



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.383 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1,2(1)

AND (5), 3(1), 10(1), (2) (b),19,20(1),(2),(3)(a), (4) (a), (b),21 22(1) AND (2)(b)

AND (c), 23(1), 24(1), 25(d), 28, 48, 159(1), (2)(d) AND (e), 165 (3)(b), (4)(6)(7),

258(1), (2) 259, 238(1)(2)(b), 239(1)(2), 242(1), (2)(a), 244(a),(c), 245(2)(b)(c)

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE

AND PROCEDURE RULES, 2013

IN THE MATTER OF ARTICLES 6(1), 7, 9 10(1), 14 OF THE INTERNATIONAL

CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1976

IN THE MATTER OF ARTICLES 1,2(1),3(2),6,13,14,16 OF THE CONVENTION

AGAINST TORTURE AND OTHER CRUEL AND INHUMAN OR

DEGRADING TREATMENT OR PUNISHMENT

IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

IN THE MATTER OF ARTICLES 2,3,5,6,10,12,17,18,21,22,24 AND 25 OF THE

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL

PERSONS FROM ENFORCED DISAPPEARANCES

IN THEMATTER OF SECTION 10 OF THE NATIONAL

POLICE SERVICE ACT No. 11 OF 2011

IN THE MATTER OF COMMISSION OF INQUIRY

ACT CHAPTER 102 OF THE LAWS OF KENYA

BETWEEN

APOLLO MBOYA.....PETITIONER

VERSYS

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DIRECTOR FO CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS....1ST INTERESTED PARTY

AND

INDEPENDENT POLICING OVERSIGHT AUTHORITY.....2ND INTERESTED PARTY

JUDGEMENT

PETITIONER’S CASE

1. The petitioner through a petition dated 22nd August 2017 seeks a declaration to the effect that enforced disappearance and extra-judicial killings in Kenya is widespread requiring an investigation by a Judicial Commission of enquiring with a view of bringing to account those responsible for the crimes. The petition further seeks the establishment of a commission of inquiring to investigate incidences of extra-judicial executions and enforced disappearances. The petition is informed by many cases of unresolved murders and enforced disappearance.

2. The petitioner further seeks an order directed at the Honourable Attorney General of the Republic of Kenya, the 1st Respondent herein, to advise the President of the Republic of Kenya to issue a Commission within fourteen (14) days, appointing a Judicial Commission of Inquiry pursuant to Section 3 of the Commission of Inquiry Act Chapter 102 of the Laws of Kenya to inquire into enforced disappearances and extra judicial killings in Kenya for the period February 2008 to date with a view to bringing to account those responsible for the crime.

3. The petitioner further seeks for an order an order that in appointing the Judicial Commission of Inquiry the Honourable Attorney General of the Republic of Kenya, the 1st Respondent herein, to advise the President of the Republic of Kenya that the instrument of appointment shall comply with the provisions of the International Convention on Civil and Political Rights (**ICCPR**) Articles 1, 2 and 7, and the **UN** Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, to ensure that the inquiry is:

- i. Conducted by investigators independent from state agents with alleged criminal involvement;
- ii. Capable of determining whether disappearance or death occurred as a result of the illegal use of force;
- iii. Aimed at the identification and prosecution of suspects;
- iv. Empowered to secure evidence including eyewitness testimony, forensic evidence, Close Circuit Television footage, objective analyses of clinical findings and conduct an autopsy that provides an accurate record of the injuries and cause of death if required;
- v. Prompt and reasonably expeditious;
- vi. Structured to afford sufficient public scrutiny of the investigation and the results to secure accountability; and
- vii. Structured to afford the victims’ next-of-kin sufficient involvement in the process necessary to safeguard their interests and ensure the remedies to which they are entitled to.

4. An order that the Honourable Attorney General of the Republic of Kenya, the 1st Respondent herein, to advise the President of the Republic of Kenya, the said Commission of Inquiry to investigate and address specific and systemic factors contributing to the high rate of disappearance and extra judicial killings in Kenya and bring to justice all those suspected of criminal responsibility for the crimes.

5. An order that the 3rd Respondent provide adequate security to Judicial Officers, Petitioner, all Counsel and all witnesses in this matter and in the Judicial Commission of Inquiry due to potential threats to their security, life and limbs.

Respondents Response

6. The 1st, 3rd and 4th Respondents are opposed to the petitioner’s petition and are relying on Replying affidavit dated 21st April 2019. It is Respondents contention that the 4th Respondent is under commend of the 3rd Respondent and is the investigative body that investigates all

murder cases in Kenya. That the 4th Respondent has investigated and successfully charged so many cases and the allegation it has abdicated its duties; is unfounded and, that the petitioner has outlined the death of various individuals some of which still have ongoing criminal cases in court.

7. That the 4th Respondent received a complaint on disappearance and subsequent murder of Willy Kimani; Josephat Mwenda and Joseph Muiruri, in which investigation was carried out and suspects were charged in court for murder, whereas others upon discovering of the body by members of public such as that of Jared Ratemo; Post mortem was done to establish the cause of death. That in respect of death of Jacob Juma the office of the 2nd Respondent has recommended an inquest to further inquire on the deceased death.

8. It is further deponed, that the 2nd and 3rd Respondents have always discharged their constitutional mandate of protecting Kenyans and have never instructed their employees and/or agents to participate in extra judicial killings. That all murder cases such as, that one of Geoffrey Oriaro, and Ronald Joseph Luby are treated as criminal offences (*murder*) and are investigated as such. It is further deponed, that no murder goes uninvestigated and where the 4th Respondent is unable to unravel the death, it is then referred procedurally to the 2nd respondent to request for a judicial inquest that is done at the Magistrate's court.

9. The 2nd and 3rd respondents contend that they have always invited members of public to give information on deaths or disappearances in order to assist the investigating authority to arrest and charge the culprits and the petitioner has never given information he has outlined in the petition to the investigating authority to assist in the investigation.

10. The 3rd Respondent further depones, that it is at an advanced stage in the investigation on the death of Chris Msando; and Caro Ngumba, and whose nature of investigation cannot be disclosed to the public for it might prejudice the very sensitive investigations.

11. That the 2nd interested party it is contended has always exercised oversight over the Respondent's day to day operations especially when there is a loss of life and the Respondents have always co-operated with the 2nd interested party when investigating the Respondent's officers who have contravened the law and the Respondents professional code of conduct. It is Respondents contention, that the court cannot stop an administrative body from discharging its constitutional given mandate unless there is outright abuse of power; which the Respondent's urge has not been demonstrated in this case. The Respondents have denied having acted in impunity and urged the letter addressed to international criminal court in paragraph 30 of the petitioner's pleadings was not copied to the Respondents for action or further investigations. That no comments were sought from the Respondents by international criminal court. It is deponed, that the 2nd and 3rd Respondents are state agencies bestowed with a duty to protect the sanctity of life.

12. It is further the Respondents averment, that the court has no jurisdiction to direct the President on how to discharge his mandate since the constitution has clear provisions on separation of powers. That there is no provisions under any act of parliament, that stipulates, that the President of the Republic of Kenya can be compelled or supervised to discharge his mandate as provided under section 3 of the Commission of Inquiry Act. It is further deponed, that the Respondents are well aware of the Country's International obligations under the international law and the same has been honoured and the state has not received any sanctions from the international community.

13. It is deponed by the Respondents, that the allegations set out in the petition has not met the legal threshold to warrant the orders pleaded and formation of a Judicial Commission of Inquiry since all cases set out are under active investigations and some are pending trial in criminal courts. It is further averred and deponed, that the presidency is an independent office and cannot be directed on how to discharge its mandate. It is further deponed, that the reports annexed (**annexture AM-19, AM-20, AM-21, AM-22 and AM-23**) and relied upon as evidence by the petitioner are one sided and none of the state agencies mentioned in the said reports were afforded an opportunity to comment or clarify the allegations set out by the author. The Respondents terms the annexure in the affidavit as prejudicial to the Respondents and intended to create bias, cause a public outcry and taint the image of the Respondents. The Respondents term the petition as frivolous, vexatious, and an abuse of the court.

First Interested Party's Response

14. The 1st Interested party is mandated under Article 249(1) of the Constitution to protect the sovereignty of the people, to secure the observance by all state organs of democratic values and principle and to promote constitutionalism.

15. In the discharge of its day to day functions, the 1st interested party makes reference to the Constitution of Kenya (2010) as its guiding beacon. Consequently, the 1st interested party has accumulated a wealth of knowledge and experience on matters pertaining to constitutional principles and human rights, and therefore, files these humble submissions with a view to highlighting before this honourable court the various human rights and constitutional principles interplaying with various issues raised in this petition.

16. In the instant petition, the 1st interested party seeks to make submissions on the following issues:-

"i) Extra-judicial executions and enforced disappearances as violation of human rights.

ii) The responsibility of the state to investigate extra-judicial execution and enforced disappearances.

iii) Failure to investigate extra-judicial execution and enforced disappearances as a breach of the right to remedy among other rights."

The 2nd Interested party's Response

17. The 2nd interested party is opposed to the petition and in doing so filed grounds of opposition dated 13th April 2018 on the following grounds:-

"1. The petitioner has not demonstrated existence any public duty reposed upon the Respondents, performance of which the court can compel as sought by the Petitioner.

2. The Petitioner has not demonstrated infringement of any specific legal rights to warrant grant of orders sought.

3. The petition does not meet required threshold for grant of reliefs sought.

Analysis and Determination

18. I have very carefully considered the petition; the Respondents Replying affidavit, the interested parties response, the written submission by the petitioner dated 8th May 2017 and list of authorities dated 8th May 2017. The 1st interested party submissions dated 22nd June 2018 and list of authorities dated 22nd June 2018; the Respondents submissions dated 6th May 2019 and authorities and 2nd interested party submissions dated 18th June 2018 and authorities. I have also considered counsel oral submissions and upon reflection of all the above, I find that the following issues arises for consideration:-

a) Whether the President as the head of the executive can be directed/supervised on how to discharge his mandate under section 3 of the Commission of Inquiry Act?

b) Whether court can issue orders compelling the Attorney General to advise the President to set up a commission for inquiry under section 3 of the Commission of Inquiry Act as sought by the petitioner and whether the petitioner has demonstrated existence of any public duty reposed upon the Respondents, performance of which the court can compel them as sought by petitioner?

c) Whether the Respondents herein have properly discharged their mandate on protection of the right to life and other human rights outlined in the constitution?

d) Whether the petitioner has exhausted all other avenues to resolve the matter before coming to this court?

e) Whether the petition meets the threshold for granting of the orders sought?

A) Whether the President as the head of the executive can be directed/supervised on how to discharge his mandate under section 3 of the Commission of Inquiry Act?

19. The petitioner amongst several orders sought herein seek, that an order directed to the Attorney General of the Republic of Kenya do issue, to advise the President of the Republic of Kenya to issue a commission within 14 days, appointing a judicial commission of inquiry pursuant to section 3 of the **Commission of Inquiry Act (Cap 102) Laws of Kenya** to inquire into enforced disappearance and extra judicial killings in Kenya for the period February 2008 to date with a view to bringing to account those responsible for the crime.

20. It is petitioner's contention, that Kenyan and global human organizations has been documenting names of victims and cases of enforced disappearance and extra-judicial killings in Kenya from as per sources and reports for period from February 2008, which has resulted into arbitrary deprivation of life and other unlawful or politically motivated killings.

21. The petition as drawn is well intentioned, however the same has to satisfy the conditions set out under section 3 of the Commission of Inquiry Act for its consideration in favour of the petitioner.

Section 3(1) of the Commission of Inquiry Act provides thus:-

"(1) The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest."

22. From the reading of **section 3(1) of the Commission of Inquiry Act**; I find no provision stipulating, that the President of the Republic of Kenya can be compelled or supervised to discharge his mandate as provided under the aforesaid section 3 of the Commission of Inquiry Act. The President of the Republic of Kenya is the head of the executive and he discharges his mandate independently under the doctrine of separation of powers. Section 3 of the Commission of Inquiry Act is not couched in a mandatory form, and as such the President is at liberty to exercise his powers at his own discretion and at his time and when he deems fit so to do.

23. In **Republic vs Honourable Chief Justice of Kenya & others Ex-parte Moiwo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the Court expressed itself as follows:-

"The court agrees that the Office of President is a special and unique office, which has immense, and numerous powers and responsibilities. In the court's view these powers and responsibilities are so vast and important that the President must always direct his undivided time and attention to his duties and responsibilities for the sake of protecting the interests of the

public. It is clear that the President is always vested with certain important and unrestricted political powers and in the exercise of such powers the President is to use his own discretion. However, the President always remains accountable to his country as a political agent."

24. The President of the Republic of Kenya though has a duty pursuant to section 3 of the Commission of Inquiry Act to appoint Commissioner or Commissioners and authorize him or them to inquire into conduct of any public officer or of any public body or into any matter into which an inquiry would in his opinion be in the public interest, and in exercise of such powers, the President is to use his own discretion and as such he cannot be compelled to do so.

B) Whether court can issue orders compelling the Attorney General to advise the President to set up a commission for inquiry under section 3 of the Commission of Inquiry Act as sought by the petitioner and whether the petitioner has demonstrated existence of any public duty reposed upon the Respondents, performance of which the court can compel them as sought by petitioner?

25. The petition under prayers (b) to (d) asks the court to compel the Attorney-General to advise the President to set up a Commission of Inquiry under the Commission of Inquiry Act in the style and manner set out in the prayers in the petition. The other prayers thereto are incidental to and consequential upon grant of those prayers. Upon consideration of the orders sought, I have no doubt, the orders sought by petitioner are in essence orders of mandamus, as they seek to compel the Attorney-General to take particular action in a given way. The petitioner in his written submissions admits and/or concedes what he is seeking are orders of mandamus.

26. Under section 6(5) of the Office of Attorney General Act No.49 of 2012, it is provided:-

"In the exercise of the powers and performance of functions of the office, the Attorney-General shall not be under the direction or control of any person or authority."

27. Under section 6 of office of Attorney General Act No. 49 of 2012, the Office of Attorney-General is an independent office which under **Article 15 (6) of the Constitution** requires the Attorney-General to promote, protect and uphold the rule of law and defend the public interest. In the instant petition, the petitioner is required to demonstrate and/or show how the office of the Attorney General has abused its powers and/or failed to discharge its mandate under the constitution, however the petitioner has not done so.

28. The petitioner has not controverted the contents of the Respondents Replying affidavit by Inspector Maxwell Otieno sworn on 21st April 2019. The petitioner before filing the present petition had never presented a petition or a letter seeking information from the office of the Attorney-General on whether it is public interest to form a commission of inquiry to investigate the alleged murders and disappearances and a request declined.

29. I now turn to the orders of mandamus as sought by the petitioner. An order of mandamus can be issued where a person or entity sought to be compelled owes a public duty imposed upon it or them by statute and has failed, neglected or refused to perform, that public duty to the detriment of a person who has legal right to expect performance of that duty.

30. In the case of **Kenya National Examination Council vs Republic Ex-parte GEOFFREY GATHENJI NJOROGE & 9 Others [1997] eKLR citing Halsburys laws of England** at page 6 defined an order of Mandamus as follows:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

31. It therefore follows, that an order of mandamus will compel performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body has failed to perform the duty to the detriment of a party, who has a legal right to expect the duty to perform otherwise where public duty is not imposed on a person or body of persons by a statute, no orders of mandamus can issue. I find that there is no legal duty reposed upon a respondent, and as such an order of mandamus cannot issue, so is the case where the Respondent enjoys discretion in the manner of performance of a duty as no order can issue directing Respondent to perform the duty in a particular manner. **(See Republic vs the Commissioner of Lands & another ex-parte Kithinji Murugu M'agere, Nairobi High Court Misc Application No. 395 of 2012).**

32. In the instant petition, the petitioner has not demonstrated, that there is a legal duty reposed upon the Respondents to advise the President to set up a commission of inquiry. Under section 3 of the Commission of Inquiry Act, I find neither the President nor the Attorney General is required under any statutory duty to act in a particular manner to warrant issuance of orders of mandamus to compel the performance of statutory duties. I find that it would be contrary to law, for this court to compel the 1st Respondent to advise the President of the Republic of Kenya in a particular manner, to wit, to set up a commission of inquiry. I find to do so would amount to this court arrogating itself the function of the 1st Respondent, which is contrary to Article 156 4(a) of the constitution and section 5(1) and (b) of the office of the Attorney General Act, which reposes that advisory function upon the 1st Respondent. It would further go against the fundamental constitutional of tenet of separation of powers. I am further to the above alive of the fact, that the decision to set up a commission of inquiry pursuant to section 3(1) of the Commission of Inquiry Act solely vests with the President and is entirely discretionary. That means even if the court make orders compelling the 1st Respondent to advise the President of the Republic of Kenya as sought by the petitioner, the orders would be in vain since the President is not bound by the 1st Respondent's advise and cannot be compelled to set up the commission. It is a trite law that court do not act in vain, and I find that this court should not be enjoined to act in vain.

C) Whether the Respondents herein have properly discharged their mandate on protection of the right to life and other human rights outlined in the constitution?

33. The petitioner has contended, that since February 2008 there has been case of enforced disappearance and extra- judicial killings. It is the petitioner and 1st interested party contention that it is the responsibility of the state to investigate extra-judicial execution and enforced disappearance. That the effective investigation of extra-judicial killings and enforced disappearances is inseparable and integral part of a state's duty to protect the right of life and that where there is a pattern of extra-judicial killings, any failure to conduct effective investigations results in and encourages an environment of impunity which promotes further extra-judicial killings and systemic human rights violations.

34. The International Covenant on Civil and Political Rights (**ICCPR**) entered into force in 1976, and creates a legally binding obligation on states parties to observe its provisions. The **ICCPR** specifically guarantees the inherent right to life and due protection of the law under Article 6. Article 2 obligates all state parties to respect and ensure all individuals within its territory the rights in the **ICCPR**.

35. Whenever acts of enforced disappearance occur, Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance obligates each State Party to take "*appropriate measures to investigate*" such acts "committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

36. It is the obligation of the state to protect the right of life and the general duty of the state to secure the rights and freedoms to whom such persons are entitled. In the **European court of Human Rights in Finucane vs The United Kingdom (Application no. 29178/95)** in the Judgment, Strasbourg, 1 July 2003, observed that the obligation "*requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.*" The Court held that:-

"The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents and bodies, to ensure the accountability for deaths occurring under their responsibility (at paragraph 67)."

37. The Respondents, in response to the above-mentioned issue, rely on the contents of the affidavit sworn by inspector Maxwell Otieno on 21st April 2019, which forms greater part of the Respondents response to this petition. In the aforesaid affidavit the Respondents have clearly outlined, that most of the cases outlined in the petition are actively before court and pending before different competent courts either as murder cases or public inquest and others are undergoing investigations; with intention to bring the culprits to justice.

38. **Article 131 (2)(e) of the Constitution of Kenya** provides:-

"(2) **The President shall—**

(a)

(b)

(c)

(d)

(e) Ensure the protection of human rights and fundamental freedoms and the rule of law."

The President delegates those responsibilities to various State Agencies including the Respondents in this petition. The petitioner in his petition has not specifically shown and demonstrated how the State Agencies have failed to investigate the deaths and disappearances alluded to in this petition. The Respondents on the other hand have alluded in the affidavit of Inspector Maxwell Otieno the steps being taken to resolve the general murders and enforced disappearances. The petitioner has not filed a supplementary affidavit controverting the averments in the affidavit of Inspector Maxwell Otieno nor attached evidence showing the State Agencies have failed or neglected or refused to take appropriate steps with a review to resolve the murders and cases of enforced disappearances raised in the petitioner's petition.

39. The burden of proof lies with he who alleges (*see section 107 of the Evidence Act*). In this petition the burden of proof to prove to this court how the respondents have failed to discharge their constitutional mandate of protecting life and upholding the rule of law lies with the petitioners. The petitioner has not discharged that burden of proof to the required standard of proof. I therefore find that the Respondents herein have properly discharged their mandate on protection of right to life and other human rights outlined in the Constitution of Kenya 2010.

D) Whether the petitioner has exhausted all other avenues to resolve the matter before coming to this court?

40. The State Agencies, who include the Respondents herein have obligation to ensure protection of human rights, fundamental freedoms and the rule of law. Any failure to investigate extra-judicial executions and enforced disappearances is a breach of human rights. That once issues similar to the ones raised in this petition are drawn to the attention of the state organs, it is their duty to have them resolved by the state agencies without undue delay and reports given back to public or concerned.

41. In the instant petition, one finds it very emotional and disturbing when it comes to the issues of enforced disappearance or cases of alleged extra-judicial killings; however the same should be considered and dealt with in pursuance of the provisions of the law. The petition

has in itself picked and raised issues, that do not arise from the Respondents exercises of discretion under section 3 of the Commission of Inquiry Act. The issues as raised in before this court are issues which could have been raised through relevant state agencies and the Respondents, and upon their consideration, make a decision whether to form a commission of inquiry or not; and if the petitioner, is dissatisfied, would beat liberty to challenge that administrative decision in a court of law. In view of the above I find that the court intervention is not warranted in a matter couched as a constitutional petition when it is not, as the petitioner is calling judiciary to supervise the executive knowing very well that is not the judicial function under Article 165 of the Constitution of Kenya 2010.

42. Upon considering the petition and counsel respective submissions, I am satisfied that the petitioner has not demonstrated, that he has approached the Honourable Attorney-General for redress and has failed to give a response either declining and reasons for declining, to justify the petitioner to file the present petition. Had that been done, the petitioner may be at liberty to challenge that administrative decision in a court of law.

E) Whether the petition meets the threshold for granting of the orders sought?

43. Before the orders sought by the petitioner can be granted, the petitioner is under obligation to demonstrate the infringement of specific rights to warrant granting of the orders sought.

44. The petitioner in this petition has annexed voluminous documents as evidence of the alleged extra-judicial killings. The petitioner has similarly attached newspapers cuttings, the basis of the petitioner's petition. The trite law is that newspapers cuttings are not admissible evidence. In the case of **Andrew Omtata Okoiti & 5 Others vs Attorney General & 2 others (2010) eKLR** the High Court held as follows:-

"This case however, can hardly go far because the petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3rd parties."

45. In view of the above and considering the newspaper cuttings as evidence, I find and hold the evidence on record and the law relating to admissibility and probative value of a newspaper cuttings, as well as a report in a newspaper is hearsay evidence (**see section 86(1) (b) of Evidence Act**) which provides the newspapers are one of documents whose genuineness is presumed by court, thus *prima facie* makes newspaper admissible in evidence, however, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of statement appearing in court and deposing to have produced the fact reported. In case of **Laxmi Raj Shetty vs State of Tamil Nadu 1988 AIR 1274, 1988 SCR (3) 706**, the Supreme Court held that a newspaper is not admissible in evidence.

46. On the Human Rights Reports, the petitioner has relied on various human rights abuse Report authorized by the 1st interested party. The 1st interested party is on record supporting the petition; which Reports adversely mention state agencies, who are not parties in this petition. One of the reports mentions the Kenya Defence Forces, who have not been enjoined in this petition nor notified of these proceedings. I have to warn myself and caution myself the need of enjoining as party adversely mention and not served before considering that particular evidence (**annexture AM 20, AM-21**) because it touches on party who is not before this court and the law provides that no party should be condemned unheard. I find if the petitioner wanted to rely on such material evidence the concerned party should have been enjoined for fair hearing and determination of this matter as per Article 50 of the Constitution of Kenya 2010. Secondly it has been deponed by the Respondents, that the author of the questioned documents never sought the opinion of the state agencies adversely, mentioned, making the documents to be one sided, as it does not have the input of the party adversely mentioned. The failure to give the adversely mentioned agencies an opportunity to give their side of the story and/or exonerate themselves makes it hard for court to consider the said documents as reflecting the whole truth nothing else but the truth. I find such evidence cannot without any other evidence, be taken as reflecting the true picture.

47. Further to the above in the current petition, the Petitioner refers to various cases, such as that of **Willie Kimani, Geoffrey Oriaro, and Jared Ratemo amongst others**, as a basis for establishment of a commission of inquiry. Some of these cases are already in court and others under investigation. The affected families and persons were not enjoined in the petition, to show how conduct of investigation or prosecution of these cases was inadequate to then warrant setting up of a commission of inquiry. Further the petitioner has not shown that he has petitioned the President to set up such a commission and the same declined to then warrant issuance of orders of mandamus.

48. Having said that much I find that the petition does not meet the threshold for granting of the orders sought.

49. The upshot is that though the petition, is well intentioned and with good cause I proceed to make the following orders:-

a) The petitioner had not exhausted all other avenues open to resolve the matter before coming to court. I find the petition is without merit and the same is accordingly dismissed.

b) This is a matter of public interest and I order each party to bear its own costs.

Dated, signed and delivered at Nairobi this 29th day of July , 2019.

J .A. MAKAU

JUDGE