



Sharma ((Suing in her personal capacity, suing as the Administrator of the late Mr. Bunty Bharat Kumar Shah, suing as the next friend of YBS (minor)) v Attorney General & 3 others (Petition 248 of 2018) [2022] KEHC 15462 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 248 OF 2018
HI ONG'UDI, J
NOVEMBER 18, 2022**

BETWEEN

**ANJLEE PARVEEN KUMAR SHARMA PETITIONER
(SUING IN HER PERSONAL CAPACITY, SUING AS THE ADMINISTRATOR
OF THE LATE MR. BUNTY BHARAT KUMAR SHAH, SUING AS THE NEXT
FRIEND OF YBS (MINOR)**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
INSPECTOR OF GENERAL OF POLICE 2ND RESPONDENT
CABINET SECRETARY OF INTERIOR & COORDINATION OF NATIONAL
GOVERNMENT 3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT**

JUDGMENT

1. The petition dated 12th July 2018 was filed under Articles 2, 10, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 43, 45, 48, 53, 238, 239, 241, 242, 243, 244, 247, 258 and 259 of the Constitution for the alleged contravention of the petitioner's human rights. Accordingly, the petitioner seeks the following orders:
 - i. A declaration that the actions on the part of the 1st, 2nd and 3rd respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the late Mr. Bunty Bharat Kumar Shah was unlawful, illegal and contrary to the Constitution.



- ii. A declaration that the actions on the part of the 1st, 2nd and 3rd respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the late Mr. Bunty Bharat Kumar Shah was contrary to the provisions of the Constitution which provides for the right to life and right to parental care and guidance.
- iii. The sum of Ksh.100,000,000 to be paid by the respondents for the unlawful execution of the late Mr. Bunty Bharat Kumar Shah.
- iv. The sum of Ksh.18,000,000 to be paid by the respondents as damages for unlawfully and cruelly denying Y.B.S the right to parental care and guidance pursuant to Article 53(1) of the Constitution.
- v. The sum of Ksh.292,000,000/= to be paid by the respondents as damages/compensation being the loss of earnings.
- vi. The sum of Ksh.20,000,000/= to be paid by the respondents as damages/compensation for moral damages, emotional harm and psychological suffering.
- vii. The sum of Ksh.200,000,000/= to be paid by the respondents as damages/compensation for loss of a life plan.
- viii. The sum of Ksh.100,000,000/= to be paid by the respondents as exemplary and punitive damages.
- ix. An order directed towards the 4th respondent to arrest, charge and prosecute those officials and/or persons responsible for the death of the late Mr. Bunty Bharat Shah.
- x. Any other relief this Honourable Court deems fit to grant.
- xi. Costs of this petition.

The Petitioner's case

2. This petition was supported by the petitioner's supporting affidavit dated 12th July 2018 and a supplementary affidavit dated 26th April 2019. The heart of this petition is the manner in which the deceased's life was taken away by an alleged unlawful execution. The petitioner averred that the respondents and their agents intentionally deprived the late Bunty Bharat Kumar Shah of his life.
3. The petitioner informed that she was married to the deceased on 7th December 2013 and were blessed with a baby boy, Y.B.S. She made known that the deceased was a 32-year-old man who was the Director of Bobmil Group of Companies. In his position the deceased enjoyed a lucrative income with benefits. He in addition was as a senior manager at Bloomingdale Roses Kenya Limited where he was a 33% shareholder, a 5% shareholder in Express Limited and 12% shareholder in Viro Locks Kenya Limited.
4. She deposed that on the morning of 21st October 2017 at around 2:49am in Westlands area, the deceased was shot in the heart by the 2nd respondent's police sniper with a single bullet. He succumbed to the wound and was pronounced dead on arrival at the hospital. She averred that based on the CCTV footage that captured the entire event, a convoy of police cars came from Mwanzi road in the Westlands area led by an armored personal carrier. The cars then blocked her residence from both sides while the armored vehicle bulldozed the petitioner's gate into their premises. The policemen then stationed themselves on various spots in the petitioner's compound.
5. She deposed that the deceased alarmed by the commotion opened their bedroom window to know what was happening. It was at this point that the police sniper shot the deceased. In a brazen attempt



to hide their misdeeds the policemen disabled the CCTV cameras and left the scene. It was noted that the police publicly admitted on a number of occasions that they had executed the deceased pursuant to faulty intelligence on the part of the police.

6. She averred further that the respondents through their agents were in blatant breach of the constitutional provisions under Articles 25 on the rights that cannot be limited, Article 26 on the right to life, Article 29 on the freedom and security of the person, Article 45 on the right to have a family, Article 53 on the rights of children, Article 238 on the principles of national security, Article 239 that provides for the primary object of national security and Article 244 on the objects and functions of the national police service.
7. The petitioner deposed that through her advocates, she wrote to the 1st respondent on 15th February 2018 seeking legal redress for the wrongs committed. She thereafter received a letter from the 4th respondent dated 27th February 2018 calling for the duplicate inquiry file from the DCI for necessary action.
8. She deposed that due to the actions of the respondents' agents her family suffered loss and damages, emotional and psychological trauma. As a consequence, the petitioner seeks damages and orders for the unlawful execution of the deceased's life. She in this regard informed that the deceased having passed away at 32 years was earning a salary of Ksh.600,000/= per month and a bonus of Ksh.500000/= . In view of this and taking a multiplier of 38 years she is entitled to Ksh.273,600,000/= and Ksh.19,000,000/= making a total of Ksh.292,600,000/=. Additionally she sought damages as listed in her prayers in the petition.

The Petitioner's oral testimony

9. The petitioner in further support of her case adduced *viva voce* evidence in open Court on 29th April 2019 as PW1. She stated that she was the widow of Mr. Bunty Bhamat Shah who she got married to on 7/12/2013 and had their son born on 27/4/2017.
10. She stated that on 21/4/2017 at around 2.30 a.m. they were in their house when they saw an unidentified vehicle which hit their gate at Peponi Road and thereafter many police officers came and positioned themselves on their property. She heard the police breaking their windows and soon after they heard commotion inside the house.
11. In the house she was with her husband, their son and her mother in-law. The husband went to check on his mother in her room which faced the gate. On opening the window he was immediately gunned down, by police officers, who shot at him thrice, and only one bullet hit him. Her mother in law called an ambulance as they informed everybody the husband knew of what had happened. Her attempts to give her husband first aid were in vain as he lay in the pool of blood. When the ambulance arrived it was blocked by 2 cars and denied entry into the compound. It waited for over 45 minutes.
12. She came out to request that the ambulance be let in but the seven police officers present did not respond to her request. The ambulance only entered after police left their compound. They rushed her husband to M.P. Shah Hospital where he was pronounced dead on arrival. The postmortem analysis taken concluded that he was shot at the heart and the single shot killed him. She reported the matter to Parklands Police Station within a week but the Police did not contact her. She then proceeded to report the matter again to the Independent Policing Oversight Authority (IPOA) who also did not get in touch with her.



13. She testified that in their compound they had 13 CCTV Cameras at different places which were working on that fatal night and captured the harrowing ordeal as captured in her affidavit “AS 5”. She then proceeded to recount the event as captured by the CCTV’s.
14. Upon cross examination she stated that they had 13 cameras as captured in her affidavit but 3 were disabled. Further that at paragraph 4 of the certificate she alluded to one camera which was for shooting and the DS2CE16 CO5-1R gives all information shown in the video. The information was saved on a hard disk and so she used the computer to bring the information to her laptop. She stated that she put the information on a hard disc 2 TB model monitor DS 7116HGHI-E1.
15. She further stressed that she had never received any response from the police or IPOA. She stated that she wrote to the DPP to take action as per Annexure “AS 5” in her affidavit. The DPP through a letter dated 27/2/2018 responded and let her know that he would arrest and charge the people who killed her husband.

1st, 2nd and 3rd respondents’ case

16. The 1st, 2nd and 3rd respondents in opposition to the petition filed grounds of opposition dated 17th December 2018 on the summarized basis that:
 - i. The petition does not raise any constitutional issues for deliberation as envisaged under the cited Articles.
 - ii. The issues raised by the petitioner are of tortious liability and nature which ought to be canvassed by the Civil Division of the High Court under the Law Reform Act, Cap 26 and the Fatal Accidents Act, Cap 32.
 - iii. The remedies sought by the petitioner are contrary to the holding in Hon. Uhuru Kenyatta v the Nairobi Star Limited High Court Petition No.187 of 2012 and Stephen Kapaiku v Coca Cola Sacco Nairobi Bottlers Limited & another Petition No 338 of 2012 which stated that such remedies lie in the Law Reform Act, Cap. 26 and the Fatal Accidents Act, Cap.32 hence the petition is placed before the wrong Court.
 - iv. This Court is being converted into a trial court as the petitioner is seeking to have this Court determine issues of liability and quantum which can only be done through presentation of *viva voce* evidence and cross examination until the tortious liability is determined.
 - v. The petition offends the provisions of Section 106A and 106B of the Evidence Act as the electronic evidence tendered in support of the petition is inadmissible and thus renders this petition unsupported.
 - vi. The petitioner has not demonstrated with precision how her fundamental rights and freedoms were violated contrary to Article 22(1) of the Constitution and the decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013)eKLR.
 - vii. Even if the averments of the petitioner were to be true, the amounts being sought in compensation are astronomical, unsupported and against public interest given that the monetary culpability on the part of the respondents will be compensated using the tax payers’ money.
 - viii. The petition is premature given that the 4th respondent has exercised his constitutional powers by seeking from the 2nd respondent the investigation report on the death of the late Bunty Kumar Shah.



- ix. The petition is an abuse of Court process and the same should be dismissed with costs.
17. The 1st, 2nd and 3rd respondents in addition filed their replying affidavit dated 11th January 2022 sworn by Maurice Chemesis, the 2nd respondent's Chief Inspector and investigating officer in this matter based at the DCI headquarters bearing No.235280. He deposed that on 22nd October 2017 the police at Parklands Police Station received a report from Nairobi Area Control Room (999) on an ongoing robbery incident at the deceased's residence along Peponi Road. He went to the said residence with other police officers.
18. He deposed that according to the mother of the deceased, she heard a commotion at their residence followed by heavy footsteps running towards their swimming pool area. In a panic she rushed to the deceased's bedroom and alerted him of the presence of intruders. The deceased a licensed firearm holder make STEYR –MA-A1 S/NO.307/147 in response loaded the firearm and left his bedroom towards the window facing the swimming pool. It is deposed that the deceased fired two rounds at the intruders through the window. In turn the supposed sniper shot the fatal bullet that took his life.
19. He deposed that they recovered the deceased's firearm at the scene which was loaded with 14 rounds of 9mm, two spent cartridges and the fired bullet head. He said this was confirmed by a Ballistic report. The investigations were subsequently instituted by opening an inquest file No. 7 of 2017 vide OB No.05/22/10/2017. He informed that this matter is still pending under Inquiry (PUI) and so the circumstances regarding the shooting incident are unclear and unknown. He concluded by noting that in the circumstances of this case, it would be premature and prejudicial to grant the reliefs sought by the petitioner without the benefit of a full Inquest report.

The 1st, 2nd and 3rd Respondents' oral testimony

20. These respondents similarly gave *viva voce* evidence in support of their case in open Court on 12th January 2022 by calling one witness DW1 identified as No.235080 Chief Inspector Morris Chemesis. He testified that he was based at DCI Headquarters at Nairobi Mazingira House and was the investigating Officer in this matter. He relied on his statement as recorded on 11/1/2022 and his averments in his sworn affidavit herein above and the report. He adopted them as his evidence in chief.
21. Upon cross examination he stated that the deceased died on 22/10/2017 and that the matter was still pending investigation. He confirmed that the matter had taken more than 5 years but noted that the police can take time to conduct an investigation. He stated that he was among the first people to go to the scene of crime where he found other police officers. At the scene he managed to retrieve a firearm – make steyrma – 91. Serial No. 307-147 with 14 rounds of ammunition and 2 spent cartridges and an expanded bullet head.
22. He confirmed that at that moment he did not know who had killed the deceased. He noted however that there were two vehicles which had come earlier which were controlled by police officers in police uniform.
23. On the issue of statement MC – 1C by C. Biwott he confirmed that the person was a police officer. Further that the people there were armed and the witness described to him the scene. On MC – 1 (b) he noted that it is a statement of a police officer who wrote on his instructions. He confirmed that all the people they found there were police officers dressed in police uniforms and were persons for ATPO with 2 vehicles without number plates.
24. On MC – 1 g., he stated that they were police officers with vehicles without number plates and that the officers were in police uniform. On MC – 1 (i) he stated that it was his statement where he noted that he opened an inquiry file. He further averred that the investigation did not go far as the police



officers were not availed to enable him complete the investigation. Further that the people who were to record statements did not do so.

25. In closing he stated that the operation was carried out by ATPO officers and that he had not gone to them to record statements. He informed that the statements availed were the only statements he had recorded.

The 4th Respondent's case

26. The 4th respondent in reply also filed its grounds of opposition dated 26th November 2018 on the premise that:
- i. By dint of Article 157(4) of the Constitution, the 4th respondent has the powers to direct the 2nd respondent to investigate any information or allegations of criminal conduct.
 - ii. Vide a letter dated 27th February 2018 the 4th respondent directed the Director of Criminal Investigations to investigate the death of the deceased and submit the inquiry file for directions.
 - iii. The Constitution and the law does not limit the time within which one can complete investigations and to date the 4th respondent is yet to receive the investigation file.
 - iv. Upon conclusion of the investigations the 4th respondent will in accordance with Article 157(6) of the Constitution and Section 5 & 6 of the Office of the Director of Public Prosecutions Act give directions on whether or not to charge any suspect with the alleged offences.
 - v. Prayer 9 in the petition on this Court ordering the 4th respondent to arrest, charge and prosecute the officers responsible for the deceased's death, is premature and devoid of any merit.

Submissions

The Petitioner's Submissions

27. The petitioner through her advocates AhmedNasir Abdullah Advocates LLP filed written submissions dated 14th February 2022 and a list of authorities dated 15th March 2022. Counsel begun by submitting that, the petition was a tortious constitutional claim for violation of the petitioner's various rights under the Constitution. Relying on the case of *Monroe v Pape and Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 03 US 388 1971, he noted that constitutional tort is generally a judicial instrument by which the state can be held liable for the acts of its servants.
28. Counsel further submitted that when the respondents intentionally targeted the deceased and unlawfully executed him, they were fully aware of the existence of the real, immediate, imminent danger and risk to life that would be imposed upon him. Likewise they could reasonably foresee that their unconstitutional actions would lead to his ultimate demise. He therefore submitted that a constitutional tort claim grants the petitioner an avenue to appeal directly to the Constitution as the source of rights to remedy government inflicted injury.
29. In support reliance was placed on the case of *Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others* (2019) eKLR where it was held that the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power. Additional reliance was placed on the case of *John Atelu Omilia & another v Attorney General & 4 others* (2017) eKLR.



30. Counsel submitted that the deceased was undoubtedly executed and killed by the 1st, 2nd and 3rd respondents' agents. He argued that this had been confirmed by RW-1, Maurice Chemsis, the Chief Inspector of Police during cross examination and evidence adduced in this Court. He noted that the agents were police officers, from ATPU, Reece Squad and Military Police and sequence of events as captured by the CCTV footage was confirmed by the account of the police officers who responded to the petitioner's distress call.
31. It was submitted hence that the respondents through their respective agents maliciously violated Article 26 of the *Constitution* by taking the life of the deceased. As a result, the petitioner lost a husband, companion and the only breadwinner and Y.B.S lost a father hence their right to family under Article 45(1) of the *Constitution* was violated. Similarly the minor's right under Article 53 of the Constitution was infringed as he is entitled to parental care and protection. In view of this Counsel submitted that the petitioner was entitled to the reliefs sought.
32. On the quantum of damages, Counsel submitted that the petitioner had specifically pleaded special damages. In this matter he submitted that the deceased was a 32 year old man who as a director of Bobmil Group of Companies drew a salary of Kshs.600,000/= per month and an annual bonus allowance of Kshs.500,000/= as evidenced by his payslips. Counsel noted that the question of multiplier for loss of life and loss of income is a key issue for consideration in this petition. He relied on the case of *David Kimathi Kaburu v Gerald Mworobia Murungi (Suing as legal representative of the estate of James Mwenda Mworobia (deceased))* (2014) eKLR to emphasize this point.
33. Additional reliance was placed on the case of *Jamakana v Attorney General* 1985 L.R.C (Cons) 569, *Mersen v Cartwright & Ano* (Bahamas) (2005)UKPC 38, *Broome v Cassel & Co Ltd* [1971] AC 1027, *Subiah v The Attorney General of Trinidad & Tobago* (Trinidad & Tobago) [2008] UKPC 47 among others, to support her case, on the function of constitutional damages and the award of damages for breach of constitutional rights.
34. Counsel in addition submitted that this is a proper case for grant of an award of exemplary damages with the view of deterring a repetition of this breach and punishing the responsible respondents. It was argued that the respondents are bound by Article 238 of the *Constitution* which provides for the principles of National Security which they have failed to adhere to. It was submitted that the respondents owed a statutory duty of care towards the petitioner, her family and the deceased to ensure that they enjoyed their constitutional right to freedom and security, the right to personal privacy, the right to life, right to human dignity and right to family.
35. To this end, Counsel submitted that it is in the Court's discretion to award damages as to what it considers to be appropriate and just according to the facts and circumstances of this matter as held in the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR. Similar reliance was placed on the case of *Siewchand Ramanoop v the AG of Trinidad & Tobago*, PC Appeal No 13 of 2004 which established the relevant principles applicable to award damages for constitutional violations. Additionally the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - (2006/ 1 LRC 291 and *DoucetBoudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

The 1st, 2nd and 3rd Respondents' Submissions

36. The respondents' through Senior State Counsel Victor Ondieki filed written submissions dated 17th February 2022. The issues identified for determination are:
 - i. Whether the petition meets the threshold for a constitutional petition.
 - ii. Whether the CCTV Footage is admissible as evidence in this case.



- iii. Whether the respondents are liable for the fatal shooting of the late Bunty Kumar Shar.
 - iv. Whether the reliefs sought should issue.
37. Counsel on the first point submitted that the petition does not meet the threshold of a constitutional petition as was held in the Anarita Karimi case and amplified by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No. 290 of 2012; [2013] eKLR. This is because the petitioner ought to have set out the constitutional provisions which she believes were violated and the manner in which the respondents purportedly violated the provisions. As such it was not enough for the petitioner to only list the constitutional provisions without demonstrating how they were infringed.
 38. Similarly, Counsel submitted that the petition does not raise any constitutional issues. This is since the issues raised by the petitioner are of a tortious liability and nature which should be canvassed by the Civil Division of the High Court under the *Law Reform Act*, Cap 26, Laws of Kenya and *Fatal Accidents Act*, Cap 32.
 39. In view of this Counsel submitted that the petitioner had not exhausted the remedies under Sections 3 and 4 of the *Fatal Accidents Act* as well as remedies those under Section 2 of the *Law Reform Act*. He thus submitted that this Court lacks jurisdiction to entertain the matter. In support reliance was placed on the cases of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] eKLR, *Jamal Salim v Yusuf Abdulabi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR, *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (2012) eKLR and *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR.
 40. Counsel concluded by stating that courts have held that such cases ought to take the route of a normal civil suit for appropriate remedies as seen in the case of *NM & Others v Smith and others (Freedom of Expression Institute as Amicus Curiae)* 200 (5) S.A. 250 (CC). Similar reliance was placed on the case of *Minister of Home Affairs v Bickle & others* (1985) L.R.C. Cost.755 and *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR.
 41. Counsel while submitting on the issue of the damages sought noted that the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR had declined to award similar exorbitant damages and set out the guidelines that ought to be followed in such circumstances. In view of this he submitted that the Courts in analogous cases namely *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2014] eKLR, *Malik Mohammed Kipsang' v Attorney General* [2014] eKLR and *Zeitun Juma Hassan Petitioning on Behalf of the Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others* [2014] eKLR had awarded a global sum of Kshs. 2 Million to 3 Million for violation of human rights leading to one's death. As such the Kshs. 730,000,000/= damage ward sought by the petitioner was untenable.
 42. Turning to the second issue, Counsel submitted that the CCTV video footage obtained from the 13 cameras and compressed into a single recording stored in a flash disk was inadmissible as evidence in this case. This is because before a Court can determine the admissibility of electronic evidence, it is important for the Court to take into account the integrity of such evidence pursuant to Section 78 A (3) (a) of the *Evidence Act*.
 43. According to Counsel nothing could have been easier than for the petitioner to produce the individual video recordings or footage from each of the alleged 13 surveillance cameras for examination and scrutiny. As such he noted that compressing the files into one, altered and distorted the recordings which amounted to editing and tampering with evidence. Considering this Counsel submitted that



the manner in which the electronic evidence was generated, stored and communicated casts doubt on the integrity of the recordings.

44. On the third issue, Counsel submitted that there is no conclusive proof implicating the respondents regarding the fatal shooting of the deceased. He noted with reference to the respondents' averments in their replying affidavit that the shooting incident was still pending under Inquiry and so the circumstances surrounding the incident were still unclear and unknown. Moreover, that it was not clear why and who executed the shooting.
45. Counsel noted that despite the media pronouncements by the 2nd respondent on the incident there was no evidence on record of any such admission. It was emphasized thus that this was an important fact that the petitioner had not sufficiently pleaded and demonstrated in conformity with the test set out in the Anarita Karimi case as confirmed by the Court of Appeal in the *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
46. Additionally Counsel placed reliance on Section 107 of *Evidence Act* on the requirement of proof. Taking this into consideration it was submitted that the petitioner had not discharged the legal and evidential burden of proof in respect of the shooting incident. As a result the petitioner had not proven her case to the required standard that the respondents were responsible for the execution of the deceased.
47. On the final issue, Counsel submitted that the petitioner's claim for special damages had not been specifically pleaded arguing that the pay slips issued were not admissible. This is because first, the pay slips bear a different name to that of the deceased that is Bunty Bobby Shar while his official documents such as the death certificate bear the name Bunty Bharat Shah. Secondly, that the maker of the pay slips had not duly certified the copies to authenticate them. In support reliance was placed on the Court of Appeal case of *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR where it was held that special damages must not only be specifically pleaded they must also be strictly proved.
48. On general damages Counsel submitted that the general and exemplary damages were grossly exaggerated, and entirely unreasonable. It was noted that general damages are discretionary in nature and must be reasonable and assessed with moderation as held by the Court of Appeal in the case of *Southern Engineering Company Ltd. v Musingi Mutia* [1985] KLR 730 where the Court went ahead to state the principles which ought to guide a court in awarding damages. To this end Counsel submitted that the petitioner had not proven her case and that the prayers were unmerited and the petition ought to be dismissed.

The 4th Respondent's submissions

49. The 4th respondent elected not to file written submissions and relied on its grounds of opposition dated 26th November 2018.

Analysis and Determination

50. I have perused the pleadings, submissions, cited authorities and the law and in my view the issues for determination are:
 - i. Whether this Court has jurisdiction to entertain the instant petition;
 - ii. Whether the petition is properly placed before the constitutional court;
 - iii. Whether the petitioner's constitutional rights were violated by the respondents; and
 - iv. Whether the petitioner is entitled to the orders sought.



Whether this Court has jurisdiction to entertain the instant petition

51. This issue was raised by the respondents who argued that the petition had been filed prematurely. The 1st, 2nd and 3rd respondents noted that the matter was still Pending Under Inquiry (PUI) and the circumstances of the shooting incident yet to be conclusively ascertained.
52. The 4th respondent informed that the prayer to charge the officers in this petition was unsustainable since the investigation was yet to be completed. Moreover that upon conclusion of the investigation the 4th respondent as mandated under Article 157 of the *Constitution* would render the decision whether or not to charge the persons responsible. The petitioner in this regard relied on the fact that the respondents had publicly admitted that the demise of the deceased was a result of a police operation based on defective intelligence on their part.
53. It is prudent to commence by determining the question of jurisdiction as required by the law. The importance of a Court's jurisdiction to entertain matters before it cannot be over emphasized. The Supreme Court *In the Matter of the Interim Independent Electoral Commission* Constitutional Application No. 2 of 2011 made a clear statement on this issue as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

54. In the same way the Court of Appeal speaking to this issue in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR opined as follows:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the case of *The Owners Of The Motor Vessel Lillian ‘S’ Vs. Caltex Kenya Ltd* [1989] KLR 1.”

55. It is clear from the cited authorities that this Court's jurisdiction cannot be assumed but must be derived from the Constitution or a statute or both. Where either is found lacking then this Court has no judicial authority to make a determination on this matter. In other words, the respondents herein



are questioning the justiciability of the instant petition. If the matter is justifiable this Court is obligated to exercise its authority and make a determination. In the same way where the matter is found to be unjustifiable this Court's jurisdiction to entertain the same will be lacking.

56. This concept of justiciability is defined by the *Legal Information Institute Wex dictionary* as follows:
- Justiciability refers to the types of matters that a court can adjudicate. If a case is "nonjusticiable," then the court cannot hear it. Typically to be justiciable, the court must not be offering an advisory opinion, the plaintiff must have standing, and the issues must be ripe but neither moot nor violative of the political question doctrine. Typically, these issues are all up to the discretion of the court which is adjudicating the issue.
57. Citing a number of authorities with approval that had discussed the doctrine of ripeness, the Court in the case of *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021) (Judgment) noted as follows:
- “ 171. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court's intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process.
172. The operation of the doctrine was discussed by a multi-Judge Bench of the High Court in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR in the following manner: -
107. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:
- The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.
108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.
- The Court of Appeal in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:
- (72) The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been



resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

- (74) Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

In *National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others* [supra] the Court of Appeal held:

- (73) Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:

- (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The Court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before Court must be ripe, through a factual matrix for determination.”

58. Still on this issue, the Supreme Court in the case of *Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) guided as follows when dealing with the question of ripeness. Chief Justice Koome opined as follows:

- “61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.
63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial



decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystallized.”

59. In the same matter, Justice Lenaola observed as follows:

“325. Justiciability was the quality or state of being appropriate or suitable for adjudication by a court. For a matter to be justiciable, it had to be ripe for it to be properly before the court. Ripeness was the state that a dispute had reached, but had not passed, when facts had developed sufficiently to permit an intelligent and useful decision to be made.”

60. Guided by the cited authorities and the law I will now proceed to apply the elements highlighted to the circumstances of this case. Undoubtedly it is clear that the late Bunty Bharat Kumar Shah met his unfortunate demise the morning of 21st October 2017. This was occasioned by a single gunshot wound to his heart when the intruders as deposed in the affidavits entered the petitioner’s residence. What is uncertain however, is the definite conclusion of the matter as required by the law, since it is a criminal matter.

61. Palpably as noted above this Court’s jurisdiction flows from the Constitution and the law. In this regard the law has set defined legal structures and mechanisms that should be adhered to in such a circumstance.

62. In this case I refer to the roles of the 2nd and 4th respondents as dictated by the Constitution. With regard to the 2nd respondent Article 245(4), (a) of the Constitution provides one of the functions of the Inspector General as follows:

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

The investigation of any particular offence or offences;

63. The Court in the case of *Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others* [2019] eKLR while discussing the mandate of the 2nd respondent in investigation of crimes noted as follows:

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.”

64. Turning to the 4th respondent Article 157 of the Constitution spells his mandate in the following sub-Articles:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
i. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;



- ii. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- iii. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b). (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

65. The Court in the case of *Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others* [2021] eKLR discussing the mandate of the 4th respondent as espoused in Article 157 of the Constitution noted as follows:

“37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of *Paul Ng’ang’a Nyaga v Attorney General & 3 others* (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the constitution.”

66. A look at the facts of this case shows that the petitioner aggrieved by the events of the fateful day reported the same to the police. The 2nd respondent’s officer indicated that the matter was still pending and a conclusive report on the investigation was not yet complete. The 4th respondent similarly directed the 2nd respondent to investigate the matter and issue a report so that a decision on whether to charge or not could be made. Nonetheless the petitioner proceeded to file this suit seeking to have the persons responsible charged and granted the damages in the prayers.

67. It is discernable from the cited law above and authorities that this Court is not charged with the mandate to investigate and charge persons suspected of having committed offenses such as the killing of the late Bunty Bharat Kumar Shah. A Court’s authority to answer questions of controversy in a purported crime only commence once the complaint of the offence is lodged in Court and a full trial conducted. This has not been done as per the materials placed before this Court by all the parties.

68. It is my considered view that the dispute in this petition although existent has not yet matured to a real controversy in need of judicial intervention by way of a Constitutional Petition. I say so because this Court cannot determine whether the respondents are actually responsible and guilty of the alleged heinous act or whether there are other existing positions in the incident. This inability to make a determination is pegged on the fact that the investigations are yet to be concluded and criminal proceedings instigated. This Court is therefore incapable of entertaining the petition until such a time that the respondents’ if at all are found culpable in the matter.

69. For this reason, the petition is not yet ripe for determination hence not justiciable. This is since the pronouncement of this Court is pegged on the outcome of the 2nd respondent’s investigations and



the 4th respondent's decision to charge or not to charge and instigate criminal proceedings against the responsible persons and a conclusive verdict made by the trial Court. It is my take therefore that it would not be prudent for this Court to assume such jurisdiction and entertain the matter without being informed of all the relevant matters at stake.

70. Having come to the above conclusion, it is my humble finding that this Court should not interfere with the process currently before the 2nd and 4th respondents. I also find that by virtue of the doctrine of ripeness, this Court ought not to delve into the merits of the issues raised at the moment until such a time when the matter is ripe for determination by the Court.
71. It would be prudent for the 1st & 4th respondents to take up this matter with the seriousness it deserves and have the investigations concluded within the shortest period from now. This death occurred on 21st October 2017 which is five (5) years ago, and a decision in respect of who the perpetrators were ought to have been made by now.
72. The upshot is that the petition dated 12th July 2018 was filed prematurely and is struck out with no order as to costs.

Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

