



**PAMM & 4 others v Attorney General (Petition E004 of 2021) [2023] KEHC 21271 (KLR)
(Constitutional and Human Rights) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21271 (KLR)

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

PETITION E004 OF 2021

JK SERGON, J

JULY 27, 2023

IN THE MATTER OF: ARTICLES 22(1, 2A, B, C), 258(1, 2A, B, C), 159(2D), 50(7, 8), 165(3A, B, D-I, D-II), 2(3, 4, 5, 6), 3(1), 10(1A, B), 19, 20(1, 2, 3, 4), 21(2, 3), 23(3), 24(1, 2, 3), 25(A, C), 27(6, 7), 53(2), 260, 1(1), 4(1), 3(1), 232(B) AND 259(1) OF THE CONSTITUTION OF KENYA 2010; THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013; SECTIONS 19, 6(1) AND 4(2, 3A, B) OF THE CHILDREN'S ACT; AND ALL OTHER ENABLING PROVISIONS OF LAW;

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 46(1C), 43(1A, 2), 35(1B), 26(1, 3), 27(1, 2, 4, 5), 28, 29(C, D, F), 45(1) AND 53(1D, E).

IN THE MATTER OF: ALLEGED THREAT TO RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 46(1D), 50(1), 26(1, 3) AND 23(3E) AS READ TOGETHER WITH ARTICLE 22(1);

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION UNDER ARTICLES 10(2B, C);

IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTIONS 17(1), 77(4), 82(3), 95 AND 3(2B) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT;

IN THE MATTER OF: CONSTITUTIONALITY OF SECTION 3(4B) OF THE OCCUPIERS' LIABILITY ACT;

BETWEEN

**PAMM 1ST PETITIONER
AMT 2ND PETITIONER
SMM (MINOR SUING THROUGH THE 1ST PETITIONER, HER FATHER AND NEXT FRIEND) 3RD PETITIONER**



JMM (MINOR SUING THROUGH THE 1ST PETITIONER, HER FATHER AND NEXT FRIEND) 4TH PETITIONER

SHOPRITE CHECKERS KENYA LTD 5TH PETITIONER

AND

ATTORNEY GENERAL INTENDED INTERESTED PARTY

JUDGMENT

1. The subject matter of this Judgment is the Petition dated 6th January, 2021 in which the Petitioners sought for the following Orders:-

- i. A declaration be, and is hereby issued, that pursuant to Article 46(1c), when read together with Article 43 (1a,2) in the context of Articles 19(2, 3a,3c), 20(2, 3b,4), 24(1, 2b, 2c, 3), 259 (1) of *the constitution*, and Section 17 (1), 77(4), 82(3), 95 and 3(2b) of the *Occupational Safety and Health Act*, Shoprite had a duty to provide First aid and to organize for emergency interventions for Patrick; and to mitigate the psychological impact of Patrick’s injury on Ann, SMM and JMM;
- ii. A declaration be, and is hereby issued, that Section 3(4)(b) of the *Occupiers’ Liability Act* is unconstitutional because it omits precise and adequate checks and balances to guarantee the proper assignment of occupier Liability to a third party, which has the effect of creating a legal loophole that can be unjustly abused to limit access by consumers to compensation for injuries, Contrary to Article 46 (1d), thereby discriminating unfairly against consumers, Contrary to Article 27(1, 2, 4, 7) of *the Constitution*, as read together with Articles 2(4), 19(2, 3a, 3c), 20 (2, 3b, 4), 24(1, 2b, 2c, 3),50(1) and 259 (1);
- iii. A declaration be, and is hereby issued, that, pursuant to Article 27(6) as read together with Articles 19(2, 3a, 3c),20(2, 3b, 4), 27(4), 2(4), 50(1) and 259(1), and in light of Kenya’s history of institutionalized injuries which permitted the Courts during the pre-independence and post- independence constitutional regimes, up until the promulgation of *the Constitution* of Kenya, 2010, the rationes decidendi in influence the thinking of subordinate courts when assessing the minimum or maximum pecuniary limits for damages in personal injury cases, and the doctrine of stare decisis shall not be invoked unless preceded by a historically contextualized critical evaluation of the constitutionality of the applicable ratio decidendi; and the same test of constitutionality shall apply mutatis mutandis when evaluating the persuasive probity of obiter dicta in personal injury case law.
- iv. A declaration be, and is hereby issued, that the “floodgates of cases” common law principle is inconsistent with Article 25(c) of *the constitution*, as read together with Articles 50(1), 2(3, 4), 19(2,3a, 3c), 20(2, 3b, 4) 24(1, 2b, 2c, 3) and 259(1) because it has the effect of limiting the right to a fair trial by arbitrarily limiting or denying access to the remedies stipulated in Article 23(3) irrespective of the merits of a case. The right to a fair trial is a right that



cannot be lawfully limited, and therefore the “floodgates of cases” principle is unconstitutional;

- v. A declaration be, and is hereby issued, that pursuant to Article 27(6), a victim of injury caused by the neglectful acts or omissions of another person or persons, shall be formally recognized, together with the victim’s spouse(s) and immediate dependent(s), as belonging to “marginalized group” pursuant to Article 260 of *the Constitution*, in recognition of the discriminative effect of Kenya’s historical injuries that systematically disadvantaged personal injury victims as a class of persons;
- vi. A declaration be, and is hereby issued, that pursuant to Articles 27 (6, 7), Courts shall recognize the pre-existing inequalities between opposing parties in a dispute, and shall make the necessary equitable adjustments, to minimize or eliminate the prejudicial effect of pre-existing inequalities which accord unfair advantages to one party over another – and which undermine the national values of equity, social justice and protection of the marginalized in Article 10(2b) having regard to the fundamental purpose and intent of Article 27(1,4) as read together with Articles 20(4) and 259(1);
- vii. A declaration be and is hereby issued that the Petitioners’ right to proper and just compensation for injuries and constitutional violations caused by Shoprite, pursuant to Articles 46(1d) and 23(3) as read together with Article 22(1), and the Petitioners’ right to a fair trial as guaranteed by Article 50(1) are under threat due to:-
 - a. Shoprite’s abuse of the ADR process to delay the Petitioners Court action, in lift of Shoprite’s impending closure or sale;
 - b. Shoprite’s deceptive posturing that projects the appearance of normalcy to the public and consumers, whereas it is secretly disposing of its assets;
 - c. Unjust ratio decidendi in personal injury jurisprudence, that has been tainted by Kenya’s history of institutionalized injustices, which entrenched absurdly law compensation amounts for personal injury victims;
 - d. The unconstitutional loophole in Section 3(4b) of the *Occupiers’ Liability Act*;
 - e. The manner in which Shoprite has structured its business and assets in Kenya;
 - f. The unsecured loan that Shoprite took from Stanbic Bank; and
 - g. Shoprite’s failure to provide information requested by the Petitioners pursuant to their rights under Article 35 (1b).
 - h. Shoprite’s secretiveness about the precise method it is using to dispose of its business and/or assets, and the relevant specific deadlines and milestones, which is a contravention of Shoprite’s duty under Article 10(c) to demonstrate the national values of transparency and accountability in the public interest.



viii. A declaration be and is hereby issued that Shoprite's failure or refusal to provide appropriate emergency assistance including physiological and psychological first aid to Patrick, Ann, SMM and JMM, pursuant to its obligations under Article 43(1a, 2), as read together with Article 46(1c, d, f) and 259(1):

- a. Needless subjected Partick to an unnecessarily extended duration of unmitigated pain; avoidable suffering; avoidable psychological distress; and avoidable socioeconomic injuries;
- b. Needless subjected Ann, SMM and JMM to an unnecessarily extended duration of psychological distress, anxiety, avoidable suffering; and avoidable socioeconomic injuries;
- c. Violated each Petitioner's consumer rights under Article 46(1c);
- d. Violated each Petitioner's social and economic rights under Article 43 (1a, 2);
- e. Violated each Petitioner's right to Human Dignity – which is guaranteed under Article 28;
- f. Was an act of discrimination, which violated each Petitioner's rights under Article 27(2,5);
- g. Was an act of psychological violence, which violated each Petitioner's rights under Article 29(c), and under Article 53(1d) for SMM and JMM;
- h. Was an act of physiological and psychological torture, which violated each Petitioner's rights under Article 29(d);
 - i. Violated each Petitioner's rights under Article 29(f), and under Article 53(1b) for SMM and JMM because it was an act of cruelty; was inhuman; and was degrading;
- ix. A declaration be, and is hereby issued, that in the context of Articles 19(3c), 20(2), 24(1,3) and 25(c), Shoprite failure, or refusal to provide information requested by Patrick, Ann, SMM and JMM respectively, violated each Petitioner's respective rights under Article 35 (1b);
- x. A declaration be, and is hereby issued that Shoprite violated SMM's and JMM's right to enjoy parental care as guaranteed by Article 53(1e) when read together with Article 20(2), and failed or refused to uphold the best interests of a child, thereby violating SMM's and JMM's right to recognition and protection pursuant to Article 53(2);
- xi. A declaration be and is hereby issued that Shoprite's actions and omissions violated and needlessly disrupted the Petitioner's collective harmony as a family unit Contrary to the spirit purport and object of Article 45(1) as read together with Articles 20(2, 3b, 4b) and 259(1a) thereby disrupting and threatening the long-term stability and security of their family unit which this court being an organ of the state is obliged to recognize and protect;
- xii. An Order for compensation, the quantum of which shall be as determined by the court be and is hereby issued against Shoprite pursuant to the state's



duty under Article 45(1) in favour of the Petitioners collectively as a family for the disruption and threatening of the harmony, stability and security of their family unit;

- xiii. An Order for compensation, the quantum of which shall be and is hereby issued against Shoprite in favour of Patrick, Ann, SMM and JMM respectively comprising of distinct compensation to be paid to each petitioner for each distinct violation of the Petitioner's constitutional rights – as listed below:-
 - a. Threatening the Petitioner's right to:-
 1. Compensation under Article 46(1b);
 2. A fair trial under Article 50 (1);
 - b. Violating the Petitioner's consumer rights under Article 46(1c);
 - c. Violating the Petitioner's social and economic rights under Article 43(1a, 2);
 - d. Violating the Petitioner's right to human dignity as guaranteed by Article 28;
 - e. Discriminating against the Petitioner, in violation of Article 27(2,5);
 - f. Subjecting the Petitioner to psychological violence, in violation of article 29(c)'
 - g. Subjecting the Petitioner to psychological torture in violation of Article 29(d);
 - h. Subjecting Patrick to physiological torture in violation of Article 29(d);
 - i. Subjecting the Petitioner to cruelty; inhuman treatment; and degrading treatment in violation of Article 29(f);
 - j. Threatening the Petitioner's right to life in violation of Article 26(1, 3) as read together with Articles 19(2), 20(2, 3b, 4), 24(1,3) and 25(1);
 - k. The violation of the Petitioner's rights under Article 35(1b);
- xiv. An Order for general damages pursuant to Article 46(1d) comprising of distinct compensation to be paid to each Petitioner under each distinct head below, the quantum which shall be as determined by the Court be and is hereby issued against Shoprite in favour of Patrick, Ann, SMM and JMM respectively for needlessly subjecting each Petitioner to an unnecessarily extended duration of:-
 - a. Unmitigated pain and avoidable suffering;
 - b. Avoidable psychological distress;
- xv. An Order for general damages, the quantum of which shall be as determined by the Court be and is hereby issued against Shoprite in favour of SMM and JMM respectively for each distinct violation below:-
 - a. Violating her right to enjoy parental care under Article 53(1e);
 - b. Failing to uphold the best interests of a child thereby violating her right to recognition and protection pursuant to Article 53(2);



- xvi. An order for compensation pursuant to Article 46(1b) comprising of distinct compensation to be paid to each of the Petitioners under each distinct head below, the quantum of which shall be as determined by the Court be and is hereby issued against Shoprite in favour of Patrick, Ann, SMM and JMM respectively for the following losses attributed to the socioeconomic harm of the aforementioned constitutional violations;
- a. Loss of amenity;
 - b. Loss of consortium;
 - c. For loss of faculty;
 - d. For loss of earning expectation;
 - e. Unforeseeable future healthcare expenses due to the nature of injury;
- xvii. An order for aggravated damages, the quantum of which shall be as determined by the court be and is hereby issued against Shoprite;
- a. In favour of Patrick for Shoprite's unwarranted cruelty in failing or refusing to offer physical and psychological First Aid; and for Shoprite's conduct that demonstrated contempt of Patrick's constitutional rights;
 - b. In favour of Ann, SMM, and JMM respectively for Shoprite's unwarranted cruelty in failing or refusing to offer psychological First Aid to each of them notwithstanding their status as vulnerable and marginalized classes of persons as defined in Articles 21(3) and 260; and for Shoprite's conduct that demonstrated contempt of each of the aforementioned Petitioner's constitutional rights;
- xviii. An Order for Exemplary Damages, the quantum of which shall be as determined by the Court be and is hereby issued against Shoprite in favour of the Petitioners collectively due to Shoprite's egregious conduct in light of the aforementioned constitutional violations and for Shoprite's continued recklessness even after realizing that their display was threatening consumer right under Article 46(1c); the overriding purpose of this order is to deter similar conduct by other members of the business community in the public interest and to highlight the important role of private sector's constitutional duty towards attainment of Article 43(1a, 2) as read together with Article 46(1c); and to deter socioeconomically retrogressive attitudes within the business community towards Articles 35(1b), 46(1c) and 46(1d);
- xix. An Order for costs in favour of the Petitioners on a full indemnity basis, or in the alternative, at the Court's discretion that each party bear its own costs – this being a public interest matter;
- xx. An Order be and is hereby issued extending any temporary order issued in favour of the Petitioners, jointly or severally in order to protect their rights under Article 46(1d) and/or 23(3d) including any conservancy order; any



freezing order; or any temporary injunction; until all orders made by this Court have been fully executed and all payments due to each of the Petitioners fully effected – the proof of which shall be furnished to the Court before any such order is lifted.

- xxi. Any other order(s) as this Honourable Court shall deem just.
 - xxii. Interest on each and every away, including interest on any costs awarded.
2. The 1st Petitioner namely: Patrick Alouis Macharia Maina, filed an Affidavit he swore in support of the Petition together with a List of documents.
 3. In response to the Petition, the Respondent filed the replying Affidavit sworn by its director namely: Anton Wagenaar to oppose the same.
 4. On 15th June, 2023, this Court gave the following directions:-
 - i. That all pending applications in this Petition including the Motion dated 5th June, 2023 are dispensed with and or struck out to pave way for the hearing of the main Petition dated 6th January, 2021.
 - ii. The parties to this Petition are hereby given 14 days to file their written submissions on the main Petition.
 - iii. If the parties fail to comply in filing written submissions, this Court will proceed to consider the material placed before it in support and against the Petition and determine the Petition.
 - iv. Judgment on the Petition dated 6th January, 2021 to be delivered on 27th July, 2023.
 - v. In order to avoid this Petition procrastinating further, no party is allowed without leave of this court to file any new Application.
 5. As at the time of writing this Judgment, the Respondent was the only party which had filed its submissions.
 6. I have considered the grounds stated on the petition plus the facts deponed in the rival Affidavits. I have also taken into account the written submissions filed by the Respondent plus the authorities cited.
 7. By way of introduction, the orders sought by the Petitioners are twofold namely:- Declaratory and Compensatory Orders in the nature of general, aggravated and exemplary damages.
 8. The background of this case can easily be deduced from the Pleadings and the rival Affidavits filed by the parties. It is alleged that on 27th September, 2019, an accident occurred in Garden City Mall within Nairobi whereof Patrick Alouis Macharia Maina, the 1st Petitioner herein sustained an injury while shopping at the Respondent's aforesaid Shopping Mall.
 9. The 1st Petitioner aver that he was injured when he was pulling items from the top shelves. The 1st Petitioner claimed that he suffered a traumatic brain injury.
 10. The Respondent denied the 1st Petitioner's assertion and stated that the 1st Petitioner was negligent since he did not seek assistance from the Respondent's attendants who were available, well trained and equipped to assist customers like him. The Respondent further stated that out of good will, it ensured that the 1st Petitioner was accorded the necessary medical care and treatment in the nearest



- medical facility within Garden City Mall namely:- Avenue Healthcare Clinic. It is pointed out that the 1st Petitioner received first aid at the aforesaid facility for the minor injuries he sustained.
11. The Respondent also stated that it settled the 1st Petitioner's medical bills at the facility to ensure that he accessed emergency health care and attention. It is the Respondent's submission that the Petitioners have failed to hinge the facts on the alleged violation of rights and fundamental freedoms.
 12. Upon considering the material placed before this court, two main issues present themselves for determination by this Court; First, whether the Petitioner's rights and fundamental freedoms were violated and or threatened as a result of the alleged injury sustained by the 1st Petitioner at the Respondent's Garden City Mall? Second: Whether the Petitioners are entitled to the Constitutional reliefs.
 13. On the first issue, it is imperative to state from the outset that the test as to whether the Complaints made against the Respondent in a Constitutional Petition are fashioned in a manner that gives proper notice to the respondent about the nature of claims being made so that such a party can adequately prepare its case.
 14. In the case of Communications Commission of Kenya and 5 others -VS- Royal Media Services Limited & 5 Others {2014}eKLR, the Supreme Court of Kenya held inter alia as follows:-

“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.”
 15. In the instant Petition, the alleged violations of constitutional rights and fundamental freedoms are outlined in paragraphs 109 to 124 of the Petition.
 16. It is the averment of the 1st Petitioners that their rights were infringed by the Respondent's refusal to provide the appropriate physiological and psychological first aid to the Petitioners pursuant to the Respondent's obligations under Article 43 (1a, 2) as read with Article 46(1c) having regard to Articles 19(2, 3a, 3c), 20(2, 3b, 4), 24(1, 2b, 2c, 3), 25(a), 29(c, d, f) and 259 (1) of *the constitution*.
 17. The 1st Petitioner argued that the Respondent subjected him to an unnecessarily extended duration of unmitigated pain, avoidable suffering, avoidable psychological distress and avoidable socio-economic injuries. The Petitioners are essentially beseeching this court to holistically interpret Articles 43(1a, 2) and 46(1c) in determining whether the Respondent is liable for the alleged violations.
 18. The Respondent on its part aver that it facilitated the provision of emergency health care services by taking the Petitioner to Avenue Healthcare Clinic which was the nearest health facility within Garden City Mall. The Respondent also aver that it settled all the medical bills.
 19. Under Article 43(1)(a) of *the constitution*, every person is entitled to the highest attainable standard of health while Article 43(2) Provides that a person shall not be denied emergency medical treatment. Article 46(1) enumerates the consumer rights which include the right to goods and services of reasonable quality, the protection of their health safety and economic interests and compensation for loss or injury arising from defects in goods and services.
 20. The question which arises for the rights set out under Article 43 is, who are the duty bearers in the provision of emergency medical treatment? It would appear from Article 43(1) (a) that the duty bearers are health authorities, medical institutions and health care Professionals.



21. The 1st Petitioner attached to his Affidavit a medical report prepared by Dr. Marvin Obath which is marked as “PM-005” which reveal that the 1st Petitioner suffered lacerations on the lips (burst lips) and tender nasal bridge.
22. The Respondent urged this Court to find that the alleged injuries outlined by the 1st Petitioner in the Petition to be merely speculative and unsubstantiated.
23. I have already stated that the law prescribes who are the duty bearers. With respect, I am persuaded by the Respondent’s submission that the Petitioner’s allegation on violation of the right to health and emergency medical treatment cannot stand because the Respondent has tendered credible Affidavit evidence showing that it took the 1st Petitioner to the nearest medical facility and even settled all the medical bills.
24. I am also persuaded by the Respondent’s submission that it cannot bear the responsibility of failure to register the 1st Petitioner as an accident and emergency patient for prompt medical attention as it has no medical expertise to diagnose injuries and the power of registering patients in a hospital.
25. The Petitioners have expressly pleaded that the Respondent failed and or refused to provide emergency assistance thus violating his right to human dignity under Article 28 of *the Constitution*. The Respondent has stated that it took the 1st Petitioner to the nearest medical facility for first aid and treatment. The Petitioners did not controvert the Respondent’s aforesaid assertion. I find that the Respondent did not violate the Petitioner’s right to human dignity.
26. As regards the allegation of discrimination, the 1st Petitioner claimed that he suffered discrimination when the Respondent failed to provide appropriate emergency assistance. I have already taken note of the fact that there is no denial that the 1st Petitioner was taken for medical treatment at Avenue Health Care Clinic a facility within the Respondent’s Garden City Mall. There is therefore no proof of discrimination on the part of the Respondent as against the Petitioners. The Petitioners have also claimed that they were subjected to physiological and psychological torture, inhuman and degrading treatment by the Respondent’s failure or refusal in providing the appropriate emergency assistance Contrary to Article 29(c), (d) and (f) and Article 53(1d) for SMM (3rd Petitioner) and J.M.M.(4th Petitioner).
27. The Respondent has beseeched this Court to find that the assertion was not backed by evidence on the part of the Petitioners. With respect, the Petitioners are enjoined by law to tender evidence proving that they were denied emergency medical treatment by the Respondent as an act of psychological violence, physiological and psychological torture, an act of cruelty which is inhuman and degrading. The Affidavit evidence tendered is so scanty and did not therefore establish the aforesaid constitutional rights and fundamental freedom violations.
28. It is also apparent that the Petitioners did not by way of evidence demonstrate the psychological violence suffered by the 2nd, 3rd and 4th Petitioners because of the injuries the 1st Petitioner sustained. The Petitioners have further averred that their right to life was threatened as a result of the Respondent’s failure or refusal to provide appropriate emergency assistance.
29. In response to this claim, the Respondent pointed out that the Petitioners have failed to establish the allegation by credible evidence. With respect, I am persuaded by the Respondent’s arguments. The Petitioners are bound to prove how their right to life was threatened as a result of the injuries the 1st Petitioner suffered.



30. The Petitioners have also averred that the 3rd and 4th Petitioners were distressed and horrified by the visible injuries on their father's (1st Petitioner's) face and were therefore unable to enjoy their parent's company as had been planned that evening and unable to enjoy a proper family dinner as they had been accustomed to.
31. Again, the Respondent urged this Court to reject the Petitioner's assertion because they failed to provide the particulars proving such a claim.
32. I am not convinced that the Petitioners have shown how the 3rd and 4th Petitioners rights to parental care and protection were flouted by the Respondent.
33. The Petitioners cited Articles 19(3c), 20(2), 24(1, 3) and 25(c) and claimed that the Respondent's failure or refusal to provide information requested by the Petitioners respectively violated each Petitioner's respective rights under Article 35(1b).
34. The Respondent is of the submission that the Petitioner's interest in the affairs of the Respondent is a malicious scheme to derive an unfair advantage. The Respondent further argued that the Petitioner has without any justification taunted and harassed the Respondent while fishing for information that might compromise the integrity and reputation of the Respondent
35. The Respondent argued that the request for information is unjustified and cannot stand the test set under Article 35 (1)(b) of the Constitution on access of information. It is said that the information sought has no connection to the events of 27th September, 2019. There is no dispute that the Petitioners have sought for the following information inter alia: Company resolutions and or board meetings; Evidence of the Respondent's compliance with the Insolvency Act and Companies Act on winding up or liquidation and dissolution; The Respondent's resolution and or board minutes showing how the company plans to deal with litigation and any Court awards that may result. CCTV footage.
36. The Respondent has argued that the Article 35(1) limits the right of access to information in so far as it is only accessible to citizens when it pertains to information that is held by the state while the information held by another person is limited to Article 35(1)(b) to those instances where the citizens show that the information is required for the exercise or protection of a fundamental right or freedom.
37. Having considered the competing arguments, I find that the Petitioners have failed to sufficiently state why they think they are entitled to the information sought being held by the Respondent and whether the same is necessary for the exercise or protection of their rights and fundamental freedoms. I am also persuaded by the argument that the information sought by the Petitioners is not connected to the events of 27th September, 2019.
38. The Petitioners have also complained that they are aggrieved that their right to proper and just compensation for the injuries and constitutional violations caused by the Respondent, pursuant to Articles 46(1d) and 23(3) as read together with Article 22(1) and their right to a fair trial as guaranteed by Article 50(1) are under threat.
39. It is pointed out that the Respondent has abused ADR process to delay conclusion of the Petitioners case and that the Respondent is secretly disposing of its interest. It is also argued by the Petitioners that there is unjust ratio decidendi and obiter dicta in personal injury jurisprudence that has been tainted by Kenya's history of institutionalized injustices which entrenched very low compensation amounts for personal injury victims.



40. In response to the Petitioners' assertions, the Respondent stated that the apprehension on the part of the Petitioners of the threat to the right to proper and just compensation is unfounded and baseless. It is also argued by the Respondent that the allegations hinges on speculations about the internal affairs and structures of the Respondent.
41. It is apparent from the rival assertions that the Petitioners are in the circumstances seeking to engage themselves in the internal affairs and structures of the Respondent yet they are third parties. It is also clear that the Petitioners have not shown how the Respondent is abusing the ADR process which in any case is voluntary by its nature.
42. The Petitioners are foreseeing a situation where their right to proper and just compensation being threatened by the unjust ratio decidendi and obiter dicta in personal injury jurisprudence. It is the submission of the Respondent that the doctrine of Stare decisis forms an integral part of Kenya's Constitutional regime and Practice.
43. The invitation to this Court to operate outside the doctrine of stare decisis cannot be entertained because this is a principle recognized by *the Constitution*. The doctrine of stare decisis postulates that decisions of a higher Court, unless distinguished or overruled, bear the quality of law and bind all Lower Courts in similar or like cases. The opinion to overrule the decision of Superior Court is not available to a Subordinate Court.
44. As regards the second issue for determination i.e. whether the Petitioners are entitled to the constitutional reliefs sought. I have hereinabove set out the reliefs the Petitioners are seeking before this Court as being declaratory orders and damages. Under Article 24 of *the Constitution*, the court may grant the appropriate reliefs in proceeding brought in the enforcement of rights and fundamental freedoms which may include declaration of rights, declaration of validity of any law that denies, violates, infringes or otherwise threatens a right or fundamental freedom in the Bill of Rights and is not justified, an order for compensation and an order for Judicial Review.
45. The Respondent has argued that the Petitioners do not deserve to be given the orders for compensation because they failed to prove the violations as alleged in the Petition.
46. It is also stated by the Respondent that the prayers for declaration should not be given because the Petitioners failed to provide sufficient reasons. In the case of *Kooba (K) Limited -VS- County Government of Mombasa [2022]eKLR, Ogolla. J* held inter alia as follows:-
- “.....the purpose of compensatory damages is to provide the monetary amount necessary to replace what was lost and nothing more. Furthermore, it must be taken into account the fact that in Constitutional matters, the Primary purpose of constitutional remedy is not compensatory or punitive but rather to vindicate the rights violated and to prevent or deter any future infringements”
47. While determining the first issue, this Court came to the conclusion that the Petitioners failed to establish that their constitutional rights and fundamental freedoms were violated and for that reason, they do not deserve to be given the declaratory orders as sought in the Petition. There is no doubt in



my mind that the initial injuries suffered by the 1st Petitioner are directly attributable to the accident. Claims arising therefrom are therefore actionable under the law of torts.

48. As regard to the prayers for Exemplary and aggravated damages, it should be noted that the aforesaid damages are awarded in limited circumstances. In the case of Mikidani -VS- Khaigan & Another [2004]eKLR, it was stated that exemplary and aggravated damages may be awarded where:-

- a. Oppressive arbitrary or unconstitutional action by servants of Government.
- b. Conduct calculated by the Defendant to make him a profit which may well exceed the compensation payable to the Plaintiff or
- c. Cases in which the payment of exemplary damages is authorized by statute.

49. Applying the above principles, it is apparent that the Petitioners do not deserve to be awarded exemplary nor aggravated damages.

50. In the end, I find no merit in the Petition. The same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2023.

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J. K. SERGON

JUDGE

In the presence of:

C/Assistant - Rutoh

1st Petitioner – Present in Person

Mbabu holding brief for Kamau for Respondent

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