



REPUBLIC OF KENYA



**MM (Suing for His Behalf and that of MK, WK TN Minors) v Ngomo (Petition
15 of 2022) [2023] KEHC 24499 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

PETITION 15 OF 2022

MW MUIGAI, J

OCTOBER 31, 2023

**IN THE MATTER OF CONTRAVENTION OF ARTICLES
22,23, 165(3) (B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA RIGHTS
ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

**MM (SUING FOR HIS BEHALF AND THAT OF MK, WK TN
MINORS) PETITIONER**

AND

JOSHUA ISUNGU NGOMO RESPONDENT

JUDGMENT

Petition

1. Vide a petition dated 1st September, 2022 and filed in court on 2nd September, 2022 the Petitioner herein sought the following reliefs from the Court;
 - a. A declaration that the Respondent violated the Petitioner's fundamental rights to human dignity, freedom against torture of any manner whether physical or physiological, forced labour, privacy, conscience, religion, belief and opinion, property, environment and language and culture under Articles 28, 29 (d), 30, 31, 32, 40, 42 and 44 of the Constitution of Kenya.



- b. An order of permanent injunction restraining the Respondent from interfering with Petitioners' properties including restraining him from violating Petitioners' rights to property and privacy.
- c. An order that the Respondent be compelled to compensate the Petitioner for damages and/or loss.
- d. An order for the costs for the petition.
- e. Interest on (c) & (d) above.

Background

2. The Petitioner averred that the Respondent violated the Petitioner's right to human dignity and privacy as envisaged at Articles 28 and 31 of the Constitution of Kenya 2010 since they did not have permission and/or consent from the Applicant to access the house been used by the Petitioner and minors namely MK, WK, TN in their home and sleeping area and create a mess going for a long call inside the house and spreading the feces all over the inhabited house and created disturbance as he had.
3. The Petitioner argued that the Respondent violated the Petitioner's right not be subjected to physical or physiological torture as envisaged at Article 29 (d) of the Constitution of Kenya 2010 since the Respondent is an alleged evil person the applicant has not had peace of mind hoping that no ungodly powers and evil works would create any disturbance in his home or his family and generations considering all the actions were taking place at the Petitioner's late mother's home as used by the Petitioner and the minors suing.
4. The Petitioner opined that the Respondent has also violated the Petitioner's right to not be subjected to forced labour as envisaged under Article 30 as he has been forced to clean up the mess done by the Respondent inside the house as it's a place used by the Petitioner and the minor children as their home and sleeping area. The Respondent violated the Petitioner's freedom of conscience, religion, thought, belief and opinion envisaged under Article 32 as he has acted against the Petitioner's belief, religion or conscience by his bizarre actions as the Respondent is an alleged witch which actions may end up tormenting the Petitioner and his whole family and generations to come.
5. The Petitioner avers that the Respondent has also violated his right to property enshrined under Article 40 by breaking into his home/house and carrying out bizarre and unexplained actions and leaving a mess in the room making the room be free of occupation by anyone for fears of what may result due to the Respondent's actions.
6. The Respondent has also violated the Petitioner's right to a clean and healthy environment envisaged under Article 42 by creating a mess in the room when he went for long call inside the house and picked up the feces and dirtied the whole house by spreading the feces on the walls and utensils and beddings used by the petitioners and refusing to clean his own mess.
7. Petitioner's house which the Respondent gained and committed the ungodly acts has become void of use and the Petitioner and minors live in fear and danger of what may befall them due to the Respondent's actions in violation of Articles 19, 22, 23, 25, 27(1), 28, 29 (c, d, f), 30, 31, 32, 40, 42, 44 of the Constitution of Kenya.

Supporting Affidavit to the Petition

8. By Supporting Affidavit dated 1st September, 2022 and filed in court on 2nd September, 2022, sworn by Muathe Mutisya on his behalf and on behalf of other Petitioners herein wherein he deposed that he



was in his house resting at the night of 1st February, 2022 at around 21:00 hours, when she heard some noise in the next house which belonged to his deceased mother but now used as a store and also a house where the minor children (Petitioners) sleep.

9. Deposing that he went into the house opened the door and saw the Respondent as there was light inside the house wherein the Respondent was talking alone uttering unknown words, picking up and re-arranging the utensils, food inside, the bags and all other items inside the house in a manner connoting ungodly powers at work and evil actions ongoing.
10. He lamented that he called the Respondent but he could not respond as he was busy in action and shortly his brother joined him and together they witnessed the unexplainable actions which culminated in the most bizarre action where the Respondent went for a long call inside the house at his watch and took up the feces spread it on the bed, utensils, walls and went to the children's bed, spread the feces and slept instantly.
11. He lamented that his brother and himself whistled to gain the attention of the villagers who later assembled and managed to lock the Respondent in the house as they waited for law enforcement officers. Deposing that the Respondent's deep sleep and non-response before they called police was amazing even they woke him up and in the event they took him photos. (photos attached). Petitioners stated that the police officers arrived from Wamunyu around 12:00am and took him from the house. The Respondent was then taken to the police station and released the following day upon giving assurance that he was going to clean and cleanse the house and pay for damages which Respondent did not.
12. The Petitioner with his family summoned the Respondent who is his relative, to request him to clean and cleanse the house and pay for damages. The Respondent responded by stating that he does not deal with foolishness. It was the Petitioner's position that he tried to settle the matter outside court however the Respondent's unwillingness made him move to court to take action against the Respondent. He prayed that it is in the best interest of justice that the said orders are issued to allow the Petitioners herein enjoy the fundamental rights and freedoms enshrined in the Constitution of Kenya.

Replying Affidavit

13. In response to the Petition, the Respondent filed a Replying Affidavit dated and filed in court on 25th October, 2022 sworn by Joshua Isungu Ngomo, the Respondent herein wherein he deposed that the said petition is frivolous, vexatious and an abuse of court process and has been made in bad faith with sole purpose of embarrassing the Respondent and that the grounds contained in the affidavit do not warrant grant of the orders sought.
14. Deposing that on the alleged 1/2/2022 he went to work as usual using his motor cycle and after work at around 5pm he joined his friends at a bar Called "Kwa Sama Bar" in Wamunyu where they took alcohol up to around 8pm. He then proceeded to Miondoni Market near his home and joined other friends at "Thome Bar" where he continued drinking up to 9pm when he got very drunk and decided to go home.
15. He deposed further that he could not ride anymore and he decided to park the motor cycle by the road side and went to call his brother to assist him ride the motor cycle to his house. That as he was heading to his brother's house, he saw a house that resembled his and since he was drunk. He staggered into the house and undressed and slept as he usually does in his house. He lamented that when he got into the house, there was nobody in the house, the alleged minors were not in the house.



16. According to the Respondent, the petitioner had incited the crowd against him hence the police were called to rescue him. Depositing that the following day the Petitioner went to the police station with an intention to press charges against him but the police told the Petitioner that he had not committed any offence it's just that he was drunk.
17. He deposed that the Petitioner called Atwii Clan which heard them, retreated to deliberate on the ruling and when it was ready demanded from each of them Kshs s 10,000/= before they could deliver the ruling. Respondent did not have the said sum and later learnt when he was called at Wamunyu police station at the behest of the Petitioner that the clan had ruled that he pay the Petitioner the sum of Kshs s 200,000/= for the disturbance. That the police officers at Wamunyu police post informed the Petitioner that the Sum Kshs s 200,000/= was excessive and advised him that they could not enforce a clan's decision and they were sent home to try and resolve the issue there.
18. The Respondent stated that while at home the Petitioner and his kin became hostile towards him and have on numerous occasions threatened to kill/ or harm him. He opined that he is a god fearing man and do not engage in witchcraft and/ or ungodly activities and if the Petitioner has any evidence of the same he urged him to produce it to court. that he did not force the minors to forced labor as he offered to clean up any mess that he might have caused but the Petitioner refused and indicated that he would use it to teach him a lesson.
19. Respondent deposed that orders being sought by the Petitioner are incapable of issuing as he did not violate the Petitioners rights. he had no intention of interfering with the Petitioner's properties which have not been described and as this court cannot issue ambiguous orders against unknown properties and he cannot compensate the Petitioner for rights that have not been infringed.
20. The Petition was disposed of by way of written submissions.

Submissions

Petitioners Submissions

21. By the Petitioner's submissions dated 6th April,2023 and filed in court on 11th April,2023, wherein Mr. Makau, counsel for the petitioners raised the following issues for determination:
 - a. Whether the petitioners' fundamental constitutional rights were infringed by the Respondent.
 - b. Who should bear the cost.
22. On whether the Petitioners' fundamental constitutional rights were infringed by the Respondent, counsel submitted that witchcraft and unnatural behavior has never been accepted in the Kamba Customary Laws. according to the counsel the spirit of the Constitution of Kenya under Article 2 (4) of the recognizes customary laws citing that any law including customary laws that are inconsistent to the Constitution is void to the extent of the inconsistency. Reliance was placed on D.J Penwill in his book Kamba Customary Law, 1986, outlines under page 94 that Kamba community did and still fear witchcraft greatly, with a chief concern of how to protect themselves against it.
23. It is the Petitioners position that in the Kamba Customary laws when a witch was caught in the act of performing witchcraft, the witch would be made to appear before the elders who would then fine the person by compelling him to pay a lump sum to the aggrieved party and further a cleansing price in form of bulls and goat as the elders would decide hence in this matter the elders asked the Respondent to pay a sum of Kshs s 200,000/= as compensation to the Petitioner as per Kamba customary laws.



24. It was contended by counsel that the following specific rights of the Petitioners were violated which rights counsel submitted on sequentially.
25. On right to human dignity, right to property and right to privacy- Articles 28, 31 and 40 of the Constitution of Kenya 2010, it was averred that the Constitution of grants the Petitioner the right to human dignity and to have that dignity respected, Article of the Constitution of Kenya. It was further argued that in the same breath, the Constitution gives the Petitioner the right to privacy which counsel submitted that the said rights have been breached by the Respondent. Reliance was placed on the case of the New Zealand Supreme Court in Brooker v the Police (2007) NZSC 30 at paragraph 252, to buttress his point on privacy.
26. Regarding the right not to be subjected to mental torture- Article 29 (d) of the Constitution, counsel contended that a petitioner has been subjected to the most cruel and tormenting mental torture that can ever exist. Averring that the house of the mother of the petitioner is a symbol of unity because that is the house the Petitioners grew and have irreplaceable memories of their mother and/or grandmother and it is the same house that the Petitioner is standing and watch the Respondent turn into a toilet and further paints the wall using his wastes and specifically feces. According to the counsel the image that the Respondent showed the Petitioner was a perfect recipe for mental torture.
27. As to right not to be subjected to forced labor- Article 30 of the Constitution, it was the Petitioner's case that upon the refusal by the Respondent to clean the mess he caused, the Petitioner was forced to have the place cleaned which the Petitioner did not do willingly or on any motivation.
28. On the freedom of conscience and religion, it was opined that the Petitioner was distorted at the sight of outright acts of witchcraft as the Respondent practiced what he believed in openly and at the expense of the supernatural being that the Petitioner believe in. credence was placed on the case of Seventh Day Adventist Church v Minister for Education to cement his position on the freedom of conscience and religion.
29. With regard to right to clean and healthy environment, it was the counsel's submission that the petitioners were subjected to a horrible environment covered in feces as result their right to clean environment was infringed.
30. Counsel urged the Court to be guided by the following cases: Centre for Human Rights and Democracy & another v the Judges and Magistrates Vetting Board & 2 others [2012] eKLR, Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited [2021] eKLR in which case court awarded Kshs s 2,000,000 as compensation for breach of a constitutional right. Similarly, reliance was on the case of MWK & another v Attorney General & 3 others [2017] eKLR.
31. On who should bear costs of the suit, reliance was placed on Section 27 of the Civil Procedure Act, and submitted costs are the unfettered discretion of the court subject to conditions and limitations as may be prescribed in that they ought to follow the event.

Respondent's Submissions

32. By the Respondent's Submissions dated 9th June, 2023 and filed in court on 12th June,2023, in which Mr. Muema, Counsel for the Respondent, submitted that the Respondent is a God fearing man, a retired teacher and a respected man in the society. He does not practice witchcraft as his only mistake was being drunk for which he regrets to this day.
33. Counsel placed his reliance in the case of S.W.M v G.M.K [2012] eKLR which case was adopted with Approval in the ruling of the court in John Kimani Mwangi v Town Clerk Kangema Nairobi Petition



- 1039 of 2007 [unreported] wherein the court outlined the principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the right infringed and how it is in respect to him.
34. Similarly, Counsel relied on the case of *Anarita Karimi Case & Trusted Society of Human Rights Alliance v Attorney General and others* Nairobi Petition No 229 of 2012 [unreported] to buttress his point on a party having to prove violation of their rights under the various provisions of the Bill of Rights by stating the provision of the *Constitution* allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement.
 35. It was submitted that the Petitioner has a duty to show this Court the manner in which the rights were infringed which according to counsel the petitioner has not shown how the rights outlined were infringed.
 36. Counsel for the Respondent opined further that the petitioner herein did not establish the nature and extent of the infringement of the alleged rights. it was the counsel's averment that outlining the alleged infringed rights is not sufficient for the court to make a determination in favor of the petitioner
 37. It was the Respondent's case that this is a family dispute and not a constitutional court issue as the Petitioner confirmed that the Respondent was a neighbor and a relative.
 38. Further it is contended that the Petitioner claimed that the sum of Kshs s 3,000,000/= will be adequate compensation for the infringement of their rights. to counter this, counsel placed credence in the case of *Cherono Gladys v University of Nairobi* [2020] eKLR which case was adopted with approval the ruling of the court in *Ramauld James v AGT* [2010] UKPC, to substantiate the point that it must be shown that there have been damage suffered as a result of the breach of the Constitutional right before court can exercise its discretion to award damages.
 39. It was counsel's submission that the petitioner has failed to prove manner of infringement, nature and extent of infringement of the alleged. He has also failed to prove damages he and the minors have suffered to warrant damages being awarded in the nature of compensatory damages.
 40. Counsel urged the Petition herein failed to meet the threshold for grant of the orders sought and the same should be dismissed with costs to the Respondent.

Determination/Analysis

41. The Court considered pleadings and submissions by parties through Counsel. The issues for determination are;
 - a. Whether the Court has requisite jurisdiction.
 - b. Whether the Petitioners' Fundamental Constitutional Rights were infringed by the Respondent or not.
42. The Court's jurisdiction is provided by Article 165 (3) (b) & (d) of Constitution of Kenya. In the Supreme Court of Kenya in Petition No 7 of 2014, *Mary Wambui Munene v Peter Gichuki Kingara and Six others* [2014] eKLR; the Court outlined and settled the question of jurisdiction of the Court in relation to matters of law and not facts on appeal.
43. This matter focuses on the parameters of constitutional Petitions in setting out violations of the *Constitution* and remedies sought thereof. Articles 22 and 258 of the *Constitution* remain the anchor provisions relating to the locus standi in instituting Petitions.



44. The Courts have expressly set out on the manner in which Petitions ought to be presented to Court. the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) (commonly referred to as ‘the Mutunga Rules’) provide for the contents of Petitions. Rule 4 of the Rules allows for filing of Petition in terms of Rule 10 thereof which provides seven key contents of a Petition.
45. The Supreme Court in [Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others](#) (2014) eKLR provided the following as regards Constitution Petition;
- 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 v 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 principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
46. From the above principles applied to the instant matter, the Court has jurisdiction and there is in place a competent petition.
47. The Petitioner’s case in a nutshell is that the Respondent averred that the Respondent without legal right, permission and/or consent from the Applicant, accessed the house where the Petitioner and minors namely MK,WK, TN were sleeping area and he created a mess by going for a long call inside the house and spreading the faeces all over the inhabited house and picked up the faeces and dirtied the whole house by spreading the faeces on the walls and utensils and beddings used by the Petitioners and he refused to clean his own mess thereby created disturbance.
48. The Petitioner was disturbed that the Respondent was alleged to be an evil person and was found chanting and carrying out bizarre and unexplained actions suspected to be witchcraft causing the Applicant lack of peace of mind that the Respondent’s actions amounted to ungodly powers and evil works and these actions taking place at the Petitioner’s late mother’s home would haunt his family for generations to come.
49. These actions amounted to violation of the Petitioner’s (including the minors) right to human dignity and privacy as envisaged at Articles 28 and 31 of the [Constitution](#) of Kenya 2010 3. The Petitioner was subjected to physical or physiological torture as envisaged contrary to Article 29 (d) of the [Constitution](#) of Kenya 2010 since as used by the Petitioner and the minors suing. The Respondent violated the Petitioner’s right to not be subjected to forced labour as envisaged under Article 30 of [CoK](#) as he was forced to clean up the mess done by the Respondent inside the house a place used by the Petitioner and the minor children. The Respondent violated the Petitioner’s freedom of conscience, religion, thought, belief and opinion envisaged under Article 32 of [CoK](#) as he has acted against the Petitioner’s belief, religion or conscience by his bizarre actions The Respondent violated the Petitioner’s right to property enshrined under Article 40 of [CoK](#) by breaking into his home/house. The Respondent violated the Petitioner’s right to a clean and healthy environment contrary to Article 42 of [CoK](#) by creating a mess in the room when he went for long call inside the house.
50. The Respondent’s response is a mere denial and attributes his actions to being inebriated/drank at the time, and he went to a house that looked like his house and slept. The rest of his explanation, amounts



to allegations of harassment and coercion by the Clan to repair the damage caused and really total disregard of damage caused by his unbecoming behavior.

51. The Respondent submitted that the Petition is not properly before Court and relied on the case of *Cherono Gladys v University of Nairobi* [2020] eKLR, where it was held, the dispute was based on Law of Contract and as such was based on the employment contract. The Respondent asserted that the dispute herein is not a constitutional matter but a family dispute, he attributed the Clan deliberations and payment of Kshs 200,000/- as extortion and more importantly, the Petitioner failed to prove manner of infringement, nature and extent of infringement of the alleged. He failed to prove the damage he and the minors suffered to warrant damages being awarded in the nature of compensatory damages.

52. In *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR Mrima J observed;

“The legal burden of proof: -The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows: (1) 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.(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

The evidential burden of proof: -The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

53. In the instant case, the Petitioner by 4 photographs marked MM1b depict the inside of a house in disarray and a man sleeping in an unkempt surrounding. The Petitioner has proved on a balance of probabilities that the Respondent was in the Petitioner’s house and saying that he was drunk and went to a house that looked like his does not cut it.

54. The Petitioner’s averments that they called Police Officers from Wamunyu Police Station who came and took the Respondent away and that as relatives the matter was discussed before the clan have not been controverted by evidence. Instead the Respondent claims that it is a family matter, it was extortion of money by the clan and there were no minors in the house at the time.

55. The action of unlawful entry and uninvited and/or allowed access to the residence of the Petitioner at night would amount to the tort of trespass but more than that happened. The Respondent is said to not only come into the Petitioner’s mother’s house, where minors were or were to spend the night and made bizarre chants and had a long call and spread the faeces all over the items in the house. This was willful, reckless and negligent infliction of apprehension fear and emotional distress to the Petitioner and minors interfered with their safety and security and quiet enjoyment and peace of privacy in their home. The Respondent’s actions interfered with the Petitioner’s right to privacy peace and quiet in / at his home, right to respect his family and respect his home.



56. The tort of trespass and /or nuisance would not adequately cover the Respondent’s unlawful entry to Petitioner’s home and the bizarre actions that were tantamount to witchcraft and spread of faeces all over the house.
57. Cumulatively, the Respondent’s actions are not denied but explained away by downplaying the seriousness of the impact of the Respondent’s actions on the Petitioner and/or minors.
58. The Court finds that the Respondent’s actions were an infringement violation of the Constitution and breached the Petitioner’s right to privacy under Article 31, violated right to human dignity under Article 48, Article 53 (d) (f) & 2 with regard to the minors who ought to be protected from abuse, neglect and all forms of violence and inhuman treatment among others. Violations were proved by the Respondent’ conduct in violation of Articles 28, 29, 30 32, 40 & 42 of the Constitution as expounded above.
59. the Constitution prescribes the binding nature by every person institution and the State to defend the Constitution and uphold human rights as follows;

3. Defence of this Constitution

- (1) Every person has an obligation to respect, uphold and defend this Constitution.

19. Rights and fundamental freedoms

- (2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
- (3) The rights and fundamental freedoms in the Bill of Rights—
 - (a) belong to each individual and are not granted by the State;

The right violated /infringed were not justified by any limitation as prescribed by Article 24 of the Constitution.

60. In light of the infringement and violation of human rights to the Petitioner and minors in terms of Articles, 28, 29 30, 31 32 40 42 44 & 53 of the Constitution. The Petitioner sought that the Respondent be compelled to compensate the Petitioner for damage injury and/or loss.
61. In MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) Mativo J(as he then was) stated as follows;

“It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[45]The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law



remedy evolved by the Courts.[46] Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights; Such claim is distinct from, and in addition to remedy in private law for damages for tort.

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 entail.[47] 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 compensation.”

62. In the instant case, the Petitioner submitted that the elders asked the Respondent to pay Kshs 2,000,000/- as compensation to the Petitioner and a further cleansing price [for witchcraft] in form of bulls and goats as elders would decide.
63. On the other hand, the Respondent deposed that he did not commit any offence he was drunk and he ended up in a house and slept only to be rescued by Police and later released to resolve the matter at home. The Aswii clan sought the Respondent to pay the Petitioner Kshs 200,000/-.
64. Clearly, there is a disparity in figures by the Clan. Be that as it may, the fact of unlawful entry to the Petitioner’s mother’s house and scared the minors who slept there, the bizarre conduct of the Respondent, speaking incoherently and chanting while rearranging items in the house caused fear, apprehension and emotional distress and physical and physiological torture. Moreso by going for a long call and smearing faeces all over the house and utensils in the house. Further making the Petitioner and minors clean up and discard the covered items. The Petitioner called Police who came to their aid. Later, the Respondent was released to settle the matter amicably at home. He seemingly declined to attend, participate discuss and/or negotiate with family or Clan members and was not remorseful while attributing such conduct to being drunk which was not proved.
65. The Court’s responsibility is to ensure adherence to the law and every person to exercise rights but not to the detriment of others.
66. This Court will not condone taking law into one’s hands, entering someone’s home desecrating it and with no care in the world attributing such unbecoming conduct to being drunk. Such misconduct and violation of human rights is not condoned.

Disposition

1. The Court declares that the Respondent violated the Petitioner’s fundamental rights to human dignity, freedom against torture of any manner whether physical or physiological, forced labour, privacy, conscience, religion, belief and opinion, property, environment and language and culture under Articles 28, 29 (d), 30, 31,32, 40, 42 and 44 of the Constitution of Kenya.
2. The Court grants the order of permanent injunction restraining the Respondent from interfering with Petitioners’ properties including restraining him from violating Petitioners’ rights to property and privacy.
3. The Court awards damages of Kshs 800,000/- to be paid by the Respondent to the Petitioner on his behalf and the minors for unlawful entry and access to Petitioner’s mother’s home, desecration of the house by discarding items in the house while chanting and in bizarre conduct akin to witchcraft and making a long call and smearing faeces all over the house causing fear apprehension and



emotional distress to the Petitioner's family and loss of items discarded and forced to cleanup after the Respondent's spread of faeces in the house.

4. Kshs 800,000/- with interest and costs of the Petition granted to the Petitioner and family to be paid by the Respondent.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 31ST OCTOBER, 2023. (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

In the presence of:

No Appearance - For The Petitioner

Mr. Muema - For The Respondent

Patrick - Court Assistant

Mr. Muema: I apply for stay of execution of Court orders.

COURT: The application for stay to be filed, served and heard interpartes.

M.W. MUIGAI

JUDGE

31/10/2023

