



**Mohammed & 4 others v Attorney General & 2 others (Petition
1 of 2017) [2022] KEHC 12256 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12256 (KLR)

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

PETITION 1 OF 2017

A ALI-ARONI, J

JUNE 30, 2022

IN THE MATTER OF ADAN MOHAMMED AND OTHERS

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 2,3,10,19,20,21,22,23,25,27,28,29,31,40,48,49,51,73,129
AND 131 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF SECTION 3, SECTION 35(4) AND
SECTION 270 OF THE KENYA DEFENCE FORCES ACT**

BETWEEN

ADAN MOHAMMED 1ST PETITIONER
ABDULLE SAHARA MAOW 2ND PETITIONER
DUBANE SAMOW 3RD PETITIONER
SALAN HASHIM 4TH PETITIONER
MOHAMMED SHIKH MOHAMMED 5TH PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE CABINET SECRETARY, MINISTRY OF DEFENCE 2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT



JUDGMENT

1. By a petition dated the January 10, 2016 Adan Mohammed, Abdille Sahara Maow, Dubane Samow, Salan Hashim and Mohammed Sheikh Mohammed, the petitioners herein moved this court against the Honourable the Attorney General, the Cabinet Secretary Ministry of Defence and the Director of Public Prosecution claiming violations of their rights under various articles of the Constitution and statute.
2. The petition was grounded on the fact that on the December 28, 2015 at around 10.45 am three (3) Kenya Defence Forces Land Cruisers coming toward the direction of Mandera town and each occupied by at least six hooded officers, stopped at Hali connection where some people were repairing a vehicle, Toyota probox white in colour when the said officers severally and injuring the driver of the Pro Box, passengers in the vehicle and a passersby some of whom succumbed to the injuries while undergoing treatment at Mandera County Referral Hospital, while another passerby died on the spot.
3. After the shooting the Mandera County Governor organized for airlifting of the injured passengers. The ATPU police thoroughly combed the white pro box and no explosives found as alleged by the KDF officers.
4. Due to the above incident the petitioners claim their rights were violated to the extent that the Government of Kenya, Kenyan State organs, and official were responsible, through acts of omission and commission directly and indirectly for the harm that was visited upon the petitioners and their properties.
5. The petitioners therefore sought for the following prayers;
 - a) A declaration that this is a public interest case.
 - b) A declaration that the petitioner's rights are guaranteed as provided for under the Constitution, and as referenced in the petition were violated.
 - c) An order for reparation including compensation for pecuniary and non-pecuniary damages, or a combination of both under article 23 of the Constitution.
 - d) A declaration that the respondents' failed and or abdicated their duty to protect the petitioners.
 - e) A declaration that the 3rd respondent has violated the petitioner's human rights, in that they failed to adequately and/or effectively record, investigate, prosecute and/or in remedy a well-documented instance of torture under the National Police Service Act, and Kenya Defence Forces Act.
 - f) A declaration that the respondents have jointly and/or severally acted, or failed to act, in such a way as he contravenes their constitutional, statutory and international obligation.
 - g) Where appropriate, sanctions and remedies provided for under the National Police Service Act and Kenya Defence Forces Act.
 - h) Costs and such order as the honourable court shall deem just and expedient to grant.
6. The petition was opposed by the 1st and 2nd respondents by way of grounds of opposition dated July 15, 2017 and a replying affidavit by Julius Karimi Githaka dated May 17, 2018.
7. In the grounds of opposition, it was asserted as follows;



- a) That no evidentiary proof has been availed before the honourable court to demonstrate that KDF soldiers of the 2nd respondent were involved in the alleged shooting of the petitioners, and/or any other citizen/or in Mandera town on the December 28, 2015 at all.
 - b) It defeats any conceivable logic that as the petitioners allege that KDF officers shot and killed anyone in Mandera town as they marched but failed even to remember the number plate of the alleged vehicles in which the said officers arrived and used during the alleged incident. Further, no death certificates have been produced to prove that anyone died of gunshot wounds inflicted by KDF officers in Mandera town of the alleged date.
 - c) The instant petition is glaring with hearsay as it depicts a story that has been conveniently conjure with the an ulterior motive to attempt to convince this honourable court that officers of the 2nd respondent allegedly committed certain heinous acts upon the petitioners and/or any other persons. This is aimed at painting the images of the said officers in bad light and cast aspersions on their noble duty to provide security to Kenyan citizens.
 - d) The petitioners herein appear to have instituted the instant petition with a view to unjustly enrich themselves by claiming compensation for allegedly acts that cannot be attributed to the officers of the 2nd respondent.
 - e) The petitioners have been unable to sufficiently prove that they have reported any alleged commission of offences by officers of the 2nd respondent to any investigative authority or any police station in Kenya. In any event the alleged OB entry mentioned in their petition has not been proved.
 - f) The instant petition, if allowed, would negate, undermine and/or defeat the very principles of national security as outlined in article 238 of the *Constitution*. Further, it will undermine the manner in which the national security organs carry out their respective functions pursuant to articles 239 of the *Constitution*.
 - g) The petitioners have failed to demonstrate, with sufficient evidence, the nature of their rights alleged to have been violated, the manner in which those rights have allegedly been violated and by whom.
 - h) The instant petition is clearly an afterthought as it has not been accompanied by concrete evidentiary or factual backing required of a constitutional petition.
 - i) The nature of the prayers sought are ambiguous, unclear and full of unnecessary speculation.
 - j) The petition is unmeritorious disclosed no reasonable cause of action against the respondents herein. As such, it is otherwise an abuse of the due process of this honourable court.
8. In the replying affidavit sworn by Julius Karimi Githaka a commissioned officer with the KDF, who informed the court that he was in the convoy heading to Elwak on the December 28, 2015, stated that upon reaching the Mandera-Elwak junction a white Pro Box KBW 269D overtook their convoy slowed down ahead of the lead vehicle which swerved to avoid hitting the said Pro Box. Which already ahead when there was an explosion from the boot of the said Pro Box throwing off the rear windscreen of the said car.
 9. And in view of previous incidents of improvised explosives involving similar vehicles driven in a similar manner, the personnel in the KDF lead vehicle opened fire against the Pro Box.



10. He asserts further that Al-shabaab militants have used similar tactics to attack KDF convoys. That prior to the incident, an IED attack had been carried out against KDF convoys on December 25, 2015 using the same method.
11. He stated further that he believes that personnel in the lead convoy opened fire on the Pro Box given that an explosion happened in the rear of the vehicle and as a purely defensive mechanism.
12. He denied knowledge of any bystander that may have been injured in the incident except occupants of the vehicle who were also affected by the explosion.
13. The hearing of the case proceeded by way of *viva voce* evidence and list of documents exchanged. The originals documents were also availed.
14. At the close of the case each side filed their written submissions.

Petitioners' Case

15. PW1 Adan Mohamed informed the court that that he is a driver and on the December 28, 2015 at around 10 am as he was putting pressure in his tyres, two Tanks (Kifaru) and 4 Land Cruisers started fired indiscriminately where 2 of the people he was with were killed and he survived. As result of the injuries he sustained a scar at the back of his right leg, his head and left hand. He initially went for first aid and later admitted for a week at Mandera Referral Hospital. That two bullets were extracted from his body. He produced a P3 and case summary from the hospital. Further he stated that the police and the Governor of Mandera went to the scene and no explosive found as alleged. The vehicle in question belonged to a third party. He was its driver. He used it to ferry passengers though it is not a PSV. The vehicle remained stationary for 2 years.
16. PW2 Dubane Samow Maalim testified that he is a businessman. He adopted the evidence of PW1 and relied on his statement before court. On cross examination he testified he also saw 4 tankers and 4 Land Cruisers. Shooting occurred from the military. He was shot on the right foot. He had been 200 meters away from the pro box. He is yet to heal from the injury. He also said the shooting was indiscriminately done.
17. PW3 Hussein Sheikh Mohammed He adopted his written statement. Further he stated that he received injuries to his left thigh, left ankle and left leg. Further the shooting affected him emotionally. He has a P3 form. He was treated at Mandera County referral hospital and produced medical documents. In cross examination he informed the court that he was walking from his house to a hotel to have breakfast when he was shot at.
18. PW4 Salam Hashim Maalim owner of vehicle KWB 269D. He testified that his vehicle was kept at the police station for 3 years awaiting investigations. It was his only source of income. He had learnt that his vehicle was shot at by the military. His driver was injured and two passengers killed. He later repaired his vehicle. He carried passengers though he had no PSC license.
19. PW5 Sahara Maow Adille equally elide on his written statement stated that he was injured at the incident. And has a P3 and medical records he wished to rely on. Further he informed the court that they were shot at while at the market. He believed the shot that was fired was aimed at him. In cross examination he stated that he was shot at while crossing the road. He was shot on the right thigh and the bullet is still lodged on his thigh. The shot was fired from the army vehicle.



Respondents Case

20. On their part the respondents called one witness Julius Karimi Githaka who essentially relied on his affidavit of May 17, 2018. He reiterated that there was an explosion from the vehicle ahead. However, it was his evidence that no ballistic examination was done to establish that there was one. Further he cannot state how many bullets were spent. The matter was reported to the police but they did not do a follow up though KDF was adversely mentioned. They did not reach out to those who were affected. Further the he stated that it is the explosion that triggered the firing by their officers. That their lead vehicle opened fire as a security measure. They aimed at the probox and not other persons.

Petitioners Submission

21. It was submitted that on the December 28, 2015 three Kenya Army vehicles with about 6 hooded officers stopped at a roundabout in Mandera town near Hali Connection and without any reason shot indiscriminately at a stalled pro box, where two person died. Thereafter government officers visited the scene, confirmed the pro box had no explosives as alleged by the KDF. Further that several persons were injured in the shooting incident.

Respondent's Submission

22. Counsel for the 1st respondent identified issues as follows;
- a) Whether the court can award damages
 - b) Whether the respondent's jointly or severally acted or failed to act in such a way as to contravene the *Constitution*.
23. Further it was submitted that this is not a public interest case as it does not advance public interest but rather personal gain.
24. That the explosion from the Pro Box is what triggered the shooting which was undertaken as a defence mechanism and only aimed at the Pro Box. Further there is no report from the police to confirm or negate the allegations. Further it is a matter of notoriety that Mandera town is prone to attacks by the Al-shabaab militant group.

Further the petitioners did not call any medical or ballistic expert to prove their allegation.

Determination and Analysis

25. After considering the evidence and submission by the parties the issues for determination are;
- a) Whether the matter is properly before the court.
 - b) Whether Kenya Defence Forces shot if so whether there was any justification for the shooting.
 - c) Whether the petitioners' were injured if so whether the petitioners deserve an awards if so how much?
 - d) Costs.
26. From the evidence on record there is no denying that the Kenya Defence Forces officers shot at a pro box as alleged by the petitioners and Indeed people injured in the incident. The defence witness admitted as much though he attributed the same to have been a defence mechanism on the part of the KDF officers.



27. The question after the admission by the respondents' witness is whether there was justification of the shooting by the said officers.
28. The 2nd petitioner Dubane Samow & the 5th petitioner Abdille Sahara Maow stated in evidence that he was crossing the road when he was shot at and injured. The bullet on the 5th respondent remains lodged at his thigh.
29. From the witness statement of the petitioners and their evidence in court is that the military entourage on reaching the junction of NCPB opened fire indiscriminately killing two civilians and injuring 4.
30. The OB of the police speaks to a report being made an allegation of an explosive. One would have expected a follow up and if for instance there was indeed an explosion, a ballistic report from the police and action taken against the driver and owner of the Pro-box. No such follow up was done which then certainly throws doubt on the allegations made by the respondents.
31. The petitioners on the other hand testified that the Governor and the police went to the scene and no explosives were found as alleged. This coupled with the defence evidence brings the scenario that there was no explosive from the Pro Box as alleged and the KDF soldiers merely acted out of fear and suspicion based on past incidents, which was unfortunate, unprofessional, an ethical and unfair to the citizens of the area. It cannot be assumed that every stationary Pro Box belongs to the Al-shabaab, and suspicion alone cannot lead to wanton shooting to the magnitude witnessed on the material day.
32. The issue of the explosive as alleged remains uncertain, he who alleges must prove the allegation. The state failed to demonstrate this supposition to justify why innocent citizens were shot at by the military. Further why the military would discriminate to shoot so as to hit civilians in the vicinity of the shot out.
33. The petitioners came to court citing violation of several of articles of the Constitution and in particular they cited article 29 of the Constitution that stipulates
 - “every person has the right to freedom and security of the person, which includes the right not to be;
 - (c) subjected to any form of violence from either public or private source.
 - (d) treated or punished in a cruel; inhuman or degrading manner”
34. The petitioners equally relied on international conventions reiterating on the bill of rights in our Constitution.
35. Article 23 of the Constitution gives the High Court, in accordance with article 165 the jurisdiction to hear and determine application for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights.
36. The petitioners moved this court aggrieved that their fundamental rights as citizens were violated by State employees who indiscriminately and for no reasonable cause attacked and injured them. The fact of the injuries inflicted by way of shooting has been admitted. No justifiable reason or cause was attributed to the action of the Kenyan defence forces.
37. The matter is properly before court and since there is the admission of violation and there being no justifiable reasons why the rights of the petitioners were violated.
38. As for the claim on damages on the vehicle and loss of user. The court is of the view that it was not furnished with details of damages and proof of repair costs and the claim therefore fails.



39. The court therefore orders and declares as follows;
- a) The petitioners rights were violated.
 - b) The State failed to investigate and prosecute the officers who shot indiscriminately at innocent citizens.
 - c) The petitioners are therefore awarded damages as follows;
 - i) 1st petitioner Adan Mohammed
Damages for violation of rights Kshs 1,500,000/=.
Damages for injuries suffered Kshs 450,000/=.
Total Kshs 1,950,000/=.
 - ii. 2nd petitioner Abdille Sahara Maow
Damages for violation of rights Kshs 1,500,000/=.
Damages for injuries suffered Kshs 450,000/=.
Total Kshs 1,950,000/=.
 - iii. 3rd petitioner Dubane Samow
Damages for violation of rights Kshs 1,500,000/=.
Damages for injuries suffered Kshs 500,000/=.
Total Kshs 2,000,000
 - iv. 4th petitioner Salan Hashim
Damages for violation of rights Kshs 1,500,000/=.
Damages for injuries suffered Kshs 500,000/=.
Total Kshs 2,000,000/=
 - e) The petitioners are awarded costs and interest at court rates.

DELIVERED AND SIGNED AT GARISSA THIS 30TH JUNE, 2022.

ALI-ARONI

JUDGE

