



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 8 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**ARTICLES 1, 2, 3, 4, 10, 19 (2), 19 (3) (a), (b) & (c), 22 (1), & (3),**

**23 (1) & (3), 25 (a), 27, 28, 29 (d), 50, 165, 38, 244 & 259**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOM ARTICLES 25, 28 & 29**

**AND**

**IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**BETWEEN**

**CHARLES MWENDA.....PETITIONER**

**VERSUS**

**INSPECTOR GENERAL OF POLICE, NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MERU.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**INDEPENDENT POLICE OVERSIGHT AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....3<sup>RD</sup> INTERESTED PARTY**

**LEGAL AID CLINIC (LAC).....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. On or about 27<sup>th</sup> May 2020, the Petitioner was travelling from Kilifi headed to Meru for purposes of burying his deceased wife in the company of 31 other individuals. He claims that while on the way, he was stopped at the Keeria area which is on the border of Tharaka Nithi

and Meru and that despite producing all the relevant documents, including the Covid-19 clearance certificates and the travel permit, his entire entourage was denied entry past the border post and that he was taken to Kianjai Police Post while the rest were ordered to go back to Kilifi. He claims to have been humiliated, tortured and treated with utter contempt by the police officers of Kianjai Police Post. This ordeal as he puts it, caused him great anguish and trauma which he still suffers to date.

2. By his Petition dated 10<sup>th</sup> June 2020, the Petitioner seeks the following orders: -

*i) A declaratory order that the actions of the police officers under the National Police Service headed by the 1<sup>st</sup> Respondent violated the provisions of the Constitution under Articles 3, 4, 10, 19 (2), 19 (3) (a), (b), & (c), 22 (1) & (3), 25 (a), 27, 28, 29 (d), 50, 165 & 259 and thus infringed on the rights and freedoms of the Petitioner under the Bill of Rights of the Constitution of Kenya 2010.*

*ii) A declaratory order that the actions of the security officers and medical officers of the 2<sup>nd</sup> Respondent violated the provisions the Constitution under Articles 3, 4, 10, 19 (2), 19 (3) (a), (b), & (c), 22 (1) & (3), 25 (a), 27, 28, 29 (d), 50, 165 & 259 and thus infringed on the rights and freedoms of the Petitioner under the Bill of Rights of the Constitution of Kenya 2010.*

*iii) Order of compensation in general and punitive damages against the Respondents jointly and severally for violating the Petitioner's Constitutional Rights and Freedoms.*

*iv) A declaration that failing to take action against the perpetrators of the crime, the 1<sup>st</sup> Respondents assumes command responsibility and is liable to pay compensation for the constitutional torts in person.*

*v) Costs of the suit and interests thereon at court rates.*

### ***Petitioner's Case***

#### ***Petitioner's Petition and Supporting Affidavit***

3. The Petitioner's case as set out in his Petition, supporting affidavit sworn on 10<sup>th</sup> June 2020 and further affidavit sworn on 13<sup>th</sup> September 2020 is that on or about 27<sup>th</sup> May 2020, in the company of 31 other close family members, they were travelling from Kilifi to Meru to bury his deceased wife who had succumbed to cancer. That prior to their travel, they had acquired all the relevant legal documents permitting them to travel during the Covid-19 pandemic showing that they had been tested and declared to be Covid-19 negative. That they had also all obtained the relevant travelling permits issued by the Malindi Sub-County Police Commander.

4. That he crossed all other police barriers in other counties using the same permits he had been issued with when he left Malindi; However on reaching Keeria area, which is on the border of Tharaka Nithi and Meru County, they were stopped and ordered to alight from the motor vehicle by police officers under the National Police Service and Officers employed by the County Government of Meru manning the barrier. That despite them producing the clearance certificates and travel permits that they had been issued with in Malindi, the same were ignored.

5. That his family members and children were all ordered to go back to Malindi and he was left alone with the casket containing the body of his deceased wife. That he was then bundled into a police vehicle together with the casket and transported to Kianjai Police Post and dumped by the road side in the middle of the night while it was raining in the cold and that he pulled the casket all alone and sheltered it under a lorry that was parked outside and near the Kianjai Police Post and that this notwithstanding, rain got into the coffin. That his pleas to be allowed to take the casket to his home which was less than 5km from the police post was to no avail. That he spent the cold rainy night outside with the coffin with mosquitoes feasting on him and that he was innocent and a victim of discrimination for the reason that he had come from a Covid-19 prone area. That his children and family members were not given a chance to bid farewell their mother and relative and neither were they afforded closure and were also threatened to be quarantined at Kangeta at their own cost for 14 days.

6. He states that the police both from the National Police Service as well as the security and medical officers from the County Government of Meru took matters into their own hands whilst there was no challenge to their permits and Covid-19 clearance certificates. That they acted extra-judicially and treated him in an inhuman and degrading manner and as a result, he suffered mental anguish, stress and excruciating pain. He also states that his right to security was violated as the police officers left him outside, in the dark, in the rain and with a casket. He states that the said ordeal still traumatizes and humiliates him.

7. He states that it is the actions of the 2<sup>nd</sup> Respondent that made the 1<sup>st</sup> Respondent's officers act in the manner they did. That it is from the advice of the 2<sup>nd</sup> Respondent that his immediate family members including his children were turned away and ordered to go back to Kilifi. That he was never allowed to make alternative arrangements and he was treated as someone with an airborne disease. That at the time of issuance of the clearance certificates, the Covid-19 pandemic was still novel and there were no enough kits to test everyone and hence the Government had directed that only people exhibiting symptoms were to be tested due to shortage of kits and the 2<sup>nd</sup> Respondent in fact sat in the Committee that issued this directive. That the letters and certificates that they had were used in all other counties that they had passed and it was only on the barrier entering Meru that they faced discrimination. That concerning their travel, there is a letter with the 1<sup>st</sup> Respondent's letterhead informing whoever is concerned about their travel and that their internal lapse of communication should not be visited on him. That no official, neither the DCC nor the Chief came to his aid and that the DCC Tigania only came to see him after his story was aired on television and there was public outcry. That when a person is handed over from one police jurisdiction to another, this has to be recorded and this was not done for him.

### ***Petitioner's Submissions***

8. The Petitioner also filed submissions dated 15<sup>th</sup> September 2020. His submissions are largely a restatement of what is in his Petition and affidavits. He urges that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were punitive and they violated the constitutional threshold of amiableness and they were humiliating, degrading, discriminatory and inhuman which amounted to psychological torture. He urges that the Petitioner's entourage were never given a chance to accompany him as claimed by the Respondents and the Respondents are simply trying to cover up for the discriminatory and inhuman way in which they treated him and his entourage which included 3 of his children all under 10 and one was a toddler of 6 months.

9. He urges that his ordeal was publicized and at no point was there any member of the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> Respondents present either during the dumping of the body or at the burial ceremony. That it is only after the same was exposed in the internet and there was public outcry on the atrocities meted on the Petitioner did they appear, way after the burial had been conducted and informed him that the threat to quarantine him had been lifted and he was free to go back home. He reiterates that his Constitutional rights were violated and that he was discriminated against in that immediately they heard that the Petitioner was from Kilifi, they said that he could not be allowed into the County as theirs was a hot bed of Corona even before they had looked at his documents. That the 2<sup>nd</sup> Respondent cannot distance himself from the actions that occurred since it was out of its advice that the police officers acted in the way they did. That upon undergoing testing, he was given documents by officials from the Ministry of Health showing that he was Covid-19 negative and he had no reason to doubt the format in which the said certificate was to be drafted. That he followed all the laid down procedures in acquiring the required documents and that he cannot be blamed for the same.

10. He urges that the averments in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' affidavits are an afterthought and that he was never given a choice of who would accompany him in the land cruiser as the land cruiser could not even carry the 15 maximum number of people allowed but only 4 if the safe distancing regulations were to be adhered to.

11. He urges that while he cannot deny that the actions of the MOH Meru in this case were inspired by a noble intention of fighting Corona virus and flattening the curve, it is paramount to remember that the ends do not justify the means. That no matter how noble and worthy of admiration the purpose of an act is, if the means to be employed in accomplishing it is simply irreconcilable with constitutional parameters, then it cannot be allowed.

12. He cites numerous provisions of the law in support of his Petition including Article 2 (5) of the Constitution, Article 1, 5 and 12 of the Universal Declaration of Human Rights 1949, International Standards Victim of Torture, the African Charter on Human and People's Rights, Articles 28, 19, 21 and 29 of the Constitution. He also submits that there is no rule under the Covid-19 Public Health (Prevention, Control and Suppression of Covid-19) Rules 2020 which allows of turning away of persons suspected of being carriers or infected by Covid-19 and that it instead provides that they be fined or imprisoned or taken into isolation. That the said rules do not provided for how a certificate of Covid-19 should look like. He urges that the Respondents breached his Constitutional rights and they should be held accountable for the same.

### ***1<sup>st</sup> and 3<sup>rd</sup> Respondent's Case***

#### ***1<sup>st</sup> and 3<sup>rd</sup> Respondent's Replying Affidavit***

13. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents opposed the Petition through the replying affidavit of Mugo Gichiri, the Deputy County Commissioner, Imenti South sworn on 10<sup>th</sup> August 2020. That he received an alert over a bus carrying 32 passengers for a burial and he then immediately alerted the interagency surveillance team to be ready and at about 11.15pm, the bus arrived at the road block and was flagged down for interrogation as has been the practice. That there were negotiations and deliberations between them and the Petitioner with respect to the merits and demerits of allowing them to get into Meru County and that during this time, the public health officer advised them of the fact that they had contravened the MoH Guidelines on Covid-19 as follows: -

- i) No burial had to have more than 15 persons and already there were 32.*
- ii) The mode of transport was not appropriate since the bus was a 37 seater and thus no social distancing was applied.*
- iii) None of the passengers had been tested for Covid-19 and cleared by issuance with a Covid-19 certificate.*
- iv) Their documents prepared on behalf of the Medical Superintendent Malindi Sub-County Hospital confirmed screened for Covid-19 thus not Covid-19 certificates.*
- v) There was no prior communication to the public health officers in Tigania West or Meru County of such large number of people attending the burial.*

14. That if the group was allowed entry, the people would have taken the law into their own hands owing to the fact that they had come from a hotspot area. That they agreed to scale the entourage down to 15 and that the team later told them that they had agreed on 7 and that it was agreed that a vehicle would come to collect the body and the 7 who would accompany the Petitioner and the rest would go back to Malindi. That after waiting for over one hour, the Petitioner informed them that the vehicle they had been depending on had changed his mind. That they then deliberated on how to assist the Petitioner and offered the Igoji Police Station vehicle which he agreed to fuel to take the Petitioner and his team of 7 to Kianjai. That when this had been arranged, the entourage changed their minds and stated that they would not accompany the Petitioner to Kianjai for fear of being stranded and fear of being quarantined and that they had made up their mind despite clarification that they would not be quarantined. That at 4.00am, the GK land rover ferried the body and the Petitioner to Kianjai Police Post where Mwenda had arranged for the body to be picked and that the body arrived at Kianjai at 5.35am, was offloaded from their vehicle and it was picked at 6.00am. That at no point during the entire period was the family of the Petitioner subjected to inhuman condition, threatened or otherwise and that the Petitioner's bitterness emanates after the people he depended on abandoned him in the eleventh hour.

## **1<sup>st</sup> and 3<sup>rd</sup> Respondent's Submissions**

15. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed submissions dated 5<sup>th</sup> November 2020. They urge that it is within public knowledge that the world is going through an extra-ordinary time with the threat of Covid-19 pandemic which has spread to many countries and infected millions of people while also causing death to many. They highlight two issues for determination as follows: -

*i) Was the action of the Respondents reasonable, proper, fair in the circumstances?*

*ii) Should the prayers sought by the Petitioner be granted?*

16. They urge that pursuant to Part 1 (7) (a) of Schedule 4 of the Constitution, the function of police services, including the setting of standard of recruitment, training of police and use of police services belongs to the National Government. They further urge that Part 2 outlines the functions devolved to the County Government and Part 2 (2) specifies the county health services and in particular: -

*(a) County health facilities and pharmacies*

*(b) Ambulance services*

*(c) Promotion of primary health care*

*(d) Licensing and control of undertakings that sell food to the public*

*(e) Veterinary services (excluding regulation of the profession)*

*(f) Cemeteries, funeral parlors and crematoria, and*

*(g) Refuse removal, refuse dumps and solid waste disposal*

17. They urge that Executive Order No. 2 of 2020 National Emergency Response Committee on Corona virus was established and that the Committee which is constituted by the Cabinet Secretary for Health as the Chairperson with 20 members and Director of Public Health has the following Terms of Reference: -

*1. Co-ordinate Kenya's preparedness, prevent and response to the threat of the Coronavirus disease;*

*2. Co-ordinate capacity building of medical personnel and other professional, so as to enable the County respond quickly and effectively to any suspected cases or outbreak of the disease anywhere within the Republic;*

*3. Enhance surveillance at all ports/point of entry in Kenya;*

*4. Co-ordinate the preparation of national, county & private isolation and treatment facilities;*

*5.*

*6.*

*7.*

*8. Formulating, enforcing and reviewing of processes and requirements that regulate the entry into Kenya of any persons or class of persons known or suspected to have travelled from a Coronavirus affected area;*

*9. Conduct any other matter ancillary to or in furtherance of any of the foregoing Terms of Reference; and*

*10. The Committee may co-opt any other persons as may be required to assist in the discharge of its function.*

18. They further urge that pursuant to Section 15 of the Health Act 2017, the Cabinet Secretary of Health is responsible for the development of health policies, laws and administrative procedures and programs in consultation with County Governments and health sector stakeholders and the public for the realization of the highest attainable standards of health including reproductive health care and the right to emergency treatment ; That in line with the aforesaid section, the Ministry of Health developed guidelines in line with the World Health Organization (WHO) on the Safe Management in the context of Covid-19 known as the '*Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020; Legal Notice No. 46 of 3<sup>rd</sup> April 2020.*' That Rule 8 (1) thereof outlines the procedure to be followed in the removal and disposal of bodies during the Covid-19 pandemic. That in addition, His Excellence the President during his address to the nation on Covid-19 in accordance with his mandate as outlined in Article 131 of the Constitution emphasized on the limitation of persons attending any given gathering during the pandemic.

19. They urge the in accordance with their mandate outlined in the National Government Co-ordination Act No. 1 of 2013, the National Police Service Act and the Constitution, the Respondents took proper steps in ensuring Covid-19 regulations are adhered to and further

assisted the Petitioner ferry the casket of the deceased wife to Kianjai Police Post. They urge that they had the responsibility for implementing the policies and guidelines developed by the Cabinet Secretary, Ministry of Health and therefore, the Petitioner has not disclosed any cause of action against the Respondents and his Petition should be dismissed.

20. On whether the prayers sought should be granted, they urge that on the material day, the persons onboard were coming from a high risk county which was among the leading with the number of infected persons and that: -

*(a) The number of persons on board were 32 riding in a 37 seater bus. There was no social distance.*

*(b) The limited number of persons authorized by Ministry of Health Regulation was 15 yet the number herein was 32, against the Regulations.*

*(c) Ministry of Health guidelines compelled any person travelling to have a Covid-19 test and be issued with Covid-19 certificates.*

*(d) None of the passengers had been tested for Covid-19 and cleared by issuance with a Covid-19 certificate.*

*(e) Their documents prepared on behalf of Medical Superintendent; Malindi Sub-County Hospital confirmed screened for Covid-19 thus not Covid-19 certificates.*

*(f) Intelligence team were informed of hostile reception that was awaiting these team.*

21. They urge that they were acting within their mandate to ensure that the laid down regulations were adhered to. That the locals were intending to take the law into their own hands if the entire entourage was to be allowed into Meru County contrary to the MOH guidelines. That allowing 32 persons to attend the burial without Covid-19 certificates and going above the limit of 15 persons was going to jeopardize the not only the life of the entourage but also risking the population of Meru, therefore, going against the larger public interest. That the circumstances of the case are such that individual rights cannot supersede public interest on exposure and would only pose a risk to the public. They urge that under Article 24 of the Constitution, fundamental rights may be limited only to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. That Courts have considered 3 criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive including asking the questions whether: -

*(a) The objective is sufficiently important to justify limiting a fundamental right.*

*(b) The measures designed to meet the legislative object are rationally connected to it.*

*(c) The means used to impair the right or freedom are no more than is necessary to accomplish the object.*

22. They urge that Articles 27, 28 and 29 of the Constitution can be limited in accordance with Article 24 and that extra-ordinary times call for extra-ordinary measures which is the case herein. They urge further that where the redress available for the Petitioner is likely to occasion harm to the public by granting the reliefs sought, the benefits will outweigh the public good, then the Court in exercising its discretionary power notwithstanding the finding of transgressions may decline the orders sought. They rely on the case of *East African Cables Limited v The Public Procurement Complaints, Review & Appeals Board and Another (2007) eKLR* in urging that due to the extraordinary circumstances of the case herein, public interest must prevail and that the risk of exposure to the public outweighs allowing the Petitioner to violate the regulations implemented by moving from a high risk area, in large numbers without clearance of being infected by Covid-19 virus to bury his deceased wife. They urge that they were acting in accordance with the law and that they did not violate any rights as alluded by the Petitioner.

### ***2<sup>nd</sup> Respondent's Case***

#### ***2<sup>nd</sup> Respondent's Replying Affidavit***

23. The 2<sup>nd</sup> Respondent opposed the Petition through the replying affidavit sworn by Festus Mwenda, the 2<sup>nd</sup> Respondent's Public Health Officer in charge of Covid-19 surveillance in Imenti Sub County, Meru County on 17<sup>th</sup> August 2020. He distinguished the role of the County Health Officers from that of the police officers of the 1<sup>st</sup> Respondent in that the former do screening while the latter are in charge of security and enforcement of the MoH Guidelines on Covid-19. That at the material time, he was informed of a bus which had 32 passengers travelling to attend a burial whilst the MoH Guidelines only allowed for a maximum of 15 mourners. That the Petitioners' certificates did not indicate that they were Covid-19 negative but that they indicated that they did not exhibit any symptoms and that 85% of people who test positive are asymptomatic. That enforcement of the orders barring the Petitioner from entry was left to the 1<sup>st</sup> Respondent. That the Petitioner is untruthful in saying that his close family members were ordered to go back as they voluntarily chose to go back. That they were explained to the reasons for denial of entry. That the 2<sup>nd</sup> Respondent's officers were performing their duty in line with Section 15 of the Health Act, 2017.

#### ***2<sup>nd</sup> Respondent's Submissions***

24. The 2<sup>nd</sup> Respondent filed his submissions dated 9<sup>th</sup> April 2021. They urge that the Petitioner together with his entire entourage were in clear contravention of the Covid-19 regulations that were in force at the material time. They invite the Court to determine two main issues in determining whether the Petitioner's claims against the 2<sup>nd</sup> Respondent are merited i.e: -

i) Whether the Petitioner's suit discloses a cause of action against the 2<sup>nd</sup> Respondent.

ii) Whether the Petitioner's claim is founded on an illegality and if to the affirmative, whether the claim for damages can succeed in the circumstances.

25. On whether a cause of action has been established, the 2<sup>nd</sup> Respondent submits that it is established under Article 176 of the Constitution with the responsibility of performing functions that may be conferred to it by the Constitution or National Legislation; That under Part 2 of the Fourth Schedule of the Constitution, the function of Promotion of Health Services is a function of the County Governments; That under Section 20 (a) of the Health Act, the County Government, in furtherance of the functions assigned to it under the 4<sup>th</sup> Schedule is tasked with the responsibility of 'Implementing the national health policy and standards as laid down by the national government ministry responsible for health;' That Section 15 (1) (a) provides that the National Government has the power to 'Develop health policies, laws and administrative procedures and programmes in consultation with county governments and health sector stakeholders and the public for the progressive realization of the highest attainable standards of health including reproductive health care and the right to emergency treatment.'

26. That the Ministry of Health developed guidelines (The Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020 (Legal Notice No. 50) published on 6<sup>th</sup> April 2020 pursuant to the aforesaid Section 15 with a view of managing the ravaging Covid-19 pandemic that has since been declared a worldwide pandemic; That under regulation 7 (1) (a) of the said regulations, attendance of funerals was limited to only 15 people and that as pleaded by the Petitioner, the entourage that was accompanying him for the burial ceremony comprised of 32 people in clear contravention of the regulations.

27. That the 2<sup>nd</sup> Respondent has admitted that it had public health officers at the border barrier whose mandate was to ensure compliance with the Covid-19 regulations and in particular the screening of persons; That contrary to what the Petitioner contends that all persons in the entourage had been tested and issued with certificates declaring them Covid-19 negative, no testing had been done but only screening and that apparently at the time of screening, none of the screened individuals exhibited symptoms associated with the disease. To assert this submission, the 2<sup>nd</sup> Respondents highlights the contents of the letters adduced as evidence by the Petitioner authored by the medical superintendent of Malindi Sub-County Hospital stating verbatim as follows: -

***“The above named client has been screened for Covid-19 and found not to have any signs or symptoms suggestive of Covid-19 as at 27<sup>th</sup> May 2020, screened at Malindi Sub-County Hospital. We recommend testing of the client.”***

28. That at the barrier where the Petitioner contends that his rights were violated, the 2<sup>nd</sup> Respondent's Public Health Officers had been stationed to conduct screening. That noting the nature of the Covid-19 disease or any other disease for that matter, the absence of symptoms manifesting at the first screening does not take away the 2<sup>nd</sup> Respondent's mandate or responsibility of doing other further screening at the border entry point. That any actions taken by the 2<sup>nd</sup> Respondent therefore were in line with its constitutional mandate and mandate under Section 20 of the Health Act and the Covid-19 regulations; That the constitutionality and/or validity of the empowering provisions has not been impugned and that the 2<sup>nd</sup> Respondent was thus acting well in accordance with the law.

29. Concerning the Petitioner's alleged violations that occurred at Kianjai Police Post, the 2<sup>nd</sup> Respondent submits that it does not have any officers deployed at police stations and neither does it have the authority or mandate to make such orders as alleged by the Petitioner. They urge that the Petitioner has failed to point out with the required precision how the 2<sup>nd</sup> Respondent's actions of ensuring compliance with the law and laid down regulations has violated his constitutional rights and therefore that the Petition does not disclose a cause of action against the 2<sup>nd</sup> Respondent. They rely on the Supreme Court decision of *Communications Commission of Kenya & 5 Others vs Royal Media Service Limited & 5 Others (2014) eKLR* and *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*.

30. On whether the Petitioner's claim is founded on an illegality and if so whether the claim for damages can succeed in the circumstances, the 2<sup>nd</sup> Respondent urges that the Petitioner's claim is indeed founded on an illegality. The 2<sup>nd</sup> Respondent highlights the Petitioner's averments that they were travelling in an entourage of 32 people in clear contravention of the Covid-19 regulations, to wit Regulation 7 (1) (a), and that the 2<sup>nd</sup> Respondent acted in the best interest of the public by informing the Petitioner that they were prohibited from attending the burial in such numbers and that it would be reckless of the County Government and abdication of the Ministry of Health Guidelines to allow the same.

31. They urge that it is without doubt that the Petitioner's claim arises from actions undertaken by the 2<sup>nd</sup> Respondent performing its functions under the law and in the public interest and that it would be against public policy to punish the 2<sup>nd</sup> Respondent by condemning it to pay general and punitive damages as the case may be. They rely on the case of *Mutimba Creser Masayi Joseph v Masinde Muliro University of Science and Technology (2020) eKLR*. They urge that the Petitioner's claim for damages should fail.

### ***1<sup>st</sup> Interested Party's Case***

### ***1<sup>st</sup> Interested Party's Affidavit in support of the Petition***

32. The 1<sup>st</sup> interested party supported the application by the supporting affidavit of Mercy Wambua, the Secretary to the Council and the Chief Executive Officer of the Law Society of Kenya sworn on 21<sup>st</sup> July 2020. The contents of the affidavit are largely similar to those of their submissions and this Court will therefore only reproduce the submissions herein.

### ***1<sup>st</sup> Interested Party's Submissions***

33. The 1<sup>st</sup> Interested Party, the Law Society of Kenya filed its submissions dated 23<sup>rd</sup> September 2020. They submit that their joinder to the Petition is by virtue of their statutory function under Section 4 of the Law Society Act which includes to protect and assist the public of Kenya in all matters touching, ancillary or incidental to law. They support the Petition, submitting that there has been a fundamental breach of the Petitioner's constitutional rights.

34. They highlight the facts of the Petition and state that the Petitioner on the material day was travelling with his close family members, 31 in total on a spacious 51 seater bus and they travelled with ease across all other counties including Mombasa, Makueni, Machakos, Nairobi, Murang'a, Kirinyaga, Embu and Tharaka Nithi. They highlight the fact that the Petitioner was dumped outside Kianjai Police Post in the middle of the night at around 1pm while it was raining. That the Petitioner underwent both psychological and emotional torture and that he has never recovered from this horrific, cruel, inhuman and barbaric incidence to date and he still undergoes counselling. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' officers went ahead to threaten everyone who was accompanying the Petitioner with mandatory quarantine at their costs of about Ksh 200,000/= per person at Kangeta Area, should they accompany the Petitioner to the burial.

35. The 1<sup>st</sup> Interested Party submits that no Kenyan should ever be subjected to the form of degrading and inhuman treatment that the Petitioner was subjected to and citing Article 1 of the Universal Declaration of Human Rights, 1949, they urge that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' Citing the case of *George Bala v Attorney General (2017) eKLR*, they urge that the officers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should have enforced the above principle as well as the Constitution. They urge that the averment made by the Respondents are untrue and meant to hoodwink and mislead the Court into believing their side of the story. They urge that not only was the Petitioner's dignity violated, but also the deceased as the dead too have their rights and deserve to be treated with dignity. They cite their case of *Joan Akoth Ajuang & Another v Michael Owuorosodo the Chief, Ukwala Location & 3 Others; Law Society of Kenya & Another (2020) eKLR*.

36. They urge that the Petitioner had complied with all the requirements under the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020.

#### ***4<sup>th</sup> Interested Party's Case***

#### ***4<sup>th</sup> Interested Party's Affidavit***

37. The 4<sup>th</sup> Interested Party supported the application by the replying affidavit of Akusala A. Boniface, the Executive Director of the Legal Aid Clinic. He states that the 4<sup>th</sup> Interested Party, the Legal Aid Clinic is a non-governmental organization with the objective of fostering compliance with human rights and providing legal services for people of limited means. He states that the 4<sup>th</sup> Interested Party supports the Petition and that the Petition before Court contains allegations of extreme violation of the basic Rights and fundamental freedoms of the Petitioner. He states that he learnt of the violations not only from the media but also from the Petitioner.

38. The other contents of his affidavit are largely a restatement of what the Petitioner states in his Petition. He also urges that respecting rights is not a favour done by the state but that state organs and public bodies are enjoined to follow the Constitutional command. He states that it is in the interests of justice that the Petition be allowed with costs.

#### ***Issues for Determination***

39. There are three main issues which present themselves for determination in the instant Petition: -

- i) Whether the Petitioner and his entourage contravened the Covid-19 Regulations.***
- ii) Whether the Respondents violated the Petitioner's constitutional rights.***
- iii) If issue ii) is in the affirmative, who is responsible for violation of the Petitioner's said constitutional rights.***
- iv) Whether the Petitioner is entitled to damages for breach of his rights.***

#### ***Whether the Petitioner and his entourage contravened the Covid-19 Regulations.***

40. The Respondents argue that the Petitioner and his entourage contravened the MoH Guidelines with respect to the maximum numbers allowed to attend a burial, the requirement of social distancing and the requirement to get Covid-19 certificates. The Petitioner on the other hand has urged that they were given clearance documents and travel permits from the offices of the Malindi Sub-County Hospital and the Malindi Sub-County Police Commander respectively. He has indeed annexed these documents to his supporting affidavit. This Court has had a chance to peruse these documents and will reproduce the contents of the same in its analysis of these sub-issues.

#### ***Maximum number of persons***

41. With respect to the maximum number, this Court has observed the travel permit which reads as follows: -

***TO WHOM IT MAY CONCERN***

***RE: PERMIT TO TRAVEL TO MERU COUNTY***

*This office has granted permission to 32 persons as per the attached list to travel from Malindi to Meru County to attend the burial ceremony of the late FAITH MWENDE NKUNU who passed away on 24/05/2020 as per the attached copy of burial permit. They will travel on 28/05/2020 and the burial will take place on 29/05/2020 and thereafter they will come back to Malindi using the same church bus Reg No. KBV 066A.*

*Note: All rules pertaining control of Covid-19 MUST be followed.*

*Any assistance accorded to them will be highly appreciated.*

**SIMON MULI**

**FOR. SUB-COUNTY POLICE COMMANDER**

**MALINDI**

42. The permit clearly indicates that 32 persons had been allowed to travel for the burial of the Petitioner's late wife. The Petitioner does not deny that they were 32 in total. It is interesting that the travel permit adds some sort of disclaimer at the very tail end that '**All rules pertaining control of Covid-19 must be followed,**' because at the time of issuing the travel permit, it ought to have occurred to the author of the said document that the maximum number of persons allowed to attend a burial at the time was 15. Indeed, Regulation 8 (1) of the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020, Legal Notice No. 49 provides as follows: -

**Removal and Disposal of Bodies**

**8. (1) The following shall apply in relation to removal and disposal of bodies of all persons who die from COVID-19:**

**(a) The person applying for burial or cremation permit shall be regarded as the responsible person for purposes of Section 18 of Public Health Act;**

**(b) The burial or cremation ceremony may only take place between 0900 hours — 1500 hours;**

**(c) The attendance at the burial or crematorium shall not exceed fifteen persons without prior written consent of a medical officer of health;**

**(d) No child under the age of twelve years may enter any cemetery or crematorium unless when accompanied by an adult, or with the medical officer of health;**

**(e) No person shall be allowed to carry on or solicit business, hold demonstration, or perform an activity which is not normally associated with a cemetery or crematorium;**

**(f) The mode of transport used during the funeral procession at the cemetery or crematorium, must be fumigated immediately after the procession;**

**(g) Every person taking part in a funeral procession at the cemetery, or attending a cremation service, must comply with instructions or directions issued by the medical officer of health or public health officer;**

43. Regulation 7 of the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020, Legal Notice No. 50 provides as follows: -

**Prohibition of Gatherings**

**(1) Save for a funeral undertaken in accordance with sub-rule (2), any gathering as defined under rule 2 is prohibited during the restriction period.**

**(2) For purposes of these Rules, a funeral shall not be regarded as a prohibited gathering provided that—**

**(a) attendance at the funeral shall be limited to fifteen people;**

**(b) night vigils shall not be held in relation to a funeral;**

**(c) hygiene conditions under rule 6 are adhered to; and**

**(d) all the conditions under rule 8 (1) of the Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020 are adhered to.**

44. The above regulations indeed prescribed for a maximum number of 15 persons for funeral gatherings at the material time i.e May 2020. For attendances exceeding 15 persons, there ought to have been a prior written consent of a medical officer of health. The Petitioner did not allude to having obtained any such consent. It is therefore safe to conclude that the Petitioner and his entourage were in violation of this

regulation since they were admittedly 32 persons in total.

45. It is indeed of concern why the 1<sup>st</sup> Respondent's agents in Kilifi authorized for this travel only for the very same 1<sup>st</sup> Respondent's agents in Meru to deny the Petitioner entry into Meru, and even then, after having passed all the other counties between Kilifi and Meru without qualms. This notwithstanding, it is clear that at the material time, and in respect of the issue currently before Court for determination, there was a contravention of the law. Ignorance of the law is not a defense and the Petitioner, who has come to seek redress from Court ought not to have been in the company of more than double the limits set by law, without a prior written consent. This Court finds that the Petitioner contravened the Covid-19 regulations limiting the maximum number of persons eligible to attend funerals to 15.

***Requirement to get tested for Covid-19***

46. With respect to the requirement for testing before movement, this Court has observed the clearance document from the hospital which reads as follows: -

***TO WHOM IT MAY CONCERN***

***RE: CHARLES MWENDA 32 YEARS SEX-MALE***

***RES. MAJENGO – MALINDI ID NO. 24506492***

***The above named client has been screened for Covid-19 and found not to have any signs or symptoms suggestive of Covid-19 as at 27<sup>th</sup> May 2020, screened at Malindi Sub-County Hospital. We recommend testing of the client.***

***Alex Thirinja***

***For Medical Superintendent***

***MALINDI SUB-COUNTY HOSPITAL***

47. A plain reading of the clearance document, indicates that the persons had been ***screened*** and found to have no symptoms of Covid-19. In fact, the document goes ahead to indicate that they recommend testing of the persons. This Court therefore agrees with the Respondents to the extent that the Petitioner and his team had not been proven Covid-19 negative but had merely been screened.

48. The Respondents argue that there was a requirement to conduct testing before travel. This Court has perused the Regulations but does not find any such express requirement therein. The Court does not therefore find that the Petitioner contravened the requirement to get tested as one can only contravene what is expressly provided for by law. The Court however takes judicial notice of the fact that there are numerous asymptomatic persons and indeed testing is best practice and is the only way to confirm one's status.

49. However, assuming that there was a requirement for testing at the time, the emerging question is why the hospital did not conduct testing on the Petitioner and his entourage despite them having presented themselves to the Hospital. Indeed, this remains a mystery. On the one hand, it could be that the Petitioner and his family members did not accurately indicate that the reasons for their screening was to facilitate their travel to Meru. On the other hand, it could be that the Hospital was limited in resources and was therefore not able to conduct the testing. The Petitioner's explanation is that at the material time, there was a shortage of testing kits and it was therefore recommended that only persons exhibiting symptoms be tested. The 2<sup>nd</sup> Respondent did not respond to this averment but merely states that there was contravention. This Court is thus more inclined to believe the Petitioner.

***Requirement on Social Distancing***

50. The Respondents claim that the Petitioner and his entourage were in contravention of the requirement to maintain social distance between persons in public. The Petitioner was silent on this issue. Although the Law Society of Kenya indicates that the Petitioner and his entourage were in a spacious 51 seater bus, the Respondents, whose officers were on site on the material day claim otherwise. Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had officers on site on the material day urge that the Petitioner and his entourage were in a 37 seater bus. This Court is more inclined to believe the Respondents.

51. Indeed, the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020, Legal Notice No. 50 provides as follows: -

***Hygiene Conditions***

***6. (1) Every person who is in a public place during the restriction period shall—***

***(a) maintain a physical distance of no less than one metre from the next person; and***

***(b) use a proper face mask that must cover the person's mouth and nose.***

52. It would not have been possible for a total of 32 persons to maintain physical distance of no less than one metre while in a 37 seater bus. This Court finds that the Petitioner was in contravention of the requirement for social distancing.

53. In the end, this Court finds that the Petitioner was indeed in contravention of the Covid-19 rules with respect to the maximum numbers allowed and with respect to the requirement of social distancing. In finding so, this Court is indeed cognizant that the nature of the Covid-19 pandemic demands the joint and collaborative efforts of both the Government and the citizenry to adequately combat it, and to this extent, this Court reasonably understands that the Petitioner and his entourage may have relied on the sanctions and facilitation of the very Respondents' agents to travel. However, the Covid-19 pandemic is a serious disease, causing loss of lives and disruption of business and the economy and is not to be taken lightly. The Petitioner had his role to play in his misfortune for failing to comply with the Regulations. The Government has a positive obligation and responsibility to ensure the safety and health of the citizenry and it must be allowed to perform its function.

***Whether the Respondents violated the Petitioner's constitutional rights.***

54. As has been discussed above, there were some contraventions of the Public Health regulations in force at the material time. The most glaring one was the one on the maximum number of persons allowed to attend a burial which is tied to the requirement to maintain physical distance. The next question to ask concerns the legality of the actions taken by the 1<sup>st</sup> Respondent in enforcing the MoH regulations, so contravened. To put it differently, the question is whether the 1<sup>st</sup> Respondent's agents at the Tharaka Nithi-Meru border justified in their actions towards the Petitioner. A finding on this issue will help in the determination of whether there were violations of the Petitioner's constitutional rights as he alleges.

55. It is instructive that non-compliance with the Covid-19 guidelines would not automatically justify violations of any of the Petitioner's rights. To a certain extent, it is immaterial whether or not there was a contravention of the Covid-19 regulations in the first place, unless it can be shown that the 1<sup>st</sup> Respondent's actions were justified.

***Factual basis***

56. Before determining whether there were any violations, it is necessary to identify the veracity of the factual allegations made by the Petitioner concerning what happened after he was found to be non-compliant with the Covid-19 regulations. The Petitioner claims that he was transported together with the casket carrying the remains of his deceased wife and he was dumped outside, at the roadside all alone. He claims that this was done, in the middle of the night while it was raining, without care as to his security and well-being, after being separated from his family. He claims that he sought shelter under a lorry and despite all efforts, rain water got into the casket. He has annexed photographs showing a casket and suitcase packed under a lorry. He also claims that no alternatives were offered to him and his family, contrary to the 1<sup>st</sup> Respondent's allegations that they had asked the Petitioner's family to decide on 15 members who would accompany the Petitioner for the burial but that the offer was declined. He claims that these are fabrications engineered to cover up for their misdeeds.

57. On the part of the 1<sup>st</sup> Respondent, the Deputy County Commissioner avers in his affidavit that at no point during the entire period was the family of the Petitioner subjected to any inhuman conditions, threatened or otherwise. It is claimed that the family was offered the alternative of agreeing on 15 people and they were assisted but they opted not to proceed as agreed. It is averred that the Petitioner was offered all necessary assistance that could be reasonably offered at the time and in the circumstances.

58. This Court has had a chance to analyze the times of the various activities that went on as per the 1<sup>st</sup> Respondent's affidavit. It is observed that the back and forth exercise between the 1<sup>st</sup> Respondents' agents and the Petitioner went on from about 11.15pm when the Petitioner got to the border up to about 5.35am when it is said that the body arrived at Kianjai Police Post. This Court is not satisfied that negotiations and arrangements were ongoing during this entire span of over six (6) hours, especially in the late hours of the night. Indeed, if a decision had been made that the Petitioner was the only one remaining, he ought to have been released immediately this decision was reached, at the very least, for purposes of taking the casket home, which he claims was only 5km away from the police post. If any assistance was to be offered to facilitate the Petitioner's movement, this Court is not convinced that it could have taken this long to be done. The contents of the 1<sup>st</sup> Respondent's affidavit and the various timings indicated thereon, to this Court's mind have been framed so as to cover up for time unaccounted for. Furthermore, the 1<sup>st</sup> Respondent has been quiet on the Petitioner's allegations that he was abandoned outside in the cold and rainy night with the casket. On a balance of probabilities, this Court is inclined to believe the Petitioner's version of the events.

59. This Court must make a comment on the fact that none of the Petitioner's family accompanied him for the burial. Although the 1<sup>st</sup> Respondent claims that an option was given for them to decide on 14 others who would accompany him and that they declined this offer, this Court finds that in the absence of evidence from a third party, this issue cannot be exhaustively determined. If however the 1<sup>st</sup> Respondent's agents indeed made the offer to allow 14 others to accompany the Petitioner, this was indeed the right action to take.

***Analysis on Violations of Rights***

60. The Petitioner claims that various constitutional provisions and his rights were violated as follows: -

***i) Article 10 on the national values and principles of governance.***

***ii) Article 20 on limitation of rights.***

***iii) Article 25 on the rights not to be tortured or treated in a cruel, inhuman and degrading manner.***

***iv) Article 28 on the right to be treated with dignity.***

***v) Article 29 on the freedom of movement and security of the person.***

**vi) Article 47 on fair administrative action.**

**Article 10 on the national values and principles of governance.**

61. The national values and principles of governance include among others, good governance, transparency and accountability. While there was a willingness on the part of the 1<sup>st</sup> Respondent's agents to enforce national guidelines, there equally ought to be guidelines and checks on how enforcement should be done and omission to have proper and lawful enforcement strategies, to the inconvenience of citizens must be abhorred. It is apparent that the 1<sup>st</sup> Respondent's agents in enforcing the MoH guidelines, extended their engagement with the Petitioner late into the night only to later come to bundle him into their vehicle, and shortly thereafter leave him all alone in the dark, cold and rainy night without any concern for his safety. Indeed, their actions were not only inefficient but a demonstration of the inexcusable gaps and shortfalls in the systems. Accountability connotes being able to justify and take responsibility for one's actions. It is incumbent upon the 1<sup>st</sup> Respondent to increase public trust between government and citizens by executing duty in a transparent and accountable manner. This Court finds that the national values and principles of good governance under Article 10 of the Constitution to wit, good governance, transparency and accountability were indeed violated.

**Article 27 on Equality and Freedom from Discrimination**

62. Despite citing this as one of the rights infringed by the Respondents in his heading and despite referencing this in his prayers, the Petitioner did not specifically plead this right in his Petition and neither did he demonstrate how he was discriminated against. Proof of discrimination requires comparisons between how the Petitioner and others were treated in similar circumstances. It is for the Petitioner to lay out his case and even then in a precise and clear manner. *See Anarita Karimi Njeru v R, Miscellaneous Criminal Application No. 4 of 1979*. This Court will say nothing further on this issue.

**Article 47 on fair administrative action.**

63. The Petitioner claims that his rights to fair administrative action was violated. He urges that there was unreasonableness and that the Respondent's agents acted in bad faith, that there was procedural impropriety, that his legitimate expectation was not met and that the principles of natural justice were not observed.

64. This Court recognizes that the rights to fair administrative action concerns administrative decisions made by authorities. However the circumstances of this case where the Respondents were merely checking compliance and enforcing MoH guidelines would invite a case founded on other Constitutional rights as opposed to violation of fair administrative action. For instance the rules of natural justice would be difficult to find footing herein because the Respondent's agents were merely acting on a directive issued from higher authorities. Once the Legal Notices were published and gazetted, this was notification to the general public of the MoH regulations and it would not be feasible to expect the Respondent's agents to conduct some sort of hearing before taking action as they are not in the first place acting in any judicial or quasi-judicial capacity. This Court does not find that the Petitioner's rights to a fair administrative action were infringed. The Petitioner's concerns as to how he was treated have been adequately dealt with in the other rights mentioned above.

**Article 29 on Freedom and Security of the person.**

65. Article 29 provides as follows: -

***'Every person has the right to freedom and security of the person, which includes the right not to be-***

***(a) Deprived of freedom arbitrarily or without just cause;***

***(b) Detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;***

***(c) Subjected to any form of violence from either public or private sources;***

***(d) Subjected to torture in any manner, whether physical or psychological;***

***(e) Subjected to corporal punishment; or***

***(f) Treated or punished in a cruel, inhuman or degrading manner.'***

66. Key to this Petition are the rights not to be subjected to torture in any manner, whether physical or psychological and the right not to be treated or punished in a cruel, inhuman or degrading manner. Article 5 of the Universal Declaration of Human Rights 1949 provides as follows: -

***'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'***

67. The Equality and Human Rights Commission defines torture as when someone deliberately causes very serious and cruel suffering (physical or mental) to another person. This might be to punish someone, or to intimidate or obtain information from them. Inhuman treatment on the other hand is treatment which causes intense physical or mental suffering and it includes serious physical assault, psychological interrogation, cruel or barbaric detention conditions or restraints, serious physical or psychological abuse in a health or care setting and threatening to torture someone, if the threat is real and immediate. Degrading treatment means treatment that is extremely

humiliating and undignified. Whether treatment is to the extent that it can be termed degrading depends on a number of factors. These include the duration of the treatment, its physical or mental effect and the sex, age, vulnerability and health of the victim. This concept is based on the principle of dignity, the innate value of all human beings.

68. Bearing in mind the factual basis of this Petition, this Court is confronted with the question whether the Petitioner was tortured and whether he was treated in a cruel, inhuman or degrading way. Torture as has been explained is not just physical but also psychological. The Petitioner claims to have suffered psychological torture when he was abandoned on the roadside, all alone, in the cold and rainy night by agents of the 1<sup>st</sup> Respondent. To this Court's mind, this was indeed a horrifying experience enough to affect one psychologically and it was also an attack on the Petitioner's dignity. The Petitioner travelled from Kilifi expecting to arrive at his home to lay to rest his beloved. The turn of events must not only have shocked him but must have caused him great shame and embarrassment.

69. Dignity connotes honour and respect. Indeed, this treatment was not dignified. When the extent of such treatment is extremely humiliating and undignified, then this no longer stops at being undignified but it escalated to degrading treatment. To this Court's mind, the fact that the event occurred in the night, and in the dark coupled with the fact that the Petitioner was already battling psychological trauma of losing a loved one, having been left with young children to look after, the treatment he received was indeed degrading. On a balance of probabilities, this Court finds that the 1<sup>st</sup> Respondent's actions were rather punitive and oppressive rather than those intended to help in combating the spread of Covid-19 and thus inhuman and degrading.

70. In the case of *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties) Petition No. 120 of 2020 (Covid 025) (2020) eKLR* W. Korir J held as follows: -

***“It was correctly submitted by the Petitioner and the interested parties that in time of crisis the State tends to overreach itself. They have also rightly submitted that the Constitution and the law has not been suspended. I agree that it is only a few rights and fundamental freedoms that have been restricted by the operation of the Curfew Order. Those rights do not include the non-derogable rights under Article 25 of the Constitution. It is necessary for defenders and upholders of the rule of law to be extra vigilant whenever the State exercises emergency powers.”***

71. The 1<sup>st</sup> Interested Party has urged that the dignity of the dead is also an issue, but what the Petitioner urges in this case is his rights and not those of his deceased wife. The Petitioner claims that he was deprived of his freedom of movement by being detained without just cause. Detention in itself connotes being taken into custody, and especially where the circumstances invite a criminal process in which case the subject was being detained without trial, which was not the case herein.

72. All in all, for reasons given above, this Court finds that indeed, the Petitioner's freedom from torture and freedom from subjection to inhuman and degrading treatment were violated.

#### ***What was the Reasonable Expectation?***

73. Furthermore, this Court observes that the Covid-19 regulations prescribe for appropriate sanctions in the event of contravention. Regulation 15 of the Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020, Legal Notice No. 49 provides as follows:

-

#### **Penalty**

***(1) Except as otherwise provided in these Rules, any person who contravenes the provisions of these Rules shall be liable to a fine not exceeding twenty thousand shillings, or to imprisonment for a term not exceeding six months, or to both.***

***(2) If the offence, contravention or default referenced under rule 15 (1) herein is of a continuing nature, the person shall be liable to a further fine not exceeding one thousand shillings for each day it continues.***

There is a replica of the above provisions in Regulation 11 of the Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules 2020, Legal Notice No. 50.

74. Indeed, the drafters of the regulations deemed these penalties as sufficient to punish and/or prevent contravention of the same. It was therefore not necessary to have the Petitioner undergo the trauma of having to spend the night outside in the cold and in the rains to a point where water found its way into the casket of the deceased. The reasonable thing to do would have been to charge him and/or impose a fine but allow him, especially now that his entire family was already enroute back to Kilifi, to proceed to his home.

75. While it was not feasible for the Respondents to allow the entire team of 32 entry into the Meru County, this Court finds that the manner in which the Petitioner was handled by the 1<sup>st</sup> Respondent's agents was not justified and it demonstrated a quest to demonstrate power and mete out punishment as opposed to a conscientious effort to enforce the law. This Court also finds that there was a more dignified and expedient way to handle the Petitioner as opposed to leaving him outside in conditions that prevailed at the time.

76. While it was within the law, for the 1<sup>st</sup> Respondent to ensure compliance with the law and regulations in force, such exigencies to maintain law and order should be done within the confines of the very law. This was not the case herein.

#### ***Article 28 on the right to be treated with dignity.***

77. The right to dignity is the general right from which all other rights in the Bill of Rights flow. The concept of human dignity was discussed at length in *The Bill of Rights Handbook , Fifth Edition* by Iain Currie & Johan de Waal pg 273 where it was established as follows: -

***‘Though a difficult concept to capture in precise terms, it is clear the Constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society. Human dignity is the source of a person’s innate rights to freedom and to physical integrity from which a number of other rights flow. The value accordingly also provides the basis for the right to equality in as much as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.’***

78. In the very book, *The Bill of Rights Handbook , Fifth Edition* by Iain Currie & Johan de Waal pg 276, when discussing cruel, inhuman and degrading treatment or punishment, the writers showed the correlation and the intersection between the right to dignity and the right not to be treated in an inhuman and degrading manner as follows: -

***‘The right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.’***

79. The writers also made reference to the case of *S V Makwanyane* where in discussing the constitutionality of the death sentence, ***‘Chasklson P held, that the right to dignity is one of the ‘relevant’ factors that must be taken into account to determine whether a punishment is cruel, inhuman or degrading.’*** The writers also state that:

***‘Although the rights are inextricably linked, the right to dignity encompasses a great deal more than the prohibition of torture or cruel punishment. These prohibitions are merely clear examples off infringement of the right to dignity.’***

80. This Court has already found in its analysis above that the Petitioner’s right not be treated in an inhuman and degrading manner was violated. The right to dignity is essentially a build up to the right not to be treated in an inhuman and degrading manner. There are instances where a positive finding that someone’s right to be treated with dignity will not amount to a similar finding that his rights not to be treated in an inhuman and degrading manner was violated. However, a finding that someone was treated in an inhuman and degrading manner will undoubtedly mean that they were also treated in an undignified manner.

81. This Court finds that the Petitioner’s rights to be treated with dignity was violated for the very reasons that his rights not to be tortured and not to be treated in a cruel, inhuman and degrading manner were violated.

***Article 25 on the fundamental rights and freedoms that may not be limited.***

82. Article 25 is one of the rights that the Petitioner claims to have been violated. Article 25 provides for certain rights and fundamental freedoms that shall not be limited, despite any other provision in the Constitution. Indeed, among these rights and fundamental freedoms is (a) freedom from torture and cruel, inhuman or degrading treatment or punishment. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents in their submissions have urged that the law allows for certain rights to be limited when the limitation is fair, reasonable, necessary and justifiable in a democratic society. They urge that Articles 27, 28 and 29 can be limited. This assertion is not entirely true since as stated above, there are certain rights including some provided for under Article 29 which the Constitution does not allow for their limitation. Freedom from torture and freedom from cruel, inhuman or degrading treatment or punishment is one of the rights that cannot be limited.

83. Concerning the other rights mentioned by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, being Article 27, 28, and 47 these are not excluded from the possibility of limitation. The Petitioner did not prove violation of Article 27 and 47. He has however proven violation of Article 28 on his right to dignity. Although the law allows for limitation of certain rights such as these ones, any such limitation cannot be done in a vacuum but must be supported by law and specifically be the subject of legislation. Article 24 (1) provides as follows: -

***“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-***

***(a) The nature of the right or fundamental freedom;***

***(b) The importance of the purpose of the limitation;***

***(c) the nature and extent of the limitation;***

***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***

***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

84. Article 24 (2) infers that such limitation shall be provided for in legislation. Limitation has to be supported by law. This Court appreciates that the term law is wide and far reaching. Even the term legislation is an umbrella term which includes many other references, not limited to Acts of Parliament. Article 260 of the Constitution defines the term legislation as follows: -

**“legislation” includes-**

**(a) An Act of Parliament, or a law made under authority conferred by an Act of Parliament; or**

**(b) A law made by an assembly of a county government, or under authority conferred by such a law;**

85. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have however not pointed to the specific legislation that they are referring to in their submissions and/or pleadings. This Court appreciates that this could mean the provisions of the aforementioned Legal Notices. However, a perusal of the said Legal Notices does not reveal any express intention to limit the rights and fundamental freedoms under reference herein.

86. The parameters for limitation of rights were discussed at length in the Court of Appeal case of *CKC & Another (Suing through their mother and next friend JWN) v ANC, Civil Appeal No. 121 of 2018 [2019] eKLR* where Karanja, Musinga (as he then was) & M’Inoti, JJ.A) held as follows: -

**“We have already adverted to Article 24, which provides the circumstances under which rights and fundamental freedoms may be limited. The provision prohibits limitation of rights and fundamental freedoms except by a law, which is clear and specific on the right and fundamental freedom to be limited and the nature and extent of the limitation. In addition such law must state expressly its intention to limit the right or fundamental freedom in question. The limiting law is further subject to strict controls that are intended to avoid facile or casual derogation. Thus for example, limitation is allowed only to the extent that it is reasonable and justified in an open and democratic society based on human dignity, equality and freedom and taking into account a host of considerations such as the nature of the right or fundamental freedom to be limited, the purpose of the limitation and its nature and extent and whether the purpose of the limitation could be achieved through less restrictive means. The limitation cannot derogate from the core or essential content of the right or freedom. Lastly, the burden is on the person seeking to justify limitation of a right or fundamental freedom to satisfy the court that the limitation in question satisfies the conditions for derogation set by the Constitution.”**

87. This Court finds that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have failed in their duty to demonstrate that the limitation of the rights complained of by the Petitioner was justified in the circumstances.

***If issue ii) is in the affirmative, who is responsible for violation of the Petitioner’s said constitutional rights.***

88. This Court has found that the Petitioner’s right not to be tortured or treated in a cruel, inhuman and degrading manner and his right to be treated with dignity were violated. These violations were done at the point of enforcement of the MoH guidelines. The 2<sup>nd</sup> Respondent has distanced itself from the enforcement aspect of the events of the material night. It is claimed that the 2<sup>nd</sup> Respondent’s role ended after screening and recommending that the Petitioners be denied entry and that what happened after that was solely on the part of the 1<sup>st</sup> Respondent’s agents. They urge that they had nothing to do with the manner of enforcement, which forms the gravamen of the Petitioner’s case. The Petitioner on the other hand has urged that the 2<sup>nd</sup> Respondent cannot absolve itself from the wrongs committed since the officers from both the 1<sup>st</sup> and 3<sup>rd</sup> Respondents were on an inter-agency mission to ensure compliance with the law. The Petitioner seems to suggest that the actions of one agency were inextricably bound to the actions of the other and vice versa.

89. This Court observes that the nature of the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is such that their roles are separate and distinct, much as it was a collaborative effort between the two. While one could only act upon the advice of the other, their roles being those of the Police Service (Under the National Government) and those of the Ministry of Health (Under the County Government of Meru) are indeed distinguishable and can be traced to different Acts of Parliament. In the present case, screening of travelers in itself is not the wrong committed, but rather the manner of enforcement of the directives issued. This Court therefore finds that the party to blame is the one who was mandated to enforce and who so enforced the directives in an unlawful manner. This Court finds that it is the 1<sup>st</sup> Respondent who is liable for violation of the Petitioner’s rights.

***Whether the Petitioner is entitled to damages for breach of his rights.***

90. The award of damages is a matter of discretion of the Court. Article 23 (3) of the Constitution permits the Court to grant a number of reliefs including **compensation** in matters involving violations of rights. Among these is an order for compensation at Article 23 (3) (e) of the Constitution. As a matter of general principle, damages in Constitutional Petitions are awarded, not so much to compensate or to punish, but to vindicate the rights violated. Indeed, no amount of money will be sufficient to compensate the Petitioner for the violations done against him. The purpose of damages in constitutional matters was well expounded in *The Bill of Rights Handbook*, 5<sup>th</sup> Edition (2005) by Iain Currie & Johan de Waal p. 218, the following was established with respect to the South African legal setting: -

**‘Nothing in the Constitution prevents a court from awarding damages (sometimes called ‘constitutional damages’) as a remedy for the violation of fundamental rights. However, the jurisprudence of the Constitutional Court has not been particularly encouraging. As we have seen, in principle constitutional remedies should be forward-looking, community oriented and structural. An award of damages is however not a forward looking remedy. Rather it requires a court to look back to the past in order to determine how to compensate the victim or even to punish the violator.’**

91. The provision in Article 23 (3) (e) of the Constitution of Kenya for the remedy of compensation, however, places the question of damages as a remedy in the discretion of the court according to the peculiar circumstances of each case. While various rights herein have been infringed, this Court observes that they all emanate from a series of unlawful acts of the same transaction. Furthermore, some of the rights are subset of the others in that the right to dignity is the foundational basis for the right not to be tortured and not to be treated in a cruel, degrading and inhuman manner. This Court observes further that the 1<sup>st</sup> Respondent’s officers callously failed to mitigate the losses

that the Petitioner suffered by ameliorating the quickly deteriorating situation. The Petitioner is on record as having pleaded with the Respondents to allow him to take his casket home which was just but 5km away to no avail. Indeed, there was room to handle the Petitioner in a more efficient way so as to prevent the loss as opposed to holding him for over 6 hours. The circumstances of the case clearly warrant aggravated and exemplary damages for purposes of deterring similar conduct in the future. This Court finds that an award of Ksh.1,500,000/= will vindicate the Petitioner's rights, to serve as a forward-looking deterrence and also to compensate him for his loss in accordance with Article 23 (3) (e) of the Constitution..

### **Conclusion**

92. The Petitioner, a recently bereaved widower was innocently travelling with his family from Kilifi to Meru to bury his deceased wife. He claims to have done so, in the earnest belief that he had complied with the law. It however turned out that he had contravened the public health guidelines on maximum numbers allowed and that he had not been tested, which this Court has confirmed. While enforcing the MoH regulations on the Covid-19 pandemic, the agents of the 1<sup>st</sup> Respondent treated him not only in an undignified way but also in a torturous, inhuman and degrading way. The event of being dumped all alone by the roadside in a dark, cold and rainy night with a casket bearing the corpse of his dead wife were not only psychologically traumatizing and horrific but they also exposed the Petitioner to physical danger, and fear thereof. The Petitioner endured this while at a most vulnerable time of grieving his loss. It could never be argued that there were no less restrictive means of achieving the same objective of COVID-19 control and there were indeed more dignified and efficient ways of handling the Petitioner especially since he was ultimately allowed to proceed and bury the deceased anyway without the assistance of his entourage of mourners. The 1<sup>st</sup> Respondent's actions do not reflect a just and democratic society governed by the Rule of Law. In any event the rights to protection from torture, and cruel, inhuman or degrading treatment cannot be limited under our Constitution. The Petitioner has indeed set out a strong case for violation of his Constitutional rights to dignity, and protection from torture, cruel, inhuman and or degrading treatment.

### **ORDERS**

93. Accordingly, for the reasons set out above, this Court makes the following orders: -

*i) A declaratory order is hereby issued that the actions of the police officers under the National Police Service headed by the 1<sup>st</sup> Respondent violated the provisions of the Constitution under Articles 3, 4, 10, 19 (2), 19 (3) (a), (b), & (c), 25 (a), 28, 29 (d) & (f) and thus infringed on the rights to dignity, protection against torture and cruel, inhuman or degrading treatment of the Petitioner under the Bill of Rights of the Constitution of Kenya 2010.*

*ii) An order of compensation of Ksh.1,500,000/= as general and exemplary damages against the 1<sup>st</sup> Respondent for violating the Petitioner's Constitutional Rights.*

*iii) The 1<sup>st</sup> respondent shall pay the costs of the suit to the Petitioner; and the other parties shall each bear their own costs.*

Order accordingly.

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF JUNE, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

**M/S Namachanja Wambulwa & Co. Advocates for the Petitioner**

**Ms. J. Kung'u, Deputy Chief State Counsel for the Attorney General for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents**

**M/S Okubasu, Munene & Kazungu Advocates for the 2<sup>nd</sup> Respondent**

**M/S Carlpeters Mbaabu & Co. Advocates for the 1<sup>st</sup> Interested Party**