



**Mungai (Suing in His Capacity as the Administrator of the Estate of the Late Stephen Gichuhi Njoroge) v Attorney General & 3 others (Petition 511 of 2019) [2024] KEHC 11243 (KLR) (Constitutional and Human Rights) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11243 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 511 OF 2019**

**LN MUGAMBI, J**

**SEPTEMBER 27, 2024**

**BETWEEN**

**STEPHEN NJOROGE MUNGAI ..... PETITIONER  
SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF  
THE LATE STEPHEN GICHUHI NJOROGE**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 2<sup>ND</sup> RESPONDENT  
STEPHEN ARIKA ..... 3<sup>RD</sup> RESPONDENT  
KENEDDY OMINDE ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition is dated 24<sup>th</sup> September 2019. It is supported by the Petitioner’s affidavit in support sworn on even date, his witness statement dated 22<sup>nd</sup> June 2023 and his oral testimony in Court on 24<sup>th</sup> July, 2023.
2. The Petition arises from the alleged unlawful killing of the Petitioner’s son, the late Stephen Gichuhi Njoroge on 14<sup>th</sup> July, 2011 by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents both police officers at the time of the incident. The Petitioner asserts the policemen’s action violated his son’s rights and fundamental freedoms mainly his right to life under Article 26 of *the Constitution* among other rights and freedoms that



the Petitioner enumerated as an affront to the constitutional values and principles. Consequently, the Petitioner seeks the following reliefs from the Respondents:

- a. A declaration that the shooting and killing of Stephen Gichuhi Njoroge by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was in violation of his right to life as enshrined in Article 26(1) and (3) of *the Constitution*.
- b. A declaration that the shooting and the killing of Stephen Gichuhi Njoroge by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was in violation and denial of his freedom and security of person provided under Articles 27(1) and 29(c) and (f) of *the Constitution*.
- c. A declaration that the force used by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents against Stephen Gichuhi Njoroge was excessive and unreasonable in the circumstances.
- d. A declaration that the shooting and killing of Stephen Gichuhi Njoroge by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents when he posed no threat amounts to cruel, inhuman and degrading treatment and the same offends Article 29 of *the Constitution* as read together with Article 16(1) of the Convention against Torture.
- e. A declaration that the killing of Stephen Gichuhi Njoroge was a violation of Articles 53(1) (d), 53(2), 238(2) (b) and 244 of *the Constitution*.
- f. A declaration that the State through its agents the Respondents herein failed to fulfil its obligations under Article 6(1) of the International Covenant on Civil and Political Rights, Articles 3, 5, 10 and 13 of the Universal Declaration of Human Rights and Article 16 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.
- g. An order compelling the Respondents to adequately and fairly compensate the family of the late Stephen Gichuhi Njoroge for his loss.
- h. This Court be please to grant such further orders as may be just and appropriate.
- i. Cost of this Petition be awarded to the Petitioner.

### **The Petition**

3. On 14<sup>th</sup> January 2011, 6 police officers shot at the vehicle Registration Number KAW 058L along Slaughter Earth Road in the Ruaka area. Inside the vehicle was the late Stephen Gichuhi Njoroge as a passenger alongside his cousins, one Solomon Kiarie who was the driver, Alex Kinuthia Ndung'u and Nancy Wanja Njeri.
4. The police officers were Stephen Arika, Kennedy Ominde, Albert Njiru, Elijah Kimoi, Job James Weru and Daniel Pakar Matunge and were attached to Gigiri Police Station. The incident occurred after the police vehicle overtook the vehicle the deceased after which they flagged them down and started firing shots at it causing the deceased fatal injury while also injuring the other passengers. It is alleged that the officers were working under the direction of the 2<sup>nd</sup> Respondent. The postmortem report revealed that the deceased died as a result of a gunshot wound in the chest.
5. The incident was reported at Gigiri Police Station and investigations were commenced. Upon conclusion, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents plus the other four police officers were all jointly charged with murder in Criminal Case Number 79 of 2012. Following conclusion of the trial, Justice R. Lagat Korir in the Judgment dated 8<sup>th</sup> December 2016 found the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' guilty of the lesser offence



of manslaughter and acquitted the rest. This finding was later on affirmed by the Court of Appeal which dismissed the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' appeal.

6. The instant Petition was filed after the criminal case was successfully concluded and upon the Petitioner being granted Letters of Administration Intestate for the estate of his son on 4<sup>th</sup> April 2018. The Petitioner avers that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' unlawful act violated the deceased's constitutional right to life under Article 26 of *the Constitution*. It also violated the principles of national security under Article 238(2) of *the Constitution*. That the impugned conduct also violated the deceased's rights under Articles 28 and 29 of *the Constitution*.
7. The petitioner further alleges that the conduct of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents and vicariously, that of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was in violation of Sections 2, 3, 10, 49 and 61 of the *National Police Service Act* on the use of firearms. Equally that their conduct was in breach of the National Police Service Code of Conduct and their duty to uphold national values and principles under Article 10 of *the Constitution*.
8. The Petitioner depones that his family has never received any compensation from the Respondents despite the trauma, psychological torture and loss of their son through this incident. As such the Petition has been brought against the Respondents for violation of the deceased's constitutional rights and to seek compensation in respect of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' unlawful conduct.

#### **Petitioner's Case**

9. PW 1, Stephen Njoroge Mungai the Petitioner and deceased's father, testified on 24<sup>th</sup> July 2023. He stated that on the fateful night while at home he heard a gunshot. Soon thereafter, his phone rung. He picked and the caller told him that his son had been shot.
10. PW 1 rushed to the scene. He found one part of the vehicle slightly inside a gully. The deceased's legs were inside the vehicle while his head was hanging outside while bleeding.
11. He testified that the driver stated that after the police car overtook their car and started shooting at them. The police had ordered the rest of the car occupants to lie down to be shot but administration police officers from a nearby police station arrived at the scene and told those police officers that occupants were well known to them and thus prevailed upon them not to stop shooting them.
12. Nancy Njeri and Alex Kinuthia had been shot too but it was only PW 1's son that succumbed to the gunshot. Nancy Njeri and Alex Kinuthia were rushed to Kenyatta National Hospital while his late son's body was taken to City mortuary.
13. The following day PW 1, accompanied by his family and families of the other passengers went to report the matter to the police station. The Divisional Criminal Investigations Officer (DCIO) admitted that his officers made a mistake and pledged to investigate the matter.
14. A post mortem was conducted on 21<sup>st</sup> January 2011 by Dr. Oduor. He found that his son had been shot from behind and with a bullet that had ruptured his chest.
15. He further testified that the criminal case was not preferred. It took his personal effort to until to go and follow up with the then Director of Public Prosecutions (DPP), Keriako Tobiko to have the suspects prosecuted. Mr. Tobiko instructed the DCIO to have the officers charged with murder. The criminal case took 8 years to be concluded and prosecution ended with the conviction of manslaughter against the 3<sup>rd</sup> and 4<sup>th</sup> Respondent. They were sentenced to 3 years imprisonment. Six other suspects were set free.



16. He testified that his son was a shop attendant at Chandarana Supermarket at the time of his death. He was the family bread winner and waiting to join a Seminary to train as a priest. He prayed for justice for his son.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

17. These Respondents' wide grounds of opposition dated 15<sup>th</sup> May 2023 opposed the Petition on the basis that:
- i. The Petition lacks clarity and precision in setting out the alleged violations.
  - ii. The Petition discloses no cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - iii. The basis of attributing the alleged action upon the government has not been set out.
  - iv. The orders sought by the Petitioner are not tenable against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  - v. The Petition ought to be dismissed.
18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's did not file a replying affidavit and also did not call any witness during the hearing of the matter.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents' Case**

19. As per the Court proceedings, these Respondents did not participate in this matter since its inception.

### **Parties' Submissions**

#### **Petitioner's Submissions**

20. The Petitioner through Prof. Albert Mumma and Company Advocates filed submissions dated 25<sup>th</sup> September 2023. Only two issues were identified for determination: whether the Respondents' violated the Petitioner's rights under Articles 26(1) & (3), 27(1), 29 (c) & (f), 238(2) (b) and 244 of *the Constitution* and whether the Petitioner is entitled to compensation.
21. On the right to life, Counsel submitted that this right is the cornerstone of human rights as emphasized in S V Makwanyane and another (1995) ZACC 3. This right in addition to *the Constitution's* protection is envisaged under Article 3 of the Universal Declaration of Human Rights; Article 6 of the International Convention on Civil and Political Rights (ICCPR); Article 4 of the African Charter on Human and People's Rights and Article 10 of the Convention on Rights of Persons with Disability.
22. The Petitioner submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' act of shooting and killing the deceased as confirmed by the post mortem report violated the deceased's right to life. In the appeal proceedings, the Respondents admitted to having shot at the vehicle with the aim of immobilize it and in self-defense but the submission was rejected by the Superior Court as the police officers did not make any effort to search the vehicle for the alleged threat upon bringing it to a halt.
23. Reliance was placed in Ann Wairimu Njahira v Nairobi City County Government & 4 Others [2017] eKLR where the Court held that:

“22. The right to life in my judgment essentially means that a person is entitled not to be killed. The right to life is a moral principle based on the belief that a human being has the right to live and in particular should not be killed by



another human being and this includes a prohibition against killing whilst making an arrest.”

24. Counsel further submitted that the 2<sup>nd</sup> Respondent’s failure to initiate disciplinary action and a probe against these officers despite the numerous reports and complaints made to his office over the killing of the deceased, violated his right under Article 27(1) of *the Constitution*. This was also in breach of the mandate of the office as provided under Section 8A of the *National Police Service Act*.
25. Correspondingly it was stated that the Sixth Schedule of the *National Police Service Act* sets out the conditions with regard to the use of force and use of firearms by police officers. Part B, Paragraph 5 provides that use of the firearm that leads to death or serious injury ought to be reported to the officer in charge or inquiry to the Independent Police Oversight Authority. It is contended that the 2<sup>nd</sup> Respondent failed to uphold this law. Reliance was placed in *Florence Amunga Omukanda and another v Attorney General & 2 others* (2016) eKLR where it was held that:
- “Where an allegation of violation of constitutional rights and fundamental freedoms are alleged particularly against State actors, the State is enjoined to investigate the same.”
26. Equally, it was stated that the Respondents violated the deceased’s freedom and security of person, from any form of violence and not to be treated in a cruel, inhuman or degrading manner. The act of shooting the vehicle and in effect ending the deceased’s life was deemed to be an act of violence yet the State is obligated to uphold this right for the citizenry as the security agency. The State is accused of failing this obligation.
27. The principles of national security under Article 238 of *the Constitution* were also deemed to be violated by the Respondents blatant disregard of their obligation to respect, protect and uphold human rights and fundamental freedoms. Equally that the objects and functions of the National Police Service under Article 244 of *the Constitution* were violated as the Respondents failed to uphold the highest standards of professionalism and discipline whilst complying with *the Constitution* and the law.
28. Accordingly, Counsel in the second issue submitted that the Petitioner was indeed entitled to compensation for the Respondents’ unlawful act of killing the deceased. Counsel noted that this position is supported by Article 23(3) of *the Constitution*. Further that in *Kenya National Commission on Human Rights & another v Attorney General & 3 others* (2014)eKLR it was held that:
- “49. Further where violations have been proved and where especially the loss of life has been occasioned by a callous act on the part of anyone, more so, the protector of those rights, compensation is warranted.”
29. Like dependence was also placed *Zeitun Juma Hassan* (Petitioning on behalf of the *Estate of Abdul Rahman Biringe (deceased) vs Attorney General (Petition No. 57 of 2011)* and *Malik Mohammed Kipsang v Attorney General* (2014) eKLR.
30. Counsel in view of general damages outlined the areas of focus as pain and suffering, loss of expectation of life, loss of dependency and aggravated and/exemplary damages. With regard to pain and suffering Counsel submitted that it was evident that the death of the deceased had caused this to the family. Relying in *JNK (Suing as the legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors Counsel [...] Boys High School* [2018] eKLR Counsel stated that an award of Ksh.500,000/- would be sufficient for the pain and suffering.
31. On the loss of expectation of life, Counsel noted that the deceased who was 25 years old had a bright future ahead of him which was cut short. Counsel urged this Court to award a global sum figure of



Ksh.10,000,000 in this regard. On loss of dependency, it was submitted that the deceased was the sole bread winner in his family. It was noted that the Court in Maingi Celina v John Mithika M'itabari suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) (2018) eKLR awarded Ksh.1,000,000 for this loss. However, Counsel distinguished that in that matter the deceased was not the bread winner as in this case. For this reason, Counsel urged the Court to award Ksh.5,000,000/=.

32. On aggravated damages, Counsel submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents action was irresponsible and callous thus entitling the Petitioner to this award. Counsel urged the Court to be guided by the Court of Appeal award of Ksh.2,000,000 in Patrick Kariuki Muiruri & 3 others v Attorney General (2019) eKLR.
33. Lastly, Counsel submitted that the Petitioner is entitled to special damages owing to the cost incurred by the family in preparation of the deceased's burial and funeral related expenses. In this regard, Counsel commended that a sum figure of Ksh.500,000/- would be adequate compensation.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

34. State Counsel, Edna Makori, filed submissions dated 23<sup>rd</sup> October 2023, where the key issue was whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' had violated the Petitioner's constitutional rights and costs of the suit.
35. Counsel submitted that while the 2<sup>nd</sup> Respondent is empowered under the [National Police Service Act](#) to investigate offences and enforce all laws and regulations, it is not empowered to institute and undertake any criminal proceedings against any person. For this reason, Counsel submitted that the Petitioner is obligated to demonstrate how the Respondents actions constitute a violation of fundamental rights as stated in Anarita Karimi Njeri v R (1976-1980) and later re-affirmed by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR. Like dependence was also placed in Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau & 3 others and Gregory Magara v University of Nairobi [2017] eKLR.
36. Counsel as well submitted that although [the Constitution](#) places an obligation on the State to protect citizens from violent acts that could lead to violation of their rights, it was stressed that in this case, the Petitioner had failed to demonstrate how the police actions had amounted to such a violation.
37. Furthermore, Counsel taking a different turn argued that this Court lacks jurisdiction to entertain the matter as relates to the Petitioner's employment. Counsel relied in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR and United States International University (USIU) v The Attorney General [2012] eKLR to sustain this argument.
38. On costs Counsel relying in Section 27 of the [Civil Procedure Act](#) submitted that the award is dependent on the discretion of the Court. Equal reliance was placed in Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application [no 6 of 2014](#) where it was held that:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”



## Analysis and Determination

39. It is my considered view that the issues that arise for determination in this matter are as follows:
- i. Whether the Respondents' violated the Petitioner's constitutional rights.
  - ii. Whether Petitioners are entitled to the relief sought.

### Whether the Respondents violated the Petitioner's of Constitutional Rights

40. The threshold for drawing constitutional petitions is specificity and precision in identifying constitutional rights that were violated and the demonstration of the alleged infringement. This test was affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others* (supra) as follows:

“(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

41. Likewise, the position was reaffirmed by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR when the Court stated as follows:

“(42) It was the High Court's observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

42. In the instant Petition, it was the Respondent's contention that the Petition is not framed with reasonable degree of precision and does shows the rights that were violated or the manner of their violation.
43. It is thus necessary that I examine the Petition in order to ascertain if it is pleaded with clarity in terms of the articles of *the Constitution* alleged to have been violated and the manner in which the violation occurred.



44. I have carefully scrutinized the Petition and I note that paragraphs 17, 22, 23, 24, 25, 26, 27 and 28 lay out the Constitutional provisions that were violated while the contents of the factual description dubbed ‘facts in support of the Petition’ gives a detailed account of how the alleged violations were carried out against the deceased and others who were with him on the fateful night. The factual account is covered in paragraph 5 to 14 of the Petition.
45. I am satisfied that the Petition is meets the threshold of clarity and precision. I reject the respondent’s argument that Petition does not meet specificity and precision principle.
46. The next issue for consideration is whether the Petitioner has proved his case. The Petitioner is required to discharge the burden of proof as stipulated under Sections 107 of the *Evidence Act*. In *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR* the Court held as follows:
- “ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...
16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013] eKLR* considered the applicability of these provisions as follows;
- We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”
47. Article 21 of *the Constitution* sets out the obligation vested on the State in the protection of rights and fundamental freedoms as follows:



1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
  2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.
  3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
  4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.
48. Article 21 embodies what may be described as positive and negative obligations of the State in observance of human rights. Positive obligations being those that require the State to take specific measures to guarantee observance of human rights by others hence the words protect, promote and fulfil. The negative obligations are those that require the State to refrain from doing anything that can hurt or harm human rights hence the words respect and observe.
49. The Court in *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae)* [2020] eKLR discussed as follows:

“ 110. According to the Human Rights Committee’s General Comment No. 31 on the ICCPR at paragraph 8:

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-State actors. In other words, the State must protect citizens from threats to their rights. I therefore find myself in agreement with the holding in *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR that:



“60 ... the State has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order...”

50. The South African Court in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 affirming the positive and negative obligations placed on the State opined as follows:

“189. The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection.”<sup>173</sup> Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective...”

51. The instant case pertains the use of lethal force by the police which resulted in untimely death of the Petitioner’s. Apparently, the Petitioner died from shooting by police officers. The factual description of that shooting has not been controverted by the Respondents. Indeed, from that shooting, a conviction of manslaughter against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was arrived at. This is also not denied. The 3<sup>rd</sup> and 4<sup>th</sup> respondents were in course of employment of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. The conviction on the criminal case for shooting to death the Petitioner’s son under the circumstances is a confirmation that the shooting to death was unjustified and unlawful. In *Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others* [2020] eKLR the Court stated as follows:

“16. Pursuant to Article 3 of the United Nations Code of Conduct the international standards regarding the police use of lethal force and firearms are underpinned by two fundamental principles pertaining to the use of force by the police generally, namely necessity and proportionality.

17. As Professor Christofel Hendrik Heyns, who was the 2<sup>nd</sup> Amicus Curiae in this case, stated;

“The principle of necessity requires that any force used must be the minimum required in the circumstances.

.....

The principle of proportionality limits the amount of force used in accordance with the level of threat posed by an individual or group and the seriousness of the offence that has been committed or that is about to be committed.”



18. These principles come into play when there is evidence that it is the police who had used lethal force or firearms.
  19. In effect, the use of lethal force or firearms by the police or other state agents was only permissible in the most extreme circumstances, such as self-defence or the defence of others from serious bodily harm or death.
  20. And when such force has to be used, it must be kept to the minimum required to bring the situation under control...”
52. Further, in *Muslim for Human Rights (MUHURI) & another v Inspector General of the National Police Service & 2 others (Petition E070 of 2021)* [2024] KEHC 3233 (KLR) (19 March 2024) (Judgment) stated:

“(47) Accordingly, having found that the deceased was shot dead by the police, the evidential burden shifted to the police to demonstrate that the shooting was warranted. The rationale for this posturing was well explicated by the Court of Appeal in *Stephen Iregi Njuguna v Attorney General* [1995-1998] 1 EA 252: The police do not have any unqualified licence to resort to shooting. They are authorized to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary...From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus has shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased...”

(48) In the same vein, Section 61 of the *National Police Service Act* provides that:

1. Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by *the Constitution* and this Act by use of non-violent means.
2. Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.

(49) Rule 1 of the Sixth Schedule on the other hand provides that:

A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended results.”

21. Like in most international conventions to which Kenya has ascribed and is party to, *the Constitution* under Article 26 guarantees every person the right to life. It is an innate right. It is an unqualified right and commences at conception until death. Only *the Constitution* or statute law may limit it. In effect the right to life exists in every person regardless of their action. Even criminals until and unless convicted of



offences which fetch mandatory death sentence have the right to life vested in them.

22. The right to life, in my judgment, essentially means that a person is entitled not to be killed. The right to life is a moral principle based on the belief that a human being has the right to live and, in particular, should not be killed by another human being, and this includes prohibition against killing whilst making an arrest. The arresting entity is to be remembered has only to use the necessary force commensurate with any resistance to help achieve the objective of an arrest which is to bring the arrested person to justice. Death is not and cannot be justice unless meted upon conviction. Additionally, the State and all State organs are enjoined to protect this right for the basic reason that the State and State organs have an obligation to “observe, respect, protect, promote and fulfil” the rights in the Bill of Rights...”

(53) Having reached the conclusion aforesaid, it follows that there was a violation of the deceased’s right to life as provided for under Article 26 of *the Constitution*. I am further satisfied that the deceased’s right to the security of his person was likewise violated; being convinced as I am that the right to life is inseparable from the right to security of the person as enshrined in Article 29 of *the Constitution*. The provision states:

Every person has the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources.”

(54) It is for the same reasons that I am satisfied that the deceased’s right to equal protection of the law under Article 27, right to human dignity under Article 28 and right to privacy under Article 31 of *the Constitution* were likewise ingrained...”

53. By parity of reasoning, I observe that no satisfactory explanation was offered for shooting to death of the Petitioner’s son. There was no evidence that the youths were armed or threatened the police officers in any way. No confrontation ensued prior to opening of fire at them. This action by the police was most callous and totally unjustified.

54. The State, acting through its agents that fateful night did not do its duty of respecting or observing human rights as required by Article 21. It instead, through its agents acted violently and fatally shot an innocent young man who alongside his cousins were heading to their parents homes after work. He lost his dear life without any lawful justification. I find that his right to life under Article 26 was violated by actions of the Respondents and by agents.



## Reliefs

55. The Supreme Court addressed the unique nature of constitutional reliefs in *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC Petition No.13 (E015) of 2022) and guided as follows:

“(94) ... under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim’s constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

56. Correspondingly, the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017)* [2021] KECA 328 (KLR) (17 December 2021) (Judgment) directed as follows:

“15. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a



monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under Section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”

57. Similar sentiments have also been echoed by the High Court as well. In *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another* [2019] eKLR the Court reasoned as follows:

- “96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;
- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
  - ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
  - iii. This remedy would be available when it is the only practicable mode of redress available;
  - iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.



97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

58. Furthermore, the Court in *Ziporah Seroney & 5 others vs. Attorney General (2020)* eKLR postulated as follows:

“124. Taking into account the cited principles, and considering that the award of general damages is not a mathematical exercise, the best guide is the awards previously made to persons whose constitutional rights were violated in circumstances similar to that of the deceased. This is the only way of determining a just and reasonable compensation considering that the parties did not make any proposals in their submissions on what they think should be the appropriate damages in this case.”

59. As for exemplary damages, the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018]* eKLR discussing exemplary damages opined as follows:

“32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard [1964] AC 1129* where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.

Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.”



60. Additional explanation was given by the Court in Abdulhamid Ebrahim Ahmed Vs Municipal Council of Mombasa [2004] eKLR where it was determined as follows:

“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of Rookes supra related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service.”

61. The common thread running through the above precedents is that damages awarded in Constitutional Petitions need not strictly follow the principles used in private law cases but such cases can serve as a valuable guide. Nevertheless, it also needs to be borne in mind that constitutional violations are breaches of public law and proof of actual damage in the strict sense of that word may necessary precondition for award of damages.

62. Guided by the above principles and the fact that this was a promising young man who died at early age in life and whose father stated was destined to join priesthood later in his life, and considering the severe psychological and mental pain that the parents underwent through having to watch their son die at the gate of their home from bullets unlawfully fired into his body by State agents (the police officers); I award compensation to the tune of Kshs. 3,800,000/- (Three million, Eight Hundred Thousand Shillings) to vindicate them for the loss of their son’s life.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

.....

**L. N. MUGAMBI**

**JUDGE**

