



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CONST. PETITION NO. 18 OF 2014**

**IN THE MATTER OF**

ALLEGED DENIAL, VIOLATION, INFRINGEMENT OF AND/OR

THREAT TO FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER SECTIONS 70, 71, 74 AND 82 OF THE REPEALED CONSTITUTION AS READ WITH ARTICLES 26, 27(1), 28, 29 AND 35 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 AND SECTIONS 6 AND 7 OF THE SIXTH SCHEDULE THEREOF, ARTICLES 6 AND 7 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, ARTICLE 2 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND ARTICLES 2, 3, 4 AND 5 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

**AND**

**IN THE MATTER OF**

THE POLICE ACT (CAP. 84 REPEALED), THE ADMINISTRATION POLICE ACT (CAP. 85 REPEALED), THE PENAL CODE (CAP. 63), THE CRIMINAL PROCEDURE CODE (CAP. 75), THE INTERNATIONAL CRIMES ACT (NO. 16 OF 2008), THE NATIONAL POLICE SERVICE ACT (NO. 11A OF 2011), THE INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (NO. 35 OF 2011), THE OFFICE OF THE ATTORNEY GENERAL ACT (NO. 40 OF 2012) AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT (NO. 2 OF 2013)

**BETWEEN**

**CITIZENS AGAINST VIOLENCE (CAVI)**

**INDEPENDENT MEDICO-LEGAL UNIT (IMLU)**

**HELLEN ATIENO OYUSO**

**EUNICE KABOSO ORWA**

**HUDSON BOB LIBABU LUMWAJI**

**VINCENT KIPNGENO KOECH**

**WINROSE CHEBET SANG**

**BENEDICT ODIWUOR ONYANGO**

**ALICE ATIENO OCHIENG**

**MAURICE OTIENO ALUSO**

**WALTER OOKO THABAKA**

**TOBIAS WANGA ODHIAMBO**

**PROTUS ONYANGO OBARE**

**BERNARD KIPLIMO RONO**

**NICHOLAS ODHIAMBO NYANGWESO .....PETITIONERS**

**AND**

**THE ATTORNEY GENERAL**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE..... RESPONDENTS**

**JUDGMENT**

The Petition was lodged by fifteen (15) Petitioners who invoked the provisions of **Articles 19; 20(1), (2), (3), (4); 21(1); 22(1), (3); 23(1), (3) and 165(3) (a), (b), (d)(i) and (ii) of the Constitution of Kenya.**

1. It was the Petitioner's case that following the announcement of Election results in Kenya's National Elections on 30<sup>th</sup> December 2007, several areas of the country erupted into Post Election Violence (**PEV**).

2. According to the Petitioners, **PEV** eventually impacted up to 136 constituencies in six (6) of the Kenya's eight (8) provinces.

3. The Petitioners said that the police responded to the violence in a manner that was often unlawful, brutal, indiscriminate and lethal. For the purposes of this case, the Petitioners indicated that the term "*Police*" also refers to and includes members of the Kenya Police Force, any or all Administration Police Officers, and other disciplined forces deployed during the **PEV** period.

4. The Petitioners stated that the 1<sup>st</sup> and 4<sup>th</sup> Respondents were aware or ought reasonably to have been aware and were therefore forewarned that adequate security measures were required to prevent and/or mitigate the occurrence of **PEV**.

5. The Petitioners made it clear that the action was brought against the Hon. Attorney General (the 1<sup>st</sup> Respondent and the Inspector General of the Kenya National Police Service (the 4<sup>th</sup> Respondent) for the following reasons;

**a. Failure to train the Police in lawful methods of conducting law enforcement operations under conditions obtaining during political demonstrations and civil unrest, and (b) the failure to ensure the lawful conduct of operations were ordered.**

**c. Issuing unlawful orders and omitting to issue lawful and proper instructions regarding the use of firearms and/or lethal force during PEV.**

**d. Prior to and during the incidents complained of in this Petition, officers of the State, for whom the 1<sup>st</sup> and 4<sup>th</sup> Respondents are responsible ordered, permitted, condoned and tolerated the intentional and/or criminally negligent use of excessive and lethal force against the Deceased, Petitioners 9 to 15 and other victims of Police Shootings.**

6. It was asserted that as a direct and proximate result of the unconstitutional and unlawful acts of the 1<sup>st</sup> and 4<sup>th</sup> Respondents who were always acting as the agents, Servants or employees of the Government of the Republic of Kenya, the Deceased sustained severe physical injuries from which they died, and Petitioners 9 to 15 were severely injured, in violation of their respective fundamental human rights.

7. The Petitioners sought the following prayers in the Petition;

**“(i) A declaratory order that the deceased persons herein through their representatives the 3<sup>rd</sup> to 8<sup>th</sup> Petitioners, and the 9<sup>th</sup> to 15<sup>th</sup> Petitioners are entitled to the right to effective remedies as guaranteed by Section 84 of the repealed Constitution, Article 23 of the current Constitution, Article 2 (3) of the ICCPR, Article 14 of the CAT and Article 7 (1) of the Banjul Charter for the violations of their fundamental rights and freedoms during PEV;**

**(ii) A declaratory order that the Right to life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Protection of the Law, the Right to Equality and Freedom from Discrimination, the Right to Information and the Right to an Effective Remedy under Sections 70 (a), 71 (1), 74 (1) and 82 (2) of the former Constitution, Article 2 (3), 3, 6 and 7 of the ICCPR, Articles 2 and 6 of the CAT and Articles 2, 3, 4 and 5 of the Banjul Charter have been violated as regard the Deceased represented by the 3<sup>rd</sup> to 8<sup>th</sup> Petitioners and the 9<sup>th</sup> to 15<sup>th</sup> Petitioners;**

**(iii) A declaratory order that the failure to conduct independent and effective investigations and prosecutions of crimes committed by the Police during PEV is a violation of the Right to an Effective Remedy and positive obligation to investigate**

and prosecute violations of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, and/or the Right to Security of the Person guaranteed by Sections 71 (1) and 74 (1) of the former Constitution and Article 2 (3) of the ICCPR and Articles 2, 6 and 7 of CAT;

(iv) A declaratory order that an investigation regarding unlawful shootings by the Police must be independent of the suspected perpetrators and the agency they serve, and that complaints against the police should not be investigated by or under the authority of the Police;

(v) A declaratory order that the failure to conduct independent and effective investigations and prosecutions of crimes committed by the Police during PEV is a violation of Kenya's obligations under the Rome Statute of the International Criminal Court, international human rights law and statutory law which requires the investigation and prosecution of murder, torture, persecution and other inhuman acts committed as part of a widespread and systematic attack directed against civilian population with knowledge of the attack;

(vi) A declaratory order that the failure to provide emergency medical care and ongoing access to medical services to victims of unlawful Police shootings committed during PEV is a violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, and/or the Right to Remedy guaranteed by Sections 70 (a), 71 (1), 74 (1) and 82 (2) of the former Constitution, Articles 26, 29 (d), (f) and 35 of the Constitution of Kenya 2010, and Articles 3, 6 and 7 of the ICCPR, Articles 2, 3, 4 and 5 of the Banjul Charter;

(vii) An order compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to produce before this Honourable Court and publicly release a full report on all incidents of Police shootings during PEV and the internal inquiries and investigations and prosecutions, if any, into Police shootings committed during PEV, particularly concerning the Petitioners herein;

(viii) An order compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to produce before this Honourable Court all files, reports, books, papers, letters, copies of letters, electronic mail (e-mail) and other writings and documents and any other form of evidence, in any medium, including but not limited to films, photographs, videotapes, radio and television broadcasts or any other recording in their custody, possession or power relating to the shootings in question.

(ix) A conservatory order for the preservation of all the materials in (vii) above and for the retention and custody of the same by and/or subject to the direction of this Honourable Court;

(x) A mandatory order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to jointly take steps as shall be necessary for the establishment of an internationalized special body for the investigation and prosecution of cases of unlawful Police shootings committed during PEV.

(xi) Special Damages – Kshs 709,800/=

.....

(xii) General Damages for 3<sup>rd</sup> to 15<sup>th</sup> Petitioners for violations of fundamental rights and freedoms in prayers (ii) and (vi) above;

(xiii) Exemplary damages for unlawful killings and grievous bodily injuries committed by the Police during the post-election violence;

(xiv) Costs of the Petition;

(xv) Interest on (xi), (xii), (xiii) and (xiv) above.

(xvi) Such other or further Orders as this Honourable Court may deem fit to grant.”

8. When the Petition came up for hearing the parties agreed that they would first address the issue of liability. In the event that the Respondents or any of them were found liable to any of the Petitioners, the court would thereafter receive further evidence in respect to the reliefs awardable to each such Petitioner.

9. For the record, the Petitioners decided to abandon Prayers **vii**, **viii**, **ix** and **x**. The Petitioners deem Prayers **vii** and **ix** as having been of an interlocutory nature, which had therefore been overtaken by the fact that the Petition had progressed to hearing; while Prayer **x** was deemed to be superfluous.

10. At the trial the Petitioners called four witnesses, whilst the Respondents called no witnesses at all.

11. In the circumstances, the Petitioners submitted that the evidence tendered by them was uncontroverted.

12. The understanding of the Petitioners was that in the absence of rebuttal evidence from the Respondents, the claims of the Petitioners were deemed to be admitted.

13. Evidence was tendered by both affidavits and oral testimonies of the witnesses.

14. The cross-examination of the witnesses was an exercise that was intended to demonstrate that either the witness was unreliable or that the evidence tendered should not be taken as proof of what had been alleged.

15. Cross-examination of a witness could bring out the weakness or strength of the evidence being tendered by the said witness. However, cross-examination, by itself, cannot constitute the rebuttal of evidence tendered by a witness.

16. Pursuant to **Article 3** of the **United Nations Code of Conduct** the international standards regarding the police use of lethal force and firearms are underpinned by two fundamental principles pertaining to the use of force by the police generally, namely necessity and proportionality.

17. As Professor Christofel Hendrik Heyns, who was the 2<sup>nd</sup> Amicus Curiae in this case, stated;

**‘The principle of necessity requires that any force used must be the minimum required in the circumstances.**

.....

**The principle of proportionality limits the amount of force used in accordance with the level of threat posed by an individual or group and the seriousness of the offence that has been committed or that is about to be committed.’**

18. These principles come into play when there is evidence that it is the police who had used lethal force or firearms.

19. In effect, the use of lethal force or firearms by the police or other state agents was only permissible in the most extreme circumstances, such as self-defence or the defence of others from serious bodily harm or death.

20. And when such force has to be used, it must be kept to the minimum required to bring the situation under control.

21. In **NOAH KAZINGACHIRE & 3 OTHERS Vs ZIMBABWE, COMMUNICATION NO. 295 OF 2004**, the African

Commission noted that when there have been allegations levelled against state agents, regarding the violation of fundamental human rights,

**“..... the African Commission will first establish whether the four deceased persons referred to in the Communication were killed by agents of the Respondent State in circumstances amounting to wrongful death, summary executions or extra-judicial killings through an excessive use of force.”**

22. The sanctity of life is the cornerstone of human rights.

23. **Article 4** of the **African Charter** provides that;

**“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may bear arbitrarily deprived this rights.”**

24. In the case of **FLORENCE AMUNGA OMUKANDA & ANOTHER V. ATTORNEY GENERAL & 2 OTHERS, CONSTITUTIONAL PETITION NO. 132 OF 2011**, the court noted that;

**“The State protects its citizens through the police service. The police service is the organ responsible for maintaining law and order, preservation of peace, protection of life and property, as well as prevention and detection of crime including the apprehension of offenders.”**

25. The court then posed the question about how an individual can demonstrate that the police had failed to discharge their duty of care, so as to render the police liable. This is how the court addressed the matter;

**“As to how an individual can demonstrate that special of care that would make the police liable, the learned Judges in the CHARLES MURIGU MURIITHI & 2 OTHERS Vs ATTORNEY GENERAL PETITION NO. 113 OF 2009 stated that;**

**‘..... the applicant must demonstrate that the acts complained of were directly perpetrated against him by the police; that the police had placed the applicant in danger he would not otherwise have faced or that a special**

relationship existed between the applicant and the police on the basis at which police protection had been assured.’

**We agree with that principle and we do not see any reason to depart from it. We must however add that the said special relationship or assurance by the police need not be express.**

**It may in fact be inferred from the circumstances of the case so that where for example a report is made to the police of an attack, and the police without any justifiable reason refuse to act, it may be deemed that they have abdicated their duty to protect a victim whose report ought to have given rise to a special relationship.”**

26. The learned Judges went on to cite several precedents which held that for the positive obligation to arise, it must be established that the authorities knew or ought to have known, at the time, of the existence of a real and immediate risk to life of an identified individual or individuals, from the criminal acts of third parties.

27. In those circumstances, if it is shown that the state failed to take measures to respond to the situation, the state may be held liable. The learned Judges in the case of **Florence Amunga Omulanda** said;

**“However, we must state that it is not always the case that the respondents would be liable whenever they fail to act on reports made to them. In our view, liability in such instances would have to be determined on a case by case basis, given the facts and circumstances appertaining.”**

28. Emphasis must be placed on the finding that each case must be determined on its own facts. Even in the case of **Florence Amunga Omukanda & Another Vs Attorney General & 2 Others [2016]eKLR**, the Judges held that the 1<sup>st</sup> Petitioner had not proved that the Respondents were liable. But the learned Judges went on to hold as follows, in relation to 2<sup>nd</sup> Petitioner;

**“However, the 2<sup>nd</sup> petitioner did not report the matter to the police. His reason for not doing so was rather flimsy, and that was that the police would protect their own. Had the 2<sup>nd</sup> Petitioner’s evidence been controverted, he would have had an uphill task proving the same in the light of his failure to report the same. Nonetheless, his failure to report an incident to the police does not necessarily deprive him a favourable finding if, apart from reporting, there is credible evidence on the basis of which the Court can find liability against the respondents.”**

29. In that case, although the 2<sup>nd</sup> Petitioner did not report the incident at any police station, there was evidence that a Corporal Ngetich had recorded in the Occurrence Book, about the incident in which the 2<sup>nd</sup> Petitioner was shot. On the strength of the record in the OB, the court found that the 2<sup>nd</sup> Petitioner was indeed shot by a police officer.

30. I therefore reiterate that in any case where there is more than one Petitioner, the court has an obligation to give due consideration to the evidence tendered in respect of each Petitioner, separately, in order to determine whether or not each such Petitioner had proved that the Respondent was liable in respect to him or to her.

31. Pursuant to the provisions of **Section 107** of the **Evidence Act**;

**“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”**

32. The legal burden of proof remains constant throughout the trial, and it is discharged when the party establishes through evidence, to the appropriate standard, that the facts he had asserted exist.

33. The production of evidence is the task of discharging the evidential burden. That means that when the claimant adduces evidence to try and meet its legal burden of proof, he would be discharging his evidential burden.

34. On the other hand, when the Respondent was producing evidence, to try and rebut the evidence adduced by the claimant, he too, would be discharging his evidential burden.

35. Whilst the legal burden remains constant, the evidential burden may shift during the trial. Thus, if the claimant produces evidence, he will have discharged his evidential burden; and at that juncture the evidential burden shifts to the Respondent.

36. It therefore follows that if a claimant produces evidence which did not prove all the facts or all the ingredients of the issue which he had asserted, the court would hold that the claimant had failed to discharge his legal burden of proof.

37. Having now laid down the law pertaining to issues raised herein, I will now evaluate the evidence, so as to ascertain whether or not the Petitioners had discharged the legal burden of proof.

38. What are the issues?

1. Did the police respond to the **PEV** in a manner that was unlawful, brutal, indiscriminate and brutal?
2. Were the 1<sup>st</sup> and 4<sup>th</sup> Respondents aware or should they reasonably have been expected to be aware, and therefore forewarned that adequate security measures were required to prevent or to mitigate the occurrence of **PEV**?
3. Did the 1<sup>st</sup> and 4<sup>th</sup> Respondents fail to train the police in lawful methods of conducting law enforcement operations under conditions obtaining during political demonstrations and civil unrest, and the said Respondents fail to ensure the lawful conduct of operations were ordered?
4. Did the 1<sup>st</sup> and 4<sup>th</sup> Respondents issue unlawful orders, or did they fail to issue lawful and proper instructions regarding the use of firearms and/or lethal force during **PEV**?
5. Prior to and during the incidents complained of in this Petition, did Officers of the State for whom the 1<sup>st</sup> and 4<sup>th</sup> Respondents are responsible, order, permit, condone and tolerate the intentional and/or criminally negligent use of excessive and lethal force against the Deceased, Petitioner 9 to 15 and other victims of Police shootings?
6. Are the Petitioners entitled to the reliefs sought?

**39. PW1, ALICE ATIENO OCHIENG**, testified that in the year 2007 she worked as a security guard at Kisumu Polytechnic.

40. On 28<sup>th</sup> December 2007 she spent the whole day, at work.

41. At about 6p.m. **PW1** was walking from her place of work, heading to her house in Manyatta Estate. Whilst still walking home, she saw police cars chasing youths.

42. **PW1** testified that she was shot as she was entering the plot where she lived.

43. She lost consciousness, and only regained her consciousness whilst at the New Nyanza General Hospital.

44. Later, in January 2008, **PW1** was told by her Landlord, **ELIUD OTIENO**, that he witnessed the police shooting **PW1**.

45. During cross-examination the witness said that she had not lodged any complaints with the Independent Police Oversight Authority (**IPOA**).

46. Having been taken through the Reports of **IPOA**, which indicated that the Authority hired staff from June 2013, **PW1** said that the period between that date and 4<sup>th</sup> September 2014 when this Petition was filed in court, was not long.

**47. PW2, SAMUEL MUHOCHI**, was the Executive Director of the 2<sup>nd</sup> Petitioner.

48. On 3<sup>rd</sup> January 2008 he received a phone-call from Dr. Nyikal, who was then the Director of Medical Services in the Ministry of Health. Dr. Nyikal asked **PW2** to attend a meeting which was scheduled to discuss **PEV**, and in particular the public crisis of over-capacity in public mortuaries.

49. There was a felt-need to discuss and quickly address the rising number of victims, as well as the need for preservation and disposal of bodies and the collection of evidence.

50. As **PW2** said, the presence of the 2<sup>nd</sup> Petitioner was required;

**“..... during post-mortems to ensure that legal and ethical rules were followed and there was an independent oversight of the process,**

.....

**The 2<sup>nd</sup> petitioner’s role was to document the cause of death, irrespective of who the alleged perpetrators were or the ethnic identity of the victims.”**

51. In the investigative report entitled ‘*Forensic Investigations into Post-Election Violence Related Deaths*’ the 2<sup>nd</sup> Petitioner concluded that all the 80 persons whose post-mortem reports were reviewed, died of unnatural causes.

52. Specifically, the Report concluded that 43% of the 80 persons died of gunshot injuries.

53. Out of the 80 victims, the 2<sup>nd</sup> Petitioner noted that 2 were police officers.

54. In 29% of the cases of death by gunshots, the Report concluded that family members alleged that they had been witnesses to the police shootings.

55. The **IMLU** Report recommended the setting up of effective and Independent investigations of the unlawful police shooting during the PEV.

56. **PW2** testified that the **WAKI** Commission was set up to investigate and document human rights violations during the PEV.

57. He concluded by saying that it was his belief that the deceased persons represented by the 3<sup>rd</sup> to 9<sup>th</sup> Petitioners herein fell within the category of the 29% of the victims of gunshots inflicted by police officers.

58. During cross-examination **PW2** said that when **IMLU** went to the ground, they did not have names of the deceased persons.

59. However, once they were on the ground, they worked with the families of the deceased and they also liaised with the police.

60. **PW2** testified that the conclusion about the 29% victims was derived from interviews with witnesses who gave eye-witness accounts of police complicity.

61. However, he clarified that **IMLU** did not have ballistics reports, to show that it was the police who shot the said victims.

62. Although **PW2** testified that **IMLU** got the contact details of the victims and of their families, he confirmed that the names of the victims of police shootings were not provided. Therefore, on the basis of the **IMLU** Report, **PW2** conceded that it would be difficult to verify the information contained in it.

63. **PW2** also noted that at page 385 of the Report of the Waki Commission, it was said;

**“..... that some people who were shot dead may have been victims of people other than police. That is subject of further investigations.”**

64. He further stated that;

**“In the absence of names and contact details of victims and of perpetrators, it would be difficult to carry out further investigations based on the Waki Report.”**

**65. PW3, HUDSON BOB LIBABU**, is the 5<sup>th</sup> Petitioner.

He is the father of **BARBARA SERETA LUMWAJI** (Deceased).

66. He testified that Barbara died on 31<sup>st</sup> December 2007. At the time when Barbara was reportedly shot dead by police officers, at their house in Kisumu, **PW3** was at his home in Museywa – Hamisi.

67. **PW3** testified that it is one **VALENTINO AMBIYO** who told him that Barbara was shot by police officers.

68. **PW3** produced a picture showing a bullet-hole on the metal door of the house where Barbara lived, and which is where she was allegedly shot.

69. He testified that he attended the post-mortem examination, at which the doctor removed a bullet from Barbara’s breast.

70. When **PW3** went to report the incident at the Central Police Station, Kisumu, he learnt that the police were already handling it, alongside other cases, under **FILE INQUEST NO. 71/07**.

71. During cross-examination **PW3** said that Valentino Ambiyio was planning to marry Barbara Sereta Lumwaji. However, at the time when Barbara was shot, she and Valentino were still living apart.

**72. PW4, TOBIAS WANGA ODHIAMBO** is the 12<sup>th</sup> Petitioner.

73. He testified that on 31<sup>st</sup> December 2007, he sustained a gunshot wound on the lower part of his right leg.

74. He was shot whilst crossing the road in the company of 3 other persons.

75. Immediately thereafter 4 police officers emerged from an adjacent compound, armed with rifles. Three of the officers accused their colleague of injuring **PW4** without any justification.

76. One police officer cut a portion of the shirt sleeve of **PW4**, and used it to tie his leg, so as to stop the bleeding.

77. Thereafter, the police ferried him to St. Joseph's Mission Hospital, where he was admitted until 18<sup>th</sup> February 2008.

78. Later, **PW4** was transferred to Tenwek Mission Hospital, where his right leg was eventually amputated below the knee, as the doctors found it so badly infected that it could not be saved.

79. On 26<sup>th</sup> June 2008 **PW4** reported the incident at Migori

Police Station.

80. During cross-examination **PW4** confirmed that he had never lodged any complaint with **IPOA**.

81. The other 3 witnesses also told the court that they had never lodged any complaint with **IPOA**.

82. The Petitioners did produce the Report of the Commission of Inquiry into the Post-Election Violence (the "*Waki Report*"), as evidence.

83. As the Petitioners stated in their final submissions herein, the Commission of Inquiry had;

**“..... established that the police caused senseless deaths of scores of innocent citizens, many of whom were shot at the back while going about their lawful business or sheltering in their homes.....”**

84. The court admits the said Report in evidence and finds that, in general terms, the police used excessive force in the manner in which they responded to the civil unrest that arose during the post-election violence that took place in December 2007.

85. However, the Waki Report did not make reference to the instances in respect to which any of the Petitioners herein were involved.

86. I have evaluated all the evidence on record and I found no evidence to prove either that the 1<sup>st</sup> and 4<sup>th</sup> Respondents were aware or should have been reasonably expected to be aware that Post Election Violence would occur after the 2007 elections.

87. I have also found no evidence to prove that the 1<sup>st</sup> and 4<sup>th</sup> Respondents failed to train the police in lawful methods of conducting law enforcement operations under conditions obtaining during political demonstrations and civil unrest.

88. The fact that some police officers exercised excessive or lethal force does not, of itself, necessarily imply that the training given to them was wanting as alleged or at all.

89. Thirdly, the Petitioners did not lead any evidence to show that the 1<sup>st</sup> or the 4<sup>th</sup> Respondents had issued unlawful orders or had failed to issue lawful and proper instructions regarding the use of firearms and/or lethal force during **PEV**.

90. In relation to **PW1**, she produced a P3 Form which shows that she reported to the Kondele Police Station on 19<sup>th</sup> May 2008.

91. The report shows that **PW1** suffered a gun-shot wound.

92. However, the Medical Officer who examined **PW1** recorded the following as being the history given by **PW1**;

**“Reports to have been hit by bullet fired by unknown person on 28/12/2008 6p.m. At the time of incident police patrol cars were driving by her house. She was at her doorstep.”**

93. That evidence confirms her oral testimony; that she did not know the person who shot her. It was her landlord who told **PW1** that she had been shot by a police officer.

94. Regrettably, the said landlord, Eliud Otieno, failed to testify at the trial. Therefore, the totality of the evidence tendered in respect of **PW1** is that she did not identify the person who shot her.

95. In the circumstances, there is no basis upon which the court could reasonably conclude that it is a police officer who shot the 9<sup>th</sup> Petitioner,

96. Accordingly, I find that the said Petitioner failed to prove that any of the Respondents were liable.

97. PW2 did not specify the particular Petitioners in respect to whom he deemed the Respondents liable for either the unlawful killing or for the use of excessive force.

98. PW3 testified that when he went to the Central Police Station, to report the fatal shooting of his daughter, he was informed that the police had already opened an Inquest into the circumstances of her death.

99. In effect, the issue about that particular incident was already being handled by the police. However, the police failed to provide this court with any information concerning the status of the Inquest.

100. The State has an obligation to expeditiously and effectively investigate any incident in which there is suspicion that the state agents had used either excessive force or lethal force.

101. I find that the 1<sup>st</sup> and 4<sup>th</sup> Respondents violated the Rights of the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners, to information and to Effective Remedy.

102. As regards the 12<sup>th</sup> Petitioner, I find that he tendered sufficient evidence to show that it is the police who shot him. The police action was unlawful and brutal. It violated the 12<sup>th</sup> Petitioner's Right to Security of the Person.

103. I also find that the police failed to discharge their obligation to investigate and to prosecute the perpetrators of the unlawful shooting of the 12<sup>th</sup> Petitioner.

104. Finally, in respect to the Petitioners who did not tender evidence before this court, I find that their respective claims must fail against all the Respondents.

105. I so find because this is not a case in which all the Petitioners were together at one particular place, when the matters complained of took place. If the circumstances in which the incident took place were same for the Petitioners, the findings on the issue of liability would apply in uniform manner, for all the Petitioners.

106. But because the circumstances were different for each Petitioner, the Court was obliged to make specific findings based upon the evidence tendered by each Petitioner. Therefore, for all the Petitioners who tendered no evidence at the trial, I find that their respective claims have no factual foundation: The same are thus dismissed.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**