.** **2) The amendment and its timing are not**	Pursued. This amendment removes an allegation of random assault and collective punishment not supported by the evidence [33-2837; line 8 – 9: "I was only beaten when I was being interrogated". It is odd that D objects to it. There is no prejudice. As to the date and timeline, this is also pursued as above.	**First amendment permitted as it removes an allegation of random assault and collective punishment.** **Second amendment refused for the reasons already given above.**

		Claimant will rely on documentation in support of his claim for its full terms and effects at trial, for example: a. Compound 21 was part of Camp 3 which had not been built as of May 1954 [32-16482]; b. Camp 3 was fully functional as of September 1954 [32-23428] which coincides with the time that screening terms arrived in Manyani in September 1954; c. The Claimant was screened at Manyani and categorised as a "grey"; it is likely that this categorisation took place on or after 6 September 1954 [32-22011].	**evidenced or explained.** **3) If the amendment were allowed, D would need the opportunity for further XX of TC19 informed by further documentary research. This applies both in relation to the matters addressed above and the further allegation made here, at 26.c, that TC19 must have been screened 'grey' following the arrival of a screening team at Manyani on 6 September 1954 and not before then (a proposition not supported in terms by the document at 32-22011).** **4) D would also need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with the credibility of TC19's new account.** **5) Additional and extensive documentary searches would also (and anyway) be necessary if this amendment were permitted, not only to support further XX of TC19 if recalled, but also to give D a fair opportunity to respond to the specific case now being put.**	Permissible submission; amendment is within the scope of the draft judgment No prejudice.	
	35	From Murang'a camp the Claimant was taken to Kamaguta in or about 1956	**No.** **1) The proposed amendment changes the**	Follows from above. 1) Timeline from any given point is a matter	**Refused.** **(i) It is not known**

		which was a chief's camp.	**date of TC19's arrival at Kamaguta, contrary to his Pt18 response [15-34] and sworn oral evidence, both to the effect that he arrived there in 1957 [33-2846].** **2) The timings are of critical importance to the role/relevance of TC19's account, and to its testing.** **3) There is no evidence or explanation in support of the amendment.** **4) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC19 effectively asserts, a year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present an important aspect of his case in his original pleadings, Part 18 responses, witness statements or oral evidence. He now invites the court to accept a different case, and D must respond.** **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC19 informed by further documentary research. TC19's case would have been changed to depart from his oral evidence, without explanation.**	of permissible submission. 15-34 refers to the Amended Individual Defence, not the Part 18 response. The Part 18 response at 15-134 does refer to 1957 rather than 1956; however, D evidently searched Muranga post in 1956 and 1957 in order to plead §30a of the AID [15-34]. So, as no date for Kamaguta Chief's camp in the IPOC was given, they would or should have searched the same timescale upon a reasonable analysis. 2) D queried an earlier date in XX [33-2846] and he fairly said that he could not tell. D on notice that date not fixed. C entitled to use docs to assist. 3) as before 4) as before No prejudice. 1) No research identified. No further cross-examination required. 2) No. No evidence of what D has done, why	**the basis upon which "in or about 1956" is proposed to be pleaded.** **(ii) The Part 18 response says that TC19 arrived at Kamaguta in 1957. When he was cross-examined he was asked the year when he came to Kamaguta and he said "1957". The cross-examination continued:** **"Q. Could it have been earlier than that?** **A. I cannot tell that because I cannot remember those dates very clearly."** **A little later he seemed to confirm 1957.** **(iii) In or around 1957 does not stop the Claimants fixing the date TC19 was taken to Kamaguta as sometime late in 1956.**

			2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC19. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 14 July 2016. The delay in seeking to amend has not been explained. TC19 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.**	more is required, what it would be and how long it would take. 3) as before 4) as before.	
	39	The Claimant witnessed people being shot by the home guards for no apparent reason or for failing to stop when running away. During his detention in Kamaguta camp the Claimant was assaulted and beaten.	**No.** **1) If this goes no further than the allegations already pleaded at §37,[1] relating to assault and battery when working off site during detention at Kamaguta, it is otiose.** **2) If – as appears to be the case – it seeks**	Pursued. 1) It goes further 2) It is in accordance with evidence [33-2849 – 33-2853], which founds a submission; a. It arises out of the same facts. TC explains that the Chief's camp (referred	**Amendment refused.** **(i) IPOC paragraph 37 alleges that the Claimant was beaten at various times whilst working. He was beaten by various Home Guards with sticks and**

[1] §37 states (so far as relevant): 'Each morning detainees were taken to work elsewhere… The Claimant was beaten at various times whilst working. He was beaten by various Home Guards with sticks and pangas…'

			to go further, it is a fresh claim of assault and battery. **a. It does not arise out of the same facts or substantially the same facts as a claim in respect of which TC19 has already claimed a remedy in the proceedings. He has made no prior allegation amounting or approximating to assault and battery at Kamaguta other than when taken off site for work.** **b. Further, and in any event:** **i. D did not have the opportunity to XX TC19 regarding allegations of assault at Kamaguta, allegations of assault being restricted to other locations.** **ii. Without prejudice to D's general submission that the amendments should be refused because made without instructions, and that statements of truth should not be**	to in his claim) is a post. This founds a submission regarding translation, which is not the TC's fault. He clarified in his evidence that there were two camps, the chief's camp and a detention camp. In the Kikuyu, what has been translated by one translator as chief's camp can also be translated as "office". The words "Kamaguta Chief's camp" could equally be "Chiefs office". §39 is amended in accordance with his evidence that he was also beaten during detention and not just while working. b. i. D could have asked whatever questions it wished once the issue became clear, as it did in evidence. ii. It arises from C's evidence. iii. As before iv. as before v. as before	**pangas. Paragraph 38 says that while clearing bushes he was beaten by Home Guards resulting in his hand being cut. At present there is no further allegation of violence against this TC at Kamaguta.** **(ii) In his oral evidence TC19 explained (33-2949) that "Kamaguta was a detention camp and there was a different camp, a chief's camp." It appears, as the Claimants say, that there was a translation issue. However, it is not clear the basis of saying that paragraph 39 "Is amended in accordance with his evidence that he was also beaten during detention and not just while working."** **(iii) Absent clear sworn evidence from TC19 on this point, the amendment must be refused. As the Defendant says, this is particularly the case where there is no statement of truth as to the amendment from the Claimant**

			dispensed with, this is manifestly not a proper pleading to make in the absence of direct instructions (if that is the case here). There are no allegations of assault at Kamaguta in the witness statements, Part 18 responses or in oral evidence. As such, the Court should not allow the Claimant to make this new allegation without the benefit of a properly signed statement of truth, affirming that TC19 (not just his lawyers) believes the new allegation to be true. **iii. If the amendment were allowed, D would need the opportunity for further XX of TC19 informed by further documentary research.** **iv. Additional searches within the documents would anyway be necessary if the amendment were allowed, addressing the**		**himself.**

			specific features and plausibility of the case now sought to be made. **v. To refuse the amendment would not be unfairly prejudicial to TC19. He had more than ample opportunity to set out his allegations in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 14 July 2016. The delay in seeking to amend has not been explained. TC19 can pursue the case previously advanced on the existing pleading/ evidence, insofar as it is proper for him to do so.**		

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
20 – Elizabeth Wangui Waithaka	13	The villagers were detained at Thuita Village. Upon the Claimant's arrival, there were no houses. They had not yet been built. The Claimant's arrival was probably in or after 1955. She will rely on the documentation for its full terms and effects for example, regarding the progress of villagisation in Fort Hall in 1955 [32-29589; 32-29332 and 32-82524].	**No.** **The amendment changes the date of pleaded allegations.** **1) The Claimant alleged at §7 that she was ordered out of her home at Magengo "shortly after the commencement of the State of Emergency". She then alleges she resided at Gikondo for around one year before being forcibly removed to Thuita village. This places TC20's forced removal towards the end of 1953.** **2) In addition, the Schedule of Loss pleaded that TC20 was first forced to work in 1952. She now seeks to amend this aspect of her claim to plead that such work began in 1954.** **3) As such, the amendment changes the date of allegations made.**	Pursued. 1) The timeline starts at §7 with "shortly after the State of Emergency"; the events at §8 in Majengo are a matter of submission - it will be submitted that this is likely to be one of the Anvil – raids [this is not a matter of pleading as C can say no more than is currently pleaded]; specific documentation assists her in terms of her removal to Thuita village which is clearly in the course of villagisation. Permissible amendment in accordance with draft judgment. 2) This assists D. It is unclear why it objects. 3) Cs disagree. No prejudice. 1) D did not cross-examine as to dates at all. If dates were important D could always have made the enquiry. It is illogical to assert that dates are only important if C herself	**Refused.** **(i) This amendment is not permissible in accordance with the draft judgment. The proper analysis of the pleadings so far is:** **a. The Claimant's neighbourhood was raided shortly after the commencement of the state of the Emergency, and then she lived in her home village in Gikonda for around 1 year before she was forcibly removed from there. (Paragraph 7 & 8 IPOC).** **(ii) The commencement of the state of the Emergency was October 1952. Therefore this gives the date of the forcible removal from Gikonda as towards the end of 1953.** **(iii) The amendment sought to paragraph 13 deals with the date of detention at**

			As to prejudice: **1) D has not had the opportunity to XX TC 20 in respect of these revised dates. If the amendment were allowed, D would need the opportunity for further XX of TC 20.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed in order to draft defences. The original searches are of limited usefulness. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. D would need to search for documents to support TC 20's original case and evidence that she moved to Thuita village in 1952/1953.** **3) This would delay the already elongated trial**	provides them. 2) as before 3) as before 4) as before 5) This is a submission. D can make it in due course.	**Thuita village. On the present pleadings this is said, by clear analysis of paragraphs 7 & 8 of the IPOC, to be about the end of 1953. This is in excess of 1 year prior to the proposed amendment of "probably in or after 1955".** **(iv) The fact that no specific date is stated on the IPOC does not detract from what the pleading says. Even allowing for latitude because of estimation of dates, late in 1953 cannot mean sometime "in or after 1955".** **(v) The commencement date of the claim under the schedule of loss is "around 1952". This gives a date even earlier than that which arises on the basis of the present pleadings.**

			timetable. **4) To refuse the amendment would not be unfairly prejudicial to TC 20. She had more than ample opportunity to set out her allegations of assault in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 1 July 2016. The delay in seeking to amend has not been explained. TC 20 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.** **5) In any event, the documents do not support the allegation that TC20 was placed in a village under a policy of villagisation in or after 1955. [32-29589] dated in February 1955 makes clear that a substantial number of villages had been built in Fort Hall by**	1) §13 Defence says D has conducted reasonable research. Presumably that was without reference to date as none is pleaded. It is unclear how a need for a fresh search arises. At §16g, D alleges a Thuita Village existed in 1952. That provided a basis for cross-examination on dates. There was no such cross-examination. 2) D did not put its own case. However, it can still rely on the documents in submissions. 3) Cs see no practical impact and D has not advanced any.	**(vi) The Defendant made a Part 18 Request in respect of "shortly after the commencement of the state of Emergency" in paragraph 7 of the IPOC, to which the Claimant said that she could not remember what day/month/season or year it took place.** **(vii) The fact that the Defendant did not cross-examine as to dates does not suggest dates were unimportant to the Defendant. Rather it suggests that they were content with the dates which were apparent on analysis from the above paragraphs.** **(viii) The Court accepts the Defendant's points as to prejudice numbered 1-3 and repeats points (iv)-(vi) and (viii)-(xi) in respect of TC14.**

			that date. Even this were not a change of pleaded date case: 1) The Defendant will still be obliged to undertake fresh searches of documents in order to draft Defences. 2) Allowing the amendment means that D for good reason did not ask what are now necessary questions of TC20 as to the date of the events. D has relied upon the lack of direct evidence as to the date of alleged incidents and the pleaded case. 3) Even if the Claimants were to be debarred from making any such complaint, it would not change the fact that TC20 was advancing a positive case as to the dates of certain events that D has not been able properly to test. The potential practical impact of that upon the Court's view of the evidence would be unknown but potentially profound.		

	23	The Claimant was detained at Githanga village for around 2 years. The living and working conditions were similar to those experiences at Thuita village including, for the avoidance of doubt, physical assaults while working.	**No.** **This is a fresh pleading of assault and not a clarification.** **It does not arise out of the same facts or substantially the same facts as a claim in respect of which TC20 has already claimed a remedy in the proceedings. She has made no prior allegation amounting or approximating to assault and battery at Githanga. In any event:** **1) D did not have the opportunity to XX TC20 regarding allegations of assault at Githanga, allegations of assault being restricted to her time at Thuita.** **2) Without prejudice to D's general submission that the amendments should be refused because made without instructions, and that statements of truth should not be dispensed with, this is manifestly not a proper pleading to make in the absence of direct instructions (if that is the case here). There are no allegations of assault at Githanga in the witness statements, Part 18 responses or in oral evidence. As such, the Court should not allow the Claimant to make this**	Pursued. It arises out of the same facts. The original IPOC pleads that Githanga was similar to Thuita. In her witness statement [16-140 §19] the same is said. D had opportunity to ask in Part 18 questions in what ways Thuita and Githanga were similar. In oral evidence C says she was detained at both and that they were like camps and if you sneaked out to get food you were beaten [33-1975-6]. She was later asked why she went to her brother in Gitambaya and she replied *"I was seeking greener pastures because at Githanga it was becoming chaotic, all the beatings …"* [33-1984]. As that was said in answer to a question in cross-examination, D cannot object and it is inaccurate to say C made no allegation prior to amendment. 1) D had every opportunity but did not cross-examine in fact. No prejudice. 2) This is simply incorrect. In cross-examination C said, *"we used to sneak out and once you are caught they would come and punish you"*. In re-examination she	**Allowed.** **(i) In relation to Thuita village, TC20 set out working conditions in paragraphs 16-18 including generally in paragraph 16 and more specifically in paragraph 18 the fact that whilst she was working she was subjected to repeated physical assault.** **(ii) In paragraph 23, in relation to Githanga village, reference is made to working conditions being similar to those experienced at Thuita village. The question is whether this is sufficient pleading that assaults took place at Githanga as at Thuita.** **(iii) In the context of those paragraphs and of the pleading as a whole (see for example paragraph 42 of the IPOC where reference is made to "The Claimant was physically assaulted on**

			new allegation without the benefit of a properly signed statement of truth, affirming that TC20 (not just her lawyers) believes the new allegation to be true. **3) To refuse the amendment would not be unfairly prejudicial to TC20. She had more than ample opportunity to set out his allegations in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 14 July 2016. The delay in seeking to amend has not been explained. TC20 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.**	confirmed that she mentioned being beaten at Githanga to the doctors: [Professor Mezey: 16-197 §49] [33-1993]. 3) as before	**numerous occasions during forced labour") "working conditions" could possibly be taken to include the physical beatings. However, it is points (iv)-(vi) below which really permit the amendment.** **(iv) Also this was specifically stated at paragraph 49 of Professor Mezey's report where she states "Mrs Waithaka said that there were frequent beatings at Githanga, as at Thuita. She was beaten on several occasions;** **(v) There is no problem in this instance in relation to the statement of truth since the Claimant specifically said in cross-examination:** **"While in this camp (i.e. Githanga), it was a camp just like Thuita…we used to sneak out and once you are caught they would come and punish you because you are**

					supposed to work…" (33-1975/6). See also at 33-1984 where she said "I was running away from the chaos that were happening at Githanga, the beatings." See also 33-1985. (vi) I do not accept there is any prejudice arising out of this amendment. The Defendant did ask questions which elicited responses that she had been assaulted at Githanga and could have explored them at that stage. It is also very questionable as to whether the Claimant could say any more of assistance.
	44	The Claimant relies upon paragraphs 45 ~~to 46C (d)~~ and 46A, 46B and 46D of the Re-reamended Generic Claim…		D has confirmed that there is no objection.	**Allowed as agreed.**
	Schedule 3	"…between around ~~1952~~ 1954 through to the end of the State of Emergency [1960], an approximate period of ~~8~~ 6 years…"	**No. See objection above to paragraph 13 amendment.**	Amendment follows if §13 permitted.	**Refused as paragraph 13 has been refused.**

	13	The Claimant was detained at Gitura Village from ~~1953~~ no earlier than June 1954 to 1960.	**No. Not agreed for the reasons given in relation to paragraph 11, above.**	As above	**Refused as above.**
	Schedule 3	…the Claimant claims	No – see objection to paragraph 11	As above	

		remuneration for the periodic work he was forced to undertake between around ~~1953~~ 1954	above.		Refused as above.

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
23 – Wagicuhugu Njuki	General objection	All	**No.** **The amendments as a whole render TC23's claim hopeless. They amount to a substantial reordering and re-dating of events, including some new place-names, and new allegations. These amendments are:** **(a) Substantially different from what was originally pleaded;** **(b) Only in part based upon TC23's evidence;** **(c) It is presumed (in common with other amendments) made without instructions from TC23 (if that is the case here);** **(d) Are an attempt by TC23's lawyers to 'piece together' a case based in part upon her evidence and in part supposition as to what her evidence should have been.** **Taken together, the amendments should not be**	`	**5) Each amendment will be dealt with separately on its merits.** **6) Nevertheless all the amendments are refused. The Claimant's lawyers have done their very best to make a coherent whole out of TC23's evidence.** **Nevertheless the proposed amendments change her presently pleaded case in terms of time, 2 periods (not one) of detention in Kianyaga, pleading Kiamwathi (Gatutu) as a place of detention, pleading Kiberi as a place of detention and pleading Kiamwathi as a punitive village when TC23's evidence was that the sharpened sticks etc were at Kiberi.** **7) TC23's evidence on oath was not crystal clear and it would in this case in particular be difficult**

			permitted. **1) They substantially change the timings of the events alleged, contrary to TC23's sworn oral and written evidence, which itself conflicts in large part.** **2) The timings are of critical importance to limitation, to the role/relevance of TC23's account, and to its testing.** **3) It also adds significantly to the circumstances/context of TC23's alleged 'detention' at various locations.** **4) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC16 effectively asserts, a year following her oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, she could not accurately present**		**to dispense with the statement of truth in these circumstances i.e. where the amendments are based on the lawyers' interpretation of her evidence.** **8) As to prejudice** • **The Claimants say the amendments do not affect the cause of action.** • **I accept the Defendant's points pleaded on this schedule.** • **Cross-examination would be materially different if the Defendant was seeking to challenge this new case.** • **There was no cross-examination on the unpleaded allegation of punitive village.** • **Document searches would have to be re-done in respect of new locations and timings.** **This would be too**

			critical aspects of his case in her original pleadings, Pt18 responses, witness statement or oral evidence. She now invites the court to accept a contradictory case, and D must respond. **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC 23 informed by further documentary research. XX was governed by the case she put in pleading and written evidence, a case that changed markedly in oral evidence. TC23 now attempts to piece the evidence together to fit a new case that D has not had the proper opportunity to test.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two**		**disproportionate and disruptive to the timetable.** • **The overriding objective is clearly in favour of disallowing these amendments.**

			rival accounts. **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC23. She had more than ample opportunity to clarify the date of her removal in her original pleadings, Part 18 responses, witness statement and supplemental statement. The delay in seeking to amend has not been explained. TC23 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.** **Without prejudice to this general contention, D attempts to respond to the individual amendments below.**		
	7 e.	a. Fifth oath: at home in Kiamwathi, Gatuu; after which she moved to a place of detention near to Kiamwathi, which she describes in her evidence	**No, in part.** **This is a substantive change of location, from a Chief's camp to a punitive village.** **1) D has not had the opportunity to XX**	As above. The amendment follows the evidence; seeks to assist by clarification. Permissible submission. 1) The amendment	**As above.**

		as being a camp in Kibeeri; this was when the houses in her homestead were burnt [33-2177]; when she arrived there, she had to build somewhere to live as it was unfinished, this probably reflects the development of a punitive village at Kiamwathi associated with a nearby detention camp; The documentations supports the development of a punitive village in Kiamwathi by November 1944 [31-40586 and 32-39404].	**TC 23 in respect of this revised allegation. If the amendment were allowed, D would need the opportunity for further XX of TC 23.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed in order to draft defences. The original searches are of limited usefulness. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. D may wish to search for documents to support TC 23's original case and evidence that she was detained at a Chief's post.** **3) This would delay the already elongated trial**	derives from the evidence and the references have been given. 2) See above. D has done the searches required. That is confirmed in the Defence and the evidence. If D is to attempt to disavow its own evidence and pleadings it should provide evidence from someone with overall control of the case. It is noteworthy that only relatively junior people had given evidence of how searches are carried out. 3) as before 4) as before	

			timetable. **4) To refuse the amendment would not be unfairly prejudicial to TC 23. She had more than ample opportunity to set out her allegations of assault in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 27 June 2016. The delay in seeking to amend has not been explained. TC 23 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.**		
	7 h-i	b. It was while she was in detention, probably in a punitive village in or around Kiamwathi that she was involved with an incident with a home guard, which lead to her being taken to court [32-	No. See objections to amendment to paragraph … below.	As above and see below.	As above.

		2177/33-2178]; from where she was taken to Gathigiriri and sentenced to 3 years detention for cooking food for the Mau Mau [33-2177]; having spent 14 days in detention at Kianyaga [33-2204]; c. On another occasion (separate and probably previous to the occasion when she was in Kianyaga prior to being sent to Gathigiriri) she had spent 9 months in detention in Kianyaga for taking food to the Mau Mau; she had been allocated a hut when in detention in Kianyaga [33-2206];			
	7	d. In view of the evidence that it was one year between the 5th and 6th oath, it is more likely that she was in conditions of detention for one year, rather than one week at Kibeeri [33-2177], before the incident that lead to her being sentenced to detention at Gathigiriri; it is probable that she was in a punitive village at Kiamwathi and taken to court in Kianyaga when accused of Mau Mau	**No.** **This amendments alters the timings of events not only from the original pleading, but also from her evidence. It amounts to the lawyers attempting to 'piece together' a case without taking any instructions from the client (if that is the case here).** **1) Without prejudice to D's general submission that the amendments should be refused because**	As above. C has provided information so as to assist. The issue of instructions is a red herring because this is essentially a (valid) submission on the evidence; amendment is to assist by way of clarification. 1) It is unhelpful for D to approach matters in this way. Cs aver that D could not reasonably object to this submission	**As above.**

		related activity; e. The incident that lead to her detention in Gathigiriri is probably the incident where she was attempted to help a Home Guard and the Mau Mau attacked and hanged him [33-2188 - 2189]' f. She is likely to have been in Gathigiriri after April 1955 as that is when the camp opened. g. She was 6 months in Gathigiriri and was then camp up in front of another committee which led to her release [33-2203] h. She was detained a total of 5 years, during which she sent work, the hardest work amounting to about 2 years in total [33-2212/33-2213]; i. The very bad punishment happened at Kiamwathi [33-2212] and there was a curfew at Kiamwathi [33-2211] j. It is probable that the Claimant was returned to conditions of restriction and detention when released from Gathigiriri until the end of the Emergency.	**made without instructions, and that statements of truth should not be dispensed with, this is manifestly not a proper pleading to make in the absence of direct instructions (if that is the case here). Timings are of critical importance to the litigation. As such, the Court should not allow the Claimant to amend timings contrary to the existing pleadings and evidence without the benefit of a properly signed statement of truth, affirming that TC23 (not just her lawyers) believes the new allegation to be true.** **2) To refuse the amendment would not be unfairly prejudicial to TC23. She had more than ample opportunity to set out his allegations in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 14 July 2016. The delay in seeking to**	being made because it is supported by the evidence, D's own pleading and the documents. That does not mean the court has to accept it or that D cannot make a rival submission. However, if D is correct it would be able to *prevent* the submission. If not, the objection is merely semantics. If D is really saying that it could object to a submission (never previously argued) then C would be grateful for one of D's (now famous) Speaking Notes setting out the basis of the submission and the authorities relied on. 2) as before.	

			amend has not been explained. TC23 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.		
	7 k	k. The incident that lead to her detention in Gathigiriri is probably the incident where she was attempted to help a Home Guard and the Mau Mau attacked and hanged him [33-2188 - 2189]'	**No – there is an additional specific objection to k. This is an entirely new allegation not previously pleaded. It is unclear to what extent it supports a cause of action, but to the extent it does, it should not be permitted. If the amendment were allowed, D would need the opportunity for further XX of TC23 informed by further documentary research.** **In any event, the amended paragraph is entirely speculative and there is no evidence these incidents were linked. Without prejudice to D's general submission that the amendments should be refused because made without instructions, and that statements of truth should not be dispensed with, this is manifestly not a proper pleading to make in the absence of direct instructions (if that is the case here). TC23 herself was unable to link the two events in the witness**	This is a submission designed to assist. As Gathigiri did not open until April 1955 it is a proper submission based on the order of events and the dates that can be ascertained from documents. The original pleading gave no date. Submissions need no statement of truth. Cs repeat what has been said above.	**As above.**

			statements, Part 18 responses or in oral evidence. As such, the Court should not allow the Claimant to make this new allegation without the benefit of a properly signed statement of truth, affirming that TC23 (not just his lawyers) believes the new allegation to be true.		
	8	In or around 1955, the Claimant was living in a group of 15 homesteads in Kiamwathi, which is in Gatuu; she was forcibly removed from her home in Gatuu, Kiamwathi. It is probable that she was removed to conditions of detention in some form of punitive village in what the Claimant understood to be a camp. The Claimant will refer to documents for their documents for their full terms and effects at trial, for example those concerning the process of villigisation in Nyeri, [32-17241] concerning the village projects actually in progress as of May 1954 and regarding the control of villages in by April 1955 [32-29332].	**No – see objection to §7e. above**	As above.	**As above.**
	15	The Claimant was ordered to sharpen stakes to insert inside the trench. This is probably describing the development of a punitive village near her former homestead at Kiamwathi, associated with the chief's camp. This ensured that	**No – see objection to §7e. above**	The fact of this being a punitive village is entirely consistent with the evidence of villagisation. The venue is one for which D has already searched and found reference to	**As above.**

		anyone who tried to escape would suffer serious or fatal injury.		villages.	
	22	During her time spent in the village camp, the Claimant was ordered to attend the local Court. On once occasion she was required to remain in detention at Kianyaga Camp for 9 months having supplied the Mau Mau fighters in the forest with food. On another, probably later, occasion, she ~~She had been accused of being a Mau Mau sympathiser~~ was implicated in a serious incident where a Home Guard was killed by Mau Mau.	**No, in part – see objection to §7k. above**	As above.	**As above.**
	25	~~The Claimant was charged with supplying the Mau Mau fighters in the forest with food.~~ She was sentenced to detention at Gathigiriri camp. It is probable that the sentencing took place towards the end of 1955 or beginning of 1956.	No. This amounts to additional particularisation of date that TC23 was unable to give in evidence or answers to Part 18 questions. Were the amendment allowed: **1) D would need the opportunity for further XX of TC23 informed by further documentary research now that a date is specified.** **2) D would also need the opportunity to re-re-consider its searches for witnesses. With more accurate dates, there may be witnesses potentially**	As above and this is consistent with the opening of the camp. 1) See above 2) without evidence of which witnesses D rejected it is impossible to assess whether this is accurate or not. D should supply details and witness statements of all witnesses not called which it asserts may assist with this issue.	**As above.**

			able to assist with the credibility of TC23's new account whom D has not obtained the assistance of. **3) Additional searches within the documents would anyway be necessary if the amendment were allowed, addressing the narrower dates now pleaded.** **4) Those matters would greatly delay the already elongated trial timetable.** **5) To refuse the amendment would not be unfairly prejudicial to TC23. She had more than ample opportunity to clarify the date of her removal in her original pleadings, Part 18 responses, witness evidence, and before the conclusion of her oral evidence, given on 27 June 2016. The delay in seeking to amend has not been explained. TC19 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.**	3) see above 4) see above 5) see above	

	40	The Claimant was unable to carry on her normal family life with her husband, work for pay and private life in these circumstances. It is probably that she returned to her home district, Kiamwathi in Gatuu, after release from Gathigiriri where she would have remained under conditions of restriction and detention and required to do forced labour until the end of the Emergency.	**No.** **This amounts to a wholly new allegations based upon speculation by TC23's lawyers and not her instructions (if that is the case here). TC23 did not allege that she returned to the Chief's post (as was originally pleaded) after her alleged detention at Gathigiriri.** **1) D has not had the opportunity to XX TC 23 in respect of this new allegation that. If the amendment were allowed, D would need the opportunity for further XX of TC 23.** **2) Additional searches within the documents would anyway be necessary if the amendment were allowed in order to draft defences. Fresh searches would have to be undertaken in respect of TC23's return from**	C has always pleaded forcible removal in 1955 (§8). She was cross-examined about her detention in total and said 5 years [33-2212]. Therefore, she was villagised/detained until 1959, as pleaded in §7p of the re-amended IPOC. 1) At 33-2203 she starts to talk about release from Gathigiri but D did not pursue the point. Moreover, the 5th oath was taken at home in Gatutu [33-2176], the 6th oath was taken a year later in detention in Kibeeri [33-2179] and the 7th oath was taken in Gatutu [33-2184]. That provides a proper evidential basis for the amendment, and D could always have challenged it. 2) D has already searched from 1954 to 1960 and expressly pleaded it.	**Amendment refused.** **(i) In her witness statement the Claimant said she did not remember which year she was forcibly removed "because I was not learned".** **(ii) However it has always been pleaded in paragraph 8 of the IPOC that she was forcibly removed in or around 1955.** **(iii) Her individual preliminary schedule of loss, paragraph 3, claimed remuneration for the periodic work she was forced to undertake "between 1955 through to the end of the state of the Emergency (1960), an approximate period of 5 years as set out above."** **(iv) When she was cross-examined about the work she carried out for 5 years she said (33-2212) "…all the camps I was in, there was a total of 5 years, not 1 specific camp or area."** **(v) At 33-2176 she said she took the fifth oath at home at Gatuu and immediately after that they shifted her home to Kibeeri.** **(vi) At 33-2719 she said she was in a detention camp**

			Gathigiriri. **3) This would delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 23. She had more than ample opportunity to set out her allegations of assault in her original pleadings, Part 18 responses, first and second statements, and before the conclusion of her oral evidence, given on 27 June 2016. The delay in seeking to amend has not been explained. TC 23 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for her to do so.**	3) as above 4) as above	**in Kibeeri when she took the sixth oath. She had earlier said that she took the sixth oath about the year after she took the fifth oath.** **(vii) At 33-2183/4 she said she took the seventh oath in the village of Gatuu. She said this was about 6 months after taking the sixth oath.** **(viii) However, TC23 has never said that she returned to her home district after release from Gathigiri under conditions of detention. Nor is there any proper evidential basis from her oral evidence as summarised above for making this allegation.** **(ix) This is a wholly new allegation.**

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
24 – Magondu Mathumba	9	In around 1953/1954 and probably no earlier than June 1954, Home Guards came to Kabare and forced the Claimant out of his house and into a group with other people. The Home Guards were in uniform and armed with spears/arrows in order to intimidate and then threaten the Claimant and his neighbours. The Claimant will rely on documentation for its full terms and effects in support of his claim, for example, as to the progress of village development in Embu District, Central Province.	**No.** **1) This amendment seeks to place the entirety of TC24's allegations beyond the June 1954 limitation cut-off date.** **2) TC24 gave evidence in accordance with the existing pleading and his witness statement that he was removed in 1953-1954. He confirmed these dates in his oral evidence.** **3) D has not had the opportunity to XX TC24 on the revised alleged date. D was entitled to assume that TC 24 would not be advancing a more specific case as to dates, especially given his Pt18 response to the effect that removal took place in 1954 but he could not remember anything beyond the year, and his subsequent witness statement (confirmed by him in his oral evidence**	Pursued. 1) Permissible amendment. Even if D only searched by date, contrary to the evidence, this is within existing range of dates. D specifically pleads a search for Kabare which located a village of that name in 1955/6 so it has unquestionably searched for the date. 2) A range is given in the IPOC [§9 20-2]; TC 24 himself cannot give greater specificity than he has already provided [see Pt 18 – 20-68 and 20-69; w/st §6 – 20-111]; he is clear that he was sacked in 1955 and paid until then [33-2374-5]. D does not advance any case that he was likely to have been paid for a long time – it would be surprising were it otherwise because he was sacked *because* he was said to be Mau Mau [33-2376]. That itself suggests he was rounded up towards the end of the period he provides. The clarification of dates is based on the progress of villagisation in the area.	**Amendment allowed.** **(i) The IPOC pleads that the Claimant was forcibly removed "In around 1953/1954". The TC's witness statement is to similar effect. In the Part 18 Response under paragraph 9 IPOC it is said "The Claimant cannot recall the exact day/month or season but the Claimant believes it was in 1954."** **(ii) This is a similar amendment to that in respect of TC1 and TC30 – see paragraph 31 of the April 2017 judgment.** **(iii) The amendment is clear, namely that the probabilities are that the removal was "no earlier than June 1954." The Defendant has the Claimants' document list for**

			without amendment) which reverted to the pleaded formulation of 1953-1954. In oral evidence, he stated that he was dismissed from his employment in 1955 and that he had remained in employment, after being removed to the village, for one or two years [33-2375, lines 6-13]. He could not remember when in 1955 he had been dismissed [33-2373, lines 22-25]. **4) On TC24's own case and evidence until this amendment was served on 21 July 2017, he was advancing a case that his removal took place at an unknown point during the years 1953 or 1954, and no more specific case than that.** **5) There is no evidence or explanation in support of the amendment or its timing at all.**	3) There is no revised date. There is a more specific date, presaging the submission in order to assist. 4) Precisely so. D now has additional information. Again, the implicit argument is that the *submission* should be disallowed. 5) as before 6) D already has the documents about villagisation in Embu and it has pleaded Kabare for itself. That has not been specified either, which is ironic in light of this complaint (and, of course, D has had the document list for this TC). 7) as above. This is a submission.	**this TC.** **(iv) The Defendant says it would have cross-examined further on a more specific pleading of "probably no earlier than June 1954"; also that this was a Claimant who could give some evidence as to dates (i.e. he said he lost his job in 1955). Nevertheless, on the pleading as it stands it would be open to the court to find that the date was no earlier than June 1954. The Defendant can make the point in submissions that TC24 was not asked about this because of the state of the pleading. The overriding objective is in favour of allowing this amendment.** **(v) In respect of documents I repeat point (ix) in respect of TC5 above. Further, the Defendant has**

			6) The "*documentation*" referred to in the proposed amendment has not been specified; the evidential basis for the amendment is entirely unclear. **7) The amendment in any event embarrassing as it is wholly uncertain as to the case being advanced. TC24 now seeks to aver that he was removed "*In around 1953/1954 and probably no earlier than June 1954.*" It is not clear if TC24 is (now) only asserting that he was removed in the second half of 1954, or if given the reference to 1953 has not been deleted he maintains some sort of case that he was removed in 1953, or indeed given that the words "*no earlier than June 1954*" are not apparently limited if he is seeking to assert some later date beyond the end of 1954.** **8) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC24 effectively asserts, a**	8) as above 1) D cross-examined about dates. C did the best he could. Nor does it appear there is any "new" documentation required. D has not specified what it is, why it has not yet been found, what is being sought, how long it would take or when it will be done. 2) If D has such documents, then it could have cross-	**already undertaken relevant documentary searches for 1953 and 1954. The Defendant says it will have to do fresh searches but I do not accept, in the circumstances, that any narrowed search will be such as to add significantly or disproportionately to the time or resources in this case.**

			year following his oral evidence and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present an important aspect of his case in his original pleadings, Part 18 responses, witness statements or oral evidence. He now invites the court to accept a different case, and D must respond. **As to prejudice:** **1) If the amendment were allowed, D would need the opportunity for further XX of TC24 informed by further documentary research. D was unaware when TC24 gave evidence that he would, a year later, seek to argue his case on the basis that the removal had taken place no earlier than June 1954, rather than at an unspecified point in 1953 or 1954. There was no opportunity to test the new case now sought to be made.** **2) If D had known that TC24 was going positively to assert that his removal**	examined on the existing timeframe. Given that D had the opportunity in cross-examination to move the event *beyond* the 1954 time bar, it is surprising it did not do so. There is no explanation for this. 3) That is a matter for D. It made it's choice. The documents suggest that the choice was a poor one. The solution is not to recall C. D had the documents before cross-examination – it could always have asked the questions its extensive preparation indicated should be asked. It chose not to try and ascertain the date, despite the documents it now says it has from 1953 (see paragraph above). Again, there is no indication of what further research would have been done. D's evidence is that every search based on name and location has been run 3 times. What else is D planning on doing? There is no evidence.	

			had taken place "*no earlier than June 1954*", then the TC24 would have been cross-examined differently as to date. D could for example have cross-examined TC24 by reference to temporal yardsticks such as events in Embu District in 1953 and 1954, as indicated by the documents. **3) D may fairly take the view that it need not XX in any great detail upon the date of alleged events – the uncertainty is a matter that goes to show that the Court cannot fairly reach a conclusion. If, on the other hand, a TC specifies a date within a pleading, D may well take a very different view as to what questions need to be asked. That is precisely the case here. D did not ask detailed questions of TC 24 about the precise date upon which he was removed, both because of the uncertainty and because the allegations on their face and as set out in his evidence (i.e. "1953-1954") were likely to have pre-dated June 1954. Had TC24 specified previously that his case was that his removal had occurred not**	4) Cs can find no evidence where the TC says he was removed in early 1954. 5) as before 6) as before. What searches? 7) as before	

			earlier than June 1954, further research would have been undertaken and questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date rather than relying upon the existing pleading and the lack of evidence as to relevant dates. **4) Allowing the amendment would mean that D had for good reason not asked what are now necessary questions of TC24 as to the dates of relevant events. D has relied upon the lack of direct evidence as to the date of alleged incidents, the pleaded case and TC24's own evidence to the effect that his removal may have taken place during 1953 or early 1954.** **5) D would also need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with the credibility of TC24's new account, in particular**	8) as before	

			witnesses with experience of Embu district and/or villages. 6) **Additional searches within the archives and/or the disclosed documents would anyway be necessary if the amendment were allowed, addressing the specific features and plausibility of the case now sought to be made. The original searches are of limited usefulness. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts.** 7) **Those matters would greatly delay the already elongated trial timetable.** 8) **To refuse the amendment would not be unfairly prejudicial to TC24. He had more than ample opportunity to clarify the date of his removal in his original pleadings, Part 18 responses, witness evidence, and before the conclusion of his oral evidence, given on 30 June 2016. The delay in seeking to amend has not been**		

			explained. TC24 can pursue the case previously advanced on the existing pleading / evidence, insofar as it is proper for him to do so.		

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
25 – Munyi Njoki	14	As payments were instituted for information and capture after June 1954 [32-19465 and 32-16409], it is probable that he was taken to Gatugura Camp no earlier than June 1954. The Claimant will rely on documentation in support of his case and for its full terms and effects including documentary evidence regarding rewards and incentives. At Gatugura camp, the Claimant was removed from the stretcher and taken to a cell. The cell was overcrowded with approximately fifty people and in fact due to the cramped conditions the Claimant was the only detainee not standing.	**No.** **Whilst no date was pleaded, this amendment amounts to a significant change of date from that previously given by TC25 in his own evidence, and which seeks (contrary to that evidence) to place the entirety of TC25's allegations beyond the June 1954 limitation cut-off date. As TC25 died in August 2016, after giving evidence and 11 months before D had notice of the amendment, the prejudice to D arising from the amendment is irremediable.** **1) TC25's case is that he was taken to Gatugura Camp immediately after his arrest by Home Guards who interrupted a Mau Mau oathing ceremony he was conducting (IPOC §§9-14). After then spending one night at Gatugura Camp and three weeks in hospital, TC25 avers that he was then taken to a court at Embu and given a three-year prison sentence (IPOC §§16-18).** **2) TC25's period at Gatugura Camp which is now dated to *"no earlier than June 1954"* pre-dates, on his own case, the imposition of his prison**	Pursued. This is a submission. C notes that D does not object to the changing of date re taking first Mau Mau oath in 1948 rather than 1952 at §7; Any prejudice caused by C's death arises only if the Court felt he ought to be recalled. C's only other point of reference by date is after hearing about the Lari Massacre §8. D had the opportunity to ask C about dates in Pt 18 questions but did not do so [21-113]; D had the opportunity to XX TC to be more precise about dates. Given the absence of points of reference to dates, the amendment is in accordance with the draft judgment and D will have had to search for this TC over a wide time period. This is a TC legitimately assisted by the documentation and his case is clarified by way of amendment. 1) D has found Gatugura	**Refused.** **(i) No date was pleaded for when TC25 was taken to Gatugura Camp. The Claimants say that the Defendant had the opportunity to ask C about dates in the Part 18 questions but did not do so. That is incorrect. In relation to paragraph 9 of the IPOC the Defendant asked the date and received the response "The Claimant cannot remember". Paragraph 9 links into paragraph 14 of the IPOC.** **(ii) As at the date TC25 gave evidence, although there was no pleaded date as to when he was taken to Gatugura Camp, there was the following:** **a. His witness statement in which he said that he had been sentenced to 3 years initially in 1953 and kept in detention until the**

			sentence: which he gave evidence had been imposed in 1953, see below. **3) TC25 told Dr Davidsson, the psychiatric expert, that he was detained "*between 1953 and 1959*" [21-224].** **4) TC25 stated at §78 of his witness statement, which he adopted as his evidence in chief when he gave evidence on 28 June 2016: "*Although I had been given the sentence of 3 years initially in 1953. The reality was that I was kept in detention until the State of Emergency was over in 1959.*" [21-177] (emphasis added)** **5) TC25 was not cross-examined about the date of his alleged arrest and detention. D has not had the opportunity to XX TC25 on the revised alleged date and is deprived of such an opportunity because TC25 died in August 2016.** **6) D was entitled to assume that TC25 was either advancing no positive case as to date, and that if the Court was to be invited to accept any date by TC25 then it would be that given by him in his own evidence, namely that he was given his three year prison sentence in 1953.**	but not the camp [21-27 §18a]. 2) This is a submission. The date is not pleaded. It is subject to consideration – see for example 32-21824 which concerns the arrest of 33 people in an oathing ceremony in August 1954. 3) submission. 4) submission. D was asked in the Part 18 request when this took place and said he cannot remember. D relies on the oral evidence. Cs rely on the documents. The Court can determine the issue in its Judgment. 5) TC 25 could not remember dates in his Pt 18 answers. He was trying to work out his age [33-2263]; he could not remember when he administered the oath [33-2288]. 6) Why? It would be obvious that a date had to be part of the submission because the limitation time bar is an issue. Why does D assume that C is obliged to	**state of Emergency was over.** **b. He told the psychiatrist that he was detained "between 1953 and 1959".** **c. In evidence in chief he confirmed the contents of his witness statement without modification.** **(iii) The Defendant was therefore entitled to assume that the case it was meeting was one where the Test Claimant was taken to Gathugura Camp prior to the year 1954.** **(iv) See the comments in the exchange with Mr Myerson QC on 23 May 2016 set out in paragraph 25 of the main judgment.** **(v) In addition I accept the points made by the Defendant at (5)-(7).** **(vi) In this Test Claimant's case I also accept the Defendant's points as to prejudice under (9)-(11) and (13) & (14).** **(vii) See also the points in relation to TC14**

			7) No notice was given to D that TC25 would seek to alter his position until this amendment was served on 21 July 2017 (11 months after TC25 had died). No explanation for the delay has been given, or for how the amendment has come to be made after TC25 has died. There is no evidence or explanation in support of the amendment or its timing at all. **8) The amendment in any event embarrassing as the case sought to be advanced is entirely uncertain. TC25 now seeks to aver that his arrest and initial detention took place "*no earlier than June 1954*", but beyond that no date is given.** **9) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC25 effectively asserts, a year following his oral evidence, 11 months after he died and months following the close of Cs' case, that, with the help of a professional legal team throughout, he could not present an important aspect of his case in his**	take the oral evidence of a man who cannot remember dates over the documentary evidence in the light of both the guidance in *Gestmin* and the fact that D does not adopt that approach itself? 7) as before 8) as before 9) as before	**which I made above at (iv)-(vi) and (viii)-(xi) – save that in this case TC25 cannot be recalled and it is the witness statement and TC25's evidence (and not the pleading itself) which indicated to the Defendant what it could properly consider as at June 2016 to be the best evidence as to the dates available.**

			original pleadings, Part 18 responses, witness statements or oral evidence. He now invites the court to accept a different case, and D must respond. **As to prejudice:** **9) If the amendment were allowed, D is irremediably prejudiced by being unable to XX TC25 informed by further documentary research. If D had known that the TC25 was going positively to assert, contrary to his own evidence, that his initial arrest and detention had taken place "*no earlier than June 1954*", then TC25 would have been cross-examined differently as to date. D could for example have cross-examined TC25 by reference to temporal yardsticks and the level of Mau Mau activity (in particular, oathing ceremonies) in Embu District.** **10) D was may fairly take the view that it does not need to XX upon the date of alleged events. TC25's own evidence was that he had been sentenced to imprisonment, following his arrest and detention, in 1953. Had TC25 specified previously**	9) as above. There is no prejudice unless C would have been recalled. He would not have been.	

			that his case was that his arrest and detention had occurred not earlier than June 1954, further research would have been undertaken and questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date (and in particular, the date given by TC25 himself) rather than relying upon the existing pleading and the lack of evidence as to relevant dates. **11) Allowing the amendment would mean that D had for good reason not asked what are now necessary questions of TC25 as to the dates of relevant events. D has relied upon TC25's own evidence as to when he was arrested and detained.** **12) D would also need the opportunity to re-approach and if appropriate recall any of its witnesses potentially able to assist with the credibility of TC25's new account, in particular witnesses with experience of Embu district and/or witnesses who might be able**	10) as before. The Defence pleads dates from at least 1955 to 1959. D always had the information necessary to decide how to conduct its cross-examination. 11) as above	

			to speak to the evidential basis given for the amendment. **13) Additional searches within the archives and/or the disclosed documents would anyway be necessary if the amendment were allowed, addressing the specific features and plausibility of the case now sought to be made. The original searches are of limited usefulness. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. D would need to undertake substantial further research into the likelihood of such an averment being accurate, including in particular with regards to Mau Mau activity and oathing in Embu District during the period after June 1954.** **14) Those matters would greatly delay the already elongated trial timetable.** **15) To refuse the amendment would not be unfairly prejudicial to TC25. Specific requests for further particulars as to dates were**	12) as above. 13) as above	

			made by Part 18 request. He had more than ample opportunity to set out dates with the specificity now provided in his original pleadings, Part 18 responses, witness statement, supplemental statement, and before the conclusion of his oral evidence, given on 28 June 2016. The delay in seeking to amend has not been explained. TC25 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for him to do so.	14) as above 15) as above	

	26	The Claimant was probably transferred to Mara River camp no earlier than about October 1954. At Mara River Camp the Claimant was placed in a tent which the detainees called 'a club'. The tent was large. Each tent held approximately one to two hundred men. Long mats were provided to sleep on, which ran from one end of the tent to another.	**No.** **This amendment appears to be consequential on the amendment to paragraph 14 above, rather than having any independent origin, and is resisted for the same reasons. The reason / evidential basis for the pleaded date of "*no earlier than October 1954*" is not given. TC25 was asked in the Part 18 request to date his move to Mara River camp and responded by giving no particulars and stating he could not remember (Q.243.b at [21-116]). No date was given by the Claimant in his written or oral evidence.**	Pursued. The amendment follows the previous one and thereby elucidates Cs case. The Defence pleads that Mara River was open in 1955 (§41a) and closed in late 1957/early 1958 (§38e).	**Refused for the same reasons as above.**
	43	The Claimant was detained at Embakasi for approximately one year from no earlier than October 1955.	**No.** **This amendment appears to be consequential on the amendment to paragraph 14 above, rather than having any independent origin, and is resisted for the same reasons. The reason / evidential basis for the pleaded date of "*no earlier than October 1955*" is not given.** **TC25 was asked in the Part 18 request to date his move to Embakasi camp and responded by giving no particulars and stating he could not remember (Q.246.a at [21-119]). No date was given in his written or oral evidence.**	Pursued. As above.	**Refused for the same reasons as above.**
	45	The Claimant was then transferred to Manyani by lorry no earlier than October 1956.	**No.** **This amendment appears to be consequential on the amendment to paragraph 14 above, rather than having any independent origin, and is resisted for the same reasons. The reason / evidential**	Pursued. As above.	**Refused for the same reasons as above.**

			basis for the pleaded date of "*no earlier than October 1956*" is not given. The amendment is also inconsistent with the amendment to paragraph 47, below, which pleads that TC25 arrived at Manyani "*in about November 1956*" rather than using the formulation of this amendment. **TC25 was asked in the Part 18 request to date his move to Manyani and responded by giving no particulars and stating he could not remember (Q.248.b at [21-127]). No date was given in his written or oral evidence.**		
	47	There were no pit latrines in the camp and buckets were again used in a similar way as in the other detention centres. The Claimant remained in Manyani Camp for about six months from about November 1956 to about May 1957.	**Agreed except for the words "*from about November 1956 to about May 1957*".** **Those words are not agreed for the reasons given in relation to paragraph 45. The reason / evidential basis for the date of "*from about November 1956 to about May 1957*" (which differs from the amendment to paragraph 14 in that it specifies a particular time period rather than using the formula "*not earlier than…*") is not given.**	Pursued. As above.	**Save as agreed, refused for the same reasons as above. Also the amendment referred to under paragraph 50, namely "and was then transferred to Gathiguri Camp via Nairobi temporary camp" is allowed as a correction.**
	49	At Gathigiriri Camp the Claimant was screened again. The Claimant was forced to work in the rice farms which included working in a quarry. The labour would start at eight in the morning and would not end until three in the afternoon. The Claimant again worked without remuneration. He	**No.** **This amendment appears to be consequential on the amendment to paragraph 14 above, rather than having any independent origin, and is resisted for the same reasons. The reason / evidential basis for the date of "*from about May 1957 to May 1958*" (which differs from the amendment to paragraph 14 in that it specifies a**	Pursued As above and please see on §50 below.	**Refused, see above.**

		remained in Gathigiriri camp for about one year, from about May 1957 to May 1958.	**particular time period rather than using the formula "*not earlier than…*") is not given. TC25 was asked in the Part 18 request to date his move to Gathigiriri and responded by giving no particulars and stating he could not remember (Q.249.c at [21-128]). No date was given in his written or oral evidence. The amendment is in any event contrary to TC25's oral evidence in XX, which is that when he left Manyani he was "*taken home*" [33-2316 line 23 to 33-2317 line 2]. TC25's existing pleaded case is that he was taken from Manyani to Kianyaga Camp (§48, now to be deleted). In his witness statement, he contradicted his pleaded case, stating that he was taken from Manyani to Gathigiriri via Nairobi (§68). When asked in cross-examination where he had been taken when he left Manyani, he replied that he had been "*taken home*". TC25 was not re-examined on this point. No explanation has been given for the change in TC25's pleaded case or for the discrepancy between his originally pleaded case and his witness statement, or for why the amendment is sought to reflect the content of the witness statement rather than TC25's evidence when cross-examined, or for the delay in making the amendment.**		
	50	The Claimant was taken to Kianyaga Camp for a screening interview. He was told he was	**No. The amendment is contrary to TC25's oral evidence in cross-**	Pursued. There is an error in the original drafting of the	**Refused, save as to paragraph 47. (i) The oral evidence**

		free to go home so he was released and sent to Kabare village. At the said village his movement was restricted as he required a permit when leaving the village. When the Claimant returned to his family home he discovered it had been burnt down by Home Guards and one of his wives had been forced to marry a Home Guard. She bore him five children. The Claimant was kept under conditions of detention and restriction until the end of 1959.	**examination, which is that when he left Manyani he was "*taken home*" [33-2316 line 23 to 33-2317 line 2]. TC25's existing pleaded case is that he was taken from Manyani to Kianyaga Camp (§48, now to be deleted) and thereafter to Gathigiriri. In his witness statement, he contradicted his pleaded case, stating that he was taken to from Manyani to Gathigiriri via Nairobi (§68) and thereafter to Kianyaga. When asked in cross-examination where he had been taken when he left Manyani, he replied that he had been "*taken home*". TC25 was not re-examined on this point. No explanation has been given for the change in TC25's pleaded case or for the discrepancy between his originally pleaded case and his witness statement, or for why the amendment is sought to reflect the content of the witness statement rather than TC25's evidence when cross-examined, or for the delay in making the amendment. The basis for the averment in the proposed new final sentence is not given.**	IPOC in the order of camps at §47, §48 and §49, and the draft amended IPOC does not entirely deal with it, for which apologies are due to the Test Claimant, the court and the Defendant. The draft is meant to reflect the TC's witness statement at 21-176 §62 – 63 where he says he was taken from Manyani to Gathigiriri through Nairobi temporary camp, and then screened again at Gathigiriri (§73), before going to Kabare village for a year, but being taken to Kianyaga camp for a screening interview, after which he was released. § 47 should include the words "and was then transferred to Gathigiriri camp, via Nairobi Temporary camp" and the court is respectfully requested to permit this correction. No additional personal injury is alleged during this transit and it is within his detention as a whole: the amendment is simply to clarify the camp order. As to §50, there is no contradiction outside what is to be expected of an interpreter – mediated account, particularly given that the TC was evidently	**is clear that after leaving Manyani where he was in detention, having previously been imprisoned in Embakasi, TC25 went home. (ii) The present pleaded case is not consistent with the witness statement. Both the pleading and witness statement contain statements of truth. There was no requirement on the Defendant to explore this in cross-examination, particularly in the light of his response at (i) above. (iii) To allow the amendments would prejudice the Defendant, as the Defendant submitted (though not in the schedule). Had paragraph 50 been pleaded as now proposed, TC25 would have been**

				tired [33-2315 line 25] leading to concern from the translator; questions were rephrased [33-2316] and the video link disconnected [33-2317]. The significance of any difference is a matter of submission but he can have been "taken home" "released" and "sent home" or a combination of all 3. What is clear is that he remained under conditions of restriction when he got to Kabare village. No prejudice.	**differently cross-examined. It is too late to recall him.** **(iv) As to paragraph 47, this was in his witness statement and not cross-examined to. I do not accept any or any significant prejudice flows from this. The overriding objective favours allowing this limited amendment.**

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
26 – Njuguna Munaro	53	The Claimant's mother lived at Ngurwe-ini Village and the Claimant was permitted to join her. This was probably in around early 1956 and the Claimant probably remained under conditions of detention until the end of the Emergency and at least as of April 1958, relaxation of curfews in the area remained opposed [32-59552]	**No.** **Agreed in part only. Not agreed are the words "*under conditions of detention*", and insofar as they are pleaded in support of this part of the new averment, the words "*and at least as of April 1958, relaxation of curfews in the area remained opposed [32-59552]*".** **1) This is a new averment about the conditions at "*Ngurwe-ini Village*" which does not appear in the existing pleading or in TC26's evidence. The source of and evidential basis for this averment is accordingly unclear. TC26 made no complaint in his existing pleadings or his evidence to the Court about the conditions at "*Ngurwe-ini Village*", still less that they amounted to "*conditions of detention*". Nor did TC26 refer at any point to a curfew being imposed on the village.** **2) TC26's own evidence to the Court was that when in the village rather than being under "*conditions of***	Pursued. The amendment merely adds a description to what is already pleaded at §54, namely that the village was guarded, had a punji moat, 20 HG (Tribal Police from the description) and had gates. The *purpose* of the amendment is to identify the end point, which can be done by reference to the documentation. 1) It is not a new averment. Cs agree that it is descriptive and D may not agree with the description but that is a submission. 2) as above	**Allowed in part. The words "under conditions of detention" are not allowed. It can be a matter of final submissions as to whether the present pleading sufficiently covers an allegation of detention. It is noted that the heading to paragraph 53 of the IPOC is "detention in the Ngurwe-ini village camp". It is further noted that it is arguable, given the content of paragraphs 53-58 that the pleading sets out a claim of the Claimant's liberty being restricted, therefore being in conditions similar to or tantamount to detention. Rather than rule on this point at this stage, it is appropriate to deal with it at the end of the case when reviewing all the evidence carefully. In those circumstances the final words are merely to identify the end period of any claim in respect of Ngurwe-ini village. They will therefore be permitted.**

			***detention"* as is now sought to be pleaded in the amendment, he "*did my own work on my land*", that he was on occasion asked to dig trenches and that on one occasion he was required to clear bushes for two weeks (Supplemental Witness Statement, §6) [22-150].** **3) Far from complaining about being detained, the averment at §20 of TC26's Individual Reply indicates that he was not detained: "*... he was on occasions asked to dig trenches and if he refused he would have been detained...*" (emphasis added) [22-115]** **4) The document referred to in the proposed amendment makes no mention whatsoever of curfews and the evidential basis for the amendment is accordingly unclear.** **5) Further, the amendment is embarrassing for want of particularity as it does not**	3) §20 also makes clear that C was rounded up and forced to clear bushes for 2 weeks. It is difficult to see how that happened if the conditions that permitted it could not legitimately be described as detention. 4) the document talks about relaxing constraints on freedom of movement for loyalists. Movement orders were how curfews were enforced. 5) The amendment does not explain the point, because it has always been pleaded in a section of the IPOC headed "Detention in Ngurwe-ini village camp". D does not admit it. the amendment occasions no prejudice. 6) this is a submission. Moreover, the dispute is not necessarily one about location but spelling.	

			explain what "*conditions*" at "*Ngurwe-ini Village*" allegedly amounted to "*conditions of detention*".		
			6) It is further not clear in what "*area*" TC26 now contends "*Ngurwe-ini Village*" was, and therefore which of the various locations referred to in the document at 32-52992 is being cited, or the basis upon which TC26 places Ngurwe-ini Village in that particular "*area*". Whilst the Defendant found a location identified as "*Nguruaini*" on a contemporaneous map and pleaded this in its Defence (Amended Defence §38) [22-42], TC26 insisted in response on this specific point that the name of his village was spelt "*Ngurwe-ini*" (Reply §19) [22-114]; the location "*Nguruaini*" found by D on the contemporaneous map has not therefore been adopted by TC26 as the location of his village.	7) as above and what other searches could D do? It has already pleaded its research. 8) D could have always cross-examined C about these issues. It was pleaded as a detention.	
			7) The amendment, if accepted,		

			would require the Defendant to conduct further research into the location of "*Ngurwe-ini Village*" (depending to some extent on the precision with which TC26 is now apparently able to locate this village in one of the areas referred to in the document at 32-52992) and into the general conditions pertaining there, and potentially to considering recalling D's own witnesses insofar as they might be able to speak to conditions in villages and the "*area*" in which TC26 now contends that "*Ngurwe-ini Village*" was. **8) TC26 was not cross-examined about "*conditions of detention*" at Ngurwe-ini Village as he made no complaint about such conditions or in particular any curfew. To the extent that they are now sought to form part of his case because of alleged references to the same in documents, the Defendant is prejudiced and would wish to further cross-**		

			examine TC26 about the location of "*Ngurwe-ini*" and as to the alleged "*conditions of detention*", if and to the extent that they capable of particularisation, once D has been able to conduct the further documentary and witness researches referred to above.		

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
29 – Gradys Njoki Muiruri	8	On a date in or around 1953/1954, five or more Home Guards arrived at the Claimant's home in Gakui one afternoon. They were mixture of older men and men in their early twenties. They were carrying pangas. They were looking for Mau Mau. It is probable that these events took place in 1954, for the reasons set out at paragraph 18.	**No.** **This is a change of date. TC 29 gave evidence and was XX on the basis that the alleged incident occurred in 1953.** **The proposed amendment renders TC 29's case hopeless:** **1) It substantially changes the dates of the events alleged, contrary to TC 29's evidence (statement, §5). Prior to the amendment, the dates of assaults were not specified, but were pleaded to have potentially taken place prior to June 1954. On the amended pleading, that possibility is taken away.** **2) TC29's Schedule of Loss pleads that forced labour began in 1953.** **3) The timings are of critical importance to limitation, to the role/relevance of TC 29's account, and to its testing.** **4) Time cannot equitably be extended under s.33 Limitation Act 1980 in circumstances where TC 29 effectively asserts, a year following her oral evidence and months following the**	Not pursued as to date in accordance with judgment save for the purposes of any cross – appeal. 1) It is a submission based on evidence. The TC is likely to be wrong. It is immensely prejudicial to prevent her advancing a case based on the evidence. Moreover D itself pleads an attack by Mau Mau on Gakui HG post in 1954 (§8d). as of c June 1954 there were only 28 villages in Fort Hall [32-17634]. 2) D therefore benefits from the amendment. 3)the Chief's Post in Gakui was there in late 1955 (Defence §8c) and the village in 1954. The timings cannot prejudice D, since it already knows them. 4) as above	**As it is accepted that cannot be pursued in accordance with previous rulings, no comment is made.**

			close of Cs' case, that, with the help of a professional legal team throughout, she could not present a critical aspect of her case in her original pleadings, Part 18 responses, statement or oral evidence. She now invites the court to accept a contradictory case, and D must respond. As to prejudice: 1) If the amendment were allowed, D would need the opportunity for further XX of TC 29 informed by further documentary research. She was not asked about the date of his arrest at Gakui (which was then asserted to be pre-June 1954), or associated details about those, nor was there opportunity to test the new case now sought to be made. 2) Additional searches within the documents would anyway be necessary if the amendment were allowed. Original searches have limited usefulness because related to a single account rather than the relative merits of two rival accounts. D would need to search for documents to support TC	1) C always pleaded detention in Gakui until 1958. D was always aware of the need for cross-examination. C's description of the village suggests it is a punitive village [33-2350-51. 2) D has already researched the issue. What remains to be done?	

			29's original case and evidence that initial arrest occurred in 1953. **3) Those matters would greatly delay the already elongated trial timetable.** **4) To refuse the amendment would not be unfairly prejudicial to TC 29. She had more than ample opportunity to clarify the date of his removal in her original pleadings, Part 18 responses, witness evidence, and before the conclusion of her oral evidence, given on 29 June 2016. The delay in seeking to amend has not been explained. TC 29 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for her to do so.**	3) as before 4) as before	
	12	The new detainees started to be moved into the Gakui village ~~on or around 1953.~~ After June 1954 and no later than April 1955. On arrival they would be forced to build their own individual houses.	**No.** **See objections above to paragraph 8 amendments.**	As above.	**As above.**

	14	The Claimant was detained in Gakui Village from a date ~~on or around 1953~~ after June 1954 and no later than April 1955 until around 1958.	**No.** **See objections above to paragraph 8 amendments**	As above.	**As above.**
	18	She would be ordered to dig trenches and clear bushes. These events occurred after June 1954 and probably no later than April 1955. The Claimant will refer to the documentation for its full terms and effects in support of her claim, for example, regarding the plan for villages in Fort Hall [32-29333] and the progress of villigisation by April 1955 [32-82524].	**No.** **See objections above to paragraph 8 amendments.** **In any event, the documents cited do not support the proposition that the alleged events must have occurred after June 1954. [32-29333] is dated 29 January 1955 and states that there should be "about 120 villages" in Fort Hall by 1 April 1955. [32-82524] contains, word for word, the same information regarding the progress of villages in Fort Hall. Neither document gives any information as to villages in Fort Hall in 1953-1954.**	This does not flow from the previous issue at all. The original pleading was that C was detained from 1953 to 1956. The amendment merely restricts the events described in the existing paragraph to a given date. D cannot have understood them to have occurred before June 1954 in their entirety. This amendment is within the scope of the previous judgment.	**Refused.** **(i) It is now accepted that this is linked to the previous impermissible amendments. The Claimants will be able to argue in final submissions that the matters complained of during her detentions continued up to 1956.**
	26	On a date ~~between October 1952 and February 1957,~~ after she became detained in a Government Village as described above, the Claimant was working on a Settlers Farm at Makuyu.	**No.** **This pleading provides less specificity than previously pleaded without any reasons being given. TC29 gave evidence that this incident occurred on a date after the Emergency began, but before Dedan Kimathi died, which was in February 1957.**	Not pursued	**No comment.**
	30	On a date ~~between October 1952 and February 1957,~~ after she became detained in a Government Village as described above, the Claimant had finished her communal labour.	**No.** **This pleading provides less specificity than previously pleaded without any reasons being given. TC29 gave written evidence that this incident occurred on a date before both Kenyatta's arrest and Dedan Kimathi's death. On her witness statement, the incident therefore**	Not pursued	**No comment.**

			occurred before October 1952. In any event, nothing in her oral evidence contradicted her statement that the incident occurred before February 1957.		
	40 (1)	Caused, permitted, allowed or suffered the ~~seizure~~ incorporation of the Claimant's home into a Government Village.	**No.** **The amendment is in relation to a specific cause of action. As the facts pleaded are changed, it does not arise out of the same facts or substantially the same facts as already in issue, and so the amendment should not be allowed under CPR 17.4(2).** **In any event, the allegation as amended is hopeless as:** **(a) TC29 was not deprived of her property;** **(b) There is no personal injury in any event;** **(c) Limitation for any possible claim that might arise has thereby expired.** **In the circumstances, D should not be put to the trouble of responding to an allegation with no prospects of success.**	Pursued. The only change is in line with C's evidence that her shamba was not seized in the sense of being taken away from her, but was incorporated into the village so that she no longer had exclusive possession of it [33-2334-5]. The difference is in nomenclature. She was deprived of her property as she had previously enjoyed it. D can submit that this is an irrecoverable loss or not a loss. But the amendment is not a new cause of action.	**Amendments allowed.** **(i) It is necessary to consider the full text of the present 40(1) IPOC. It reads: "Caused, permitted, allowed or suffered the seizure of the Claimant's home. The Claimant was deprived of her peaceful enjoyment of and legal entitlement to her home through intense fear of further physical assault."** **(ii) Therefore, the Claimant's case is that she was deprived of her peaceful enjoyment of and legal entitlement to her home.** **(iii) The evidence from the Claimant was that her home became the base of a relocation camp**

					and people from other households came to stay on her shamba with a trench surrounding it. **(iv) The claim does come within CPR rule 17.4(2).** **(v) The Court is not prepared to say at this stage that the amended allegation is hopeless. The problem the court is faced with is that the only realistically possible argument that this allegation is not time barred is based on s32 Limitation Act. The court cannot at present say this s32 argument made by the Claimants is hopeless. On the other hand the court cannot say that the s32 argument has a real prospect of success. In those circumstances, and with some**

					hesitation, the amendment is allowed.

Test Claimant	Paragraph amended	Amendment	Agreed?	Cs' Response	Judge
33 – David Thurugu Guchu	9	On a date following the visits referred to at paragraph 6 above, but still in 1953 so far as the Claimant can recall, Home Guards arrived at the Claimant's homestead.	**Not agreed for the reasons given in relation to paragraph 11 below.**	It is agreed that the proposed amendment is one as to date per the draft judgment. It is pursued only on the basis that C was a small child at the relevant time. If that makes a difference – see below. If it does not, the below is only for the purposes of any cross – appeal.	**Refused.** **(i) The Claimants accept that this is a change of date.** **(ii) The fact that the Claimant was a child at the relevant time does not make any difference. See below.**
	11	The Claimant, his mother and siblings and other villagers were forced to walk to Gitura Village, accompanied by the police. They did not try to run or escape because they believed they could have been shot, as the police and soldiers had weapons. The Claimant was put in fear. It is probably that these events took place later than recalled by the Claimant. It is probable that they took place no earlier than June 1954. The Claimant will rely on documentation in support of his claim and for its full terms and effects at trial, including documentation that identifies the nature and progress of villigisation in Fort Hall: for example, the Emergency Administrative Policy from	**No.** **This is a change of date. TC 33 gave evidence and was XX on the basis that the alleged incident occurred in 1953.** **The proposed amendment renders TC 29's case hopeless:** **1) The Claimant gave evidence in accordance with the existing pleading and his witness statement that he was removed in 1953. This is clearly stated at §7, 9 and 13 of the existing IPOC and §§7 and 12 of his Witness Statement, i.e. that he spent seven years in the village from 1953-1960. In cross-examination, TC33 said that his mother had been arrested in 1953 and then that he had been at the village "*maybe about six years*" by**	As above. The reason for the amendment is clear from the pleading. 1) Refusing the amendment deprives C of part of his case and privileges C's evidence at a stage prior to the evidence being considered as a whole. That is unfair. C was 7 or 8 when these events took place. It is doubly unfair to deprive him of the opportunity to correct a childhood memory from the documents, particularly when C told Prof Fahy that	**Refused.** **(i) It may be that refusing the amendment deprives the Claimant of part of his case. This is not unfair. The point is not the age of the Claimant at the time of the event. It is the fact that the claim that he has pleaded, and that pleaded on his behalf, cannot be amended at this stage in accordance with the overriding objective of dealing with the case justly and at proportionate cost. The points set out in the draft judgment and in**

		March 1954 [32-14928], notes for the Governor regarding priorities for Fort Hall from July 1954 [32-20470], Governor's directive from January 1955 [32-28517] and concerning discipline and punishment in Fort Hall in January 1955 [32-29332].	**that point [33-3188, lines 5-7].** **2) TC33 was not cross-examined about the date of his alleged removal. The Defendant has not had the opportunity to XX TC33 on the revised alleged date. D was entitled to assume that TC33's case was that he was removed in 1953, which was TC33's own case and evidence until this amendment was served on 21 July 2017.** **As to prejudice:** **1) If the Defendant had known that the Claimant was going positively to assert that his removal had taken place "*no earlier than June 1954*", then the Claimant would have been cross-examined differently as to date. Had TC33 specified these dates, further research would have been undertaken and questions could have been asked as to various factual matters that might assist D in showing that the alleged matters are more likely to have occurred at an earlier date rather than relying upon the existing pleading and evidence.** **2) To refuse the amendment would not be unfairly prejudicial to TC33. Specific requests for further particulars**	the removal happened in 1954. 2) As C was a child it is unlikely he could add more. 1) The cross-examination is unlikely in the extreme to have yielded anything. The research has already been undertaken. D has expressly pleaded that it has no record of Gitura village that assists. As C was there until 1960 it is extraordinary that D implicitly suggests that it has not looked for dates throughout the emergency.	**relation to similar refusals for those who were adults at the time apply.** **(ii) It does not follow that because the Claimant was a child at the relevant time, that it is unlikely he could now add more.**

			as to dates were made by Part 18 request. He had more than ample opportunity to set out dates with the specificity now provided in his original pleadings, Part 18 responses, witness statement, opportunity to file a supplemental statement (not taken up), statements, and before the conclusion of his oral evidence, given on 21 July 2016. The delay in seeking to amend has not been explained. TC33 can pursue the case previously advanced on the existing pleading/evidence, insofar as it is proper for him to do so. **3) Allowing the amendment would mean that D had for good reason not asked what are now necessary questions of TC33 as to the dates of relevant events. D has relied upon the pleaded case and TC33's own evidence to the effect that his removal took place in 1953.** **4) The amendment in any event is wholly uncertain as to the actual date of TC33's alleged removal. The amendment seeks to aver that TC33 was removed "*no earlier than June 1954*", and no positive date is advanced in place of 1953. Nor is a new period for the time TC33 spent in the village,**	2) as above. 3) as above. 4) this is a submission.	

			in place of the pleaded period of seven years, advanced. Nor is it proposed to amend the period of seven years given in the Particulars of Injury at §42 of the IPOC ("*At the dates of the events complained of he was aged between 7 and 14.*") **5) As a result, it is entirely unclear if TC33 is (now) asserting that he was removed in the second half of 1954, or (given the reference to documents from January 1955) in 1955, or at some even later date during the Emergency. To meet such an uncertain case, D would have to undertake substantial further research both in the disclosed material and potentially in the archives.** **6) The documents do not, in fact, show that TC33 could not have been sent to Gitura village in 1953. [32-14928] states that as at March 1954 some villages had already been constructed in the reserves.** **In any event, if the amendment is allowed, TC33 would be advancing a new and different positive case as to the dates of certain events that D has not been able properly to test. The potential practical impact of that upon the Court's view of the evidence**	5) what other research could D do? D cannot go back to the archives to seek details of an event that has always been pleaded to last until 1960. That is mere opportunism. 6) This is a submission. In reality, villagisation in Fort Hall did not really proceed until 1954.	

			would be unknown but potentially profound.		
	13	The Claimant was detained at Gitura Village from ~~1953~~ no earlier than June 1954 to 1960.	**No. Not agreed for the reasons given in relation to paragraph 11, above.**	As above	**As above.**
	Schedule 3	…the Claimant claims remuneration for the periodic work he was forced to undertake between around ~~1953~~ 1954	No – see objection to paragraph 11 above.	As above	As above.

Test Claimant	**Paragraph amended**	**Amendment**	**Agreed?**	**Cs' Response**	**Judge**
34 – Anonymised.	18	On arrival at Manyani Detention Camp, the Claimant was forced to strip. He was searched. The Claimant will rely on documentation in support of his claim and for its full terms and effects at trial which indicate he arrived after October 1954, for example: a. He was probably detained in Compound 30 (rather than Camp 30) which was in Camp 3 [32-23428] and was not heavily populated even by October 1954; b. By May 1954, Camp 3 had not yet been built [32-16482] c. Camp 3 was occupied after September 1954 [32-23428]	**No.** **This is a change to TC34's case upon which the Defendant has not had the opportunity to cross-examine and which will if allowed necessitate further research into Manyani and the recall of TC34. TC34's case is now said to be that he was in "Camp 3, Compound 30", rather than "Camp 30" which is what he told the Court in evidence (Witness Statement, paragraph 28) [28-182].** **1) No explanation has been given for the delay in advancing this new case. No evidence or explanation is advanced for the failure to make this change at any time before or during TC34's evidence, given over a year ago, or even subsequently until now.** **2) If the amendment were allowed, D would need the opportunity for further XX of TC34 informed by further documentary research, including in particular as to the strength of his recollection of Manyani, given the differing formulations used by him, and the reasons for the amendment being made. D**	Pursued in accordance with draft judgment. This is not a new case. There is plentiful evidence about Manyani and it entirely supports the amendment, which is merely an indication to D as to the way the case will be put. 1) The proposition that this is a new case is wrong. D pleaded the case currently advanced by TC34 at §20 c ii of its Defence to TC19, specifically stating that on final completion of Manyani there were 3 camps, each with 10 compounds. Cs do not know why the pleading was not replicated in this case, but the fault is not Cs. 2) This cannot be right. D's documentary research actually confirms the accuracy of the amendment. It is surprising that D does not know this. If D does know it, then this is an improper objection and ought to be withdrawn forthwith. On what basis is D to cross-	**Amendment allowed.** **(i) The amendment essentially changes camp 30 to compound 30 in camp 3.** **(ii) This is a change of case based on the Claimants' lawyers belief from the documents that TC34 meant compound 30 which was in camp 3.** **(iii) The Claimants' amendment seems also to be reflected in paragraph 20(c)(ii) of the Individual Defence to the claim by TC19 which states "On final completion of Manyani Camp, there were three distinct camps, each with its own camp commandant… each of the three camps was divided**

			would also need to return to and possibly to recall its witnesses with experience of Manyani. **3) Additional documentary searches would also (and anyway) be necessary if this amendment were permitted, not only to support further XX of TC34 if recalled, but also to give D a fair opportunity to respond to the specific case now being put. D was entitled to rely on the Claimant's case and evidence that he was detained in "Camp 30" at Manyani. D will now need to undertake further research into "Compound 30" and into "Camp 3" in order to respond to this change in the Claimant's pleaded case, including (but not exclusively) into whether there was any place named "Compound 30" prior to the building of "Camp 3".**	examine without disowning its own pleading for TC 19 and the statement of truth that verifies it? 3) This cannot be right. It is unhappy that D has committed itself to this proposition when its own case confirms the amendment. Cs and the Court are entitled to an explanation of why D says that further research is required. Was D unaware of its own pleading regarding TC 19? Did it disregard it? How can D say it relied on TC34's nomenclature?	**into 10 compounds…"** **(iv) I do not accept that much if anything would be gained by recalling TC34 on this point. The Defendant can make such final submissions as it wishes.** **(v) Nor am I persuaded that the Defendant would need to return to and possibly recall its witnesses with experience of Manyani. Given the nature of the evidence they have provided, it is unlikely that they would deal with this. Nevertheless, if the Defendant did wish to recall any of its witnesses on this specific, relatively narrow, point then an application would probably be looked on favourably by the Court.** **(vi) Nor is the Court**

					persuaded that there would be much, if any, further research into documentation on this specific point. If there is then it can be done and done relatively timelessly. **(vii) The overriding objective is in favour of allowing this amendment.**
	19	He was then placed in what he terms Camp 30, but which was probably Compound 30.	Not agreed for the reasons given in relation to paragraph 18 above.	As above.	**Allowed as above.**
	20	The Claimant was taken to the mortuary in the Camp by a prison guard. He was ordered to carry the dead bodies. The bodies would be carried to a trench. The Claimant would then have to bury them. As he was carrying it, one body's intestines fell onto the Claimant's face. The Claimant dropped the body in horror. He was beaten as a consequence by a prison guard. He was hit with a baton on his head and shoulders and during this beating his left hand was injured, causing (the Claimant does not seek to add this injury to his Particulars of Injury, but the injury is significant because it is likely to be defensive).	**No.** **1) This is an attempt to insert into TC34's pleaded case an injury which he gave no evidence about. This injury could have been pleaded before, or referred to in his witness statements, but was not. No explanation for the failure to do any of those things is given, nor for the delay until 21 July 2017 (after TC34 and the medical experts had given evidence) in proposing the amendment.**	Pursued. 1) C's do not agree. C gave evidence of beating, including beating to his upper body and head. The scar was identified on the medical evidence [28-212]. It founds a submission of a defensive injury, which C is entitled to make based on the medical evidence and about which D is able to make a submission in response. 2) D was able to XX the TC about any of the beatings he alleged regardless of injury suffered; in fact,	**Amendment refused.** **(i) TC34 gave no evidence about this injury.** **(ii) I accept that the Defendant has been deprived of the opportunity to cross-examine TC34 on this.** **(iii) This is one of the few cases where there are hospital notes. The reference to the hand injury in Mr Heyworth's report gave rise to cross-examination**

			2) The fact that it is not to be relied on for the purpose of an award of damages does not alter the prejudice to D arising from the failure to plead or evidence this alleged injury previously. D is deprived of the opportunity to XX TC34 about this injury, and about the failure to plead it previously. **3) The averment that the injury "*is significant because it is likely to be defensive*" is neither particularised nor evidenced and the basis for this averment is accordingly unclear. Without prejudice to this fact, D could have raised the correctness of this contention (i.e. that this was 'likely' to be a defensive injury) with the medical expert, Mr Heyworth, when he gave evidence in January 2017 but was deprived of the opportunity to do so as the amendment was not**	none were challenged. At no point was it suggested to him that the injuries he complained of were not attributable to beatings but were attributable to some other cause [33-3215f]. It is hard to contend that the position would have been any different regarding this injury. 3) D had the opportunity to XX the medical witness and referred to the scar on the left hand in XX at [33-8141 line 19 – 22: "*leaving aside for a moment, we'll come back to it …*'] and at [33-8151 line 7 – 17: "*there's the residual scarring at the site of the wound sustained to the Claimant's left hand*"]. Direct XX on the topic then arises at 33-8152 line 23 – 25 "*It's possible this refers to the scar on this claimant's left hand; A: that's certainly possible yes*".	**based on the record of a much more recent injury to the hand. Mr Heyworth was not asked about the consistency of this hand injury with a defensive injury.** **(iv) The way the injury is now specifically pleaded, i.e. not as a particular of injury but as a defensive injury in relation to being beaten on the head and shoulders, could well have been a matter which the Defendant explored with TC34 and/or Mr Heyworth. Points (x) & (xi) in relation to TC14 are repeated.** **(v) Although the submission could still be made as this is not relied on as a cause of action, it would be so undermined by the above prejudice that it would not have a real prospect of success.**

			proposed until 21 July 2017.		
	21	The Claimant remained in Manyani camp between 6 months and a year and a half.	**No.** **The basis for this amendment is not understood. TC34's oral evidence was that he was at Manyani for "*about one year*". [33-3215af, line 1]. He repeated this in re-examination. [33-3215aw, line 5], this time stating that he had spent slightly under a year at Manyani.**	D's objection is correct. Amendment pursued, as follows: "The Claimant remained in Manyani for about one to one and a half years". C says "1 ½ years" at §26 of his claim [28-5] and he has provided clarification in oral evidence. The D had the opportunity to XX TC regarding any difference between "approximately 1 year" and "1 ½ years". The rest of the dispute is a matter for submissions.	**Amendment allowed to read "The Claimant remained in Manyani for about 1 year".** **Paragraph 26 of the IPOC is referring to Mackinnon Road Camp not Manyani. In his evidence TC34 said that he remained in Manyani for about 1 year.** **The present pleading and witness statement do not specify any period of time. The period of the year arose in response to cross-examination.**
	25	...He was hit with a wooden frame baton on his hip (including lower back), knee right shoulder and ankle…	**No.** **TC34's evidence was that he was hit on this occasion in a variety of places, not including the lower back (Witness Statement §38) [28-184]. The basis for the amendment to be made is not given. No explanation is given for the delay to 21 July 2017 in proposing this amendment.**	Pursued. TC's claim always indicated severe beatings, with blows to areas of his body, particularly his hip. The emergence of pain to the lower back was reported to the medical witness, identified in	**Refused.** **(i) Paragraph 25 of the IPOC refers to Mackinnon Road Camp. The relevant part reads in full: "On one occasion a guard hit the Claimant**

			This appears to be an attempt to insert into TC 34's pleaded case an injury which he gave no evidence about. This injury could have been pleaded before, or referred to in his witness statements, but was not. No explanation for the failure to do any of those things is given. D is deprived of the opportunity to XX TC34 about this injury, and about the failure to plead it previously.	examination [28-218], and is in keeping with the medical evidence about how histories emerge. D XXd on the issue: [33-8146: "*save for the lower back and pelvic area which I am saving for possibly this afternoon*"], at length, despite the current assertion of insurmountable prejudice: [33-8156: "*The remaining issue for us to discuss is the lower back and hip symptoms*"]; and further at 8157 lines 4 – 25 - 8166 where causation was addressed. D can make a submission on the reliability of the account, given that C told Mr Heyworth this beating happened at Mwea [28-214 §3] rather than Mackinnon Road [as per his claim, §and his oral evidence that he was not assaulted at Mwea – 33-3215al]. But there is no prejudice.	**with a baton. The Claimant hit back with a mallet. The guard stated he would be beaten. The Claimant was taken to a room. He was slapped, causing him to fall to the floor. He was hit with a wooden frame baton on his hip, knee, right shoulder and ankle. It took him 3-4 months to recover."** **(ii) This reflects paragraph 38 of the Test Claimant's witness statement.** **(iii) At page 213 of his report Mr Heyworth deals with an incident of violence at Mackinnon Road. He says that the Test Claimant was also kicked in the course of this assault and sustained painful blows to various parts of his body, in particular his**

					lower back and hips and that pain persisted at the sites of the blows sustained in this assault for a period of 4 months. He confirmed in cross-examination (33-8144) that the pain was self-limiting to 4 months. **(iv) At page 214 Mr Heyworth deals with interrogation at Mwea and says that Mr Muhura was slapped violently and fell to the ground during interrogation and was repeatedly kicked sustaining blows to his lower back and right hip. He was cross-examined about the back and hip symptoms resulting from this.** **(v) It is accepted that the Claimants' case is that he was not assaulted at Mwea. (TC34 in his evidence said he was assaulted at**

					Mwea. He retracted this when shown his witness statement.) The amendment attributes the alleged long term lower back symptoms to the (as yet) unpleaded allegation of an assault to the back at Mackinnon Road. **(vi) TC34 gave no evidence at all about an assault to his back. This is neither in his witness statement, nor in his oral evidence.** **(vii) Firstly, it is impermissible for the Claimant's representatives to try to piece together his claim in this way and the amendment is not allowed for this reason. See further paragraph 6(i) and paragraph 7 of the judgment.** **(viii) Secondly, and in**

					any event, the Defendant was deprived of any opportunity of cross-examining TC34. There is real prejudice here to the Defendant. The Defendant was entitled to rely on the pleaded claim. **(ix) No explanation has been given for the delay in proposing this amendment.** **(x) In any event the state of the evidence is such that there is no real prospect of success in relation to this amendment. Nor is there any statement of truth from TC34 to support this amendment.**
	28	The Claimant was held at the Mwea Works Camp for 6 months, during which he worked in other places, including Gathigiriri and Yatta before being transferred to Waithaka Detention Camp.	**No.** **This is a significant change to TC34's case, which will require significant further research into each of Mwea Works Camp, Gathigigiri and Yatta. It also differs significantly from TC34's oral evidence. The basis on which the new case is advanced is unclear. No explanation is given for the delay to 21 July 2017 in**	Pursued. This is not a significant change. C's case has always been that he was detained in a multiplicity of camps, consistent with the documentary evidence of the "Pipeline" system put in place by D. The claimed need for	**(i) The amendment as proposed is unclear and will not be allowed.** **(ii) As to Gathigigiri, an amendment will be allowed to plead that the Claimant, whilst at Mwea**

			advancing this new and significantly different case, based upon different locations to those originally pleaded. **TC34's existing pleaded case is that he was held at Mwea Works Camp before being transferred to Waithaka Detention Camp (IPOC §28). TC34's IPOC was signed with a statement of truth by his solicitor on 28 November 2014. In his prior witness statement dated 27 October 2014, however, TC34 stated that he was detained in "*Mwea Camp*" and also the nearby "*Gathigiriri Camp*" (§41).** **Despite the reference to "*Gathigiriri Camp*" in the witness statement which pre-dated the IPOC, TC34 did not plead any period of detention in Gathigiriri in his IPOC. This was noted in the Individual Defence. In his Individual Reply at §31, the Claimant averred that whilst at Mwea Works Camp "*he spent about two weeks at Gathigiriri and then went back to the main works camp at Mwea*".** **There was therefore no mention of Gathigiriri in the original IPOC, and no mention of Yatta in the TC34's IPOC, witness statement or Individual Reply.** **In oral evidence, TC34 claimed not to have been detained in Mwea Works Camp at all, but at Yatta [32-3215ah lines 10-23] where he stayed for "*six to eight months*".** **The proposed amended averment,**	further research is not borne out by the evidence. If Cs are right, TC34 went to Mwea in about 1957. TC 25 was at Gathigiriri at the same time and D has found the camp and pleaded its location and purpose at §61 of the Defence to that case. What significant research must be done is wholly unspecified. We do not know what D has already done, what else it needs to do, when it would be done, how long it would take, or why it would assist. The amendment regarding Gathigariri is consistent with C's Reply and his witness statement. D actually pleaded to it at §34b of the Defence. In oral evidence, C introduced Yatta at [33-3215ah]. He did so by saying that Yatta was part of Mwea (line 20) and that Mwea Works camp is the same as Yatta camp (line 23). It is therefore unfair and incorrect to characterise his evidence as saying he "claimed not to have been detained in Mwea Works Camp at all, but at Yatta". It *is* fair to say that being detained and moved around to work was all the same to him: he was at	 **(iii)**	**Works Camp, spent about 2 weeks at Gathigigiri. This is to bring the IPOC in line with the individual reply. It is also in para 41 of his witness statement. Although (33-1546) the Defendant, generally in relation to cross-examination of the TCs, said it would cross-examine only on IPOCs, little if any prejudice arises as the Defendant accepts it has done considerable document searching on Gathigiriri.** **The first mention of Yatta was in the Test Claimant's oral evidence where he said that he was in Yatta for 6-8 months and that Yatta was part of Mwea. He said that in his statement where he referred to Mwea**

			so far as D can see, advances none of these varying accounts, and instead another entirely new and different version of events is advanced. The proposed amendment seeks to aver that TC34 was detained at Mwea Works Camp, during which time he worked in "*other places including*" [emphasis added] Gathigiriri and Yatta. TC34 has not previously advanced any case that he worked at any further (as yet unidentified) locations whilst detained in Mwea Works Camp, and D is not aware what further locations might be being referred to. **Further, as TC's oral evidence was to the effect that when he referred to his detention at 'Mwea' he actually meant detention at Yatta, it is not clear to the Defendant on what basis the Claimant's case is now being put, because the proposed averment is, contrary to his own evidence, that he was detained at Mwea Works Camp and that Yatta was a distinct and different place.** **D is prejudiced by not having been given notice of TC34's new case either prior to his oral evidence or prior to 21 July 2017 and would wish to XX TC34 further on this case, if the amendment is to be allowed.** **In any event, D will need to undertake substantial further research into the documents in order to meet this new case,**	Yatta for 6 – 8 months [33-3215ah], and he says it is correct that he was at Mwea for 6 – 8 months [33-3215al]. Therefore the amendment clarifies the position and founds a submission, to which the Defendant can respond. The position in respect of Gathigiriri was noted in the Reply and there can be no prejudice arising from failure to XX of the TC with respect to Gathigiriri. If D seriously considers it is prejudiced by the word "including", C will substitute "namely". The issue as to where C was is a submission and it was clear well before C gave evidence that he meant the Mwea Works camp<u>s</u> – as set out in the documentation. Unless D is challenging the fact of detention, it is difficult to see how this makes a significant difference. There is no prejudice. 	 **(iv)**	**Works Camp it was the same as Yatta Camp. The proposal to amend to include Yatta is not allowed. The whole basis of the pleading and the witness statement was that the Claimant was held in Mwea Works Camp (with 2 weeks at Gathigigiri – where he says he worked – see reply paragraph 31).** **It is too late to introduce Yatta into the pleading. I accept that there is real prejudice here. This is an entirely new case and would require substantial documentary research. Further see points (x) and (xi) in relation to TC14.**

			including in particular the inter-relationship between Mwea Works Camp and the other locations (and Yatta in particular). In the event that TC34 specifies the apparently yet unidentified further locations at which he allegedly worked whilst detained in Mwea Works Camp (see above), the scope of that work will increase.		
	32	The Claimant ~~was then transferred to~~ went back to his home in Gikuni in about 1959 ~~Camp.~~ Whilst ~~at Gikuni Camp~~ there, a man whom the Claimant describes as a Home Guard, but who was probably a Tribal Policeman entered the house of a friend he was visiting. The man hit him with the butt of a gun asking him why he did not stand up. The Claimant hit the man back. Later that day a British Officer and some Home Guards/Tribal Policeman came to the Claimant's house. He was taken by the British Officer and handcuffed to the Officer's Land Rover. He was left in that position overnight. He was unable to sleep. The next day he was taken to court. He was in ~~not~~ no fit state to attend the hearing, having experienced sleep deprivation, ~~had~~ a lack of food and water, and having been subjected to brutal physical assault. He was not given access to legal advice. He pleaded not	**No.** **Agreed in part. The following words are not agreed: "*whom the Claimant describes as a Home Guard, but who was probably a Tribal Policeman*", "*Tribal Policeman*" and "*He was not given access to legal advice*"** **TC34's evidence in his witness statement (§45) and orally [33-3215an, line 9 and 33-3215ao, line 4] was that the man in question was a Home Guard. The basis for the averment that the individual "*was probably a Tribal Policeman*" is not given. D is prejudiced by not being able to XX TC34 on the new case that the individual was a Tribal Policeman rather than a Home Guard. No explanation for the delay in making this amendment is given. The same applies to the averment that TC34 "*was not given access to legal advice*". This appears nowhere in TC34's evidence. In re-examination, TC34 gave evidence that he had not <u>received</u> legal advice at the time of his court appearance [33-3215aw, line**	Pursued. Permissible amendment, founded on the submission that the Home Guard were absorbed into the Tribal Police in 1955 (as Opened paragraph 472 and footnotes). The reference to C's evidence is unfair: the matter was originally pleaded as "a man". That is how C dealt with it in his witness statement, then saying he later learned the man was a HG. He was, therefore, doing no more than giving evidence of what he was told. In cross-examination C was asked *"was that because you were arrested for attacking a Home Guard?"*. C adopted that term in his answer, but the idea came from the leading question he was asked [33-3215an]. In any event, the TC cannot be expected to understand or give evidence of the niceties of	**Amendments allowed.** **(i) As to the Home Guard/Tribal Policemen issue, I accept the Claimant's submission. There is no prejudice and it is unlikely in the extreme that further cross-examination of TC34 would make any difference. In the Part 18 response "the man" in paragraph 32 IPOC was said to be a Home Guard.** **(ii) As to the legal advice point, again I accept the Claimant's submission. This is their case. It is a matter of interpretation of the evidence after final**

		guilty before a white judge and was allowed to leave. As soon as he left the building he was re-arrested for being a Mau Mau. He was ordered to be detained. He was taken to Embakasi Camp via Waithaka camp and Langata camp.	**24 to 33-3215ax, line 2]. The new averment is apparently to the effect that TC34 was not given access to legal advice. To the extent that it is TC34's case, then it not only does not accord with his evidence but also prejudices the D; the D would have to conduct further research into the justice system in Kenya in 1959, and in particular the extent to which defendants were "*not given access*" to legal advice. No explanation for the delay in making this amendment is given.**	policy decisions that were unknown to him; further XX would not have assisted. The objection regarding the availability of legal advice is not understood – D's account is incomplete. C said, *"In those days, at those times, lawyers for us were just a dream"* [33-3215aw – ax]. D can make a submission that – on the basis of that evidence – there is critical issue between not receiving legal advice and not being given access to it, if it wishes. But Cs say it is a distinction without a difference, and it is not a matter regarding amendment.	**submissions. Although new, it is accepted by the Claimants that this does not give rise to a cause of action.**