



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 1 OF 2020

JOAN AKOTH AJUANG.....1ST PETITIONER

BRIAN THOMAS OYUGI.....2ND PETITIONER

VERSUS

MICHAEL OWUOR OSODO

THE CHIEF UKWALA LOCATION.....1ST RESPONDENT

MUTAHI KAGWE, CABINET

SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER HEALTH,

COUNTY GOVERNMENT OF SIAYA.....4TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

MALAIKA FOUNDATION.....2ND INTERESTED PARTY

JUDGMENT

1. The Petitioners are **JOAN AKOTH AJUANG** and **BRIAN THOMAS OYUGI**. They describe themselves respectively as sister and son to the late **James Oyugi Onyango** hereinafter called the *deceased*. The Petitioners initially filed the Petition dated 15th April, 2020 which they subsequently amended on the 17th April 2020. The Petitioners seek the following orders:

a) *“A declaration that the right of the late James Oyugi Onyango to a decent burial under international law, the Constitution and Luo Culture as well as the rights of the Petitioners together with the deceased’s loved ones have been violated by the Respondents.*

b) *An Order that the body of the late James Oyugi Onyango be exhumed by the Respondents and subject to the conduct of an autopsy/biopsy to ascertain cause of death, the deceased’s body be re-buried immediately thereafter in a decent burial in accordance with the World Health Organisation guidelines on the safe management of a dead body in the context of COVID-19 (if confirmed that the deceased died as a result thereof), the Constitution and cultural requirements.*

c) *An order that upon exhumation of the body of the late James Oyugi Onyango an autopsy and/or biopsy be conducted on the body of the deceased in the presence of the Petitioners and/or their nominees to ascertain the cause of death of the deceased and in particular whether the deceased died of COVID-19.*

d) *The exhumation, autopsy/biopsy and re-burial of the late James Oyugi Onyango at his ancestral home be undertaken by the Ministry of Health at their own costs.*

e) *The Petitioners, immediate and/or extended family of the late James Oyugi Onyango be allowed to designate a maximum of 15 persons to witness the exhumation and re-burial of the deceased person and the Ministry of Health do provide the necessary protective gear for the 15 representatives of the deceased's family during the exercises.*

f) *The costs of this Petition be borne by the Respondents."*

2. The Petitioners seek to invoke the jurisdiction of this Honourable Court to determine the question whether their rights and fundamental freedoms in the Bill of Rights have been denied, violated and infringed upon by the respondents in the latter's alleged decision to conduct an alleged hurried burial of the late James Oyugi Onyango.

3. In support of the Petition, the 1st Petitioner, Joan Akoth Ajuang, a sister to the deceased James Oyugi Onyango swore an affidavit on her behalf and on behalf of her co-petitioner, Brian Oyugi.

The Petitioners' Case

4. It is the Petitioners' case that on the early morning of the 6th April, 2020 the deceased, **James Oyugi Onyango** in the company of some of his family members began their journey from Mombasa City for his rural home in Kamalunga Village, Siaya County.

5. The Petitioners' further state that on reaching Awasi shopping Centre, along Kericho- Kisumu road, the deceased, James Oyugi Onyango, was involved in a road traffic accident wherein the motor vehicle he was driving lost control and the same was wrecked. That the deceased thereafter called for a tow truck from a garage owner in Kisumu City who went and towed his motor vehicle to Kisumu City for repairs.

6. It is the Petitioners' case that on reaching Kisumu City, the deceased started complaining of mild chest pains, stating that he suspected he had hit his chest on the steering wheel of the motor vehicle when the accident occurred, but that he ignored going to hospital stating that the pains were mild and that he would spend the night and see how he would wake up in the morning before making a decision on whether to go to hospital.

7. The Petitioners further state that the deceased spent the night at a relative's place within Kisumu City and proceeded on with his journey to Ukwala, in Siaya County, the following day on the 7th April, 2020 and on reaching his rural home, the deceased spent the day and the following day indoors.

8. The Petitioners assert that on Thursday 9th January, 2020 the deceased complained of increased chest pains and requested for medication to be brought to him after which his brother, Mr. Oloo rushed to Matibabu Hospital in Ukwala Town, explained the deceased's condition to one of the doctors and some medication prescribed, which Mr. Oloo bought and took to the deceased.

9. It is the Petitioners' case that upon taking the medication, the deceased's condition did not improve and on the Friday of 10th April, 2020 the deceased woke up with worse chest pains than the previous day and subsequently, in the company of Mr. Oloo, the deceased headed to Matibabu Hospital for an in-depth check-up and diagnosis wherein the doctor examining the deceased recommended that the deceased be transferred to Siaya County Referral Hospital for a chest X-ray to be conducted to confirm why his chest was aching. The X-ray was done and the deceased together with Mr. Oloo went back to Matibabu Hospital with the results.

10. It is the Petitioners' case that the deceased, on returning to Matibabu Hospital, his sugar and blood pressure levels were critically high and the doctor recommended the admission of the deceased at the Matibabu Hospital so that he would be monitored overnight. Mr. Oloo then called the deceased's wife to stay overnight with the deceased whilst he (Oloo) went home.

11. The Petitioners' state that later that evening, the deceased passed on and his brother Mr. Oloo was informed, but that upon returning to the hospital, Mr. Oloo was told that he could not view the deceased's body at that time since it had already been taken to the morgue but could do so the following day.

12. It is the Petitioners' case that on the morning of 11th April, 2020 Mr. Oloo proceeded to Matibabu Hospital to view the body and embarked on the plans and modalities of burial of the deceased but on reaching the Hospital in the company of other family members, they were informed that they could not view the deceased's body since samples had been taken from the deceased and transported to KEMRI Kisumu for analysis, in line with the Ministry of Health guidelines to forward samples for testing for the Covid-19 virus if a person showed any of the known symptoms associated with the disease and especially if the said person had travelled from an area known to have positive cases of COVID-19.

13. The Petitioners state that the deceased's relatives were not given an opportunity to see the samples being taken from the deceased and that neither have they received the results of the diagnosis to date and that further, the deceased's relatives were told to go home and await for the results of the test and further instructions on collection of the body of the deceased.

14. The Petitioners further state that at around 4.00 p.m. on 11th April, 2020, Mr. Oloo received a telephone call from the 1st Respondent (area Chief) informing the said Mr. Oloo to go and collect the body of the deceased from Matibabu Hospital for immediate burial to which Mr. Oloo and the Petitioners protested as they had not received the results from the Hospital and further as no burial arrangements had been put in place.

15. It is the Petitioners' assertion that at that time, the relatives of the deceased paid for a casket just in case matters went beyond their control and they would need to bury the deceased on short notice.
16. The Petitioners further state that later on the same day, officials of the County Government of Siaya went to the deceased's homestead where they found the Petitioners together with relatives of the deceased and took the details of the deceased's wives and that of his brother, Mr. Oloo whom they demanded accompany the said Officials to the Hospital.
17. The Petitioners state that Mr. Oloo went with the said officers to Matibabu Hospital where he found the 2nd Respondent's officers already clad in the appropriate hazmat suits complete with protective gear and that the deceased had been placed in a body bag.
18. It is the Petitioners' case that the 2nd respondent's officers then demanded Mr. Oloo to identify the deceased's body and that after he had identified it, they demanded that he directs them to the deceased's home where they would personally bury the deceased.
19. The Petitioners further state that despite Mr. Oloo's protestations that burial in the middle of night was on such short notice and contrary to Luo customary traditions, and further that a grave had not been dug, the 2nd Respondent's officers who were in the company of police officers insisted that the burial had to be conducted at that ungodly hour.
20. The Petitioners further state that Mr. Oloo then called the Petitioners and other family members and informed them of the developments and instructed them to choose an appropriate burial ground and start digging a grave where the deceased would be buried.
21. The Petitioners state that the 1st Respondent and the 2nd Respondent's officials, escorted by a battalion of police officers together with officials of the County Government of Siaya, accompanied Mr. Oloo to the deceased's home whereupon arrival, the police officers surrounded the home; the deceased's body was taken to the grave site where the 2nd Respondent's officers off-loaded the deceased's body from the motor vehicle which transported the body, into the shallow grave which had also not been dug to the required depth and once the deceased's body was off-loaded into the grave, the 2nd Respondent's officers stood aside and said nothing after which Mr. Oloo instructed the grave diggers to cover the body of the deceased with the soil that had been dug out.
22. It is the Petitioners' case that the deceased's body was disposed of like a stray dog, contrary to the deceased's constitutional right to human dignity and his right to be buried in accordance with Luo cultural customs, in contravention of the deceased's right to traditional celebration being burial rights and further that neither the Petitioners herein nor the family members to the deceased were issued with a burial permit contrary to the law.
23. It is the Petitioners' case that the decision by the 1st and 2nd Respondents to inter the remains of the deceased devoid of any traditional and/or Luo customs with regard to burials is in complete contravention of the Petitioners' rights under **Articles 27, 32 and 44** of the Constitution and an affront to the deceased's right to human dignity even in death.
24. Further, the Petitioners further state that the decision of the Respondents to inter the remains of the deceased devoid of the deceased's cultural practises is contrary to the World Health Organization Guidelines on the Infection, Prevention and Control for the Safe Management of a dead body in the context of COVID-19 pandemic.
25. The Petitioners further state that the manner in which the Respondents ordered for the interment of the deceased's remains without the input of the Petitioners together with the relatives of the deceased caused them untold anguish and pain since they were denied the right to bury their loved one in a decent and respectable manner.
26. The Petitioners further state that the manner in which the deceased was buried devoid of the Luo customary traditions has occasioned the stigmatization of the deceased's family members since the Petitioners together with other relatives of the deceased are already being shunned by the larger society and further that the manner in which the deceased's remains were interred will have the ultimate effect of causing stigma in the general Kenyan population since the recordings of how the deceased was buried have been circulated on social media and news outlets which in turn has caused an uproar.
27. The Petitioners further state that the deceased was buried in an extremely shallow grave that can be easily opened up upon weather elements acting on the grave or wild and/or stray animals digging up the grave and laying bare the deceased's remains which in itself is a public health hazard, which the 2nd Respondent has so vehemently tried to avoid during the current COVID-19 pandemic.
28. It is the Petitioners' case that in complete contravention of Section 21 of the Births and Deaths Registration Act Cap 149 of Laws of Kenya, the deceased was buried without the requisite burial permit and that in addition, an autopsy and or biopsy was not conducted on the deceased's body to ascertain the cause of death of the deceased hence, the Petitioners and other family members are still grappling with the real cause of the deceased's death, as his death and burial was shrouded in a lot of secrecy and misinformation.

The 1st to 3rd Respondent's case

29. The 1st to 3rd Respondents filed a replying affidavit sworn by Dr Patrick Amoth, the Acting Director General for Health. Dr Amoth deposed that public Health is a devolved function under the Fourth Schedule of the Constitution and that under section 15 of the Health Act, the Ministry of Health is responsible for national Health policies, laws and administrative procedures and programmes in consultation with County Governments, health sector stakeholders and the public, for progressive realization of the highest attainable standards of health including reproductive health and the right to emergency treatment.
30. He further deposed that pursuant to the said section 15 of the Health Act, the Ministry of Health had developed guidelines in line with

WHO Guidelines on Safe Management and Disposal of Human Remains in the Context of Covid-19 pandemic and had disseminated the said Guidelines for use to all Counties as shown by Annexure PA-1.

31. Dr Amoth further deposed that under section 19(4) and (5) of the Health Act, the County Director of Health is established and mandated to supervise all health services within the county hence the National Government cannot be held answerable for actions taken by the said office.

32. In addition, it was deposed that the said Office of County Director of Health is mandated under section 20 of the Act to implement the national health policies and standards as laid down in the National Government Ministry responsible for health.

33. Dr Amoth further deposed that in view of the aforesaid, there is no cause of action disclosed against the National Government Ministry of Health or any National Government Administrative Officer.

34. In his professional opinion, however, Dr Amoth deposed that in instances where a person has died of highly contagious diseases such as Covid-19 as happened in the instant case, it would be highly prejudicial to the general public living within the immediate location where the deceased has been interred to exhume the body as it will unnecessarily expose them to the risk of contracting the disease hence, issuance of the orders prayed for by the petitioners will highly negate the various efforts and measures put in place by the Government to fight and prevent the spread of Covid-19 in the Country. He contended that as such, public interest militates against the issuance of the orders sought.

35. It was further deposed on behalf of the 1st to 3rd respondents that nonetheless, tissue samples had already been taken from the deceased prior to his death for testing purposes as a result of which he was found to have died of the covid-19, therefore, in his view, it would not serve any interest or purpose to exhume the body of the deceased for purposes of ascertaining the cause of death when the same had already been determined and can still be done from the samples previously taken without risking the health of the general public.

36. Dr Amoth deposed that in view of the peculiar circumstances of this case, this court should weigh the wider public interest and public safety from the potential spread of covid-19 and the interest of the individual family of the deceased whose interest, if granted, would endanger the public.

The 4th Respondent's Case

37. On behalf of the 4th Respondent, Dorothy Akinyi Owino, the Siaya County Executive Committee Member in charge of the Department of Health and Sanitation in the County Government of Siaya swore an affidavit in response to and opposing the petition.

38. Ms Owino deposed that she knew that the Government of Kenya had adopted Guidelines for Safe Handling and Disposal of Human Remains from Covid-19 outbreak which emphasized three main processes that must be accomplished as follows; Identification of the Deceased, Certification of death and the Disposal of the human remains.

39. She further deposed that the Government had further emphasized that due to the infectious nature of Covid-19, the handling of human remains should be kept to a minimum and only trained personnel should handle remains during the outbreak and further that the World Health Organization had also emphasized that the safety and well-being of everyone who attends bodies should be first priority and therefore protection of health and lives superseded the right of the dead.

40. It was her contention that the Government Guidelines stipulate that where a person infected with Covid-19 dies, the body shall be interred or cremated within 48 hours from time of death and that further to this, the World Health Organization provides that funeral ceremonies not involving the burial should be postponed as much as possible until the end of the epidemic.

41. She further deposed that whereas most of the family members of the deceased were placed under quarantine on 11th April, 2020 the Petitioners herein who are sister and son to the deceased respectively who had been in primary contact with the deceased ran away into hiding and the 1st Petitioner was only apprehended on 13th April, 2020 upon the intervention of her Area Chief and placed on mandatory quarantine at Urenga KMTC whereas the 2nd Petitioner continued on the run and was only apprehended on 18th April, 2020 and placed in quarantine at Siaya KMTC.

42. It was further deposed by Ms. Owino that the supporting affidavit deposed by the 1st petitioner, Ajuang in support of the instant petition is irregular and should be struck out and or expunged from the record as it goes against Rule 7 of the Oaths and Statutory Declaration Rules that stipulates in mandatory terms that a Commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing.

43. She bases the above proposition on the fact that the said supporting affidavit was purportedly sworn on 15th April, 2020 before Advocate Samuel Onyango, the advocate for the 1st interested party, who was not competent to commission an affidavit on a matter in which his firm is on record for one of the parties.

44. Ms. Owino further deposed that it is even more intriguing that the said affidavit was commissioned at Nairobi at a time when the 1st Petitioner who is the deponent thereof had already been placed in quarantine at Urenga KMTC located in Ugenya Sub-County on 13th April, 2020, a facility with strict restriction on entry, exit or movement and as such it was inconceivable that the 1st Petitioner would have appeared before the said advocate Samuel Onyango in Nairobi or elsewhere on the 15th April, 2020 to swear the affidavit. Further deposition was that taking into account the fact that movement into and out of Nairobi was prohibited during the date of the alleged swearing of the said the affidavit and still remains so to date, the affidavit is no affidavit.

45. Ms. Owino further deposed that the Petitioners' prayers to have the body of the late James Oyugi Onyango exhumed is not only illegal and in contravention of Rule 8 of the Public Health (Covid -19 Restriction of Movement of persons and related Measures) Rules, 2020 but will also be an endangerment to the health and lives of the people handling the decomposed body and or executing the Court Order.

46. Further deposition was that that the Government's directives are very clear that if the deceased died in a health facility and certification has been done by competent professionals, there is no need for an autopsy to be done and that since in this case the test that was done at KEMRI Kisumu confirmed the Covid-19 Positive results of the deceased, results which were transmitted to the Ministry of Health in Nairobi and announced by the Cabinet Secretary and the certification done by both the health official from the County Government of Siaya and Matibabu Hospital, there is no need for an autopsy.

47. Ms Owino further deposed that the urgent need to bury the deceased was necessitated by the fact that the deceased and the family had concealed a lot of material information that would have assisted the medical personnel to make informed decision and advise the family accordingly. She contended that information such as the fact that the deceased had a travel history made him susceptible to infection by Covid -19.

48. Further deposition was that the deceased's body was then taken to his home for burial under the guidance and direction of his brother Zack Oloo who led the way and was followed closely by the contact tracing team which was supposed to place the family and the people at the deceased's home under immediate mandatory quarantine.

49. It was further deposed that upon reaching the deceased's home, Zack Oloo directed the team to the grave site, which was located at what appeared to be a family cemetery within the home as there were other previous graves next to the one for the deceased and that as the undertakers for the day were removing the body from the vehicle, the deceased's weight overwhelmed them and as the body bags had severely been fumigated hence slippery, the body bag slipped off their hands as they were lowering the body into the grave making the deceased fall into the grave.

50. She further deposed that the slipping and consequent falling of the deceased's body was neither deliberate nor intentional but was due to the weight of the body and the fact that it was only the 2 people who had the hazmat suits that were allowed to handle the body as per the Ministry of Health Guidelines while the third suited person was conducting fumigation.

51. Ms. Owino further states that County Public Health Officers supervised the entire process until the grave was filled before the contact tracing team moved in to move the family and the people who were within the home to mandatory quarantine. She stated that however, by this time, many people had vanished when the body arrived home while others ran away on learning that they were to be taken for quarantine including the Petitioners who were only apprehended on 13th and 18th April, 2020 respectively.

52. It was Ms. Owino's contention that the chronology of events reveal that the deceased's family had suspected the deceased was infected with the Covid-19 virus and that had they and the deceased been candid with information and sought proper medical treatment instead of over the counter treatment, the urgency in disposing off the body would not have been necessary because, from the time of death, the body would have been handled and preserved properly instead of being left un preserved as the investigations and tests were being done to confirm the cause of death.

53. Ms. Owino further deposed that the Matibabu Hospital had already prepared the notification of death but the same was not picked up as all the close family members of the deceased had been put in mandatory quarantine and further that whether a Burial Permit was issued or not, neither the Petitioners nor any of their family members would be held criminally liable for interring a body without a burial permit as the Jurisdiction of burying a Covid-19 victim is undertaken by the County Public Health Officers after certification of death by a competent health professional.

54. The deponent further stated that the Petitioners had not specifically stated which cultural right or freedom of conscience or belief or opinion had been violated and how nor had they stipulated which rights and freedoms had been violated with due particularity to warrant the court's intervention other than just stating that the deceased was buried like a dog.

55. Further, that from the Petition, the Petitioners aver and confirm that the appropriate burial ground was chosen by the deceased's family members including the deceased's brother one Mr. Zack Oloo and that the deceased was buried at his ancestral home and that the deceased's wife and the brother, Mr. Oloo, viewed the body of the deceased at Matibabu Hospital and therefore they cannot state that they were not allowed to view the body of the deceased as conventional viewing of the body cannot be done for a Covid-19 mortality as the body has to be put in a sealed body bag.

56. Ms. Owino further deposed that in instances as those brought about by the Covid-19 pandemic, an individual's rights and fundamental freedoms can be limited or curtailed for protection of public good or public interest and that such was the case of the burial of the deceased herein and as such in the instant case the deceased's culture was in the circumstances secondary to the safety and health of the public including safety of his family.

57. It was further deposed on behalf of the 4th respondent that there was no discrimination against the deceased as there was no previous Covid 19 mortality with similar peculiar circumstances anywhere else in the country which was accorded a different treatment and as such it is in the interest of justice that the petition herein ought to be dismissed with costs for lack of merit.

The 1st Interested Party's Case

58. Ms. Mercy Wambua the Secretary of the 1st interested party Law Society of Kenya swore an affidavit on 16th April 2020 supporting the petition and deposing that it was the Law Society's mandate to ensure that the Respondents were held accountable for its acts or omissions and further that the Respondent's action necessitating the instant petition were against its own Rules and set Guidelines on the internment of

dead persons contained in sections 6, 7 and 8 of the Kenya Gazette Notice Special Issue dated 6th April 2020.

59. Ms. Wambua further deposed that the conduct of the respondents was reprehensible and served to stigmatize the general public thus defeating the respondents' guidelines issued on March 2020 to combat the spread of Covid-19 pandemic.

The 2nd Interested Party's case

60. The 2nd Interested Party was enjoined to these proceedings on an application dated 21st April 2020 which was determined vide a ruling rendered on 15th day of May 2020.

SUBMISSIONS

61. Parties filed written submissions to canvass the petition, with the interested parties supporting the averments by the Petitioners while the Respondents opposed the Petition. Each party relied on statutory and constitutional provisions as well as case law.

The Petitioners' Submissions

The Petitioners framed the following issues for determination in support of their case.

- a) *Whether the Respondents actions on 11th April, 2020 amounted to a violation of the Petitioners' fundamental rights and freedoms of participating in a cultural practice of their choice.*
- b) *Whether the deceased right to human dignity was violated.*
- c) *Whether the Petitioners are entitled to the prayers sought in the petition?*
- d) *Costs.*

62. The Petitioners submitted that their rights under Articles 27, 28, 32 and 44 of the Constitution were violated. The Petitioners submitted further that they are of the Luo Community which has its own unique elaborate burial practices in which the dead are honoured and respected and as such given dignified burial. The Petitioners further submitted that such burial ceremony is conducted during the day and that the deceased person is buried in a coffin as a sign of respect for the departed.

63. The Petitioners thus submitted that the practice detailed above clearly demonstrates a burial cultural practice among the Luo community which the Petitioners are entitled to participate in as guaranteed by the Constitution under Articles 11 and 44.

64. Accordingly, the Petitioners submitted that the burial of the deceased James Oyugi Onyango on the night of 11th April, 2020 without a coffin was a taboo in the Luo community and further that if a person is buried in the undignified manner like the way the deceased was buried, it was likely that the deceased's spirit would haunt them.

65. Reliance was placed on the case of **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR** where Bosire JA (as he then was) while examining the aspect of the culture in the Luo community rendered himself as follows:

"To borrow the words of Nyarangi JA in the case of Sheikh Mushtag Hassan v Nathan Mwangi Kamau Transporters and 5 Others, Civil Appeal No 123 of 1985 (CA), that "there is always a purpose for the practice of a custom." The Luo have a purpose for the custom which, to my understanding of it, is intended to unify the people in a family."

66. The Petitioners further submitted that they were compelled to bury the deceased in a shallow grave, without a coffin and worst of all, in the middle of the night which is contrary to their beliefs and/or customs and contrary to the provisions of Article 32 (4) which provides:

"A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion." (Emphasis added).

67. The Petitioners relied on the case of **JWM (alias P) v Board of Management O. High School & 2 others [2019] eKLR** where *Mwita J.* held:

"It is therefore plain to me that the Respondents' demand that the minor must cut her hair is constitutionally prohibited. Article 32 contains constitutional guarantees that should not be undermined in a way that violates one's religious beliefs. In that regard, Article 32 underscores the breadth and width of the right to religion and, therefore, guarantees MNW's right to declare, express, practice and manifest her religious beliefs to the fullest extent." (Emphasis added).

68. The Petitioners urged the court to be guided by the words of *Mwita J* in the above case of **JWM (alias P) v Board of Management O. High School & 2 others [supra]** where the learned judge further stated:

"i) 38. Article 19 of our Constitution unashamedly proclaims that the purpose of recognising and protecting human rights and

fundamental freedoms is to preserve the dignity of individuals, communities and to promote social justice and the realisation of the potential of all human beings. The Article is also categorical that the rights and fundamental freedoms in the Bill of Rights belong to each individual; are not granted by the State and are subject only to the limitations contemplated in the Constitution.

ii) 39. In the same vein, Article 20(1) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The Article requires courts when interpreting the Bill of Rights, to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

iii) 40. Regard must also be had to Article 21(1) which makes it a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. All State organs and public officers have a duty to address the needs of vulnerable groups within society, including “children” and members of particular ethnic, “religious” or cultural communities.”

69. The Petitioners further submitted that their right to equality and freedom from discrimination was violated by the 2nd Respondent contrary to **Article 27** of the Constitution as they were not allowed to bury the deceased with dignity and in accordance to their cultural beliefs whereas other families who had lost members to the Covid-19 disease were allowed to conduct decent burial ceremonies for their relatives. The Petitioners cited the case of **Captain Daudi Kibati** who was hailed by the 2nd Respondent as a Kenyan hero, and was given a befitting send off wherein his former colleagues from the airline, lined up at the funeral home to bid him farewell and that when the body reached his rural home, a church service was conducted for the deceased and the deceased was buried in a coffin during the day and in the presence of his family members.

70. On whether the deceased’s right to human dignity was violated, the Petitioners, quoted the words of the Philosopher Aristotle that: **“Both good and evil are thought to happen to a dead person...Take, for example, honours and dishonours, and the good and bad fortunes of his children or his descendants generally”** and submitted that the dead have interests that can be helped or harmed after death.

71. Reliance on this position was placed on an article written by **Associate Professor of Law, Kirsten Rabe Smolensky: ‘Rights of The Dead’ (2009) Vol. 37:763 Hofstra Law Review** page 765 where she begins her article by saying:

“i) Many legal rules suggest that the dead do not have rights. Often, the dead cannot marry, divorce, or vote. The executor of an estate cannot sue for the libel or slander of a deceased person. And the right to medical privacy substantially erodes at death, giving family members the ability to obtain sensitive information about a decedent’s medical conditions.

ii) On the other hand, various legal institutions have spent considerable time trying to protect the rights of the dead. As a result, most testamentary distributions, burial requests, and organ donation designations are held to be valid even if they contradict the preferences of the living. Certain destructions of property requested in wills are honoured even though they may have a negative impact on the living...This Article argues that while legal rules affecting the dead often have a practical aspect, one of the primary, and yet unrecognized, forces driving the creation of these legal rules are cultural norms, including dignity and respect for decedents’ wishes.”(Emphasis added).

72. The Petitioners also submitted that the Kenyan legal system also recognized posthumous rights for instance in the Constitution, its Preamble honours those who heroically struggled to bring freedom and justice to our country and further at Articles 11 and 44 promotes culture as one of the rights a person is entitled to, wherein traditional celebrations are encouraged.

73. The Petitioners also cited the Law of Succession that acknowledges wills which are posthumous covenants between the living and the dead and submitted that Courts in this Country have enforced wills as the wishes of the dead meaning that they indeed recognize that dead people too, have rights.

74. The Petitioners further submitted that the right to Human Dignity is an enforceable right as Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. The Petitioners submitted that it is for this reason that in the Luo culture, the burial ceremonies are quite elaborate owing to the respect and honour the community gives to the dead on the premise that if one is not accorded such honour, calamities might happen to the ones who did not perform the elaborate ceremony for the departed.

75. To further buttress the above, and show the inherent dignity for the dead, the Petitioners placed reliance on the World Health Organization (WHO) Interim Guidelines on Infection and Prevention and Control for the Safe Management of a dead body in the context of COVID-19 released on 24th March, 2020 which provided that one of the key considerations to guide handling dead bodies is the dignity of the dead, their cultural and religious traditions, and that their families should be respected at all times.

76. The Petitioners also submitted that the 2nd Respondent’s own Guidelines on the safe disposal of human remains of a patient who has died from suspected or confirmed COVID-19 released in March 2020 provided that the deceased must be shown respect and as such it was abundantly evident that deceased persons have a right to human dignity.

77. The Petitioners thus submitted that the act of burying the deceased James Oyugi Onyango in the dead of the night, without a coffin yet the customary beliefs he practiced in his lifetime dictated that when he died or a member of his community died, they be buried in a coffin and the burial ceremony be conducted during the day, and that the same be conducted in the presence of family members, led to the conclusion that the deceased’s right to human dignity were violated by the respondents.

78. On whether the Petitioners’ supporting affidavit dated 15th April, 2020 should be expunged as contended by the 4th Respondent, the

Petitioners relied on Section 1B (1) (e) of the Civil Procedure Act which provides that *for the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims the use of suitable technology.*

79. It was the Petitioners' submissions that the Civil Procedure Act allows the use of technology to further the dispensation of justice and as such, a Commissioner for Oaths is, in the circumstances such as the one we find ourselves in currently, allowed to employ the use of technology in administering an oath. The Petitioners' further stated that the 1st Petitioner did appear before the Commissioner for oaths electronically and as such the Commissioner for oaths could satisfy and, in this case, indeed satisfied himself that the person named as the deponent and the person before him was the same person.

80. Further to the above, the Petitioners submitted that the error on the face of the affidavit was a procedural technicality which could be cured under **Article 159 (2)(d)** of the Constitution which provides that *in exercising judicial authority, the courts and tribunals shall administer justice without undue regard to procedural technicalities.*

81. The Petitioners also relied on **Rule 3 (5) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)** which provides that *for the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the - (a) just determination of the proceedings; (b) efficient use of the available and administrative resources; (c) timely disposal of proceedings at a cost affordable by the respective parties; and (d) use of appropriate technology.*

82. The Petitioners further relied on **Rule 3(8) of the Mutunga Rules** which provides that *nothing in the Rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

83. Accordingly, it was the Petitioners' submission that the 4th Respondent could not use the physical absence of the 1st petitioner before the Commissioner for Oaths when signing the supporting affidavit to deny not only her but the family of the deceased access to justice.

84. On whether the Petitioners had established a cause of action as against the 2nd Respondent, the Petitioners submitted that in the context of the Covid -19 disease, it was only the national government that was in charge of testing of the samples collected from the suspected cases and giving the results which results they were challenging.

85. Further, the Petitioners submitted that in the context of Covid-19, it was the national government that provided technical support to county governments, in line with section 15 of the Health Act, in terms of handling the body of a suspected Covid-19 victim as well as the heavy contingent of police officers at the site of burial of the deceased, who were there at the behest of the 2nd Respondent. The Petitioners thus submitted that they had established a cause of action as against the 2nd Respondent.

86. On the question of whether the deceased was buried in compliance with the Law, Regulations and Guidelines provided, the Petitioners submitted that no written examination results or burial permit were handed over to any of the deceased's kin to formally inform them of the cause of death of the deceased.

87. The Petitioners submitted that this is contrary to the provisions of Section 21 of the Births and Deaths Registration Act which provides:

“No person shall bury, cremate or otherwise dispose of the body of any deceased person the registration of whose death is compulsory, without a permit issued in accordance with sections 19 and 20 of this Act.”

88. The Petitioners further submitted that as of the 11th of April 2020, the burial permit to allow the burial of the late James Oyugi Onyango had not been prepared and/or issued to the Petitioners or family of the deceased or at all hence the forced burial of the deceased was contrary to the law.

89. The Petitioners submitted that the family of the deceased and specifically the deceased's brother Zack Oloo Onyango had the right to be informed of the various tests to be conducted on the deceased including the Covid-19 test which information was never conveyed contrary to the provisions of Section 8 of the Health Act which provides that provision of health information is a right due to the user and/or his guardian as well as the Kenya National Patient's Rights Charter, 2013 at Chapter 1 paragraph 9 and 10.

90. The Petitioners further submitted that the World Health Organisation and Ministry of Health Guidelines were not followed during the interment of the deceased by the Respondents. It was further submitted that the 2nd respondent indeed acknowledged that the MoH Guidelines were not followed in handling and burial of the deceased, in the **Response to the Adhoc Committee of Senate on Statement Regarding Handling of the Body of the Deceased** James Oyugi Onyango, dated 21st April, 2020.

91. The Petitioners submitted that the failure by the Respondents to follow the procedures stipulated in the above provisions of the law and the WHO and MoH Regulations rendered their actions unconstitutional, illegal null and void and that it cannot be said that their actions fall under the exceptions in Article 24 of the Constitution.

92. The Petitioners submitted that the assertion that the exhumation of the deceased body is a public health concern is simply an unwarranted fear and an excuse by the respondents to avoid taking responsibility for the wrongs they committed not only to the Petitioners but also the Luo community in general.

93. The Petitioners further submitted that winning the general Kenyan public trust by the exhumation, conducting a post mortem on the body

of the deceased and re-burying the deceased in a decent and dignified burial in conformity with the deceased's cultural rights, the law and the 2nd Respondent's own regulations will increase the public confidence in the governments' efforts to combat the pandemic.

1st, 2nd and 3rd Respondents' Submissions

94. The Attorney General on behalf of the 1st – 3rd respondents submitted that under **Section 15** of the Health Act 2017, the 2nd Respondent was only 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, which was done in enacting **“The Public Health (Prevention, Control and Suppression of COVID-19) Rules, 2020; Legal Notice No. 46 of 3rd April 2020.**

95. The Attorney General further submitted relying on the affidavit sworn by Dr Patrick Amoth which basically focused on the statutory mandate of the Ministry of Health at the National level. It was submitted that the functions of the 2nd Respondent, therefore, was the development of policies and regulations which would be implemented by various Counties as enshrined in Sections 15, 19 and 20 of The Health Act, 2017.

96. Accordingly, it was the submission of the Attorney General that the 4th Respondent was responsible for implementing the policies and guidelines developed by the 2nd Respondent and as such the Petitioners failed to disclose any cause of action against the National Government. They urged the court to dismiss the petition.

97. On whether the prayers sought should be granted, it was submitted that based on the depositions and opinion of Dr Amoth as a health professional, they were opposed to any exhumation, biopsy and autopsy and reburial of the deceased as to do so would endanger public health since the deceased died of Covid-19 which is a highly contagious disease. It was submitted that individual rights can be limited in the interest of the larger public who are likely to suffer as a consequence of being exposed to the Covid -19.

98. Reliance was placed on **Article 24 of the Constitution** on limitation of rights and the decision in **East Africa Cables Limited v Public Procurement Complaints Review & Appeals Board & Another (2007) e KLR** and **Kiarie Mbugua v Njoki Mbugua (1992) e KLR** on whether a body should be exhumed.

The 4th Respondent's Submissions

99. It was submitted on behalf of the 4th respondent that the Supporting Affidavit deposed by Akoth Ajuang in support of the instant petition is irregular and should be struck out from the court's record as it offends Section 4 (1) of the Oaths and Statutory Declarations Act which bars a Commissioner for Oaths from commissioning any document in any proceeding or matter in which he takes part and Rule 7 of the Oaths and Statutory Declaration Rules (the Oaths Rules) which stipulates in mandatory terms that a Commissioner for Oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same and that such person is outwardly in a fit state to understand what he is doing.

100. Reliance was placed on the case of **Stephen M. Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2017] eKLR**, where it was stated that affidavits that offended Section 4(1) of the Oaths Act were incurably defective and therefore null and void and subsequently struck out of the court's record. Further reliance was placed on **Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR** where it was affirmed that noncompliance with the provisions of the Oaths Act is so fatal that no cure can be found under Article 159 of the Constitution. The Court went ahead and stated that Article 159 of the Constitution, by no means derogates from the duty of parties to comply with the law of the land.

101. The 4th respondent also relied on the case of **Raila Odinga & 5 others v IEBC & 8 Others [2013] eKLR** where the Supreme Court dealt with the provisions of Article 159 (2) (d) of the Constitution which obliges a Court of Law to administer justice without undue regard to procedural technicalities and court stated that the aforementioned Article was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from Court of Law.

102. The 4th respondent further submitted that the Oaths and Statutory Declarations Act and Rules do not contemplate electronic administration of oath and as such the same is farfetched and cannot be coined into the Act.

103. It was further submitted for the 4th respondent that **Exhibit JAA-1**, to the Supporting Affidavit, a newspaper cutting, is of no evidential value and must be struck out from the Affidavit. Reliance was placed on **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** where it was held that news paper reports are of little evidential value without the persons who made the report.

104. It was further submitted that the Petition has not pin pointed and or raised any single WHO or MoH Guideline which was contravened by the Respondents. Further, that the GOK guidelines insist that, in Covid-19 deaths the remains of the deceased shall be disposed of within 48 hours from the time of death, and WHO provides that funeral ceremonies that do not involve burial shall be postponed as much as possible until the epidemic ends and thus the 4th Respondent cannot be condemned for non-compliance more so when the same do not pervade constitutional obligations.

105. It was further submitted that the Petition does not meet the test of constitutional petitions that needs a petitioner to bring out which right or freedom was particularly and specifically violated to warrant the court's intervention. Reliance was placed on the Court of Appeal decisions of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] Eklr**; **Godfrey Paul Okutoyi v Habil Olaka & Another [2018] eKLR** and **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where it was held *inter alia* that if a

person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

106. The 4th respondent further submitted that the Petitioners have not specifically stated which cultural right or freedom of conscience or belief or opinion of the Luo or the deceased's family had been violated and how. That they had not demonstrated how the stipulated rights and freedoms had been violated with due particularity to warrant the court's intervention.

107. It was further submitted that the deceased cannot claim violation of any right or freedom as was held in the case of **Helidah Awuor Ogol v The Truth Justice And Reconciliation Commission & Another** [2016] eKLR that the dead were not capable of enjoying human rights and freedoms and further as was held in **Jimi Richard Wanjigi & another v Stephen Gitagama & 3 others** [2019] eKLR where it was held that there is no dignity that can be attributed to death as a dead person does not enjoy the rights and privileges of a living person.

108. It was further submitted that there was nothing discriminatory in the handling and interment of the remains of the deceased and the Petitioners have not proved any discrimination or any ground of discrimination as provided for under Article 27 the Constitution. Reliance was placed on the case of **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others** [2018] eKLR where discrimination was defined as unfair treatment or denial of normal privileges to persons because of their race, age, sex....a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.

109. It was further submitted that the Petitioners have not established what distinction was made as against the deceased to warrant the handling of the deceased to amount to discrimination and/or unequal treatment as there was no previous Covid-19 mortality with similar peculiar circumstances as the one herein in Siaya County or anywhere else in the country which was accorded a different treatment and further that it was not the 4th Respondent who handled the burial of the other Covid-19 victims outside Siaya County to be regarded as having discriminated and unequally treated the deceased. Reliance was placed on the case of **John Harun Mwau v Independent Electoral and Boundaries Commission & Another** [2013] eKLR.

110. The 4th respondent further submitted that the rights and freedoms claimed by the Petitioners are subject to limitation and curtailment when the conditions set under Article 24 of the Constitution are met a position that was upheld by Justice Korir in **Nairobi Constitutional Petition No. 120 OF 2020 (COVID 025) Law Society of Kenya v Hillary Mutyambai, Inspector General of Police & 8 Others**.

111. It was further submitted that compelling public interest and societal need for limitation outweighs an individual's right as was addressed in **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others** [2017] eKLR. Further, that any right or freedom of the Petitioners and/or the deceased that may have been abridged was warranted to protect the greater public including the Petitioners and the deceased's family.

112. It was submitted that Matibabu Hospital had already prepared the notification of death for the deceased but the same was not picked as all close family members of the deceased had been put in mandatory quarantine and as such a burial permit was therefore not obtainable. It was further submitted that neither the Petitioners nor any of their family members nor the deceased's family member would be criminally liable for interring the deceased without a burial permit as the jurisdiction of burying Covid-19 victims is undertaken by the County Public Health Officers and on certification by a competent health professional.

113. It was further submitted that Courts do not act in vain and as such most if not all the orders sought by the Petitioners are incapable of implementation and/or execution, due to the infectious nature of the disease and the fact that the orders sought will pose a real and great danger to the public, the Petitioners and the deceased's family members and back track the gains made in the fight against Covid-19.

114. It was submitted that no order is sought against the 4th Respondent and therefore none can be issued against the 4th Respondent in terms of costs and further that the Petitioners' prayers (d) and (e) of the Petition specifically pray that the exhumation, autopsy/biopsy, reburial of the deceased and costs thereof and provision of personal protective equipments for the 15 persons should be borne by the Ministry of Health.

115. The 1st interested party did not file any submissions.

The 2nd Interested Party's Submissions

116. The 2nd interested party Malaika Foundation filed the initial submissions accompanying the application for joinder and also filed supplementary submissions in support of the Petition. It was submitted that cultural democracy cannot be negated in the wake of fundamental human rights and freedoms and implored the court to find that the manner in which the late James Oyugi Onyango was interred resulted in him losing his humanness and identity as a human being and as a Luo.

117. It was further submitted that the treatment meted on the late Mr. Oyugi, his family, community and the larger Luo Nation was an affront to Kenya's character and a violation of the right to Health. Further, that the discrimination based on 'health status' meted out on the deceased is prohibited under Article 27 (4) of the Constitution of Kenya.

118. Further submission on behalf of the 2nd Interested party was that the manner and the mode in which the body of the late James Oyugi (deceased) was interred violated both the legal rights and the fundamental rights and freedoms of the deceased, his family and relatives and those who share in similar cultural group with the deceased and the National Culture of Kenya.

119. It was further submitted that culture does not only involve one person's rights but a constitutional principle which society holds dear and the same ought to be upheld and jealously guarded. The court was urged to find that the respondent's actions and omissions towards the Petitioners were unconstitutional.

120. The 2nd interested party submitted at length on the duty of the state as far as promotion and protection of human rights which include the cultural rights of the deceased and the Petitioners are concerned and as espoused in International Human Rights instruments and norms.

121. It was emphasized that there are certain cultural celebrations that accompany the dead especially among the Luo community and that the said rights were violated by the bizarre burial of the deceased James Oyugi Onyango hence the need to allow the Petition. Three components of the cultural scripts that are useful to this petition were pointed out namely- **chike (laws and norms), kwero (taboo) and kido (variety)**. Thus that although all members of the Luo community or Luo nation are bound by some general rules of social behavior, variations are allowed. It was submitted that COVID- 19 is a transformative force that shall have enormous bearing many practices and social relations.

122. The 2nd interested party maintained that the rights of the deceased were inalienable even in death hence he did not deserve to be dumbered. The rest of the entailed submissions entailed the Luo cultural practices and celebrations and agreed entirely with the submissions of the Petitioners on how the deceased was interred which was claimed to be an abomination.

Analysis & Determination

123. I have considered the Petition, the responses by the respondents and interested parties and the respective parties' written submissions and authorities relied on. Before I isolate the issues for determination, I must state that the COVID-19 outbreak has given rise to risks and uncertainties, at both the general and individual levels.

124. Therefore, in my humble view, the main issues for determination in this highly contested petition are:

- 1) ***Whether the Petitioners' supporting affidavit and exhibit JAA-1 should be expunged from these proceedings;***
- 2) ***Whether the instant petition discloses any infringement of the Petitioners' rights;***
- 3) ***Whether the deceased has rights and whether those rights and the Petitioners' rights were infringed;***
- 4) ***Whether the Petitioners are entitled to exhumation of the body of the deceased and whether a biopsy should be done on the said body for an autopsy to be carried out on the deceased's body to determine the cause of death of the deceased?***
- 5) ***What orders should this court make?***
- 6) ***Who should bear costs of this petition?***

1) On whether the Petitioners' supporting affidavit and exhibit JAA-1 should be expunged from these proceedings:

125. It was the 4th respondent's contention that the Supporting Affidavit sworn by the 1st Petitioner Joan Akoth Ajuang in support of the instant petition should be struck out from the court's record as it offends Section 4 (1) of the Oaths and Statutory Declarations Act and Rule 7 of the Oaths and Statutory Declaration Rules (the Oaths Rules).

126. The Petitioners on the other hand submitted that the error on the face of the affidavit was a procedural technicality which curable under **Article 159 (2)(d) of the Constitution which provides** for the disregard of technicalities in the administration of justice, as well as Rule 3 (5) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules) which provides *that for the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the - (a) just determination of the proceedings; (b) efficient use of the available and administrative resources; (c) timely disposal of proceedings at a cost affordable by the respective parties; and (d) use of appropriate technology.*

127. The Petitioners also placed reliance on Rule 3(8) of the Mutunga Rules which provides *that nothing in the rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

128. **Section 4 (1) of the Oaths and Statutory Declarations Act** provides:

"A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any Court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested."

129. Rule 7 of the Oaths Rules provides:

"A commissioner for oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing."

130. In **James Francis Kariuki & Another V United Insurance Co. Ltd Civil Appeal No. 1450 of 2000**, Onyango Otieno J, (as he then was) held that:

“The verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act.” “The simple facts of this case are that the Plaintiffs are, according to the Plaint represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a Partner in the firm of Njenga Mwaura and Company, Advocates, who are the Advocates representing the Plaintiffs. The Verifying affidavit has been sworn before Njenga Mwaura as Commissioner for Oaths...”

“It will be clear from the above that Mr. Njenga Mwaura, being an Advocate in the firm that is acting for the plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party.”

131. In **Kenya Federation of Labour & Another V. Attorney General & 2 Others Industrial Court of Kenya at Nairobi, Case No. 735 of 2012**, Nzioki wa Makau J held:

“The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed, the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declaration Act.”

132. In **Stephen M Mogaka v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2017] eKLR**, it was held that affidavits that offended Section 4(1) of the Oaths Act were incurably defective and therefore null and void and subsequently struck out of the court’s record. In **Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR** it was further held that noncompliance with the provisions of the Oaths and Statutory Declarations Act is a so fatal that no cure can be found under Article 159 of the Constitution. The Court further stated that Article 159 of the Constitution, by no means derogates from the duty of parties to comply with the law of the land.

133. To crown it all is the decision in **Raila Odinga & 5 others v IEBC & 8 Others [2013] eKLR** where the Supreme Court in dealing with provisions of Article 159 (2) (d) of the Constitution which obliges a Court of Law to administer justice without undue regard to procedural technicalities stated that the aforementioned Article was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from Court of Law.

134. As correctly submitted by the 4th Respondent, the Oaths and Statutory Declarations Act and Rules do not contemplate electronic administration of oaths and therefore the Affidavit in support of the petition is fatally defective and incapable of cure by application of Article 159(2) (d) of the Constitution.

135. In addition, even if electronic administration of oaths were to be valid, from the above authorities and the provision of **Section 4 (1) of the Oaths and Statutory Declarations Act**, as read with Rule 7 of the Rules made under the Oaths and Statutory Declarations Act, it is clear from the facts of this petition that the Petitioners in this petition are represented by the firm of M/s. Odindo & Co. Advocates, the firm which drew and filed this petition. The affidavit in support is allegedly sworn before Advocate Samuel M. Onyango, the advocate for the 1st interested party in this case. The 1st Petitioner’s supporting affidavit offends **Section 4 (1) of the Oaths and Statutory Declarations Act** because the affidavit in support of the petition was sworn before an unauthorized commissioner by virtue of **Section 4 (1) of the Oaths and Statutory Declarations Act**, as a Commissioner cannot commission his or her own documents or documents prepared by the firm where that Commissioner works or where he/she is interested. The said Section is couched in mandatory terms.

136. Further, the deponent’s residence in her introduction is Siaya, Ugenya Sub county. The said Affidavit was sworn at Nairobi but before an advocate Mr Samuel M. Onyango Advocate and Commissioner for Oaths whose address is P.O. Box 2864, Kisumu, albeit the affidavit was drawn by her advocates Odindo & Company Advocates in Nairobi. The question is whether the affidavit in question qualifies as an affidavit duly commissioned on oath.

137. To answer the above question, I must set out what an oath is. **Black’s Law Dictionary** defines an oath as:

“Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.”

138. Taking the above definition of what an oath is, the question is whether the 1st petitioner took an oath before a Commissioner of Oaths. Examining her affidavit annexed to the Petition, and which affidavit annexed documents to the said Supporting Affidavit and was allegedly sworn in Nairobi before Samuel M. Onyango Advocate whose address as per the commissioning stamp affixed is Nairobi and on 15th April 2020, no doubt, the 1st petitioner did not deny that as at the time the said affidavit is alleged to have been commissioned, the 1st petitioner was under mandatory quarantine and therefore she could not have been juggling between Nairobi and Kisumu immediately after her brother’s demise when indeed there was already a curfew imposed on travels from and to Nairobi. The Petitioner did not controvert the challenge to the defective affidavit and oath which was allegedly sworn before an advocate and Commissioner of Oaths who has an interest in this Petition. Such a defect in my humble view cannot be a mere procedural defect curable by application of Article 159(2) (d) of the Constitution.

139. The 1st Petitioner’s affidavit in my humble view failed to conform to the requirements of Sections 4(1) and 5 of the Oaths and Statutory Declarations Act Cap 15 of Laws of Kenya and Rule 7 of the Oaths Rules as well as the case law established. Section 5 of the Act stipulates that:

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.” (Emphasis added)

140. Even assuming the 1st Petitioner took oath electronically, which was not as it would have been easier done so by scanning the affidavit, sending it to her for signature and returning it for Commissioning and not otherwise, which, in my humble view, the said oath would have stated so; accordingly, I find and hold that defects identified cannot be remedied by section 1B (1) (e) of the Civil Procedure Act, Order 19 Rule 7 of the Civil Procedure Rules, Rule 3(5) and (8) of the Mutunga Rules, 2013 or Article 159(2) (d) of the Constitution. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits.

141. The swearing of the aforesaid affidavit by the said commissioner for oaths and the failure to demonstrate that the affidavit was indeed sworn before a Commissioner for oaths offends an Act of Parliament and in my view that does not represent a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective.

142. That being the case here, I find and hold that there is no affidavit in support of the petition as it is not made under oath. In addition, any documents annexed to that **“affidavit”** are no annexures at all. For those reasons, the affidavit and its annexures are hereby struck out.

143. On whether the petition can be sustained if the supporting affidavit is struck out, Rule 11 of The Mutunga rules provides:

“11. (1) the petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

144. From the above Rules, a Constitutional Petition filed under The Mutunga Rules is not required to be filed with the Petitioner’s supportive affidavit. The wording of Rule 11 cited above is not mandatory. Accordingly, the petition herein is sustainable on its own without the supporting affidavit and therefore this court proceeds to determine the merits of the Petition without the benefit of the supporting affidavit and annexures attached to the said affidavit as struck out.

2) On whether the instant petition discloses any infringement of the deceased’s and or the Petitioners’ rights?

145. On behalf of the 4th respondent, it was submitted that the Petitioners did not show how their constitutional rights had been infringed. She added that constitutional violations ought to be pleaded with due particularity and on that submission, she relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, Godfrey Paul Okutoyi v Habil Olaka & Another [2018] eKLR and Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where it was held *inter alia*, that a Petitioner must plead with a measure of precision how the Constitution has been violated and the manner in which it has been violated.

146. Article 22 of the Constitution grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened while Article 258 of the Constitution provides that:

“Every person has a right to institute court proceedings, claiming that this constitution has been contravened, or is threatened with contravention.”

147. It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of **Anarita Karimi Njeru (supra)** where the Court stated:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

148. This principle was emphasized by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

149. In the instant case, the Petitioners allege that their rights to practice their cultural rights under Articles 27, 28, 32 and 44, to bury a deceased were violated by the respondents. The manner of violation was stated to be through the decision of the Respondents to inter the remains of the deceased devoid of the deceased’s cultural practises and contrary to the World Health Organisation guidelines on the infection, prevention and control for the safe management of a dead body in the context of Covid-19 situation.

150. **Article 27 (1)** of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Under **Article 27 (2)**, equality includes the full and equal enjoyment of all rights and fundamental freedoms. Further to the

above, Article 27 (4) provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, **health status, ethnic or social origin**, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

151. **Article 32** (1) provides that every person has the right to freedom of conscience, religion, thought, belief and opinion. **Article 44** (1) provides that every person has the right to use the language, and to participate in the cultural life, of the person's choice. Under **Article 44 (2)**, a person belonging to a cultural or linguistic community has the right, with other members of that community—(a) to enjoy the person's culture and use the person's language; or(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

152. In determining whether the Petitioners proved that their rights under the above cited Articles were violated, I wish to start with the right to human dignity, I find that Article 28 of the constitution is clear on this right and the provisions require no further elaboration. It was not disputed that indeed the deceased was buried without any of the cultural rights from the Luo community, to which he was a member being observed which caused the Petitioners pain and anguish. In addition, the deceased was hurriedly buried in the night and without any coffin. His family members did not participate in his hurried burial, he was interred in a shallow grave and the **undertakers** were overwhelmed by the body so they literally dumped the body wrapped in plastic bags into the grave.

153. Accordingly, it is my considered opinion that the Petitioners pleaded in a precise manner the constitutional provisions alleged to have been violated or infringed by the respondents, the manner of infringement and the jurisdictional basis for it. The only question is whether those pleaded rights were infringed and this will be discussed later in this determination.

3) On whether the dead have rights?

154. The Petitioners herein submitted that the deceased's right to a decent burial in line with his cultural practices were infringed by the respondents whereas the 4th respondent deposed that the Petitioners could not claim violation of any right or freedom on behalf of the deceased as a dead person does not enjoy the rights and privileges of a living person. The 4th Respondent relied on the cases of **Heildah Awuor Ogol (supra)** and that of **Jimi Richard Wanjigi (supra)**.

155. On behalf of the 2nd interested party, it was submitted that the manner and the mode in which the body of the late James Oyugi (deceased) was interred violated both the legal rights and the fundamental rights and freedoms of the deceased and his family.

156. To answer the question of whether the dead have rights, it is important to give some examples where such questions have been resolved.

157. In March 2002, a French court ruled that the refrigerated bodies of a married couple must be removed from basement storage in their chateau and buried properly or cremated. Against the couple's final wishes, and over the strenuous legal objections of their son, the court held that Raymond Martinot, who died the previous month at age 80, and his wife, Monique, preserved in a refrigerated container since 1984, must be cremated or buried. **Remy Martinot** had filed a legal request to keep both his parents' bodies frozen at his home in Neuil-sur-Layon in the Loire valley.

158. Rejecting his request, France's top court ruled that the bodies must be cremated or buried in **"the interest of public order and public health."**

159. On January 13, 2015, a Section of the European Court of Human Rights ruled in **Elberte v Latvia [2015] ECHR 211** that the removal of body tissue from the applicant's deceased husband for use by a pharmaceutical company in Germany pursuant to a state-approved agreement without her knowledge or consent violated the European Convention on Human Rights. The Court found that Latvia violated Article 8 (right for respect to private and family life) and Article 3 (prohibition of inhuman or degrading treatment) and "in particular that Latvian law regarding the operation of the consent requirement on tissue removal lacked clarity and did not have adequate legal safeguards against arbitrariness." The Court highlighted that, "in the special field of organ and tissue transplantation, it had been recognised that the human body had to be treated with respect even after death" and "stressed that respect for human dignity formed part of the very essence of the European Convention." The Court also held that Latvia was to pay the applicant **"16,000 euros (EUR) in respect of non-pecuniary damage and EUR 500 in respect of costs and expenses."**

160. More recently, in May 2020 during the Covid-19 situation, the Bombay High Court held that the right to a decent burial is recognized as a facet of the right to life and even in such a pandemic situation this right cannot be taken away from any person. The Court held that the Mumbai civic body had the power to designate any cemetery to dispose of bodies of COVID-19 patients. The Court further stated:

"The Right to a decent burial, commensurate with the dignity of the individual, is recognized as a facet of the right to life guaranteed by Article 21 of the Constitution. There is, thus, no reason as to why an individual who dies during this period of crisis because of suspected/confirmed COVID-19 infection would not be entitled to the facilities he/she would have otherwise been entitled to but for the crisis," the bench said in its order. The court, quoting **Oscar Wilde** stated:

**"Death must be so beautiful. To lie in the soft brown earth, with the grasses waving above one's head, and listen to silence. To have no yesterday, and no tomorrow. To forget time, to forget life, to be at peace."
"We are sure, while preparing to embrace the painful truth, i.e., death, one would like to depart from life, the beautiful lie, with these soothing thoughts in mind. However, in the recent past, the situation in Mumbai posed uncertainties ..."**

161. The court noted that the circular issued by the civic body was in consonance with law and the corporation had all authority and power to designate burial grounds and cemeteries. The bench added that the Corporation and other concerned authorities shall have to follow the guidelines prescribed by the government of India and the World Health Organization (WHO) for safe disposal of bodies infected with Covid-19. The court further stated:

"To err is human but taking lessons from mistakes and rectifying the situation was the call of the moment. Proper management of disposal of dead bodies ought to have been worked out consistent with the recommendations of WHO and the government of India guidelines, as well as the sentiments of the members of the communities for whom burial of a dead member is an integral part of their religious belief and faith," the court said.

162. The Court added that though such management was initially lacking, but ultimately better sense prevailed on the Corporation which left no stone unturned to remedy the situation. It stated:

"There is, thus, no reason as to why an individual who dies during this period of crisis because of suspected/confirmed Covid-19 infection would not be entitled to the facilities he/she would have otherwise been entitled to but for the crisis," it observed."

Accessed at <https://theprint.in/judiciary/bombay-hc-quotes-oscar-wilde-to-rule-covid-patients-have-right-to-decent-burial-too/427814/>

163. That the right to dignity prevails even after death, is clear from the following precedents set by the Supreme Court of India. In **S. Sethu Raja vs The Chief Secretary [W.P.(MD)No.3888 of 2007 decided on 28 August, 2007]**, the petitioner had brought to the court's attention, the Supreme Court's stand on right to accord decent burial or cremation to a dead body. The Supreme Court's stand could be interpreted from its decision in **Ram Sharan Autyanuprasi Vs. Union of India (AIR 1989 Supreme Court 549) in which it held:**

"13.....It is true that life in its expanded horizons today includes all that give meaning to a man's life including his tradition, culture and heritage and protection of that heritage in its full measure would certainly come within the encompass of an expanded concept of Art.21 of the Constitution."

164. Further, the apex court, in **Pt.Parmanand Katara Vs. Union of India (1995 (3) SCC 248)** had observed thus:

"We agree with the petitioner that right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death."

165. In **Ashray Adhikar Abhiyan Vs. Union of India (AIR 2002 SC 554)** the Supreme Court had upheld the right of a homeless deceased to have a decent burial as per their religious belief and the corresponding obligation of the State towards such people.

166. Article 21 of the Indian Constitution is similar to Article 28 of the Constitution of Kenya, 2010 and which guarantees every person inherent dignity and the right to have that dignity respected and protected.

167. The above cases though persuasive illustrate that even once dead, one does not lose their dignity and more so, others can retain an important interest in our bodies and legacy. Thus, whereas the Court would not consider the direct rights of the deceased to have a private and family life, but the action taken against his cadaver could be considered to the extent that it affected the private and family life of others around him and also affected his inherent dignity which does not expire even after his death.

168. Many international covenants and laws deal specifically with the rights of handling the dead. Article 16, IIInd paragraph of **Geneva Convention 1949 IV** provides *"As far as military consideration allows, each party to the conflict shall facilitate the steps taken to protect the killed – against ill treatments."* Article 3(a) of the **1990 Cairo declaration on Human Rights in Islam** provides *"In the event of the use of force and in case of armed conflict- it is prohibited to mutilate dead bodies."*

169. **The Turku Declaration of minimum Humanitarian standards**, adopted by an expert meeting convened by the Institute for Human Rights of Abo Akadami University in Turko/Abo, Finland in 1990, states that *"Every possible measure shall be taken without delay, to prevent (the dead) being despoiled."*

170. **Australia's Defense force manual (1994)** provides: *"The remains of the dead, regardless of whether they are combatants , non-combatants, protected persons or civilians are to be respected ,in particular their honour, family rights, religions convictions and practices and manners and customs at all times they shall be humanely treated."*

171. The **Central African Republic's Iristacors Manuel (1999)**, states in volume 2 that *"Dead enemy must be treated well."* The **UK Military Manual (1958)** states *"The dead must be protected against maltreatment."* (f). The **US Field Manuel (1956)** provides that *"Maltreatment of dead bodies"* is a war crime. The **US. Naval Hand book (1995)** provides that *mutilation and other mistreatment of the dead are representation of war crimes.*

172. The **United Nations Commission on Human Rights**, in a Resolution adopted in 2005, on **Human Rights and Forensic Science**, underlined *"The importance of dignified handling of human remains, including their proper management and disposal as well as of respect for the needs of families."*

173. I reiterate that Kenyan Law does not guarantee specific rights to the dead but provides for the protection of the dignity of every person. However, Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. Whereas there are no proprietary rights in a dead body, one does not cease being a human once dead, only the state of life is altered.

174. It is universally agreed that a dead body is the physical remains of an expired human being prior to complete decomposition. Many countries have adopted many statutes that regulate the disposal of dead bodies. Although the right to a decent burial has long been recognized

at common law, no universal rule exists as to whom the right of burial is granted.

175. The right to possession of a dead human body for the purpose of burial is, under ordinary circumstances, in the spouse or other relatives of the deceased. See *Joash Ochieng Ougo & Another v Virginia Edith Wambui Otieno [1987] eKLR Civil Appeal No 3 of 1987* and *Sherman v. Sherman*, 330 N.J. Super. 638 (Ch.Div. 1999). However, an unrestricted property right does not exist in a dead body. The matter of the disposition of the dead is so involved in the public interest, including the public's health, safety, and welfare, that it is subject to control by law instead of being subject entirely to the desires, whim, or caprice of individuals. see *Wolf v. Rose Hill Cemetery Ass'n*, 832 P.2d 1007 (Colo. Ct. App. 1991).

176. Disposal of dead body is the practice and process of dealing with the remains of a deceased human being. Several methods for disposal are practiced. In many cases, the manner of disposal is dominated by spiritual concerns and a desire to show respect for the dead, and may be highly ritualized. This event may be part of a larger funeral ritual. In other circumstances, such as war or natural disaster, practical concerns may be forefront. Many religions as well as legal jurisdictions have set rules regarding the disposal of corpses. Since the experience of death is universal to all humans, practices regarding corpse disposal are a part of nearly every culture. The most common methods of disposal are:

i. Burial of the entire body in the earth, often within a coffin

ii. Cremation, which burns soft tissue and renders much of the skeleton to ash. The remains, known as "cremains" may contain larger pieces of bone which are ground in a machine to the consistency of ash. The ashes may be stored in an urn or scattered on land or water.

177. In the United States, for example, Close relatives of the deceased person can sue the mortuary for tortious infliction of emotional distress. See *Contreras v. Michelotti-Sawyers & Nordquist Mortuary*, 271 Mont. 300 (Mont. 1995). In *Quesada v. Oak Hill Improvement Co.*, 213 Cal. App. 3d 596 (Cal. App. 5th Dist. 1989), where the plaintiff, sister of the deceased person brought an action for damages against the defendant/funeral home. The allegation against defendant/funeral home was that the defendant/funeral home mishandled the dead body and caused emotional distress to plaintiff. The defendant/funeral home delivered another person's dead body for burial. In spite of the protest made by the relatives of the deceased person, the dead body was cremated in the plaintiff's property. However, the trial court ruled in favour of defendant/funeral home for the reason that there was no contractual relationship between plaintiff and defendant/funeral home. Hence the defendant /funeral home had no duty towards plaintiff.

178. On appeal, the appellate court reversed the trial court judgment and held that the duty of defendant/funeral home was to be decided on the basis of test of foreseeability of injury to close relatives and friends of a deceased person. The court of appeal further held that the plaintiff is a close relative of the deceased person and is entitled to damages.

179. Still in England, the family of a deceased person has a personal right to bury the dead body of their relative. Any mutilation or disturbance of a dead body is considered as an interference with this personal right and it gives rise to an actionable wrong. A plaintiff must however establish that a defendant has caused a serious emotional distress to plaintiff intentionally. See *Powell v. Grant Med. Ctr.*, 148 Ohio App. 3d 1 (Ohio Ct. App., Franklin County 2002).

180. In an article written by Associate Professor of Law, Kirsten Rabe Smolensky 'Rights of The Dead' (2009) Vol. 37:763 Hofstra Law Review page 765 it is stated:

"i) Many legal rules suggest that the dead do not have rights. Often, the dead cannot marry, divorce, or vote. The executor of an estate cannot sue for the libel or slander of a deceased person. And the right to medical privacy substantially erodes at death, giving family members the ability to obtain sensitive information about a decedent's medical conditions.

ii) On the other hand, various legal institutions have spent considerable time trying to protect the rights of the dead. As a result, most testamentary distributions, burial requests, and organ donation designations are held to be valid even if they contradict the preferences of the living. Certain destructions of property requested in wills are honoured even though they may have a negative impact on the living...This Article argues that while legal rules affecting the dead often have a practical aspect, one of the primary, and yet unrecognized, forces driving the creation of these legal rules are cultural norms, including dignity and respect for decedents' wishes."(Emphasis added).

181. From the above exposition, it is uncontroverted that some actions that involve the dead are wrong from an ethical and moral perspective and are unacceptable in many societies, even of the Western world. What follows therefore is that the dead must be respected not out of fear, but because it's the proper human thing to do. As was stated by Martin Luther King Junior:

"Death is not a period that ends the great sentence of life, but a comma that punctuates it to more lofty significance. Death is not a blind alley that leads the human race into a state of nothingness, but an open door which leads man into life eternal."

182. Articles 11 and 44 of the Constitution promote culture as one of the rights a person is entitled to, wherein traditional celebrations are encouraged. In many Kenyan cultures which are varied, the burial ceremony is a vital component of honouring the dead.it is one of the traditional celebrations accorded to the dead by giving them a dignified send off, albeit solemnly.

183. Other legislation dealing with dead bodies are the **Anatomy Act, the Births and Deaths Registration Act and the Public Health Act**. The Anatomy Act is an Act of parliament to regulate the practice of Anatomy and it primarily focuses on the persons who are licenced to practice anatomy and the approved places of practicing such. On the other hand, the Births and Deaths Registration Act is an Act of Parliament focusing on the registration of births and deaths. The Public Health Act of Kenya is close with regard to dead bodies and under Part XIII it contains provisions for cemeteries, and also provides for exhumation of buried persons upon obtaining of a permit. As submitted by the Petitioners, the Law of Succession provides an avenue where the dead can have their wishes recognized.

184. I have perused the authorities relied on by the 4th respondent which are equally persuasive. I have no doubt in my mind that the dead have limited legal rights. Chief among them is the right to remain silent. From the time of the ancient Egyptians, the conviction has been that corpses have the right to rest undisturbed and unmolested. However, the dead do have rights attributable to those they leave behind and further there is a legitimate expectation that the dead be interred in a respectful and dignified manner.

185. I therefore conclude that indeed the dead have rights.

4) Whether the deceased's and Petitioners' rights were infringed

186. I have set out some of the situations where the rights of the dead are recognized, and the rights of family members as far as disposal of a dead body are concerned. Therefore, the next question is whether those rights have been violated.

187. The Petitioners allege that the undignified burial of the deceased, without a coffin was against their culture and an affront to their rights as envisioned in Articles 11 and 44 of the Constitution. Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and further obligates the state to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.

188. Article 28 of the Constitution recognizes the inherent dignity of every person and the duty of the state to protect that dignity.

189. Article 44 (1) provides that every person has the right to use the language, and to participate in the cultural life, of the person's choice. Under Article 44 (2) of the Constitution a person belonging to a cultural or linguistic community has the right, with other members of that community—(a) to enjoy the person's culture and use the person's language; or(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

190. The 4th respondent argued that the rights of the Petitioners could be limited as provided under Article 24 of the Constitution as a result of the COVID19 pandemic.

191. The traditional view of grief resolution requires the bereaved person to disengage from the deceased. This is often expressed as a necessary "**letting go**" of the past for the survivor to be free to continue her or his life and form new relationships. Contemporary grief theory, in contrast, recognizes that healthy grieving involves maintaining bonds with the deceased. The relationship between the bereaved person and the person who has died, although transformed, is ongoing.

192. Long before Covid-19, WHO has always developed interim guidelines or protocols on "**how to conduct safe and dignified burial of a patient who has died from suspected or confirmed ebola or marburg virus disease.**" I have perused the said Guidelines which are in the public domain, and which guidelines are as near or similar to those developed by the same WHO with regard to Covid-19.

193. On the other hand, the WHO Guidelines on Management and Handling of the dead bodies of the victims of Covid-19 provide inter alia that **there is no harm in either burying or cremating people who have died from COVID-19. The guidelines provide that:**

a) **Family and friends may view the body after it has been prepared for burial, in accordance with customs. They should not touch or kiss the body and should wash hands thoroughly with soap and water after the viewing."**

b) **Any person (e.g. family member, religious leader) preparing the deceased in a community setting should wear gloves for any contact with the body. For any activity that may involve splashing of bodily fluids, eye and mouth protection (face shield or goggles and medical mask) should be worn," read the report.**

c) **The clothing worn to prepare the body should be immediately removed and washed after the procedure or an apron or gown should be worn.**

d) **The person preparing the body should not kiss the deceased. Anyone who has assisted in preparing the body should thoroughly wash their hands with soap and water when finished," the report added.**

e) **Children, older people, and anyone with underlying illnesses (such as respiratory illness, heart disease, diabetes, or compromised immune systems) should not be involved in preparing the body.**

f) **A minimum number of people should be involved in preparations. Others may observe without touching the body at a minimum distance of one metre," the report added.**

194. Domestically, **Legal Notice No. 49 published on the 3rd April 2020 under The Public Health (Prevention, Control And Suppression Of Covid-19) Rules, 2020** in section 8(1) provides that 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.*

195. The guidelines by WHO and the local authorities do not restrict burials or funerals, in fact the first guideline provided by WHO acknowledges the need to take a deceased's custom during preparation of their burial. Further, the **Legal Notice No. 49 of The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020** provides that burial or cremation ceremonies may only take place between 0900 hours to 1500 hours.

196. It is evident that the officers and agents of the 4th respondent were responsible for the transportation and burial of the deceased at his ancestral home and were given protection by agents of the National Government namely the 1st Respondent who is the Chief of the area who ensured that security was provided. In the process of handling and interring the body of the deceased, and as admitted by the 4th Respondent, the 4th Respondent's agents did not follow the protocol or guidelines set up and established by the 2nd respondent in the disposal of the deceased James Oyugi Onyango's body. That being the case, I have no hesitation in finding that the 4th Respondents violated the protocols or guidelines established for handling dead bodies and neither did they adhere to the guidelines on observance of the deceased's and the petitioners' cultural norms and practices of giving respect and dignity to the deceased. That in itself is a violation of the rights guaranteed in Articles 11, 28 and 44 of the Constitution.

197. The 2nd respondent Cabinet Minister for Health admitted as much when he appeared before the **Senate Adhoc Committee on Health** on the 21st April 2020. It therefore follows that the 4th respondents did not adhere to the MOH and WHO Guidelines and protocols when they buried the deceased in the manner that they admittedly did, in a shallow grave, without any cultural or religious ceremony, no participation by his family members, no coffin and in the dark night, ostensibly dumping the deceased's body.

198. The Petitioners also allege discrimination of the deceased in the manner in which he was buried as there were other persons (Covid 19 victims) who were accorded decent burial ceremonies including a church service and a coffin burial during the day and in the presence of his family members. To counter this, Ms. Owino on behalf of the 4th respondent seemed to state that had the deceased and his family been truthful about the deceased's condition from the start then the deceased could have been treated in a different manner. She claims that the deceased and his family members knew or suspected that he was covid-19 positive, having travelled from Mombasa, a hotspot for the pandemic but declined to disclose this information to the hospital authorities early enough. Instead, despite feeling unwell with symptoms of covid 19 he undertook treatment with over the counter drugs which worsened his situation.

199. The definition of discrimination is found in the case of ***Rose Wangui Mambo & 2 Others v Limuru County Club & 15 Others [2014] eKLR*** citing ***Peter K. Waweru v Republic [2006] eKLR*** as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

200. In the instant case the deceased was buried in the dead of the night in direct neglect of the deceased's custom or religious beliefs and practices which are guaranteed under Articles 11, 32 and 44 of the Constitution, and without any input of the deceased's surviving relatives and further in direct contravention of the guidelines by both WHO and the local authorities, MOH.

201. This court takes judicial notice of other unfortunate victims of COVID19 who have been accorded decent burials including a KQ Pilot and comparing this to the treatment accorded to the deceased and his family, it is my considered opinion that indeed there was discrimination evident in the treatment of the deceased. The 4th respondent's agents handling of the deceased's body leading up to the deceased's interment portrays, in my considered view, a different treatment to different persons who passed on as a result of COVID19, whether such discrimination was intended or through ignorance of procedures and guidelines given by MOH.

202. For all the above reasons, I find and hold that the deceased's and the Petitioners' rights as identified hereinabove were violated by the 4th Respondents.

5) Whether the Petitioners should be granted the orders sought

203. The question thus arises as to what remedy the Petitioners have in law. The nature of this Covid 19 disease is that it kills twice; it isolates one from his loved ones right before death and subsequently does not allow those remaining to get close or closure.

204. The Petitioners seek orders to exhume the deceased, James Oyugi Onyango, have an autopsy and biopsy carried out and subsequently a decent re-burial carried out in the presence of the Petitioners and their family members all at the cost of the respondents. The Petitioners further pray that they may be provided with protective gear during the re-burial of the deceased James Oyugi Onyango.

205. The Respondents contend that the dead have no rights and argue further that allowing the Petitioners' prayers would constitute a health risk not only to the petitioner but to other members of the society. It also argued that the restrictions leading up to the deceased's internment are provided for under Article 24 of the Constitution on limitation of rights. Article 24 (1) provides that ***a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and 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 the nature of the right or fundamental freedom; the importance and the purpose of limitation, the nature and the extent of limitation, the need to ensure that the enjoyment of the right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

206. Article 24(1) requires that there be reasonable and justifiable reasons for the limitation to a right. The question is whether in the instant case there was reasonable justification to inter the deceased as carried out by the 4th respondent's agents.

207. This court is alive to the fact that the guidelines of both WHO and local authorities acknowledge the need to respect the deceased's customs during burial and further that there is no need to bury the deceased without a coffin. The MOH Guidelines also provide for the time for burials which is between 9 am and 3.00pm. The ***WHO in its March 24th 2020 guidance on burials of COVID19 victims said that dead bodies are generally not infectious but recommended that relatives should not touch or kiss the body.***

208. I also note that Health being a devolved function, the mandate to implement the WHO Guidelines as well as the Ministry of Health National Government Guidelines fall upon the respective Counties which in this case is represented by the 4th respondent.

209. Whereas I agree that where it is established and or suspected that the deceased has died of Covid-19 the deceased should be buried as fast as possible within 48 hours as recommended in the MOH and WHO Guidelines, iam in agreement with the Petitioners that the 4th Respondent's agents hurriedly engaged in a process that increases stigma associated with the rush to bury dead people at night.

210. In my humble view, whereas the dead have no individual guaranteed rights, Human dignity does not end with death. In all cultures across the world, the burial of the dead is a solemn event accompanied by elaborate rituals. In other cultures, only those who commit suicide or those who drown are buried at night. The dead are respected and that is why we have graves, tombs, crypts, mausoleums and pyramids. Veneration of the dead is based on love, respect and dignity for the deceased.

211. As correctly observed by **Justice J Turkel in HCJ 81/66 *The Inspector-General of The Israel Police v. Ramla Magistrate Court Judge Mr. Baizer, at 337, 353., "The protection of the dead and their dignity is just like the protection of the living and their dignity." See Justice J. Türkel.***

212. Human rights come in two parts: the rights of the individual, and the corresponding duty of the state to protect them. Our rights may die with us, but the duties of the state linger on. It follows that when an individual is no longer around to exercise their rights, the State still has a duty to investigate violations leading to their demise. Similarly, while deceased victims are no longer around to experience the assault of human rights violations, the impacts of actions taken against them can affect the human rights of their loved ones, for, our personhood remains entangled amongst the rights of those we shared our lives with. The rights that we hold are fixed in our legacy, alongside the echoes of our dignity. Though they may pass with us, human rights are much bigger than our individual rights.

213. The rights and obligations applicable to the handling of human remains in general, and to exhumations in particular, have been examined by the **Strasbourg-based European Court of Human Rights** from the perspective of ***the rights to private and family life in Article 8 ECHR (ECHR)***, sometimes in connection with other rights such as the prohibition of degrading treatment under Article 3 ECHR. According to the ECtHR, the exercise of the right to private and family life pertains, predominantly, to relationships between living human beings, yet it cannot be excluded that it can be extended to certain situations after death. **See Jones v United Kingdom, 2005.**

214. ***Having said all that, the lingering question is whether to exhume or not to exhume the body of the deceased James Oyugi Onyango and to perform a biopsy and an autopsy as petitioned by the petitioners and supported by the interested parties.***

215. The Petitioners urged this court to order for exhumation of the deceased's body, a biopsy be done and that an autopsy be carried out to determine the cause of death as the family of the deceased were not present when the samples were taken from the deceased's body for testing of Covid 19 virus and further, that the family were never given any results of the said tests. They also claim that the deceased was buried without a burial permit being issued.

216. On the part of the Respondents, they warn that exhumation of the deceased's body is a dangerous venture which would expose the family of the deceased, the community around the deceased's home and he health personnel exhuming the body to Covid-19 infection. Further, the Respondents content that in any event, the family of the deceased withheld important information on the travel history of the deceased from Mombasa to Siaya prior to falling ill and that when the Hospital suspected the deceased to be suffering from the Covid-19 viral infection, and before his demise, they took samples from his body which were submitted to KEMRI at Kisumu for testing and that the results were positive for Covid-19, which information was conveyed to the Cabinet Secretary for Health. Further, that the body of the deceased had therefore to be handled with care as required of the person dying of the highly infectious disease hence the Public Health personnel from the Siaya County had to handle the body and bury it hurriedly as they did, and left the burial permit at MATIBABU Hospital.

217. What is clear is that no such burial permit was exhibited by the Respondents and the 4th Respondent deposed quite apologetically that the falling of the deceased's body in the grave which was interpreted by the deceased's being thrown into the shallow grave or dumping, was the slipping of the heavy body from the hands of the two undertakers while lowering the body into the grave, as the plastic bags in which the

body was wrapped were slippery as they were fumigated. Further, that the deceased's family would not be liable criminally for the interment without a burial permit which is available.

218. It is clear that the deceased's family did not bury the diseased who was buried in a huff and at night by Public Health Officials from Siaya County Government who found an already dug grave which was dug by the family of the diseased apparently in a hurry to allow the urgent burial of the diseased. It is also undisputed that the diseased was not buried in accordance with the WHO and Ministry of Health Guidelines in that his family members were not accorded an opportunity to attend his burial and give him the last religious or cultural rights.

219. The discourse on whether some highly infectious diseases remain infectious after death is a scientific discourse and not a legal argument one. Albeit the WHO have been heard to say that there is no evidence that a covid 19 victim's body would be infectious, it is agreed that Covid-19 is a novel virus which attacks the respiratory system and that it has no cure or vaccine. That scientific evidential uncertainty means that it is essential to take extreme care when handling the bodies of individuals who have died from these novel diseases. If that were not the case, WHO would not have developed **a very cautious** Protocol on handling of the bodies of people who have died from certain diseases, which Protocols contains advise on safety measures to be taken during burial of such persons to protect others.

220. In my humble view, the only reason why such Protocols are developed and must be adhered to is that these diseases can spread through contact with bodies even after death. The Protocols demand that Specialists from the Ministry of Health or other organizations may be available to carry out such burials. This is so, despite the acknowledgment by WHO that burial of the dead people is a sensitive issue in any community and therefore the state must be careful not to upset the family of the deceased. The family of the deceased is expected to be assisted to understand why the person they love very much must be buried in a different way. Psychosocial support to the families of those who have died should be readily available and offered to the family to enable them heal from the loss.

221. Concerning burial and exhumation of dead bodies, Section 146 of the Public Health Act 2017 stipulates:

“146 (1) Subject to the provisions of section 147 of this Act, it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorized cemetery, or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.

(2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.

(3) Such permit may be granted by the Minister in respect of any body interred in any cemetery or burial ground or any other place.

(4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes any body or the remains of any body contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of a body for the purpose of holding an inquiry into the cause of death of any person.”

222. The only other powers to order the exhumation of a body is found in **section 388(3) of the Criminal Procedure Code**, which empowers the Attorney-General to direct that a body be disinterred for the purposes of an inquiry into the cause of a particular death, and in **section 387(2) of the Criminal Procedure Code** which empowers a magistrate holding an inquest to cause a body to be disinterred.

223. Thus apart from the above stated cases, no dead body wherever interred in Kenya can be exhumed without a permit granted by the Cabinet Secretary for the time being responsible for matters relating to Health.

224. I must emphasize that this Petition is not entirely based on customary law and practices as the 2nd interested party tried to argue before this court. It is based on an obvious acts of omission and commission by agents of the state. This is so because the Respondents did agree in principle that the WHO Guidelines on management of Covid 19 and handling of bodies of the dead are clear on the respect for the dead and the families of the dead in handling of the victims of the Covid 19. They also conceded that those Guidelines were flouted in the process of burying the deceased James Oyugi Onyango. Furthermore, those Guidelines clearly call for involvement of the family members in the burial of the victims of Covid 19 and they appreciate the cultural and religious beliefs of the deceased and their families.

225. A post mortem examination or autopsy is a medical procedure that consists of the examination of a corpse to determine the cause and manner of death and to evaluate any disease or injury that may be present. It is usually performed by a specialized medical doctor. An autopsy helps in evaluating new diagnostic tests, the assessment of new therapeutic interventions and the investigation of environmental and occupational diseases. Moreover, medical knowledge on existing diseases derived from autopsy based research is often important.

226. For the 4th Respondent to undertake an autopsy on the body of the deceased, an exhumation of the body of the deceased, which body was buried in plastic bags and without a coffin must be undertaken. Since the Petitioners doubt that the deceased could have died of Covid 19, it means that the mortician will be required to do much more than take some tissue or a biopsy from the body of the deceased for an examination to determine the actual cause of death. An overhaul of the deceased's body must be done to determine any other cause of death in the event that Covid -19 is ruled out.

227. The 4th Respondent however deposes that the deceased was a confirmed case of Covid 19 after tests were run before his demise and samples taken to KEMRI for analysis which revealed that the deceased died of Covid 19 complications. These results were then

communicated to the 2nd Respondent who announced that one such case had been conformed in Siaya County.

228. It is clear that the deceased died at a time when there was what I call chaos in the country and the world over. There is this novel Covid 19 which emerged from China and in no time, the whole world did not know how to manage the pandemic, even with WHO Guidelines which had just been issued and which the WHO member states were starting to implement. The state was trying to manage the pandemic as well as the panic from citizens including the health caregivers, by issuing executive orders, declaring curfews and lockdowns. The deceased James Oyugi Onyango was a public servant and from the look of things, he, too, was in a state of panic, trying to escape from the lockdown in Mombasa which had also been declared a hotspot for Covid-19 pandemic, by driving with some of his family members to Siaya County. Enroute, the deceased was involved in an accident. He was assisted by his relatives to reach his home where he fell ill, he did not seek professional medical attention immediately but took over the counter medication before his condition worsened and was rushed to Hospital and shortly thereafter he died of what was suspected to be due to Covid 19 complications.

229. Undisputedly, then and now, there is stigmatization of the victims of Covid 19 in that on being suspected of the virus, one is surrounded by an army of public Health Officials, accompanied by heavy security or enforcement teams, captured like a stray monkey, taken to quarantine at the suspect's own cost and all contacts traced and quarantined.

230. Following the demise of the deceased James Oyugi Onyango, most of his contacts and family members were traced and quarantined to prevent the suspected possible spread of the virus. All this was being done in the interest of public health and public good, albeit not in a so pleasant way.

231. As was stated, quite encouragingly by **Carol Staudacher, in his Book A "Time to Grieve"**, in a very real sense, our world is changed the moment a loved one dies because each person we love makes up a precious and vital piece of our world. At such a challenging time, we need to be patient with the chaos we are now enduring both inside us and around us.

232. Emotions can become powerful during a time of death of a loved one. The question is, to what extent can a state legitimately restrict the liberties of its citizens in order to serve the common good? This question is further compounded in its complexity during times of a pandemic such as the one experienced currently as a result of the novel corona virus now baptised COVID-19. In a report accessed at-

<https://www.deccanherald.com/national/south/chennai-corporation-declines-nod-to-exhume-covid-19-doctor-victims-body-829842.html>, Chennai Corporation in April 2020 declined a nod to exhume a COVID-19 55 year old neurosurgeon doctor victim's body on the basis that the report of experts had said that **"it is not safe" to exhume and again bury the body of a COVID-19 victim and hence "it is not possible to accept her request."** The wife of the neurosurgeon had requested the civic body to allow exhumation and then re-burial at a cemetery in Kilpauk, but the Greater Chennai Corporation said that it sought a report from a committee of public health experts to ascertain the feasibility of entertaining her plea. The widow had claimed that burial in the Kilpauk cemetery was her husband's last wish and that he had conveyed it to her before he was put on a ventilator.

233. A mob which falsely feared that the burial may lead to the spread of contagion had attacked the Corporation health employees and associates of the deceased doctor. The doctor's wife and son also had to leave the burial ground in view of the violence. The body was brought to Velangadu as people of Kilpauk area had opposed his burial there. The widow said that it was her husband's last wish to be interred at the Kilpauk cemetery as per Christian rituals.

234. Kenyan officials enjoy broad legal authority to impose various forms of restrictions during public health crises. The Constitution authorizes the Head of State to declare a state of emergency and put in place wide-ranging public security preservation measures, including restrictions on movement and assembly, appropriation of private property and labour, and restrictions on entry into the country and exit therefrom. However, in order for actions under this authority to remain in place for an extended period of time, they need legislative approval.

235. Similarly, the Public Health Act (PHA, 2017), the primary legislation applicable to matters of public health crises, authorizes public health authorities, particularly the Cabinet Secretary of Health, to take various actions during public health crises, including declaring an infectious disease a "notifiable infectious disease" or a "formidable epidemic, endemic or infectious disease," and taking the necessary prevention and suppression measures to fight the disease. Specific powers accorded to health authorities for the purpose of prevention and suppression of an infectious disease include search, seizure, and detention powers; the power to designate any place as a quarantine area, including ships and aircrafts; and the power to restrict or ban immigration into the country.

236. Kenyan and international laws impose certain transparency requirements on the state. Chief among these are the requirement under the PHA to periodically publish information regarding infectious diseases in Kenya, neighbouring countries, and around the world, and the obligation under the International Health Regulations to report any public health emergency to the World Health Organization (WHO).

237. The Constitution of Kenya at Article 43 (1)(a), together with the Public Health Act, 2017 place a fundamental duty on the state to ensure that the health and well-being of the people of Kenya is maintained at the highest attainable standards, which duty is owed to the present and future generations. Article 25 sets out rights which cannot be limited.

238. Despite all the above, the Constitution of Kenya in Article 24(1) allows for limitation of rights but requires that there be reasonable and justifiable reasons for the limitation to a right. Article 24 (1) provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and 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 the nature of the right or fundamental freedom ; the importance and the purpose of limitation, the nature and the extent of limitation, the need to ensure that the enjoyment of the right and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

239. It is for this reason that the state legislated through subsidiary legislation, the regulations governing the management of Covid 19 pandemic. It is however clear as earlier stated that these Regulations or Guidelines founded on the WHO Guidelines were not followed to the letter in the burial of the deceased James Oyugi Onyango hence this Petition.

240. However, it is also clear that there was fear among not only the populations but also among the public health officials who entered into a panicky mode on encountering cases suspected of Covid 19. It was reported in the mainstream media that in some health facilities, some health care givers took to their heels upon seeing any patient who exhibited symptoms of Covid 19. This could have been due to lack of experience in handling such a pandemic which has no vaccine or known treatment or cure.

241. Health personnel were not spared either. Some of them were shunned for handling patients suspected of being covid 19 positive.

242. A few of such cases as reported by BBC News Africa, in Nairobi are recorded below as follows:

“Kenyan nurse: 'I was shunned over coronavirus fears'

By Basillioh Mutahi BBC News, Nairobi, 13 May 2020

(E.M.) [Full name withheld] works at a private hospital in the Kenyan capital

A Kenyan nurse found herself being shunned and harassed after she prepared a patient for a Covid-19 test while she was on a nightshift.

[E.M.] says the case was handled professionally - she wore personal protective equipment while dealing with the man, who was placed in an isolation room at the hospital.

By the next morning, her friends and neighbours in the capital, Nairobi, had begun to avoid her, fearing she had become infected with coronavirus.

It is unclear who leaked the information that she had organized to have the patient tested - but both her name and number were leaked on social media.

The patient ended up being negative, but that news never filtered out - the damage was done.

[E.M.] Out there it was like I was already a Covid suspect. It really affected me"

*[E.M.]
Kenyan nurse*

She began to receive phone calls from strangers - some wanting to know where she worked - and anxious friends wanting to find out her status.

The story was even on the media. It was on TV," Ms M. told the BBC.

One neighbour shouted to her: "I hear you are the one catching coronavirus patients."

An acquaintance told her husband that she really pitied him "because of what has happened to your wife".

"Do you imagine, up to today that lady friend has never bothered to call me to find out how I'm doing after that incident," she said.

Kenyan Ministry of Health Image caption B.C. [Full name withheld] was trolled after being interviewed about her recovery from Covid-19

She is not the only Kenyan who has faced coronavirus-linked stigma.

Even some of those who have recovered have found it hard to be accepted back into their communities.

Recently Health Minister Mutahi Kagwe spoke about someone who had fully recovered but was not allowed to re-join their local choir.

The ministry says others have found that after leaving hospital even their families have been stigmatized.

Cyberbullying survivors

And the fear is pervasive.

One man I contacted to find out about life in a quarantine center refused to answer my questions as he feared the stigma he would be subjected to afterwards.

He had been sent to the facility as a precautionary measure for 14 days after some people in the apartment block in which he lived tested positive for coronavirus - though he never contracted the virus.

Even before the country registered its first coronavirus infection, an MP's xenophobic Facebook message went viral in February as he called for his constituents to avoid nationals from China, where the virus originated.

In April, [B.C.] among the first coronavirus patients to recover, was interviewed on television about her experiences.

Officials wanted her to be the beacon of hope, to show that people could survive the illness - instead she was subjected to cyberbullying.

Not long after that, a 27-year-old man in the coastal city of Mombasa was "condemned to death by medics" who abandoned him in his hour of need fearing he had Covid-19, his father told *The People Daily* newspaper.

'I was scared to go out'

For the nurse, Ms M, it all started when D.M [full name withheld] walked into private Catholic Church-run hospital where she worked at the end of March.

[D.M.]

"I had a one-month-old baby who I had never seen, and my wife was shocked and worried that I was sending the family away and did not want to see them"

[D.M.]

Kenyan chef

The 40-year-old chef had returned from the US a week before.

He had gone into self-isolation on his return, asking his family to move in with relatives as a precaution.

"I had a one-month-old baby who I had never seen, and my wife was shocked and worried that I was sending the family away and did not want to see them. But after explaining, she understood that it was for the good of the family," he told the BBC.

After seven days, he went to the hospital for a test because he was scared by reports on social media about the virus - and he wanted to be sure he didn't have it.

"The way they put it is like everyone who came into the country was already affected," he said.

But after he did the test his name and phone number were also leaked - with people alleging online that he had coronavirus.

Even though he had tested negative, he was afraid of leaving his house - scared he would be accused of deliberately trying to infect other people.

He contacted Ms M to see if she knew how their information had been shared: "She told me that her colleagues were even asking her why she was not isolating herself. But I was not even positive."

Leaked police memo

Ms M can only point to a visit by the police on the evening of DM's check-up.

The officers had wanted information about suspected Covid-19 patients as part of an ongoing investigation into an escape from a coronavirus quarantine centre.

[D.M.]

Image caption [D.M.] (L) has now met his new baby

It seems a police memo about their visit was leaked.

"I don't know exactly how it leaked with my name and details, as well as that of my client," she said.

The hospital has complained about the leak, and police say the matter is under investigation.

Ms M.says what made it more challenging was after the leak, she went down with tonsillitis for a week.

"When I resumed at work, some of my colleagues were asking, 'Did you go on quarantine?'... You can just suspect what was going through their minds."

More than a month later, Ms M. says she is a stronger person after going through the experience.

It has made her more determined to do her job well as "each person, whether positive or negative, needs our services".

For Mr. D.M., the moment he learnt that he was Covid-19-free, he could not wait to meet his new baby.

"That very day, they came back immediately, I couldn't let my family stay for another night away from me."

Accessed at <https://www.bbc.com/news/world-africa-52630804>.

243. The above scenario is just one among the many cases being reported of medical personnel and family members and the communities at large being shunned for coming into contact with Covid-19 patients. In other words, Covid-19 is now dreaded by all. In hospitals around the world, doctors, nurses and other healthcare workers are fighting an enemy that has already killed more than 100,000 people, including over 16,000 in the United States, the largest economies of the world possessing or equipped with the best health facilities and caregivers.

244. It is anticipated that as with any war, the fight against COVID-19 will result not just in direct casualties, but also take a terrible toll on the minds of many of those who survive. A study published on March 23 in the medical journal *JAMA* found that, among 1,257 healthcare workers working with COVID-19 patients in China, 50.4% reported symptoms of depression, 44.6% symptoms of anxiety, 34% insomnia, and 71.5% reported distress. Nurses and other frontline workers were among those with the most severe symptoms. Accessed at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2763229>.

245. In the instant case, I find that there was no time to process what this pandemic is all about and for health workers at Siaya, in my humble view, it was too early to expect them to have processed what the pandemic entailed and more so, coming face to face with one of the first suspected cases of Covid 19 victims in the country.

246. Therefore, before reaching a decision whether to order for exhumation, biopsy and autopsy of the body of the deceased or not, this court must appreciate the circumstances under which the deceased died and his body hurriedly interred in a shallow grave in plastic bags without a coffin and at 3.00am, without any cultural or religious rights or involvement of his close family members.

247. It is incumbent upon the State to ensure that measures are put in place to ensure that harm or potential harm or death of its citizens are mitigated while at the same time ensuring that the freedom of citizens does not become a torturous process, which ought to be dreaded and avoided by all means and at all costs.

248. Currently, it is conceded that COVID-19 is an emerging, rapidly evolving pandemic. Research conducted by the *Royal Society of Chemistry, United Kingdom and published on April 16, 2020 titled "COVID-19 policy: Applying the precautionary principle when the science is uncertain"* elucidates that:

"The COVID-19 crisis is the most complex situation any government has had to face for many decades—and scientific advice has been vital in informing difficult decisions and rapid government action. However, keeping up to date with the pace at which scientific knowledge and evidence is emerging is a real challenge."

The novelty of the disease means there are still many unknowns, and therefore policy has to be based on partial information. Our experts in regulatory decision-making have been considering how governments can practically make decisions in the face of uncertain and evolving scientific evidence."

249. The WHO Guidelines on burials of Covid 19 victims state that dead bodies **are generally not infectious** but advises that relatives are not advised to touch or kiss the body. This statement in my humble view is not framed in certainty. It is a general cautionary statement and an advisory to all those who come into contact with the body of a Covid 19 victim to be cautious. It is written like a **volenti-non fit injuria** statement. It is for that reason that even the most developed and advanced countries like UK through the Royal Society of Chemistry warns that **"The novelty of the disease means there are still many unknowns, and therefore policy has to be based on partial information."**

250. The UK Royal Society of Chemistry further acknowledges that:

"Although science must play an important role by providing sound, trustworthy advice on what can be very complex questions, it is recognized that it is not the only consideration and scientists are not the decision-makers. Further, that elected politicians need good information that enables them to balance this evidence with the social and economic drivers. They do and should apply societal values to the decisions they make, particularly social attitudes to acceptable balances between risk and benefit. In times when the evidence remains uncertain, policies are required that are based on due precaution, balanced against risks, impacts and economic costs to society. The severity of the outcome of life, death or gross morbidity plays a factor on the extent of precaution that is implemented."[emphasis added].

251. The above statement was made in April 2020 at the height of Covid-19 deaths in England and elsewhere, globally. Many health workers were overwhelmed by the number of indiscriminate infections and deaths of Covid 19 victims.

252. The **1992 Rio Declaration on Environment and Development** enunciated the precautionary principle [PP] and defined it as:

"Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

253. On how the precautionary principle relates to disease prevention in public health, three statements of the precautionary principle are illustrative. As stated above, an early version was developed at an international gathering of the environmental community—the **Rio Conference—in 1992** (Raffensperger & Tickner, 1999, p. 43); this was followed by **The Wingspread Conference in 1998** (Raffensperger & Tickner, 1999, pp. 353-354) which produced a very similar version, **adding mention of public health** and stating:

"When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically."[Emphasis added].

254. In a **Lancet Editorial** (Horton, 1998, p. 252), the precautionary principle's role in public health was more carefully described as follows:

"We must act on facts, and on the most accurate interpretation of them, using the best scientific information. That does not mean that we must sit back until we have 100% evidence about everything. Where the state of the health of the people is at stake, the risks can be so high and the costs of corrective action so great, that prevention is better than cure. We must analyze the possible benefits and costs of action and inaction. Where there are significant risks of damage to the public health, we should be prepared to take action to diminish those risks, even when the scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it."[emphasis added].

255. Each of these accounts of the precautionary principle contain the core idea of **anticipatory preventive action in the face of uncertain scientific evidence**. Actions and their evidentiary warrants highlight a core idea in applied public health ethics:

"That health professionals and public institutions seek to benefit the health of communities by finding cost-effective ways to remove health hazards before those hazards cause significant harm."[emphasis added].

256. The goal of precaution is thus precisely that of public health itself: ***to do some good by preventing the harm produced by diseases, injuries, and premature death.***

257. The precautionary principle has been applied not only in environment matters but also in public health matters and the many statements I have referred to above allude to the said principle, as far as the management and prevention of Covid-19 pandemic is concerned. This precautionary principle is one of several decision-making principles used internationally in chemicals regulation. It is considered together with evaluations about risk and impact to society, alongside socio-economic benefits and disadvantages. The precautionary principle provides further that:

"Nations shall use the precautionary approach to protect the environment. Where there are threats of serious or irreversible damage, scientific uncertainty shall not be used to postpone cost-effective measures to prevent environmental degradation."

258. This principle found its way into the Kenyan courts and was applied in **Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others [2018] eKLR** at Nairobi HC Judicial review Division [Aburili J] notably known as the **Shisha Case** to the effect that ***the burden of proof for potentially harmful actions by industry or governments rests on the assurance of safety and that when there are threats of serious damage, scientific uncertainty must be resolved in favour of prevention.***

259. The precautionary principle therefore is designed to prevent potential risks. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. ***In such instances, the state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent or manifested.***

260. In an Article by **Jane E. McArthur, a Doctoral Candidate in Sociology, University of Windsor** on: **"How governments can make public health decisions when some information about coronavirus is missing"** published on May 4, 2020, accessed at <https://theconversation.com/how-governments-can-make-public-health-decisions-when-some-information-about-coronavirus-is-missing-137368>, it is aptly stated, though persuasively that:

"The COVID-19 pandemic continues to be a rapidly evolving crisis. The implications of the virus were at first seen in terms of the need to flatten the curve on the number of cases. It is now evident that we need to address the other impacts of the virus on our lives.

From economic difficulties to mental health, mobility and surveillance concerns to gendered, racialized and class disparities, the public health measures taken in response to the novel coronavirus are taking their toll. And as public health officials and governments begin to plan for transitioning out of these measures, there are many lessons to be learned from how things have been handled thus far.

A primary lesson that should come out of what has transpired is the value of the precautionary principle.

An ounce of prevention

The precautionary principle states that “when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.” It’s a population-based approach and its adoption is fundamental to public health.

The approach is illustrated in the classic story of Dr. John Snow’s recommendation to officials in London, U.K., in 1854 to remove the Broad Street water pump handle to stem a cholera outbreak. The conventional view at that time was that cholera was spread in the air, but Snow was of the opinion that it was being spread through contaminated drinking water. At the time, scientists were unaware of the existence of pathogens.

When the pump handle was removed, the number of new cholera cases dropped dramatically. The lesson of removing the pump handle — taking a population-based approach with prevention in mind — is important to remember now.

Lessons from the environment

Environmental health advocates have long argued for the application of the precautionary principle in the face of threats to human health stemming from exposure to pollution and toxins.

“The precautionary principle is meant to represent the public good in all decisions made under scientific uncertainty. When there is substantial scientific uncertainty about the risks and benefits of a proposed activity, policy decisions should be made to err on the side of caution with respect to the environment and the health of the public.”

Regulations on air pollution, chemicals in industrial and consumer products and workplace exposures to environmental toxins have often taken the precautionary principle into account.

Government adoption

Governments at all levels, institutions and even businesses and individuals should be adopting the precautionary principle as we continue to move through the COVID-19 pandemic and prepare for life afterwards.

The SARS outbreak of 2003 provided a road map for dealing with future outbreaks. An independent commission conducted hearings to explore how things were handled, and a key recommendation to emerge was for the implementation of the precautionary principle:

“That in any future infectious disease crisis, the precautionary principle guide the development, implementation and monitoring of procedures, guidelines, processes and systems for the early detection and treatment of possible cases ... [and] worker safety procedures, guidelines, processes and systems.”

Public health measures and transitions towards returning to work, school and normal operations should include policies that both anticipate possibilities and mitigate effects as the virus continues to be felt. Individual-level behaviours are important for slowing the spread of COVID-19. Yet they are insufficient from a systems or population perspective.

Disproportionate impacts

The premise of individual responsibility dominates policies for many health issues. It’s true of obesity, breast cancer, violence against women and poverty. Individualized arguments fail to capture that health exists in a nested set of relationships. Individual health is a product of the conditions of families, workplaces, communities, nations and global environments. The precautionary principle can serve as a guideline to capture these complexities.

.....

Decision-making for the public good

The actions taken to mitigate the effects of the COVID-19 virus highlight the flaws of our health-care system and public health approaches.

As governments and public health officials prepare for a return to normal, the precautionary principle should be front and center. All policy decisions should be made with the public good as the foremost consideration, even in the face of continuing uncertainties. Health, as has been made clear as we have endured the lockdown of COVID-19, must take into account not only the role of this novel coronavirus but also its implications.

The uneven impacts of COVID-19 across communities must be considered as risk mitigation strategies are constructed. These policies must address intersectional factors such as gender, racialization, mobility, housing, transportation and other health issues.

The way forward for overall health needs to apply the precautionary principle and focus on primary prevention of illness and disease.[emphasis added].

261. The UNESCO working definition of the precautionary principle dictates that:

“When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm.”

262. In my humble view, the above statements are relevant to this case. It is this precautionary principle which has been applied by the state, even without mentioning it by name, thus subconsciously, by suspending mobility of persons, (*thereby limiting the fundamental freedoms of movement*) of persons, and restricting gatherings which *limits the freedom of association* as a strategy, to prevent and stop the spread of the novel Covid-19 pandemic.

263. This court takes judicial notice of the fact that Countries around the world have continued to enforce lockdown measures, **even as these measures cause a severely detrimental impact on the global economy.**

264. According to the precautionary principle, authorities must take precautionary measures when stakes are high, despite scientific evidence about the expected event being harmful is not yet certain. This implies that protective action should be taken to prevent any possible harm, even if there is a chance that such harm will not occur—thus playing it safe. For example, when there is a hurricane, it would make more sense to get out of its way than to stay put and evaluate possible responses.

265. The Petitioners assert that a burial permit was not issued prior to the interment of the deceased James Oyugi Onyango, which offends the law; that the manner in which the deceased was buried was discriminatory because other victims of covid 19 were buried in a dignified manner and in accordance with the WHO guidelines as domesticated in the Rules and Regulations made under the Public Health Act. Further, that the deceased was buried in a shallow grave without a coffin and that weather elements or wild animals may dig and lay bare the deceased’s remains which is a public health hazard.

266. The above position by the petitioners clearly acknowledge that there are serious public health risks and possible harm associated with the body of the deceased if exhumed by wild animals or weather elements. In my humble view, there is already the potential risk that with exhumation of the deceased who was buried in plastic bags without a coffin, and taking of samples or biopsy and postmortem, will pose a health hazard.

267. In such circumstances, and applying the precautionary principle explained above and its applicability in covid 19 situations, I find and hold that it is better to err than to be sorry. It follows that if the consequences of an activity could be serious and subject to scientific uncertainties, as is in this case, where it is not certain whether the body of the deceased who was suspected of being covid 19 positive, then precautionary measures should be taken, or the activity should not be carried out (SRA 2015).

268. Exhumation of the deceased’s body will entail digging up the grave, removing the body therefrom, then for a post mortem to be conducted, the body must be taken to the mortuary for the post-mortem procedure to be carried out by a pathologist who will then take samples of body tissues or fluid for forensic examination elsewhere to determine the actual cause of death of the deceased, just in case the initial diagnosis was erroneous, before that body is placed in a coffin and returned to the grave or a new grave for interment and in a more dignified manner.

269. On ***whether an autopsy should be carried out on the deceased’s body to confirm the cause of death, the petitioners sought an order that an autopsy and/or biopsy be conducted on the body of the deceased in their presence or that of their nominees to ascertain the cause of death of the deceased and in particular whether the deceased died of COVID-19.***

270. Dr. Patrick Amoth the Acting Director General of Medical Services, Ministry of Health on behalf of the Cabinet Secretary for Health, as a Health Professional and Ms. Owino on behalf of the 4th respondent deposed that there was no need for an autopsy to be carried out on the body of the deceased since in this case the COVID-19 test on samples taken from the deceased was done at KEMRI Kisumu and the results confirmed that the deceased was Covid-19 Positive and further, that as the deceased had died in a health facility, certification had been done by competent health professional. They also deposed that it would be risky to exhume the body and expose it to the family members of the deceased including the Petitioners herein, owing to the infectious nature of the Covid 19.

271. The Public Health Act requires that health authorities take all the necessary, lawful actions imposed on them under any law to prevent or manage an outbreak or the prevalence of ***“any infectious, communicable or preventable disease, to safeguard and promote the public health and to exercise the powers and perform the duties in respect of the public health.”***

272. There was no contrary evidence that the deceased herein was certified by health personnel at Matibabu Hospital to have died and that his death was suspected to be as a result of COVID-19. This court takes judicial notice of the fact that prior to his death, the deceased had travelled from a COVID-19 hot spot zone, that is Mombasa and that he worked at the Kenya Ports Authority, a government entity, which had reported a large number of infections since the outbreak of the pandemic. The Petitioners also deposed that the deceased on feeling unwell only took medication over the counter which may have worsened his condition. It is therefore highly probable that the deceased died of covid19 related complications. To support this proposition, [Dr. Judy Melinek](#), a forensic pathologist in the **San Francisco area and CEO of Pathology Expert** writes that:

“If a body at the morgue is positive for COVID-19, “you want to avoid doing an autopsy unless it’s absolutely necessary,” because of the risk of becoming exposed to the virus through aerosolized particles or blood. She notes that the Occupational Safety and Health Administration recommends against performing autopsies in COVID-19 deaths.”

273. According to Professor [Lorna Thorpe a Professor of epidemiology at New York University Grossman School of Medicine](#):

"Post-mortem testing is helpful and important when it is balanced by the logistical feasibility of doing it." She adds that "When politics enters this space, it's nice to have confirmed cases so that it can't be critiqued."

274. From my analysis of the material placed before this court, it was indeed unfortunate that the deceased James Oyugi Onyango was not accorded a proper, decent and dignified burial. However, I am unable to find that the actions of the Respondents were deliberate or that they were wholly intended to stigmatize the Petitioners and/or disrespecting the dead. In my humble view, the circumstances prevailing were beyond the capacity of the public health officials at Siaya.

275. As was succinctly observed by a three Judge Bench comprising Kimondo, Aburili & Onyiego JJ where the court considered the question of whether or not to order for the opening of the secret sealed CIPEV envelope, famously known as the WAKI Envelope, the court held, citing **Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others**[shisha case] (supra):

"81. We appreciate that legal order does not support actions contrary to it. However, extraordinary circumstances sometimes call for extraordinary measures. In the instant case, there were exceptional circumstances that called for protection of the public interest and public good. The ensuing violence had the character of a crisis, an emergency that would have jeopardized the very existence of the state and the political Community."

82. In those circumstances, respect for the rule of law rested precisely in accepting publicly and openly the extra-legal character of the conduct by those who negotiated for a political solution to the political question. See Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others, High Court, Nairobi, JR. No. 2 of 2018 as consolidated with JR. NO. 709 of 2017 [2018] eKLR."

276. Applying the above principle to this case, it is clear that the Respondents were expected to handle the body of the deceased James Oyugi Onyango in accordance with the WHO guidelines as domesticated in Kenya. They failed to do so and have elaborately explained the circumstances then prevailing and have also given a profuse apology, even when called upon to explain by the Senate Committee on Health, explaining the overwhelming situation that was.

277. In my humble view, there is scientific uncertainty as to whether dead bodies can transmit Covid 19, and if there was certainty, then the question is, why would there be such elaborate, carefully crafted Guidelines and Protocols developed by WHO on handling the bodies of such the deceased persons from the time of death until burial?

278. This court takes cognizance of the fact that medical personnel, health caregivers or public health officials, grave diggers and coffin handlers are foot soldiers and front runners who are vulnerable to any infectious disease and pandemic such as novel Covid-19 hence the need to protect them from the possible infection as there is no scientific certainty that a person who was buried in a plastic bag and without a coffin if exhumed, his body which must be in the process of decomposing, has not burst or is likely to burst in the process of exhumation and transfer into a coffin, thereby exposing those engaged in the exhumation and reburial of the body to Covid 19 infection.

279. Accordingly, it is my most considered view that this is not a clear case where the body of the deceased James Oyugi Onyango ought to be exhumed, an autopsy carried out or a biopsy be taken therefrom and in the interest of public health, and public good, this court declines to grant or issue an order for exhumation and/or a biopsy and an autopsy on the said body of the deceased James Oyugi Onyango, who died suspected of Covid 19 infection in order to ascertain the cause of death.

280. This is further, because, despite praying for an autopsy, there was no irregularity demonstrated in the sampling and testing of the deceased's body for COVID-19.

281. I further find that the formalities of carrying out an autopsy in the presence of the petitioners and/or with their nominees will likely expose the petitioners and/or their nominees to an environment of high risk infection of Covid19 and even if they are provided with personal protective equipment, PPEs, this in my view diverts the use of personal protective equipment PPE by the medical service providers who need them most, and essentially in the battle against Covid-19 infection and thus increases the potential risk of more victims succumbing to Covid-19.

282. In my humble view, this is a perfect case where the precautionary principle applies in the interest of public health and to protect the public good.

283. The state organ which was responsible for the interment of the deceased has confirmed that the deceased died of Covid 19 and therefore the only thing that this court can do is to direct that a death certificate do issue to assist the relatives of the deceased undertake succession proceedings. This is so because the risk of harm or risk involved in exhuming the deceased to determine the actual cause of death and to rebury him in a coffin is not trivial or negligible and neither are the Petitioners certain that there would be no such harm.

284. The Petitioners had the burden of proving that no such harm or risk exists. Further, no scientific evidence was adduced to eliminate the possible harm or risk involved in exhuming, taking a biopsy or conducting an autopsy on the body of the deceased. And such harm or risk in my humble view, is both physical and psychological. For example from odour, or potential harm which includes risk of harm and future harm, to individuals, whether of long term or immediate impact or effect.

285. As earlier stated, the precautionary principle requires regulators to be ***"safe rather than sorry"*** and in effect reverses the onus of proof, where the burden is now to demonstrate that a product or activity does not present a risk of harm to public health, rather than requiring the regulator to demonstrate that it does.

286. Some examples will help explain how the principle operates- Second hand tobacco smoke was thought to present a risk of harm to people exposed to it (since direct exposures were known to present health problems for smokers it was plausible to suggest that non-smokers indirectly exposed could also be harmed). But initially there was uncertainty about the nature and extent of the risk to health that passive exposures presented. Applying the precautionary principle, regulators could justify erring on the side of caution, taking measures that restricted exposures, even though the nature and extent of the risk was not clear. Similarly, uncertainty may surround the likelihood and effects of exposures from an industrial process on a nearby community but if there is evidence to substantiate a perception that it may present a material risk to public health, the precautionary principle would authorize proportionate measures to eliminate or minimize that risk, imposed via a notice to comply with the general duty. Thus, if there is a perceived risk to the community from a suspect source (as in the case of contaminated food) but the link has yet to be fully demonstrated, the precautionary principle could justify a public statement warning of the risk and identifying the suspect source.

287. In the instant case, for a disease whose cause and cure is unknown, and whose spread continues to escalate with no known vaccine, it would be irresponsible of this court to grant the orders sought by the Petitioners, however meritorious and justifiable their claims may be.

288. A burial permit, if not issued prior to the burial of the deceased will not change the health status of the deceased. Owing to extraordinary circumstances of this case, a burial permit which, if not issued prior to the burial of the deceased can still be issued via an order of this court. Nonetheless, the County Public Health Office which is responsible for ensuring that burial of a deceased person is done only after a burial permit is issued are parties to this petition and have confirmed that the said burial permit was issued by Matibabu Hospital but that it was not collected by the deceased's family because the body of the deceased was collected by the Public Health Officials for interment. What follows a burial permit is a death certificate which is necessary for the family of the deceased person to undertake succession proceedings and even seek for benefits due to the deceased's estate from his employer. Again, a death certificate can issue by the District Registrar of Births and Deaths upon presentation of the burial permit and in the absence of a burial permit, the Certification by a professional Medical Officer certifying death of the deceased. In default, an order of mandamus can be sought in the circumstances such as these.

289. The Petitioners have not claimed that they are unable to obtain a death certificate for the deceased or that they are unable to undertake any of the legal processes that require a burial permit or death certificate. That being the case, and having regard to the circumstances described in this judgment, I find that no prejudice was occasioned by the failure to issue a burial permit, assuming that the same was not issued prior to the burial of the deceased by Public Health Officials themselves who were responsible for issuance of the said burial permit.

290. In other jurisdictions, like Scotland, guidance has clarified that for the purposes of completing an MCCD (form 11) related to COVID-19 on cause of death:

- *the terms COVID-19 disease and SARS-CoV-2 infection are acceptable*
- *if the disease is suspected but not confirmed, one may write: 'Presumed COVID-19 disease' on the MCCD .[emphasis added]*

291. In my humble view, there is sufficient material to demonstrate that the deceased died of Covid 19 and therefore an autopsy on his body is not necessary, having regard to the circumstances of this case.

292. As I conclude, it is important to appreciate that the dead are never dead to us, until we have forgotten them. No one wants to leave the planet in a state of discord with his or her family. We are all going to reach the departure lounge - one day. The question is, Will you be ready? And in a very real sense, our world is changed the moment a loved one dies because each person we love makes up a precious and vital piece of our world. At such a challenging time, we need to be patient with the chaos we are now enduring both inside us and around us. To the bereaved family of the deceased James Oyugi Onyango and others who have lost their loved ones in the recent past due to Covid 19 pandemic, this court condoles with you. To our heroes in the battle front fighting the pandemic, we salute you with honour because you risk your lives for the rest of us.

293. Therefore, on what orders this court should make, I make the following final orders:

- a) That the substantive prayers sought in the petition are dismissed for the reasons advanced above;*
- b) That the County Government of Siaya through its Department of Health shall within three days of the date of this Judgment and at their own cost[in the event that the grave of the deceased James Oyugi Onyango has not been cemented], proceed to the deceased's grave and, observing all MOH Guidelines, construct and or cement the said grave using high quality material, to protect the grave from being depleted by weather conditions or possible digging and or exposure of the said body by wild animals;*
- c) That in all its future endeavours, the state must comply with the Public Health and WHO Protocols on the management and disposal of bodies of persons suspected to have succumbed to highly infectious diseases such as the Covid-19;*
- d) That the Cabinet Secretary responsible for Health in consultation with the Office of Attorney General, County Attorneys for all the 47 Counties and the Kenya Law Reform Commission do undertake a review of the Public Health Act and other analogous Acts of Parliament and or County Assemblies Acts relating to public Health, to incorporate the Precautionary Principle and its various components.*
- e) That the 4th Respondent having flouted the protocols for disposal of the body of the deceased James Oyugi Onyango, and as the court would have granted the orders sought had it not been for the exceptional extraordinary circumstances subsisting in this matter, I order that the 4th Respondent shall pay the costs of this petition to the Petitioners.*

Orders accordingly.

Dated, Signed and Delivered at Siaya this 15th Day of June, 2020.

R.E. ABURILI

JUDGE

Delivered in open court in the presence of all parties and their respective advocates.