



**Kinyua (Suing as the legal representative of the Estate of Kibara Njagi (Deceased))
& another v OCS Nkubu Police Station & 2 others (Petition 6 & 5 of 2017
(Consolidated)) [2022] KEHC 14238 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION 6 & 5 OF 2017 (CONSOLIDATED)**

EM MURIITHI, J

OCTOBER 21, 2022

IN THE MATTER OF A SECTION 84 OF THE CONSTITUTION OF KENYA (REPEALED)

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTION 70 & 71 OF THE
CONSTITUTION OF KENYA (AS REVISED IN 2001, REPEALED)**

BETWEEN

**NJAGI KINYUA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE
OF KIBARA NJAGI (DECEASED)) 1ST PETITIONER**

**PETER NKONGE CHABARI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF ERICK MWENDA (DECEASED)) 2ND PETITIONER**

AND

OCS NKUBU POLICE STATION 1ST RESPONDENT

**PS MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

Vicarious liability for the actions of police officers while on duty answering distress calls

It was the petitioners' case that the deceased, who were unarmed, were fatally injured by bullets fired by the police officers under the command of the 1st respondent. The court found that the petitioners had proved on a balance of probabilities that the lives of the deceased were unlawfully cut short by the 1st respondent and his officers, in the guise of exercising their constitutional mandate of maintaining law and order. The court noted that one of the deceased was killed in the prime of his life, by the negligent and irresponsible action of the respondents, while at the youthful age of 20 years. The court thus held that the respondents were vicariously liable.



Reported by Kakai Toili

Tort Law - vicarious liability - vicarious liability of the Principal Secretary Ministry of Interior and Co-ordination together with the officer commanding station for the actions of police officers while on duty answering distress calls - whether the Principal Secretary Ministry of Interior and Co-ordination and the officer commanding station were vicariously liable for the actions of police officers while on duty answering distress calls - claim that the action of some police officers while on duty answering distress calls used excessive force by shooting at a crowd and killing people - whether the Principal Secretary Ministry of Interior and Co-ordination and the officer commanding station were vicariously liable for the actions of police officers while on duty answering distress calls.

Constitutional Law - constitutional petitions - timelines for filing constitutional petitions - whether there was a limitation period on the claims made under the Constitution for redress of violations of rights and fundamental freedoms - constitution of Kenya (repealed).

Brief facts

The petitioners filed the instant petitions seeking among others a declaration that the deceased rights to life under sections 70 and 71 of the repealed Constitution were infringed and an award of damages as compensation to the estates of the deceased. It was the petitioners' case that on or about May 15, 2004 at about 5.30 am at Miruriri Market, the deceased, who were unarmed, were fatally injured by bullets fired by the police officers from Nkubu Police Station under the command of the 1st respondent (Officer Commanding Station Nkubu Police Station).

The petitioners alleged that the lives of the deceased were curtailed as a result of the 1st respondent's negligence and therefore the 2nd respondent (the Principal Secretary of the Ministry of Interior and Co-Ordination of National Government) was vicariously liable for the acts and/or omissions of the 1st respondent in the cause of his duty. The petitioners thus stated that due to the negligence of the police officers, the deceased rights to life were curtailed and that their estates suffered loss and damage.

The respondents claimed that they were responding to a distress call and that when they got to the scene, they identified themselves to the people. They however claimed that the people became violent and started attacking them using arrows and stones. The police further claimed that they opened fire thinking that it was robbers who were shooting at them while trying to escape, and that visibility was not clear. They further claimed that an inquest was opened but the court made its findings that the police were not liable for the deaths. It was also claimed that the petition was an afterthought and an abuse of the court process, as it had been filed 12 years after the findings of the inquest were made.

Issues

- i. Whether the Principal Secretary Ministry of Interior and Co-ordination and the officer commanding station were vicariously liable for the actions of police officers while on duty answering distress calls.
- ii. Whether there was a limitation period on the claims made under the constitution for redress of violations of rights and fundamental freedoms.

Relevant provisions of the Law constitution of Kenya (Repealed)

Section 70 - Fundamental rights and freedoms of the individual.

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,



the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Section 71- Protection of right to life.

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case -

- 1. for the defence of any person from violence or for the defence of property;*
- 2. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- 3. for the purpose of suppressing a riot, insurrection or mutiny; or*
- 4. in order to prevent the commission by that person of a criminal offence,*
or if he dies as the result of a lawful act of war.

Held

1. There was no limitation period on the claims made under the constitution for redress of violations of rights and fundamental freedoms. In addition, the third petition arising from the incident subject of the instant proceedings, the delay of 12 years in the circumstances of the instant case was not unreasonably long, and no prejudice was suffered by the respondents.
2. The petition was founded on the provisions of sections 70 and 71 of the repealed constitution, which was applicable to the circumstances of the instant case which occurred on May 15, 2004. With the detailed narration of the events of the fateful day by eye witnesses in their respective affidavits, the circumstances under which the deceased were shot dead did not fall within the exceptions provided under section 71 of the.
3. It was admitted in the witness statements recorded in respect to the inquest by eye witnesses that the police did not identify themselves to the people, which culminated into the shooting and scampering for safety. It was not shown that the respondents had attempted to shoot in the air to warn the alleged mob that was shooting arrows and throwing stones at the police in an attempt to stop the attack and contain the situation.
4. The inquest file, where the police were vindicated, was only opened a year after the incident after innumerable correspondence by counsels for the deceased families to the respondents. It was not inconceivable that the police who were in charge of calling the witnesses in the inquest did not call crucial witnesses.
5. The petitioners had proved on a balance of probabilities that the lives of the deceased were unlawfully cut short by the 1st respondent and his officers, in the guise of exercising their constitutional mandate of maintaining law and order. It was not lost to the court that one of the deceased was killed in the prime of his life, by the negligent and irresponsible action of the respondents, while at the youthful age of 20 years.
6. In exercise of its jurisdiction under articles 23 and 165(3)(b) of the , 2010, to redress denial, violation, threat or infringement of rights and fundamental freedoms, the deceased persons' rights to life protected under sections 70 and 71 of the repealed constitution was violated in the action of the police officers who, while on duty answering distress calls, in unnecessary, unlawful, illegal and excessive force shot at the crowd and killed the victims subject of the instant petitions without seeking lesser methods of containing the situation and neutralizing any real or perceived threat to themselves. The respondents



were vicariously liable. The shooting of the deceased was negligent, illegal and with use of excessive force.

Petition allowed.

Orders

- i. *A declaration was issued that the deceased's rights to life under sections 70 and 71 of the repealed Constitution were infringed.*
- ii. *The estates of the deceased were each awarded the sum of Ksh 2,500,000 for the breach of the deceased fundamental rights to life under sections 70 and 71 of the repealed Constitution.*

Citations

Cases

1. Kiumo, Amos, John Muturia Mutua & Richard Muroki Karithi & 17; Others (Vide Attached List on Behalf of Themselves and Residents of Igembe Central District) v Cabinet Secretary Ministry of Interior and Coordination of National, Principal Secretary Ministry of Interior & Coordination of National Government, District Commissioner Igembe South & Attorney General (Petition 16 of 2013; [2014] KEHC 4373 (KLR) [2014]eKLR) — Applied
2. Law Society of Kenya v Attorney General & Central Organization of Trade Unions (Civil Application 20 of 2018; [2018] KESC 2 (KLR)[2018] eKLR) — Explained
3. Mbae, Rael Kendi (Suing as the legal representative of the Estate of Patrick Mbae M'Muruga (Deceased) v OCS Nkubu Police Station, PS Ministry of Interior & Coordination of National Government & Attorney General (Petition 7 of 2017; [2019] KEHC 4375 (KLR)[2019] eKLR) — Explained
4. Njeru, Anarita Karimi v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Applied
5. Njuguna, Mburu (Suing on Behalf of the Estate of John Macharia Mburu (Deceased)) v Chief Korogocho Location, Minister of State for Provincial Administration and Internal Security, Attorney General & Director of Public Prosecution (Petition 83 of 2011; [2014] KEHC 5288 (KLR)[2014] eKLR) — Applied
6. Omukanda, Florence Amunga & Francis Khashiyi Ivayo v Attorney General, Commissioner of Police & Permanent Secretary Ministry of Internal Security and Provincial Administration (Petition 132 of 2011; [2016] KEHC 3667 (KLR)[2016] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 23,165(3)(b) — Interpreted
2. Firearms Act (cap 114) — In general — Cited

Advocates

M/S Muia Mwanzia & Co. Advocates for the Petitioners.

Mr. J. M. Kiongo Senior Litigation Counsel for the Respondents

JUDGMENT

1. The petitioners, Njagi Kinyua and Peter Nkonge Chabari moved this court by way of respective petitions, dated June 29, 2016 and October 18, 2016, seeking:
 - a. A declaration that the deceased rights to life under section 70 & 71 of the *Constitution of Kenya (2001)* now repealed were infringed.
 - b. An award of damages as compensation to the estates of the deceased for breach of the deceased's fundamental rights under section 70 & 71 of the *Constitution of Kenya (2001)* now repealed.



- c. Costs and interests at court rates.

a. The Petitioners' Case

2. On or about the May 15, 2004 at about 5.30 am at Miruriri Market, Kibara Njagi and Erick Mwenda (both deceased), who were unarmed, were fatally injured by bullets fired by the police officers from Nkubu Police Station under the command of the 1st respondent. The lives of the deceased were curtailed as a result of the 1st respondent's negligence, and therefore the 2nd respondent is vicariously liable for the acts and/or omissions of the 1st respondent in the cause of his duty. Due to the aforesaid negligence, the deceased rights to life as provided under section 70 and 71 of the Constitution of Kenya (as revised in 2001) now repealed were curtailed, their estates suffered loss and damage and they hold the respondents responsible.

The Respondents' Case

3. The 1st respondent swore a replying affidavit on August 2, 2017 in opposition to the petition. He avers that on May 15, 2004 at about 4.40 am, a report of robbery at Miruiri Trading Centre was made to the then OCS Nkubu Chief Inspector Lawrence Riungu. Upon receipt of that report, the OCS together with his officers went to the scene to counter the robbers. When they got to the scene and identified themselves to the people, the people instead became violent and started attacking them using arrows and stones. The police opened fire thinking that it was the robbers who were shooting at them while trying to escape, and since it was in the wee hours of the morning, visibility was not clear.
4. After the OCS had ordered the officers to stop shooting, it was discovered that two members of the public, who were not robbers, had been shot dead. The police also discovered that the people were fighting them because they thought it was the robbers ordering them to stop. An inquest No 8/2004 CF 4/2005 was opened but the court made its findings on September 12, 2005 that the police were not liable for the deaths. He urges the court to dismiss the petition as it is an afterthought and an abuse of the court process, as it has been filed 12 years after the findings of the inquest were made. In his view, there was no violation of the petitioners' rights by the respondents, as the police were exercising their constitutional duty of maintaining law and order, when they were confronted by armed people who they thought were the robbers they had gone to deal with.

Further Affidavit in Support

5. Japhet Muthamia Joseph swore a further affidavit on March 9, 2020 in support of the petition. He avers that on May 15, 2004 at about 2.00 pm, they were woken up by Eric Mwenda (deceased) and his brother Kiambi who informed them that the market had been invaded by thieves. He unsuccessfully went in search of the thieves in the company of 14 others, and they converged at Patrick Mbae's shop at 5.30am to keep vigil till dawn. While still there, the police came and Patrick Mbae (now deceased) recognized them and informed the other people. The police without any provocation opened fire on the people there, who were unarmed killing Mwenda, Patrick and Kibara Njagi. He accuses the police of being negligent for shooting without satisfying themselves that it was necessary, as it was morning already.
6. The 1st petitioner swore a further further affidavit in support of the petition on March 16, 2022 faulting the police for failing to summon the proper witnesses in the inquest, in a bid to cover up their negligence. He avers that he was an eye witness to the shooting by the police yet he was not called as a witness to testify during the inquest proceedings. He relies on Rael Kendi Mbae (Suing as the legal representative of the Estate of Patrick Mbae M'Muruga (Deceased) v OCS Nkubu Police Station & 2



others [2019] eKLR which emanated from the facts herein. He wants the police to take responsibility for shooting his son in cold blood and unlawfully taking his right to life away.

7. The 2nd petitioner and David Mbae M'Arimi swore affidavits on October 18, 2016 fully supporting the petitions.

Oral Evidence

8. PW1 Lenson Njagi Kinyua testified that Kibara Njagi (now deceased) was his child, and he succumbed to the gunshot wounds he sustained on May 15, 2004. The deceased was aged 20 years and he had a small business at Mururiiri market. He blamed the police for shooting his son, who was innocent. He produced the death certificate, Grant Ad Litem and the post mortem report as exhibits in court.

Submissions

9. The 1st petitioner submits that the petition is premised on the tort of negligence, the right to life under the repealed Constitution and the use and/or abuse of firearms as provided under the *Firearms Act*. He submits that the inquest was conducted without his knowledge and/or participation and eye witnesses to the shooting were also not summoned to give evidence. He urges the court to hold the respondents 100% liable for depriving a law abiding citizen of his life and grant the orders sought. Reliance is placed on *Rael Kendi Mbae (Suing as the legal representative of the Estate of Patrick Mbae M'Muruga (Deceased) v OCS Nkubu Police Station & 2 others* [2019] eKLR, *Mburu Njuguna (Suing on behalf of the estate of John Macharia Mburu (deceased) v Chief Korogocho Location & 3 others* [2014] eKLR and *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR.
10. The respondents submit that the instant petition falls way below the Constitutional threshold set out in *Amos Kiumo & 2 others v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 8 others* [2014] eKLR and *Anarita Karimi Njeru v AG (No 1)* [1979] KLR 154. They fault the petitioner for failing to establish the nexus between what befall the deceased and the conduct of the 1st respondent. They urge that the petition is untenable, mischievous, suspiciously generalized without particularity and an abuse of the court process because it was filed 6 years after the promulgation of the 2010 Constitution.

Analysis and Determination

11. Having considered the pleadings herein, the testimonies of the witnesses together with the submissions, the court finds the issues for determination to be whether the rights life of the deceased were violated by the respondents, and what compensation, if any, should be made.
12. On the one hand, the petitioners contend that the deceased's lives were unlawfully cut short by the careless, negligent, illegal and indiscriminate firing by the respondents, while on the other hand, the respondents contend that there was no fault on their part as the alleged shooting took place in the course of the exercise of their constitutional duty to protect people against robbers. The undisputed facts of this case are that there was a shooting by police officers on May 15, 2004, which took the lives of the deceased herein, as shown by the post mortem reports on record.
13. There is no limitation period on the claims made under the *Constitution* for redress of violations of rights and fundamental freedoms. In addition, as held by Mabeya J in *Rael Kendi Mbae, supra*, the third petition arising from this incident subject of these proceedings, the delay of 12 years in the circumstances of this case was not unreasonably long, and no prejudice is suffered by the respondents.



14. The petition is founded on the provisions of sections 70 and 71 of the former Constitution, which is applicable to the circumstances of this case which occurred on May 15, 2004. Section 70 of the former Constitution provides that:

' Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) Life, liberty, security of the person and the protection of the law;
- (b) Freedom of conscience, of expression and of assembly and association; and
- (c) Protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

15. Section 71 of the former Constitution provides for protection of right to life as follows:

- ' (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.
- (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case –
 - (a) For the defence of any person from violence or for the defence of property;
 - (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) For the purpose of suppressing a riot, insurrection or mutiny; or
 - (d) In order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.'

16. The bone of contention is whether the said shooting was justified and exempted by virtue of section 71 of the Constitution, set out above. The 1st respondent has acknowledged at paragraph 8 in his replying that, 'after the police and the people ceased fire, police discovered that the two members of the public had been shot dead. The police talked to the people and discovered that the people shot were not the robbers. The police also discovered that the people were fighting the police because they also thought it was the robbers ordering them to stop.'



17. With the detailed narration of the events of the fateful day by eye witnesses, namely Japhet Muthamia Joseph, the 2nd petitioner and David Mbae M'Arimi in their respective affidavits, it is clear to this court that the circumstances under which the deceased were shot dead do not fall within the exceptions provided under section 71 of the *Constitution*. This court has considered the witness statements recorded in respect to the inquest, and in particular those by Alikanjero Muriithi, Brigit Kajuju Mwenda, Japhet Muthamia Joseph, Peter Nkonge Kinyamu and Purity Kanana Solomon, who were all eye witnesses. It is admitted in those statements by the eye witnesses that the police did not identify themselves to the people, which culminated into the shooting and scampering for safety. It was not shown that the respondents had attempted to shoot in the air to warn the alleged mob that was shooting arrows and throwing stones at the police in an attempt to stop the attack and contain the situation.
18. This court notes that the inquest file, where the police were vindicated, was only opened a year after the incident after innumerable correspondence by counsels for the deceased families to the respondents. It is not inconceivable that the police who were in charge of calling the witnesses in the Inquest did not call crucial witnesses as urged by the 1st Petitioner.
19. In *Law Society of Kenya & 2 others v Attorney General & 2 others [2018] eKLR*, this court emphasized the sanctity of life as follows:

' It is the height of impunity if Police Officers who are constitutionally charged with the duty to maintain law and order and to enforce the law for the protection of life, liberty and property and observation of the human rights and freedoms were to arrest persons for whatever transgressions of the law only for such arrested persons to subsequently disappear and the Police to deny ever arresting such persons, cover up their actions and get away with it. It is cheating Justice. Not only should such police officers be held personally liable in a criminal process for their offences against the person but the State must be held vicariously liable for the unlawful actions of its employees.'

The death of the victims of the Police attack in the incident subject of this petition should equally be remedied.
20. It is this court's finding that the petitioners have proved on a balance of probabilities that the lives of the deceased were unlawfully cut short by the 1st respondent and his officers, in the guise of exercising their constitutional mandate of maintaining law and order. It is not lost to this court that one of the deceased was killed in the prime of his life, by the negligent and irresponsible action of the respondents, while at the youthful age of 20 years.
21. In exercise of its jurisdiction under articles 23 and 165(3)(b) of the *Constitution, 2010*, to redress denial, violation, threat or infringement of rights and fundamental freedoms, this court finds that the deceased persons' rights to life protected under sections 70 and 71 of the former Constitution was violated in the action of the police officers who, while on duty answering distress calls, in unnecessary, unlawful, illegal and excessive force shot at the crowd and killed the victims subject of the petitions in this case without seeking lesser methods of containing the situation and neutralizing any real or perceived threat to themselves. The Respondents were vicariously liable.
22. As in *Florence Amunga Omukanda & anor v AG & 2 others [2016] eKLR*, (Lenaola, Mumbi Ngugi & Odunga, JJ (as they were), this court finds 'the shooting of [the petitioners] was negligent, illegal and with use of excessive force.'



23. This court notes that in the related case of *Rael Kendi Mbae* case (*supra*) arising from the same incident, Mabeya J awarded the petitioner Ksh 2,500,000. In the spirit of uniformity of awards for personal injury, this court considers the sum of Ksh 2,500,000 as adequate compensation to each petitioner for the fatal injury of their children.

Orders

24. The upshot from the foregoing is that the petition is allowed in the following terms:

- a. A declaration is hereby issued that the deceased's rights to life under sections 70 and 71 of the former Constitution of Kenya, now repealed, were infringed.
- b. The Estates of the deceased are hereby each awarded the sum of Ksh 2,500,000/= for the breach of the deceased fundamental rights to life under sections 70 and 71 of the former Constitution of Kenya (now repealed).

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER, 2022.

EDWARD M MURIITHI

JUDGE

APPEARANCES:

M/S Muia Mwanzia & Co Advocates for the petitioners.

Mr JM Kiongo Senior Litigation Counsel for the respondents.

