



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 311 OF 2016

LAW SOCIETY OF KENYA.....1ST PETITIONER

BRIAN NZENZE.....2ND PETITIONER

ERICKSON ALUDA MAMBO.....3RD PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

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

JUDGMENT

Introduction

1. The 1st Petitioner is a statutory body corporate established under Section 3 of the Law Society of Kenya Act. It has commenced this suit on behalf of the 2nd and 3rd petitioner's pursuant to Article 22 (2) (a) and (c) of the Constitution. The 1st, 2nd and 3rd Respondents are offices established under Articles 146, Article 157 and 245 of the Constitution respectively. Article 22(1) of the Constitution gives every person the right to institute court proceedings where fundamental freedom in the bill of rights has been denied, violated or infringed and a person who has been detained can be produced pursuant to an order of *Habeas Corpus* under Article 51 of the Constitution.

2. The Petition seeks an order of *habeas corpus* for the production of the 2nd and 3rd petitioners who, it is alleged, were arrested by Administrative Police Officers on the 1st June 2016, a fact denied by the Respondents who, consequently, pray that the application for *habeas corpus* be dismissed.

The Petitioner's case

3. The petitioners' case is as follows. On 1st June 2016, the 2nd petitioner was a pillion passenger on the 3rd petitioner's motorcycle when they were arrested by two administration police officers and bundled in motor vehicle Toyota Land Cruiser registration No. GKA 875X. The officers and the vehicle were attached to Kawangware chief's camp. This happened when onlookers and passers-by witnessed the same but no person knew the destination, where they were taken on arrest. Enquiries were made in all police stations in the area including Kabete, Kinoo, Kileleshwa, Muthangari police stations but they could not be found. The Administration police officers knew the whereabouts of the 2nd and 3rd petitioners whose continued detention is illegal and unlawful since it infringes on their constitutionally protected and guaranteed rights.

4. The Petitioners are seeking redress for the enforcement of their rights, freedoms and entitlement under the following Articles 20(1), (2), (3) & (4); 21(1); 22(1); 23(1),3(a); 25 a, c, & d; 26(1) & (3) and 51(1) & (2) of the Constitution. These Articles provide for the right to institute court proceedings when a right has been violated for declaration of rights; right to freedom from torture, cruel, inhuman or degrading treatment, right to a fair trial and hearing, right to an order of habeas corpus, right to freedom and security of the persons and the right to inherent dignity which dignity has to be respected and protected. In addition, Article 23(1) provides that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of violation of the rights and freedoms.

5. In furtherance of the above, Article 29 provides that every person has right to freedom and security which includes the right not to be

deprived of freedom arbitrarily or without just cause; the right not to be detained without trial, except during a state of emergency; a right not to be subjected to any form of violence from either the public or private source; a right not to be subjected to any manner of torture whether physical or psychological, corporal punishment or be treated in a cruel, inhuman or degrading manner.

6. It is their contention that the 2nd and 3rd petitioners could be in police custody since they have not been arraigned in any court thus violating their rights pursuant to Article 49(1) (a, c, f) and 51(1) of the Constitution. Under Article 51(2) a person detained or held in custody is entitled to petition for an order of *habeas corpus*. In addition, Article 2(5) & (6) of the Constitution provides that the general rules in International law shall form part of the law of Kenya and any law ratified by Kenya shall be part of the law under this Constitution. Accordingly, Article 1 of the ***International Convention for the Protection of All Persons from Enforced Disappearance***, as read together with Articles 2 and 3 provides that no one shall be subjected to enforced disappearance and no justification may be invoked by the State for enforced disappearance.

7. The Petition is supported by an affidavit sworn by Mercy Wambua, Secretary of the 1st Petitioner, on the 21st July 2016 that:

a) The parents to the 2nd and 3rd petitioners disclosed to her that their sons had been missing since the 1st June 2016 and they believe they are being held by the administrative police officers who were the servants of the 3rd respondent. They were taken to an unknown place. The arrest of the two was at the market place as onlookers witnessed. The parents Eunice Kajairo and Sarah Khadi Muyera searched for the two persons between the 2nd and 3rd June 2016, at the Kawangware chief's camp; Police stations at Riruta satellite, Muthangari, Kabete, Kilimani, Kileleshwa and Kinoo police stations, and at hospitals and mortuaries within the City but to no avail. The 3rd petitioner's motorcycle was also taken.

b) The 3rd petitioner's mother was asked to go to Muthangari police where she was asked to record a statement. Further she was asked to come back with his photo within four days for him to be advertised as missing persons. There was an eye witness who had told them that the reason for the arrest was that the police officers said they were witnesses in a murder case. The said eye witness had refused to record his statement for fear of his life.

c) Through the assistance of Mr. Rashid, the OCPD Kabete police station, it was revealed later that the motor vehicle land cruiser registration number GKA 875X and the two arresting officers were attached at Kawangware police station. An eyewitness called Antony identified the officers as Benson Simiyu a.k.a 'Kichwa', Officer Simon Mbau Mureithi and officer Njoroge a.k.a 'Njoro'. They denied that they arrested the said persons and there was no assistance from the Kawangware Administration Police commander. This position was later reversed to be an admission when the Kabete OCPD summoned the Kawangware A.P Commandant to the DCIO offices.

d) The parents to the 2nd and 3rd petitioners and witnesses went and recorded statements though some of the witnesses were intimidated. Further the police at the DCIO had refused to cooperate with the parents by refusing to pick their calls and whenever they could visit the offices they were informed that investigations are ongoing. It prompted the parents to make a complaint to Independent Police Oversight Authority (IPOA) but so far there had been no progress. It is therefore her belief that the arresting officers know the whereabouts of the 2nd and 3rd petitioners.

e) That this court has the warrant under Article 51 of the Constitution and under Section 389 of the Criminal Procedure Code to compel the respondents and any other person to produce the 2nd and 3rd petitioners.

8. Consequently, the Petitioners pray that the following specific orders be granted:

a) *A declaration that the right to petition for an order of habeas corpus is guaranteed under Article 25(d) and cannot be limited.*

b) *An order of habeas corpus directed at the respondents to immediately produce the persons and/ or bodies of the 2nd and 3rd petitioners before a court of law.*

c) ***An order of compensation and reparation for the violation of the fundamental rights of the 2nd and 3rd petitioners as provided for and guaranteed under the Constitution.***

d) *Costs of the Petition.*

RESPONSES

9. The respondents were served with the application and petition on the 21st July 2016. The 2nd respondent (DPP) did not file any response to the Petition. The 1st and 3rd respondents filed replying affidavits in response to the petition giving their defence as follows:

(i) **Benson Simiyu Makokha** averred that he is an administration police officer service number 220667 attached at Administration Police Unit at Kawangware Divisional headquarters. He was one of the police officers mentioned in the petition. He had reported for duty on 1st June 2016 in the morning and he was allocated to patrol at Riruta area, a duty roster and firearm register was annexed. **He was on duty together with his colleagues APC Simon Mbau, Kenneth Njoroge, Simon Rotich, Joseph Lekalcha and driver CPL James Kahari who were all from Dagorretti sub county headquarters.**

The officers only arrested and booked in Thomas Mauti and Caleb Akori who had plumbing materials that were suspected could be stolen. They were booked in. They also impounded two motorcycles registration number KMCN 366(TVS) and KMCL

187(LOCIN) whose riders ran away. They also made other arrests at 10.00 p.m.

He came to learn through the *Saturday Nation* that he was required to attend court on 26th July 2016 over the disappearance of the 2nd and 3rd petitioners. He stated that in Kawangware they had a cell where they kept suspects when booked in and they would transfer them to the nearest police station.

The allegations by Sarah Muyera are false. She had called his colleagues Simon Mbau to inquire whether they had detained the 2nd and 3rd petitioners. **He was not on duty on the 1st June 2016 around the mentioned area as alleged.** He is a law-abiding citizen who was being victimized by the public. The prayer for *habeas corpus* and for compensation is misplaced since he did not detain anybody. It was his prayer that the prayer sought should fail since there was no violation of any person's rights and freedoms.

(ii) **James Kahari** swore a replying affidavit on 27th July 2016 stating that he is an Administrative Police Officer service number 2007116488 attached at Dagoretti sub county police headquarters. **He confirms to have been on patrol with SGT Benson Makokha, APC Simon Mbau, APC Joseph Lekalja on patrol at 4.00 pm on the 1st June 2016. He annexed the work ticket for the period 1st June to 19th June 2016 He did not arrest the 2nd and 3rd petitioners thus the allegations are false.**

(iii) Daniel Miruka swore an affidavit stating that he was an Inspector of Police Service No. 2011313936 in charge of Kawangware Division Administration Police camp. The 2nd and 3rd petitioners were never booked at the AP Camp. He learnt of the issue through the local newspaper on 21st July 2016. The names of the two did not feature anywhere in the OB. He went to Muthangari police station where the mother to the 3rd petitioner had reported that she last saw her son on the 31st May 2016, whereas Eunice Kajairo reported that Brian Nzenze had gone missing on the 1st June 2016. The informer has never recorded a statement. Further that the motor vehicle GKA 875X has never been attached to Kawangware Administration Police Station. A person cannot be detained for more than 24 hours. It is upon the petitioners to prove this case. He said that the order of compensation and reparation is not applicable and urged the Court to strike out the petition.

Cross-examination of the deponents of the replying affidavits

10. On application by Counsel for the Petitioners for cross-examination of the deponents, the Respondents availed the said deponents in court for cross-examination as follows:

James Kahari Police Service No. 2007116488/Force NO. 231564 confirmed that on 1/6/16 he was on patrol with APC Benson Makhoha, Simon Mbau, Kenneth Noroge and Joseph Lakaja attached to Headquarters at Dagoretti except Sgt. Makhoha who is attached at Kawangware AP Camp, and that Daniel Miruka was the in-charge of the Kawangware Division of the Police and he was aware of the patrol on 1/6/16/.

Senior Sgt. Makhoha FN 220667 attached to Kawangware AP camp who had sworn an affidavit on his behalf and on behalf of his fellow officers Kennedy Mburu Njoroge ID 25243147, Simon Kinyanjui Mbau ID no. 26202012 and Symon Rotich ID no. 21526045 who had signed a document entitled authority to plead and act that they "do hereby give authority to Benson Simiyu Makhoha id 13718532 to lead and act on our behalf in these proceedings" confirmed that he was on the 1/6/16 with the officers listed in his affidavit from the Division Headquarters although the Kawangware camp and Division Headquarters have their own separate personnel establishment. He, however, could not explain different dates on duty roster showing the 24/8/2015, 26/1/16 and 1/6/16. **He testified that they had dispersed at 1000pm and that they had been with Simon Mbau until late.** He conceded that "*there appears to be an over-write on the date stamp*" on the Daily Deployment Register at Dagoretti Sub-county Headquarters for 1/6/16. When referred to the Daily Arms Issue Book Dagoretti Sub-County, he said:

"At lockup shows the officers: Simon Mbau appears twice on the sheet. The first at 0621 was returned at 12.26

[Ct.: it appears to have over-writings].

The magazine was not firm that is why it was returned. The 2nd entry is at 15.43hrs and returned on 2/6/16. It appears to be at 0600hrs

[Ct.: it is not clear on the photocopy].

When the two mothers of the 2nd and 3rd Petitioners were pointed for him in Court he said, "*I do not know the two ladies presented before the Court.*" He stated in reexamination that the report of the missing person at OB25 of 3/6/2016 was made on 3rd June 2016 and the reportee said the person had gone missing on 31/5/2016. He denied arresting the person on 1/6/16 or having him in custody, reiterating the contents of his affidavit.

Chief Inspector Daniel Miruka when cross- and re-examined on his affidavit confirmed that he was in-charge of the Kawangware AP camps one of the 5 camps under the command of the District AP command at the Dagoretti Sub-county Headquarters; that he knew Sarah Khadi, the 3rd petitioner's mother who had approached him in early June with a request to discuss some urgent matter and when he met her at the camp's gate she shouted emotionally and exchanged words with him while asking for two police officers "Kichwa" and "Njoro" who she said had arrested her son, and he had advised her to file a report at the Camp's report office. He also confirmed that Benson Simiyu Makhoha was an officer from his camp and that on the 1/6/16 Benson Makhoha was with 5 officers from the Dagoretti sub-county headquarter on lockup duties which meant that they were stationed at Dagoretti Corner from where they waited for any response within the sub-County and that they were using a motor vehicle GKA 875X from the sub county headquarters.

11. The Petitioner on 1st September 2016 made an application under Notice of Motion, which was supported by the affidavit of Julius Otieno, advocate seeking the following specific orders:

- a) An order do issue directed at the 3rd respondent for the immediate production in court of the untruncated and edited CCTV footages of the 1st June 2018 at Nairobi Kawangware Mlango Sokoni 46 opposite Mbuja flats and Genesis supermarkets, between 3.00 pm and 5.00 pm.
- b) That the personnel or the officer responsible for the retrieval of the same CCTV records be summoned to this Honorable Court to present the CCTV records and to answer relevant questions raised on the same.

12. The 1st and 3rd Respondents through Francis Gachina, the Director, Integrated Command and Control Centre replied to the said application and said that the video surveillance system can only store data for thirty days after which the system automatically deletes the same and, therefore, the same couldn't be availed. The said Gichina testified in Court at the oral hearing of the Petition pursuant to directions therefor given by the Court as shown below.

Directions for Oral hearing of the Petition

13. Pursuant to Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, in its ruling of 9th August 2016, the Court while ruling on an interlocutory application by way of a Chamber Summons dated 21st July 2016 seeking interim relief -

“That pending the hearing and determination of this petition, this Honourable court be pleased to issue an order of Habeas Corpus for the urgent production of the 2nd petitioner and 3rd petitioner before a court of law”

gave directions for oral testimony to be made in addition to the affidavit evidence filed by the parties, as follows:

“DETERMINATION

Question before the court

*7. The primary question for determination in both the Chamber Summons application and the Petition is whether the dispute before the court is a case of abduction and or disappearance, which are matters that ought to be investigated and prosecuted if a criminal offence is disclosed, or arrest and illegal detention for which an order of **habeas corpus** would apply. See **Masoud Salim Hemed & another v Director of Public Prosecution & 3 Others** [2014] eKLR, and cases cited there.*

8. In other words, where does the truth lie between the petitioners' case of cover-up that the police officers arrested and detained the 2nd and 3rd petitioners and covered it up, and the respondents' case that they never arrested the petitioners and it could have been a case of abduction by private persons. If it is the latter, investigations will be the suitable remedy to have the culprits identified and dealt with in accordance with the law. If the former is true, an order for habeas corpus should issue against the Respondents to produce the illegally detained petitioners.

9. The current state of the law of physics and chemistry does not accept that the body mass of a person can vanish and disappear into the thin air, without external factors. While the persons who cause the disappearance need not be state actors, the court should not lightly dismiss request by an aggrieved applicant to determine whether the circumstances of the disappearance is part of a transaction involving illegal arrest and detention.

10. The human person takes perhaps the greatest premium of all the earthly beings and corresponding judicial time and resources must be brought to bear to establishing the whereabouts of a missing human being. Accordingly, the court must minutely and intensively scrutinize all available evidence that may assist the court in its determination of the whereabouts of the subject and consequent order for habeas corpus or otherwise.

11. Moreover, I consider that the alleged disappearance of a human being is a serious matter which ought to be examined by the court notwithstanding that the facts of the case are deponed to on basis of information and belief rather than personal knowledge as required for originating (as distinguished from interlocutory applications) process in ordinary civil cases (see Order 19 Rule 3 of the Civil Procedure Rules). Indeed, Article 22 of the Constitution gives locus standi to a person making the application on behalf of another and under its sub-article (3) emphasizes substance over form, providing that the rules of procedure made thereunder by the Chief Justice for enforcement of the Bill of Rights must satisfy the criteria that—

“(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation”.

In the Rules made by the Chief Justice, THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, a Petition may or may not be supported by affidavit – see Rule 11 thereof.

12. At this stage of the proceedings, I am not able to conclude that the 2nd and 3rd Petitioners were arrested and detained by the Administrative Police Officers so as to justify an order of habeas corpus against the 3rd Respondent. Moreover, I think that the

matter should be disposed of by way of full hearing on the basis of the main petition rather than an interlocutory application by chamber summons in the Petition.

13. It would appear the petitioners mixed up the procedures for approaching the Court before and after the promulgation of the new Constitution of Kenya 2010. While an order for habeas corpus was previously sought by procedure for **Directions in the Nature of Habeas Corpus** under the Criminal Procedure Code cap. 75, the procedure under the new Constitution is for a petition under the 2013 Rules aforesaid for the enforcement of the Right to **habeas corpus** under Article 51 (2) of the new Constitution which provides as follows:

“(2) A person who is detained or held in custody is entitled to petition for an order of **habeas corpus**.”

14. Upon considering the chamber summons application and the evidence presented by the parties upon supporting affidavit and replying affidavits together with cross-examination thereon, and without detailed discussion thereof in order not to prejudice hearing of the main petition, I find that a case has been established to warrant the further examination of the matter by the court and that there are serious questions to be determined upon the full trial of the petition including the cancellations and over-writings on the Daily Deployment Roster for the police officers and the Firearms Register.

15. **On the hearing of a petition, Rule 20 of THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 provides as follows:**

20. (1) *The hearing of the petition shall, unless the Court otherwise directs, be by way of—*

(a) *affidavits;*

(b) *written submissions; or*

(c) *oral evidence.*

(2) *The Court may limit the time for oral submissions by the parties.*

(3) *The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.*

(4) *The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.*

(5) *A person summoned as a witness by the court may be cross examined by the parties to the petition.*

16. *In accordance with the substantial justice Article 159 of the Constitution, I consider that the matter should proceed to full hearing of the petition whereupon the Court shall after hearing such witnesses as the parties may wish to put forward in accordance with the discretion of the court to allow oral evidence or cross-examination under Rule 20 of the 2013 Rules, make a final decision as to the question before the court whether the 3rd respondent's officers arrested and illegally detained the 2nd and 3rd petitioners to warrant an order for habeas corpus.*

Orders

17. *The court considers that the evidence of the petitioners' mothers who reported their disappearances to the police; that of the Officer Commanding Police Division OCPD, Kabete and Administration Police Superintendent, Kabete both having dealt with this matter before the petition was filed in court; and that of the alleged eye witness named Antony is crucial and likely to assist the court to arrive at a decision in the matter.*

18. *Accordingly, pursuant to Rule 20 (4) of Kenya (Protection of Rights and Fundamental Freedoms) Rules, the Court will examine the said two police officers to whom summons will consequently issue, and the said eye witness if presented by the petitioners upon addressing his fears for his life with the Witness Protection Agency.*

19. *For the same purpose, the court finds merit in the request by the petitioners for the production of the mobile phone records of the named police officers, and an order for the production of the same shall issue to the relevant mobile service providers to be executed by the 3rd Respondent. The request for CCTV records was not specific to the geographic area in question and an order for production of the same may be made when full particulars of the relevant area are given by the petitioners.*

20. *In accordance with Rule 20 (3) of the Kenya (Protection of Rights and Fundamental Freedoms) Rules, and in view of the gravity of the matter, the Court further directs that the petition shall be heard by oral evidence and the parties are, accordingly, at liberty to call viva voce evidence in addition to affidavits already filed.*

21. *Reports of any investigations so far undertaken by the Respondents in response to the missing person reports made by the mothers to the 2nd and 3rd petitioners on 3rd June 2016 shall also be produced at the hearing. The petition shall be fixed for hearing on priority basis on a date convenient to the court and counsel for the parties.*

22. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 9TH DAY OF AUGUST, 2016.

EDWARD M. MURIITHI

JUDGE

[emphasis added]

Hearing of the Petition

14. The following petitioners' additional witnesses recorded statements and attended court for the oral hearing when they were examined by counsel for the parties - Maurine Makongo (PW1), Ventrine Muthoni (PW2), Eunice Kajairo (PW3) and Sarah Khadi Muyera (PW4).

1. PW1 Maurine Makongo who testified that on 1st June 2016 was Madaraka day. She was coming from Kawangware 46 Market when she saw Erick with another person unknown to her on a motorbike going towards Congo. Erickson stopped a motorbike to take a passenger on board but he did not board it. As they stood by a car belonging to Police came. The vehicle was green in colour with a maroon strip all round and she got its registration No. as GKA875X and whose make she thought could have been a Toyota Land Cruiser. The vehicle stopped and three police officers alighted and they started hitting and slapping Erickson Aluda as the other person watched; he was put into the Land Cruiser. The other person was also arrested and put into the back of the vehicle which then drove off towards the Cooperative Bank at Msalaba. She knew quite well one officer by the name Benson Simiyu Makokha and the others by facial identification. She had come to know the names of two other officers in court from the mother of the 3rd petitioner, Sarah Muyera, as Mureithi and Njoroge, who took the bike and drove it. **On cross examination**, she said she had called the 3rd respondent's mother on 6/6/16 after failing to get her at home on two visits on 4/6/16 and 6/6/16. She also said that the police had blocked the motor cycle and that motor vehicle and the cycle were both headed in the same direction towards Congo area. She said that she saw the police start beating the motor cycle rider Eric and "the young man who had stopped the bike was slapped twice. They were both put in the vehicle and taken away. The motor bike was ridden away by Njoroge."

2. PW2 Ventrine Muthoni testified that she was a sister to Brian Nzenze, the 2nd Petitioner, and that on 1st June 2016 she was headed to fetch water near Kawangware 46 Road. As she was fetching water she heard screeching brakes of a vehicle. She could clearly see what was happening. There were three police officers in green uniform who started hitting the *boda boda* rider. She said that she knew the three police officers by the names 'kichwa', 'Mureithi' and 'Njoro' hit the boy who was standing next to his brother. As they were leaving Kichwa said they should not leave Brian, so the two were put at the back of the land cruiser. AP officer Njoro was following behind riding the motorcycle. Since then she has never seen her brother.

On cross-examination, she said the police vehicle was "coming from Kawangware towards Nairobi. The motor bike was coming from the other side towards the Bus stop" and the police vehicle was overtaking the motor bike. She said that the motor bike rider was beaten and arrested together with her brother and that she knew the 3 police officers by names, Kichwa, Njoro and Mureithi only and that sometime ago they had beaten up another matatu tout. She said she did not know the 3rd petitioner Ericson before the incident but "he was the one riding the motor cycle. My brother was being carried on the motor bike which was being ridden by Ericson. The Police started beating Ericson and my brother alighted from the bike and stood there. The police got the rider Eric and started beating him. The police did not beat my brother. It was Eric who was beaten. My brother was searched and put in the car. It was Mureithi who searched my brother and put him in the car. "Kichwa" said that they should not leave the other person. So Mureithi alighted and searched my brother without beating him and put him in the vehicle. The vehicle drove towards town and Njoro followed on the motor bike." She said that she had been afraid when she went with her mother to the Kabete police station and she had consequently not given the full information and that it was true as indicated in the statement that she had spoken with her brother: "I lied at the Police station that I had spoken to my brother."

3. (PW3) Eunice Kajairo statement was that Brian Nzenze was her son. On the morning of 1st June 2016 Brian who was a garbage collector left for work. She was in the house through out the day since she had just recently given birth. Her daughter Muthoni had gone to fetch water. While in the house the caretaker came and informed her that the police at Mlango Kubwa Mbufa Flats had arrested Brian. In the evening she went to the roadside and met Gugaa who was a porter and a well-known person. Gugaa informed her that Nzenze had been arrested together with another boy by Kawangware police officers. As she was still talking to Gugaa people came and gave her particulars of a registration number GKA 875X with the names of the arresting officers namely 'Kichwa' aka Benson Makokha Simiyu, 'Njoro' aka Kennedy Mburu Njoroge and 'Mureithi' aka Simon Mbau Mureithi. In the course of that month Gugaa was found dead next to St. Antony's school.

She went back to the house and called her brother Erick Asava though he did not pick her call. He called back the following day and she informed him about Nzenze's arrest. The brother went to the chief's camp, D.O's office, Kabete and Muthangari police stations to inquire about Brian but was told he was not at the station. She decided to go in person to Kawangware's AP's chief's camp and an AP by the name Wanyonyi told her they had not arrested her son and there were no cells to keep arrested persons.

She tried searching for her son as from the 2nd to 5th June but in all the places she visited she got the same response that her son had not been arrested. At the village people told her the AP's had arrested her son. On 6/6/16 she decided to go to Kilimani police station. She was informed that Kawangware remandees are usually taken to Kabete or Muthangari. She went back to the chief's camp to inquire about the three named officers but she was informed that they were on patrol at a place called Corner and she was

asked to go back at 5.00 pm as directed by the officer. She then got to meet Erickson's mother and since then they have been searching for their sons together.

People at the scene had given her the three officers' phone numbers. She called Mureithi pretending to be Brian's grandmother and he answered that he did not know about his whereabouts. When she called Njoroge he replied 'that was a wrong number.' Simiyu Makokha never picked up her five phone calls. She then texted Makokha and he texted back by stating that he wanted to see her, however the people warned her not to go.

Further she stated that because of going round looking for her son, the baby she had delivered developed pneumonia and had to spend 33,000/= for treatment. She depended on her son who would give her 100/= daily.

On cross-examination, he said that she had been informed of the arrest of her son by David the caretaker and her daughter Muthoni and she had got the names of the police officers involved from Gugaa as Kichwa, Mureithi and Njoro. When referred to her statement at the Kabete Police station indicating only two officers as Makhoha and Njoro, she insisted she had given three names. She said that she got the telephone numbers for the three officers from a business lady who operated from Kawangware 46 road.

4. PW4 Sarah Khadi Muyera testified that she was with Erick on 31st May 2016 when they had supper and he went to sleep in his house, which is adjacent to hers. The following morning the 1st June 2016 she woke up and went on to work. In the evening she came back but there was nobody, her eldest son Collins had gone to work. Eric's phone was off, so she slept, woke up on the 2nd June and went to work. As she was coming back home Collins called her to inform her that Erick's phone was off and she should tell him to call him. Erick's wife had gone to her home to sleep since its Erick who had the house keys. A shop owner called Mark who sold compact disks at a shop located at Barclays Bank told her that his friends had told him that Erick had been arrested at 46 Sokoni Kawangware next to Genesis Supermarket at Mbufa flats. She then proceeded to Satellite, Muthangari police stations but her son was not there.

On 3/6/16 she proceeded to Kabete, Kilimani and Muthangari police station but her son was not there. The AP at Kawangware chief's camp told her they had not detained her son. At Kinoo police station he was told that an arrest from Kawangware could not be booked since it was under Kiambu. She went back to Mark's shop. Mark then asked police officers from Muthangari who advised them to go see the OCS. The OCS told her to wait for 4 days then go back with her son's photo so that he be listed and advertised as missing. She declined to accept that her son was missing.

She went back to Mark's shop to confront him since he seemed to know the whereabouts of her son. He called someone who identified himself as a boda boda rider, who said he was driving a passenger to El Shaddai area and he saw Brian Nzenze and her son being arrested and put at the back of the land cruiser GKA 875X. That further one of the arresting officers called Kennedy Mburu was riding her son's motorcycle registration number KMDU 813N. The pillion passenger he was carrying knew her son so he went to the officers to inquire the reason for the arrest. He was told that they had killed a 'mzungu' in Lavington. She said that person even took her to the scene of the arrest but he had however refused to go to the police station to record his statement for fear of his life.

Later on the same day she informed the village elder Mr. Omollo who telephoned a 'youth' called Patie who informed them that the issue was sensitive and that he would call him back. On 4/6/16 while on her way to see area M.P. Simba Arati, she met a lady who stays at the chief's camp Kawangware who gave her a mobile phone number for Inspector Miruka. The two later met at the chief's camp and when she narrated that her son had been missing and enquired who the arresting officers were. He denied by stating that the said Officers were not attached to the station. She later informed people what she had been informed but witnesses at the scene did not accept that, they insisted the arrests were made by the said police officers. Meanwhile she had sent Erickson's wife to check at the Industrial Area Remand and the City Mortuary.

On 6/6/16 she went back to the D.O's office but was informed he was on leave. His assistant told her that she should report the same to IPOA or LSK. The head of the A.P. Police asked her to leave her mobile number to be informed of any progress in the investigations, which she has never been told to date. She went to the scene of arrest to inquire about the details of the boy who had been arrested with Erickson. She subsequently met Brian's mother and together went to Kawangware where they found Land Cruiser GKA 875X ready to go on patrol. At the said station a lady officer told them there had been no such arrest.

On 7/6/2016 with Brian's mother went to the chief's camp and found the same vehicle ready to go on patrol. Mureithi was yet to board the vehicle, and when she asked him about her son but he said he had been on leave therefore knew nothing about the arrest. Then they proceeded to Muthangari police station where they were told their sons would be advertised as missing persons. They declined to accept their sons were missing so the OCS directed them to record statements.

The head of AP Kawangware was called by the OCPD on the 9/6/16. They were directed to record statements and the head of AP Kawangware to avail the three officers to record statements too. The following morning they reported to the station together with their witnesses that there was intimidation by the police officers especially from Kichwa aka Benson Makokha who had even identified the witnesses and their places of work.

The youth named Patie had disclosed to them that the boys had been beaten and blood was oozing from their bodies when he last saw them in the land cruiser. The officers had gone to the station with the boys, changed from police uniform to civilian clothes and left the station with Brian and Erick. She confirmed to have sent MPESA mobile money to Benson Simiyu Makokha aka Kichwa, Simon Mbau Mureithi and Kennedy Mburu Njoroge aka Njoro to establish their true names.

Further, it was her statement that prior to the arrest, her son in the company of his wife met Kennedy Njoroge and he informed her that Kennedy was his friend. Also two weeks before his son disappeared, Kennedy Njoroge, Benson Makokha and Simon Mbau had

arrested his son and detained his motorcycle and it was released to him upon payment of Ksh.2000/=. Erick had told her about that particular incident. Therefore these officers knew his son quite well. Her prayer was that her son and his motorcycle be released.

On cross-examination, she testified that her son had two mobile phone numbers one which he regularly use 0702001908 and another 0721766398. She said that Eric's friend Mark had told her that he had been told by his friends that Eric had been arrested by police officers whose police stations was not clear. One of the said friends named Samuel who was a bike rider had witnessed the arrest. She had also found a witness at the scene named Antony, a worker with garbage collection along 46 road. When she presented the two witnesses to record statement Kabete Police station as requested, one police officer recognized the witnesses she said she was the owner of the Motor cycle that her son Eric was riding KMDU813N which she had bought from Mark Holdings Ltd on 12th April 2016. He said that she had been given the telephone numbers from a person who works along the 46 road whom she did not name. She had then sent MPESA mobile money to the said numbers to get the full names of the persons. She lamented that the OB25/3/6/2016 at Muthangari Police station was erroneously recorded as a missing person report.

Respondents' Witnesses

15. The Respondents further filed the following witness statements and the witnesses attended court for oral examination.

DW1 Police constable Joseph Leshuku Lekalja, personal number 2008122898, based at Dagoretti Sub county Headquarters testified that on 1st June 2016, in the company of SSGT Benson Simiyu, APC Simon Mbau, APC Kenneth Njoroge, APC Symon Rotich and CPL James Kahari reported for duty at LOCK-UP Junction Mall along Ngong Road at 6:00 am on board land cruiser GKA 875X.

On the way to their duty station, they arrested Thomas Mauti and Caleb Akori at Deliverance Area for failure to produce documents for the goods they were carrying and booked them at Kawangware AP Camp. They then proceeded with their Patrol until around 5:30 pm before they took a break at Kawangware AP Camp and resumed patrol at around 7:30 pm at 46 bus terminus where they seized two motor bikes; KMCN 366E(TVS) and KMCL 187T(LOCIN), both maroon in colour.

They then proceeded with their patrol and at around mlango area they met their colleagues; Sgt Patrick Mulei, Cpl Jamil Lemiso, APC Geoffrey Mutai and APC Benson Mumasi, trying to arrest 4 people - Julia Nyambura, Margaret Ndungu, Josphine Waitera and Joseph Njoroge - who were fighting. They were assisted to arrest and book them in the occurrence book at Kawangware AP Camp as entry No. 12 of that day. They equally booked the motorbikes they had recovered and **later dispersed at around 10:00 pm**.

He denied ever arresting the 2nd and 3rd petitioners and booking them into custody on 1st June 2016. He proceeded for leave on 13th June 2016 and only came to know of the case through the media.

On cross-examination, he said he did not recall Simiyu, James kahari the driver or Njoroge or any other team members leaving the team except Simon Mbau left around noon to return his rifle which had a problem and that around 3-4pm he had accompanied Mbau to get another rifle from the Headquarters.

DW2 Sergeant Francis Siema testified that he was an administrative officer working as a sergeant at Dagoretti Sub County headquarters and currently attached to the Armory and stores where he is in charge of issuing and receiving firearms. On 1st June 2016, he assigned four AK 47 Rifles to APC Simon Mbau, APC Kenneth Njoroge, APC Symon Rotich, and APC Joseph Lekalja and a Czeska pistol to CPL James Kahari, all the officers were stationed at Dagoretti Sub county headquarters and they signed for the firearms at the Movement Register.

The officers then departed for duty until 1226 when APC Mbau returned his rifle on grounds that it was faulty. He confirmed that indeed the rifle was faulty but had none left in store. So he asked APC Mbau to check later if any other rifle had been returned from other deployments. APC Mbau returned at 1500hours to check whether a replacement had been found but there was none. He then opted to give him a standby Czeska pistol, which APC Mbau signed for and returned to work until the following day on 2nd June 2016 at 0600hrs.

At the end of their duty, all the officers returned their rifles in good condition but at various intervals as recorded in the movement register. He further stated that overwriting occurs on the movement register when pens fail to write on paper that gets into contact with gun oil but he confirms that there was no sinister motive behind the cancellation and/ or overwriting contained in the firearm movement register.

On cross-examination, he was referred to the alterations and over-writings on the arms register and he said there were such alterations on other dates as well. He further said that the remarks OK on the arms register showing the return of the rifle by Mbau "means that the ammunition was there and had not been used but it was faulty".

DW3 Chief Inspector Hannington Kirimi, the OCS Muthangari Police station testified that he had on 3/6/16 received the 3rd respondent's mother who had been referred to him by the duty officer at the report office. He said the lady had reported that her son had been arrested by AP officers from unknown AP post and he had instructed that the report be recorded in the Occurrence Book (OB). The lady had given him a cellphone number that her son was using as 0702001908 and 0721766398. He said "I contacted the DCIO who have tracking facilities to see where the number was last used. I also referred the lady to DCIO. I called the DCIO in the presence of the lady. When I told him that I did not have tracking system, he said I should send her to him at Kabete DCIO." He said he had also circulated two signals on the two missing persons on the 7/6/16 when he received report from the mother of the 2nd petitioner that he had been missing from 31st May 2016. He said that he learnt of Guka's body having been found along Kawangware Mlango soko on 27th June 2016 from a peace coordinator Charles Oloo who called him to inform him of the

discovery. He had then checked the OB and found the incident reported and then went to the scene where he met the mother of Hamaton Ibaki as 'Guka' was officially known. He did not know of Guka before as the ladies had not mentioned his name when they made their reports. A postmortem carried by police doctor out on 30th June 2016 pursuant to section 386 (1) of the criminal Procedure Code (CPC) established the cause of death as carbon monoxide poisoning. He said the doctor had found no foul play and had released the body to the mother for burial and that he (OCS) was in the process of presenting the police investigations file to the Chief magistrate court at Kibera which was responsible for his jurisdiction in accordance with the law. He said testified to the connection between the death of Guka and the missing persons saying:

*“On 7/6/2016, in the OB there is a report by Eunice the mother of Nzenze Brian in OB/17/7/6/2016. The mother had reported the disappearance of her son Brian Nzenze and she alleged that she had information from the said Hamerton alias 'Guka' that he saw the missing son being arrested by unknown AP police officers in Kawangware. **When I went to receive the dead body at Kawangware I related the matter to the report made on 7/6/16.** The matter of Hermaton's death was also reported as OB7/27/6/16. OB 8/27/6/16 is the report to the scene upon report. We came back from the scene and reported under OB15/27/6/16 reporting what we saw at the scene and the taking of the body to the mortuary. I wish to produce the OB record book. DEX NO. 4 [No objection from Counsel for the petitioners]. **The matter is still pending investigation by DCIO, Dagorretti, who took over the investigations.**”*

On cross-examination, he said he had not conducted the investigations because it was beyond his reach as he had no tracking system for the phone numbers and he had handed over the matter to the DCIO when the latter said he would take over the investigations. He further testified that the Police doctor did not remove any organ from the body of Guka for further investigations and that 'the doctor is one who says that further investigations should be done.' Asked whether it was his responsibility to investigate the issue of poisoning he answered that "The doctor is the expert. The doctor did not take specimen for further investigation by further analysis by Government Chemist." He also conceded that he had learnt of Guka when he reviewed the OB of 7/6/16 but said that he did not consider that there was a connection between the death of Guka on 27/6/16 and the report of 7/6/16 that he had witnessed the arrest of the 2nd and 3rd petitioners by AP officers.

On reexamination, DW3 said that in the missing person report he had found it convenient that the DCIO who was his senior to deal with it because of the allegation of arrest by police officers and it was the DCIO who could access the service provider for the mobile phones, and that the investigations were conducted by the DCIO. Referring to OB 15/27/6/16, he said that the police officer who recorded it PC Osewe said the mother had told him that Guka had epilepsy. He also asserted that he had worked at the Command Centre at Jogoo House, Nairobi from where the control of the CCTV equipment is manned and there was no CCTV at Kawangware where the incident of Guka occurred but only at Valley Arcade and Gitanga road.

DW4 Phillip Rono testified that he is a Senior Superintendent of Police then in charge of the Administration Police Service, Dagoretti sub-county said on 7th June 2016 Sarah Muyera came to his office to inquire whether he had arrested Erickson Aluda Mambo. His name was not in the occurrence book thus he asked her to make a report for missing person. She told her she had already made a report at Muthangari Police Station. On 9th June 2016 the OCPD Dagoretti. Mr. Mohamed Rashid called to inform him that there were ladies who alleged that police officers and a motor vehicle registration number GKA 875X from his station had been involved in the disappearance of Erickson Aluda Mambo and Brian Nzenze. The ladies were Eunice Kajaira and Sarah Muyera whom he had met at the OCPD'S office.

He went to the DCIO's office to open an inquiry file since his officers were implicated. Back at the station he checked the deployment register of 1st June 2016 and confirmed that motor vehicle registration number GKA 875X had been assigned to six police officers namely: SPC Benson Simiyu, APC Simon Mbau, APC Kenneth Njoroge, APC Symon Rotich, APC Joseph Lekalcha and the driver CPL James Kahari. When he summoned the said officers to ask them if they had arrested Brian Nzenze and Erickson Aluda they denied. He asked them to go record statements at the DCIO's office. The same issue came to limelight on 21st July 2016 when the media highlighted the story. On inquiry from the DCIO'S office he was told the matter was still under investigations. On cross examination he said he had on 9/6/16 "handed over to the DCIO to continue with investigations...[and] between 9/6/16 and 21/7/16 I did not know anything as I waited for a report from the DCIO." He said he did not recover the CCTV footage for the area although he knew it t be important because it was the DCIO who was investigating. He confirmed on reexamination that when he met Sarah Muyera on 7/6/16 and that she was making enquiries as to arrest by AP officers.

DW5, Francis Gachina Gachathi, Assistant Inspector General of Police and Director of Integrated Command Control and Communication Centre (IC3) who had sworn an affidavit of 21/9/16 testified adopting the contents thereof and confirming that the area in question had 3 cameras owned by the central government in collaboration with Safaricom. On cross-examination, he said:

“The data from the cameras are sent through a transmission line to Government data centre real time owned by the Ministry of Communication. When we require data obtained at data centre, the team at IC3 is able to access the data upon request by Investigating Officers through his Commander (OCS) or DCIO whoever is doing the investigation.

The data is stored from 30 days at Data Centre from the date of recording. After 30 days the system deletes the information because of storage capacity. It overwrites it. When a request comes we access and store it separately in a Folder in the same storage. The stored one will not be overwritten.

We did not receive any request from the police to access the data. We got a request from IPOA (Independent Police Oversight Authority) on 24/8/16 and from the Attorney general in September 2016. We were not able to provide the data because it had been overwritten. Had police requested the data with 30 days we would have been in a position to provide it.”

DW6 Mohammed Rashid, Senior Superintendent with the police then the Officer Commanding Police Division, Dagorretti said that on 9th June 2016, two ladies Sarah Muyera and Eunice Kajairo went to his office at around 11.00am and complained that they

had made reports of missing persons namely Brian Nzenze and Erickson Aluda, but they were not being assisted. They further stated that police officers were involved namely: 'kichwa' and Njoro' who were from Kawangware camp. He asked Mr. Rono who was in charge of Dagorretti Sub County who confirmed that the said motor vehicle was in his station. He however said he did not know the named police officers.

He called his colleagues at Muthangari police station who said there were no arrests of the two individuals Brian Nzenze and Erickson Aluda. He asked the ladies to go to the DCIO's office where an inquiry report was opened. A signal had been sent to all police stations to inform them of the missing persons. He came to hear of the matter again when the media highlighted the story implicating the three administration officers.

On cross-examination the OCPD said he had upon receipt of the complaint referred the matter to the DCIO to investigation as follows:

“A report was made to me on 9/6/16 with respect to this matter. The complainants come to my office directly. I summoned the counterpart in charge of Administration Police at Dagoretti. He came to my office directly and I directed that the complaint be dealt with by the DCIO on the 9/6/16. After handing over the matter to the DCIO, I did not deal with it again. The DCIO was supposed to deal with the matter to its logical conclusion. When the matter came up in the media in July 2016, I enquired from the DCIO the position of the matter and the DCIO confirmed that the investigations were still going on.”

As regards the death of Guka, the OCPD said:

“On 27/6/16, I recall receiving update of recovery of a dead body by Muthangari Police station. It is the responsibility of the OCS to investigate the matter. I get the results of the investigations in all times. I do not recall getting any results of investigations at the moment.”

He said that it was the DCIO who would have made request for CCTV data and the last time he had had an update was on 21/7/16.

DW7, police pathologist, Peter Muriithi Ndegwa, MBChB, University of Nairobi (1982), MMed.(Path) 2005 who conducted the post mortem on the body of Hermaton Idaki Midera identified by Jane Midera Skyle the mother of the deceased and neighbor Isabella Akosa Basar, reported an African male of 26 years, Height 172cm whose body had “cherry red discoloration with no physical injury of abnormality” and concluded that the cause of death was carbon monoxide poisoning. He explained the *cause* of death as follows:

“Carbon monoxide is [produced] partial combustion of carbon. It is a dangerous gas. A charcoal burner in a room which is not airy, exhaust of cars, or burning of substance without presence of air. Where logs are burned without oxygen it may happen. In this case of a burning of wood where some logs are not burned. Carbon dioxide has a higher affinity of hemoglobin. The hemoglobin is depleted quickly. Even a small amount of carbon monoxide, the hemoglobin will be depleted fast. The combination of carbon dioxide with hemoglobin is irreversible. Therefore, the carboxyhemoglobin will deny oxygen to the body and the tissues will die. It is a silent killer and it kills very fast. It is odourless; no colour and no taste. It is a good killer. There is no symptom. The person who gets it does not know. He just collapses and dies. Carbon monoxide can be administered by locking someone in a boot of a car or locking him in a house and light a Jiko (stove).”

On cross-examination the pathologist the carbon monoxide poisoning could have arisen where on “is locked in a room where there was incomplete combustion and if locked in a car boot or garage and the car is on. It could be exploited by criminals to kill by tying someone in a garage.” He stressed the need for investigations to establish the *manner* of death as his report did not make a finding on the manner of death and the police should have investigated all cases of death, murder, suicide or accident, as follows:

“The cause of death is established by a pathologist but the manner of death is established by investigations. [The killing could have been done elsewhere and the body transported to the roadside. There are no injuries in this case. If it was charcoal, there may not be any soot in the lungs. I examined the lungs and there was no abnormality detected except for the cherry red discoloration. Discolouration is a drastic finding. It was the basis of my conclusion. It is the effect of carbon monoxide. I have not had cyanide poisoning experience. I am not able to comment on that. I am also not able to comment on whether discoloration may be caused by death in cold situation. Cherry red colouration is usually carbon monoxide.”

He said he had not got any history that the deceased was epileptic. He said that the manner of death whether suicide or murder was for the police to establish by circumstantial evidence as the deceased's body was found lying along a road within Kawangware.

16. Upon application of the Petitioners, the Court summoned as witness **Safaricom Ltd.** representative who appeared as **(DW8)** [although really an independent witness] to testify on mobile phone data records for the persons involved in this matter. Witness complied with the provisions of sections 65(8) and 106B of the Evidence Act as regards production of electronic evidence in computer printouts. From the evidence of the Safaricom's expert, Mr. Simon Bitok, the Safaricom Law Enforcement- Liaison Officer, it was established that –

1. The mobile phone number 0795xxxxxxx for one Brian Nzenze was in active during the period subject of the court order - 31/5/16 -2/6/16.

2. Benson Makhoha Simiyu and Simon Mbau were at the same location between **1643 - 1659 hrs** on 1/6/16 in the area of Ngong Race Course. The 3rd Petitioner's mobile phone number registered in the mother's name, Sarah Muyera is at the same area as

Simiyu and Mbau but at different location [an **Area** cover 1km square and **loc** 100metres square] at **1659hrs on 1/6/16**.

3. Earlier between **1609 - 1628hrs**, Mbau and 3rd petitioner are in the same loc of Sokoni Arcade and Simiyu is in the same Sokoni Arcade area. At **1629 - 1630hrs** on 1/6/16, Simiyu and 3rd Petitioner move to a location at Kawangware area.

4. At **1636hrs** on 1/6/16 Kennedy Mburu Njoroge was at Sokoni Arcade until **1646** hrs when he moves to Kawangware.

5. At 1956hrs, Njoroge is at Uthiru Shell area. For 2hrs 15 minutes between 1649 – 1905hrs, Njoroge’s calls are ‘forwarded’ meaning he was not accessible and his location cannot be shown.

6. At 1950hrs Simiyu is at Kawangware where he stayed until 2016hrs. Kennedy Njoroge stayed at Uthiru shell area until 22.32hrs. Mr. Mbau is from 1940hrs shown to be with Simiyu at Kawangware and then at Uthiru Shell at **21.51hrs**.

7. At 2142 – 2232hrs, Mr. Njoroge is at Uthiru Shell, where he has been since 1956.

8. There is no phone record between 23.16 on 1/6/16 and 04.28 on 2/6/16.

9. On 2/6/16 at **04.28hrs** Simon Mbau is at Hombe Road and a minute later at **04.29hrs** he changes location to Uthiru shell meaning that he must have moved to Hombe road from Uthiru Shell where he was at from at **2151hrs** before returning at **04.29hrs**.

10. At 04.31hrs Mbau and Makhoha are shown at the same location at Uthiru Shell when Mbau makes a voice call to Simiyu. This is the same location that Njoroge last used his phone at 2232hrs with no phone activity thereafter until 0930hrs on 2/6/16, and it is not clear whether Njoroge moved from Uthiru Shell station that night.

11. There was a flurry of phone communication, seventeen communications - some only a minute apart - between Simiyu, Mbau and Njoroge on the night of 1/6/16 as follows:

1. 17.50 Voice call Mbau to Simiyu
2. 18.03 Voice call Simiyu to Mbau
3. 19.50 Voice call Mbau to Simiyu
4. 20.15 Voice call Simiyu to Mbau
5. 20.33 Voice call Njoroge to Mbau
6. 20.54 SMS from Mbau to Njoroge
7. 20.56 Voice call Njoroge to Simiyu
8. 20.58 Voice call Simiyu to Njoroge
9. 21.30 Voice call Simiyu to Mbau
10. 21.42 Voice call Mbau to Njoroge
11. 21.51 Voice cal Simiyu to Mbau
12. 21.55 Voice call Simiyu to Mbau
13. 22.17 voice call Mbau to Simiyu
14. 22.23 Voice call Simiyu to Mbau
15. 22.31 Voice call Njoroge to Simiyu
16. 22.32 Voice call Njoroge to Simiyu
17. 23.16 Voice call Mbau to Simiyu

The witness said that there must be a movement over a distance from one cell site code location to another; that all voice calls are captured; that codes cannot be captured when a phone is off but location can be established when phone is on but not in communication.

17. The DCIO (**DW9**) testified as the last witness of the Respondents upon a ruling of the Court made on 22nd December 2016 on an

objection to calling him by the Respondents, wherein the Court held pursuant to Rule 20 of the **Constitution of Kenya (Protection of Rights and Fundamental freedoms) Procedure Rules, 2013**, as follows:

“Determination

4. The proceedings before the Court are proceedings for an order of habeas corpus and evidence as to the whereabouts of the subjects of the application is crucial. The Court does not in this proceedings seek to find the guilt of innocence of any person who may have, or have had, the subjects in custody; that would be a matter for a criminal trial. In these circumstances, the evidence relating to the investigations into the disappearance of the subjects is important to the fair decision in the matter and, accordingly, admissible under Rule 20 (4) of the Rules of the Court.

5. No prejudice will be suffered by the Investigations Officer or the Respondents who may continue with investigations even after testifying in these habeas corpus proceedings and prosecute any persons who may, upon the investigations, be established to have committed any crime in the matter. Indeed, the Court may well order further investigations into the matter as happened in **Masoud Salim Hemed & Another v. Director of Public Prosecution & 3 others [2014] eKLR**.

7. The court has power to issue directions in the nature of habeas corpus under section 389 of the Criminal Procedure Code as follows.

“389. Power to issue directions of the nature of habeas corpus

(1) The High Court may whenever it thinks fit direct—

(a) that any person within the limits of Kenya be brought up before the court to be dealt with according to law;

(b) that any person illegally or improperly detained in public or private custody within those limits be set at liberty;

(c) that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;

(d) that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;

(e) that any prisoner within those limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within those limits be brought in on a return of cepi corpus to a writ of attachment.

(2) The Chief Justice may make rules of court to regulate the procedure in cases under this section. [Act No. 27 of 1961, Sch., L.N. 124/1964.]”

7. To exercise the powers of the court under section 389 of the CPC, the Court must establish the whereabouts of the subjects. The evidence of the Investigations Officer on his findings, even if only so far, as to where the subjects may be is crucial to that determination. The Investigations Officer is the person who, according to the OCPD, Kabete and OCS, Muthangari who testified hereinbefore, was responsible for dealing with the complaints lodged by the two mothers of the subjects of the habeas corpus petition.

8. The Report on investigations can only be adduced in evidence upon oath, and even if the investigation officer were to swear an affidavit he would liable to cross examination in accordance with the principle of fair hearing under Article 50 of the Constitution and by analogy of section 77(3) of the Evidence Act.

9. For the reasons set out above, I direct that the Investigations Officer will testify before Court to produce his report on investigations and be examined by Counsel for the Petitioners, without prejudice to any continuing investigations.

10. Order accordingly.

DATED AND DELIVERED THIS 22nd DAY OF DECEMBER 2016.”

18. The substance of the Investigator Joseph Ondoro’s report dated 23rd August 2016 and his testimony in court as **DW9** was that the matter had the status of *Pending Under Investigation* (PUI) but that so far the statements of the officers mentioned implicated as regards “what work they did on this date” including the motor bikes they had booked at Kabete Traffic on 1/6/2016 had checked out, and that the CCTV footage could not be accessed as the same had overrun due to storage capacity “when we went to check on the day the High Court ordered us to check”. On cross-examination he could not explain why he had not sought the CCTV earlier when on 9/6/16 the matter was referred to him by the OCPD Kabete for investigation or undertaken an investigation in the death of “Guka” which responsibility he pushed to the OCS Muthangari (DW3) in whose jurisdiction the body was found.

SUBMISSIONS

19. The Petitioners by their submissions dated 10th January 2017 urged their case as follows:

On the 1st June 2016 the 2nd and 3rd petitioners went missing in what is believed to be an unlawful act of arrest by administration police officers. Maureen Makhongo (PW1) testified that she knew the 3rd petitioner from the time he was in High School. She saw him at the back of the vehicle. She was consistent with her testimony that indeed she saw the 3rd respondent being carried in the AP vehicle. Dr. Muriuki (DW7) testified that he was a police surgeon who carried out autopsy. He received the body of Hamaton (Gugaa) on 1st July 2016 from Muthangari police. He concluded that Gugaa had died out of carbon monoxide poisoning due to the cherry colouration of the internal organs. On cross examination he said the cherry coloration was not exclusive to carbon monoxide poisoning but it could also occur from cyanide poisoning or death in a very cold place like refrigerator or ice. He stated that the police should have carried out further investigations to determine the source of the carbon monoxide and that there it was not right for the OCS Muthangari to close his file without conducting crucial investigations.

Mr. Simon Bitok (DW8) had testified and stated that he was an independent witness who was to produce telecommunication records of the 2nd and 3rd petitioners as well as those of the suspected police officers. He was a security officer who worked with Safaricom Limited. He produced telephone records as a bundle of exhibits (DEX-4). He testified that on 1st June 2016 at about 4.30pm the phone numbers belonging to Benson Simiyu, Kennedy Mburu Njoroge, Simon Mbau, Sarah Muyera were all being used in the same area in Kawangware, Nairobi. There had been intense communication between Makokha, Mbau and Njoroge on the evening of 1st June 2016 until dawn 2nd June 2016. At 1956 hours on 1st June 2016 all the way to 2232 hours the phone for Kennedy Njoroge was being used from Uthiru shell area and there was a lot of communication between Njoroge, Mbau and Makokha. At 0431 hours (dawn) on the 2nd June 2016 Benson and Simon were in the same location at Uthiru area. Whereas at 2052 Benson was at Ngong racecourse, there were no recorded activities on the phones for Benson, Kennedy and Simon. The next time their phones were active they were in different locations. Simon Mbau was in different places from Uthiru Shell location at 2313 on 1st June 2016 and 0428 on 2nd June. On the night of 1st June 2016 before 10.00 pm. Benson, Kennedy and Simon had their phones used in various locations thus denoting that they were not together until dawn at 0430 on 2nd June 2016. This creates the notion that considering the last time the 3rd petitioner's phone was used was at Ngong Race Course near the vicinity of Makokha, where he was collected for execution. The mission is accomplished when Makokha meets up with Mbau and Njoroge and they all switch off their phones thus their movement cannot be traced.

Further that Joseph Ondoro (DW 9) being the investigating officer was to go further and not only get the registered owner but also find the physical position of the motorcycle. He had never requested for a CCTV data. He confirmed that PW3 had mentioned 'Gugaa' as one of the key witnesses. The phone records support the testimonies of PW 1 and PW 2 to the fact that the arrest was made at Kawangware area using the same vehicle seen by PW 1 and PW2. The consistency of change in locations by the three officers at the same time with the 3rd petitioner shows he was in their company. The phone records for the 2nd petitioner could not be retrieved which gave a conclusion that he was in the same location with the police officers since the respondents have not produced evidence to contradict this fact. The evidence by the police that they were on patrol together until 10 pm is misleading since they parted ways on several occasions, and they teamed up at Uthiru. It is their submission that the police were trying to cover up something.

It is their submission that Article 22(1) of the Constitution grants any person the right to institute court proceedings if such a person is of the view that his right or fundamental freedom in the Bill of Right has been infringed. Further another person can bring proceedings on behalf of the person whose right in the bill has been infringed on. see *Masoud Salim & Anor v. Director of Public Prosecutions & 3 Others* [2014] eKLR. The respondents attempt to show that the 2nd and 3rd petitioners were not booked at any police station on the material day hence they could not be arrested or detained by the police is not conclusive enough. They urged the court to take judicial notice of the extra judicial arrests and executions, which have been attributed to the police officers in service. On the same day the 2nd and 3rd petitioners went missing a human rights lawyer Willie Kimani was arrested and illegally killed together with his clients. In *Willie Kimani's* case, the officers did not book the detainees at any police station. They urge the court to consider the dicta of Kimaru J. In *Law Society of Kenya & 3 Others v. Attorney General and Ors* [2016] eKLR where *information was relayed to the public to the effect that the three deceased petitioner's were not at the material time in their custody even after one of it's investigators had established from a witness that one of the deceased petitioners was detained in the container at Syokimau Chiefs camp*. Thus the absence of official booking in an occurrence book does not water down the evidence of the 2nd and 3rd petitioner's witnesses.

They have established the fact that the suspected AP officers made contact with the 2nd and 3rd petitioners, they arrested them and thus the burden of proving the arrest was lawful or that they released the detainees shifts to the respondents. The phone records provided circumstantial evidence that the arrests took place, and the presence of the police vehicle GK A 875X at the locus in quo and the police evidence that the suspected police officers had been allocated the vehicle and were in patrol at Kawangware is not coincidence. In *Masoud Case* (supra) where the petitioners have established arrest or detention by police the burden shifts to the police to explain the circumstances of the detention and the whereabouts of the detainees.

Indeed, they have established their case from the evidence that the 2nd and 3rd petitioner's were in the hands of the AP officers on 1st June 2016. The AP officers can only explain whatever became of them since the 3rd petitioners phone was last used in the same location with that of the two suspected AP officers Benson Makokha and Simon Mbau. Finally, the state should be made to bear the costs since the Constitution obligates the state to take necessary measures for protection and enforcement of individual rights and freedom.

20. The 1st and 3rd respondents raised the following points in submissions:

Francis Siema (DW1) had testified and stated that he was in charge of the armory and he kept records on firearm movement. On 1st

June 2016 he received an AK47 Rifle from APC Simon Mbau, which was faulty, and he replaced with a Czeska pistol. That the overwriting in the movement register was as a result of gun oil getting in contact with paper. The firearm movement register was produced as Dex- 1.

Joseph Lekalja (DW2) testified that on 1st June 2016 as he was on duty patrolling the junction area. He confirmed Simon Mbau left them at some point to go sort out an issue with the rifle, which was faulty. He said that the LOCK-UP team was a response team, which was to answer to any distress calls from Dagorretti area; his testimony was consistent and was corroborated by Benson and James evidence. Hannington Kirimi (DW4) testified that he had collected a body of one Harmetton Midera alias Gugaa on the 27th June 2016 and he referred it to autopsy. The mother of the deceased had told him he was epileptic. The autopsy had revealed he had died of carbon monoxide inhalation and he was in the process of forwarding the file to the magistrate to direct the closure of the file or to conduct an inquest when the current suit came up and he was called to furnish the petitioners with information on the death of Gugaa. He produced the OB for Muthangari police station containing all entries concerning this matter marked as Dex- 2.

Further they urged the court that the case was on a missing person. The complainants who are relatives of the missing persons were the proper people to file this suit and not the 1st petitioner. It was erroneous for the CEO of the 1st petitioner to depone the affidavit in support of the petition. No reason has been advanced why the complainants failed to move the court and advance the rights of their kin.

They have raised a question whether the 2nd and 3rd petitioners were arrested by the administrative police officers and whether they are responsible for the disappearance. The petitioners allege that the police arrested the 2nd and 3rd petitioners on 1st June 2016. PW1 and PW2 contradicted each other in their evidence at the DCIO offices in Kabete. PW1 had testified that both the police and motorcycle came from the same direction only the motorcycle was ahead whereas PW2 testified that the police vehicle and the motorcycle came from opposite directions but the police vehicle swerved and blocked the motorcycle. Pw1 testified in court that she saw three officers beating up the 2nd and 3rd petitioner's. In her statement PW 2 changed her statement in court and said three officers whom she knew very well were involved but the names 'Kichwa', 'Njoro' and 'Mureithi' remain alien to the respondents. There has been no evidence as to the place of arrest of the 2nd and 3rd petitioners whether it was at the market or at the main road. If it were in an open place how come nobody raised an alarm or even attempted to intervene, as it would naturally be. Further that despite Kawangware being near to the place of incidence nobody went to the camp to report or find out why the two men had been arrested. David the caretaker, Omollo or Patie who have been mentioned did not testify in court yet they put so much overreliance on 'Gugaa' who cannot be called as a witness. Further on 3rd and 7th when the complainants made reports to Muthangari police station, they never mentioned the issue of arrest by the said officers. The alleged eye witnesses (PW1 and PW2) are not credible witnesses since no independent witness was called to corroborate their evidence. The evidence by PW3 and PW4 lack probative value as it amounts to hearsay, which cannot be used as evidence. In the case of *Dominic Waweru v. Occidental Insurance Company Ltd (2015)* eKLR at para 17, the court observed that *hearsay in its non legal sense means gossip or rumor. It conveys that what is being reported is somehow second hand, adulterated and a remove from the original*. The same position was held in *Salim Awadh Salim & 10 others v. Commissioner of Police & 3 Ors (Nairobi High Court Petition No. 822 of 2008)* where the court held that the 1st petitioner did not have the capacity to depone to matters of fact and events that happened when he was not there. And in *Kenya Power and Lightning v. Fridah Kageni Julius [2014]* eKLR the court held that it was not the quantity of the evidence that matters in any case but the evidence adduced must be capable of proving the alleged facts on a balance of probability, must be relevant and capable of belief. They urge the court to find that there was no evidence to prove the arrest was undertaken by the Administrative Police Officers as alleged.

The Petitioners have not demonstrated beyond reasonable doubt that the police were involved. An order for Habeas Corpus should be made at the earliest opportunity for purposes of securing the evidence and the wellbeing of the detained persons as provided under Article 51(2) of the Constitution. The police officers mentioned to be involved in the case have demonstrated that they never arrested the said persons, which is supported by the OB entries at Kawangware AP Camp and Kabete Police station. They urge the court to find that the National Police Service exercises its mandate lawfully and this means that anything taken away from a person whose liberty is curtailed should be officially booked in. The occurrence books show the two petitioners were not booked in. and neither did the police take motorcycle registration number KMDU 813N.

In addition, the mobile phone records produced were of little or no probative value. There is a probability there was an incident necessitating the intense communication within their line of operation since they are charged with the duty to maintain law and order and are presumed to be on duty at all times. There is no law that bars the police from communicating to each other during or after duty or at any time. The 3rd petitioner's phone number was active on 1st June at 1933 hours around Kangemi road and at 1951 hours at Kawangware area. A person who has been arrested or detained in a police cell does not access his phone while in custody.

No evidence was tendered to show the petitioners owned the phone number mentioned. The line 0702001908 was registered under Sarah Muya and not Erickson Aluda Mambo the 3rd petitioner herein. The line 0795067962 could not be traced meaning it was not in use long before the incident happened. ***The petitioners have really tried to connect the police officers to the crime, implying their was an ulterior motive as to the filing of this case which was filed two months after the cause of action. This cause of action happened before the Willie Kimani's case, which made the complainants to blame the officers who are well known in the area.***

Further, that the petitioners have failed to discharge the burden of proof. They have made numerous allegations without any proof. Section 107(1) and (2) if the Evidence act is clear on who owns the burden of proof. In the *Masoud* case on burden of proof the court held that –

“The general burden in a habeas Corpus application must pursuant to Section 107 of the Evidence Act remain with the Petitioner. The petitioner must establish by competent and convincing evidence that the missing person, on whose behalf the petition was filed is under the custody of the respondents.”

In *Raila Odinga & Anr v. IEBC & Ors (Election petition no. 5/2013)* the court held that the petitioner should be under an obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. There is no evidence to prove that the 2nd and the 3rd petitioners were alive on 1st June 2016.

The purpose for *Habeas Corpus* is to relieve a person from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority as seen in the decision made in the Supreme Court in *MA. Estrelita D. Martínez v. Director General and Ors*. They urge the court to find that the respondents are neither detaining nor restraining the petitioners on whose behalf the petition for habeas corpus has been made, and therefore the petition should be dismissed. The same position was held in *Mariam Mohamed & Anor v. Commissioner of Police & Anor*. (2007) eKLR. Custody is very crucial so that when an order for habeas Corpus is made it should not be in vain. This is because court orders are focused, clear, enforceable and capable of being secured by applying the law of contempt. It is their submission that the 2nd and 3rd petitioners' are not in their custody. The prayer for habeas corpus cannot issue and thus the order for compensation automatically fails in the circumstances.

21. The petitioners filed a response to the 1st and 3rd respondents' submissions on 1/2/2017, and replied urging the court to find that the evidence by PW1 and PW2 has been corroborated by the respondents' own account that the two missing persons were at Kawangware. The demeanor of PW2 was that of a truthful and innocent minor who witnessed the arrest of her brother. There was difficulty in procuring witnesses as testified by PW2, PW3 and PW4. They took witnesses who were intimidated by the police and therefore refused to come forward. The death of Gugaa further made it difficult to get the witnesses records their testimonies for fear of their lives. The witnesses put this across during oral evidence in court. The three police officers testified that at 10.pm on the 1st June 2016 they all retired to their homes and they did not conduct any operation till the following day. This is false since the phone records show they were in constant communication. On 2nd June at 19.54 Ap Simon Mbau made two phone calls and that is the same time the 3rd petitioner' s phone was used at the same location. Since Benson Simiyu had talked to Augustine Mutegi there is a probability that he made the call to confirm that he had 'finished the job.' Augustine Mutegi had a bad relationship with Erick Aluda. Mr. Mutegi's daughter had a relationship with Erick, which led to a child out of wedlock. He had on several occasions threatened the 3rd petitioner with unspecified consequences. On the other hand, the 3rd petitioner's phone was last used on 2nd June 2016 at 1951 hours in Kawangware MGF area during that time Officer Simon Mbau's phone was being used. The investigating officer had a duty to establish what kind of incoming calls and text messages were made on 1st and 2nd June 2016 before the phone went off. Indeed the phone records clearly highlights the connection between the three AP officers and the 3rd Petitioner on 1st June 2016. In addition to the above, they urge the court to find that the complainants gave an elaborate account on the steps they took in futile search for the 2nd and 3rd petitioners, with the police who tried to conceal the wrongful acts of its officers. Section 4 of the LSK Act gives the 1st petitioner the mandate to act in public interest and Article 258(1) of the Constitution too. The official birth and death records are kept by the State. It would not have been hard for the respondents to call for such records to confirm whether such people existed or not. The respondents never challenged the existence of the 2nd and 3rd petitioners when the matter proceeded in court. Further the investigating officer failed in his role to investigate the matter. He never retrieved the CCTV footages within time to know what took place at the scene of crime and in 'Gugaa's' death. He also did not retrieve phone records of the accused officers and the 2nd and 3rd petitioners. He only got the motorcycle's logbook to show the lawful owner but that could not assist to know the location. The officer was never hindered by anything to investigate on the issue. Lastly, that the three police officers colluded and unlawfully caused the disappearance of the 2nd and 3rd petitioners. They urged the court to find that they have established the arrest and detention by the police therefore the burden then shifts to the police to explain the circumstances of the detention and the whereabouts of the detainee.

Issues for determination

22.. Having considered the pleadings, evidence and submissions before the Court, I consider that the issues for determination are as follows:

(a) Whether the petitioners have proved that the 3rd Respondent's officers had arrested the 2nd and 3rd Petitioners in breach of the rights of the petitioners.

(b) Whether the petitioners have proved that the Respondents had custody of the persons the subject of the habeas corpus application.

(c) Whether the petitioners are entitled to compensation, or any other appropriate remedy.

23. I have already dealt with the issue of competency of the 1st Petitioner to file these proceedings and I need only reiterate the provisions of Article 22 (2) (a) and (c) which grants *locus standi* for a petitioner on behalf of another who cannot sue and in public interest as follows:

“22 (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

a. A person acting on behalf of another person who cannot act in their own name;

b. A person acting as a member of, or in the interest of, a group or class of persons;

c. A person acting in the public interest; or

d. An association acting in the interest of one or more of its members.”

24. I am willing to accept the matter of disappearance of persons under police arrest or custody is a matter for public interest concern of the 1st petitioner Law Society of Kenya in terms of its rule of law objectives under the Law Society of Kenya Act, and that the two petitioners subject of the *habeas corpus* application are not in a position to sue and file depositions on their own behalf.

25. The court also notes the context of the filing of this suit where witnesses were said to be afraid of coming forward following the death of the Guka and the 1st petitioner had obtained an order that they seek witness protection orders for one Antony who was alleged to have been an eye-witness in the matter. I have no doubt that the circumstances of the case were of apt for invocation of the expanded standing provisions of the Article 22 (2) (a) and (c) of the Constitution.

Determination

Whether the petitioners proved that the subjects of the habeas corpus application were arrested by the Administration Police Officers and were in police custody.

International Law

26. Although Kenya may not have ratified the United Nations *INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE*, 2007 as to make it part of the law of Kenya under Article 2 (6) of the Constitution, global concern over disappearance of persons gives this matter the grave moment which must drive a deliberate effort to resolve cases of disappeared persons. Articles 1 and 2 of the Convention provide for protection against enforced disappearance for all circumstance so that the vice is indefensible by any justification or exceptional circumstances, as follows:

Article 1

1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Article 2

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The events proved by evidence in this case neatly fit the billing of an enforced disappearance within the Convention for which there is a total ban under the international treaty law.

Burden of proof in habeas corpus cases

27. As held in the case of *Masoud Salim Hemed v. AG*, Petitions No. 7 and 8 of 2014, the burden of proof in *habeas corpus* petitions lies with the petitioner until he proves detention by the respondent, upon which the respondent must prove the lawfulness of detention:

24. The general burden in a habeas corpus application must pursuant to section 107 of the Evidence Act remain with the petitioner. As stated in the case of MA. Estrelita D. Martinez v. Director General & Ors., supra, "the petitioner must establish any competent and convincing evidence that the missing person, on whose behalf the petition was filed, is under the custody of the respondents." In this case the petitioners were able to establish, and this was admitted by the respondents, the arrest of the subject by the police and the question is on whether the police had custody of the Subject at the time of the habeas proceedings.

25. Where detention of an applicant is established, the burden of proving the legality of detention rests with the State, see Archbold Criminal Pleading Evidence and Practice 2012 at p. 1767 paragraph 16-55. To place the burden on an applicant to prove illegality of the detention is to require the applicant to prove a negative.

In this case, unlike *Hemed* where arrest was admitted, the arrest and detention of the (2) petitioners subject of the proceedings is tenuous denied with the respondent's implicated officers indicating arrest only on the material day of wholly unrelated persons. The burden of proving the arrest by the police of the 2nd and 3rd petitioner rests wholly with the petitioners which they must discharge to the applicable standard of proof before the respondents would be put on their defence, as it were, calling for evidence in rebuttal or lawful reasons for the arrest and detention.

Exclusion of Hearsay statements implicating the police.

28. Much of the statements made by witnesses PW3 and PW4 involving the police officers Makhoka, Mbau, and Njoroge in the arrest and subsequent disappearance of the persons subject of the *habeas corpus* application was hearsay, and therefore inadmissible for purposes of proving the truth of these statements. Section 63 of the Evidence Act provides that oral evidence can be adduced as follows:-

63. Oral evidence must be direct

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

29. The PW 3, Eunice Kajairo mother of Brian Nzenze Petitioner No. 2 testified that she had on 1/6/2016 been informed by one David, her rental plot's caretaker, and a casual labourer/loader named Guka that her son Brian had been arrested with another person by AP officers, and that Guka had told her that the APs were Kichwa Njoroge and Muriithi. She also claimed to have been informed of the arrest by her daughter Muthoni (PW 2). However, the Court finds that Muthoni's evidence is unreliable because of her own acknowledgment that she had lied to the Police when she recorded her statement at Kabete Police station.

30. The two, David the caretaker and Guka the loader did not testify, the latter having been found dead along the Kawangware Nairobi road in controversial circumstances on 27/6/16 shortly after the alleged incident of 1/6/16. The statements of the said David and Guka and hearsay cannot be accepted as the truth of the allegation that the two persons subject of these *habeas corpus* proceedings were arrested by AP officers named as Makokha, Njoroge and Mbau.

31. PW 4 Sarah Khadi Muyera, mother of the 3rd petitioner, said that she got to know of her son's arrest from one Mark, a friend of her son who said that he had information from his friends that her son Erick had been arrested. Mark led the witness to a friend *boda boda* rider who informed her that, while carrying a passenger, he came across the arrest of the 3rd petitioner and when this passenger asked him to stop as he knew the 3rd petitioner. When the passenger enquired from the police the reason for his arrest the police allegedly said that two (petitioners 2 and 3) had killed a *Mzungu* (a white man). The said *boda boda* rider, **Antony**, told the witness that the police officers who arrested the petitioners were "Kichwa", Njoro and Mureithi". The rider also gave the witness the registration number of the Police vehicle involved.

32. Although the evidence of the two witnesses as to what others told them as to the arrests of their children cannot be taken as evidence of the truth of those allegations, their testimony is important as to the steps that they took upon the disappearance of the 2nd and 3rd respondent, which is confirmed by the evidence of the OCS Muthangari, AP Commander Dagorreti Sub-County and OCPD Dagoretti and the court must find proved on a balance of probabilities that, contrary to submissions by the respondents, the two petitioners existed and that they had disappeared on the 1/6/16 in circumstances the subject of this dispute. It is also evidence that those statements were made, as distinguished from their truth, to the witnesses and their contents may be tested against other evidence produced in the hearing.

Standard of Proof applicable to habeas corpus application

33. *Phipson on Evidence* 16th ed. (2005) at paragraph 6-54 and 6-55 discusses the application of the civil balance of probabilities standard of proof in cases of serious or criminal allegation as follows:-

"b) Serious or criminal allegations

6 - 5.4 Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof remains the civil standard. Otherwise, where there was a claim for fraudulent misrepresentation and breach of warranty, the court might hold that the warranty claim was proven and the fraud claim was not proven on the same facts. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, and thus to prove the allegation. Courts have for some time sought to grapple with the logical difficulty of requiring more cogent evidence to prove fraud, but still holding that the allegation must be proved on a balance of probabilities. The matter was explained by Lord Nicholls in Re H (minors) -

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on occurrence of the event was more likely than not. **When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.** A step father is usually less likely to have repeatedly raped and had a non-consensual oral sex with his stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the serious of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. **The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.**"

6 – 5.5 Whilst the House of Lords confined their decision to issue of care orders under s. 31(2) of the Children Act 1989, where it had to be shown that the child would suffer significant harm, it means unlikely that the court will in future apply any standard other than the civil standard in civil cases.

Re H does not mean that in every civil case where a serious allegation is made, that allegation will necessarily require proof somewhere approaching a criminal standard. Lord Nicholls explained that the heightened standard derives from the fact that “the more serious the allegation the less likely it is that the event occurred.” Attention should be paid to the nature of the allegation, the alternative version of the facts suggested by the defence (which may not be that the event did not occur, but rather that it occurs in a different way, or at someone else’s hand), and the inherent probabilities of such alternative having occurred. It may be the version of events which is inconsistent with innocence of wrongdoing.”

[emphasis added]

Assessment of Balance of Probabilities on the question of arrest of petitioners by AP officers

34. In this case, being mindful of the standard of proof on balance of probabilities to the appropriately heightened standard as held in **Re H (Minors)**, supra, and paying attention to **“the alternative version of the facts suggested by the defence”** in assessing the probabilities, it would appear to the court more probable that the AP Officers arrested the two petitioners than their version of events put forward by the respondents that they never arrested them and that they had been together all the while in a lockup team and only arrested (2) persons who were ferrying un-receipted items and only (2) motor cycles whose owners ran away on seeing the police.

35. Having assessed the probabilities, I find that the APs arrested the 2nd and 3rd petitioners because the following events make the alleged arrest by the police more probable than the converse:

(a) The eye witness event account of PW 1 Maureen Makongo who saw the AP officers one of whom PW1 knew as Makokha, the AP Sgt. in charge of police patrol in the area on the material date.

(b) The co-incidence of the motor vehicle Registration No. GKA 875X which PW2 indicated that was involved in the arrest and the fact that the said vehicle was being used on the particular date by the very officers who are alleged to have arrested the petitioners.

(c) Death of ‘Guka’ the loader who allegedly witnessed the arrest and gave the names of the police officers involved to the 2nd petitioners mother PW 3. As shown in the OB of 17/7/6/16 at Muthangari Police station, the matter of Guka’s information as to the arresting officers was recorded in the report by PW3 as follows:

“OB No.17/7/6/2016 -

*0855 hrs: Missing person Report: Eunice Kajairo a resident of Kawangware Mlango Soko c/o Tel.0726xxxxxx and ID. NO. [particulars withheld] who is reporting that on 1/6/2016 she was informed by the caretaker Mr. David that her son namely Brian Nzenze was arrested by AP Officers at around 16.00hours. She did not take any action since she was feeling unwell. **At around 19.00hrs. she went out and that is when she got more information from Hamaton Alias “Nguka” who told her that he saw the son being arrested.** She tried to inform his brother Mr. Erick Asava but he did not respond. The following day on 2/6/2016 at around noon, the brother called and that is when she informed him. It was not until yesterday when she went to Kilimani Police station but did not find his son. She then went to AP camp to Muthaiga police station since her son could not be traced. She needs police assistance.”*

His death in unclear circumstances 21 days later which is also reported to the same station should have put the OCS Muthangari and the DCIO who was investigating the case into inquiry. That the OCS was ready to close the case under section 386 of the CPC upon the establishment of the cause of death as carbon monoxide poisoning while the DCIO pushed his responsibility to investigate the matter to the OCS is clear case of buck passing which may only be explained as part of a cover-up. For why would the OCS in charge of a station under whose jurisdiction a body of a person named in the station’s OB report as having witnessed the arrest by AP officers of the petitioners only 21 days previously and the DCIO, to whom the matter of the alleged arrest of the petitioners was referred by the OCPD and his AP Commander counterpart for investigations, not investigate the circumstances of the death for foul play? The police pathologist only established by postmortem examination the cause of death as carbon monoxide poisoning and it was, as he testified, for the police to the establish by investigation the manner of death, whether innocent or criminal.

d) The report by the 3rd petitioner’s mother gave the 3rd petitioner’s mobile phone numbers as follows:

“OB. No.25/3/6/2016

0855hrs: Missing person: To the station is one Sarah Khadi of 07136xxxxxx a resident of Kawangware (56) who is reporting the missing of his son Errickson Alunda Mambo of 0702xxxxxx or 0721xxxxx a boda boda operator who was seen lastly on 31st May, 2016 but on 1st June, 2016, his wife namely Pauline Mutaka received a call from the man claiming that she should send some Ksh. 500 via his mobile phone that he had been arrested by some AP officers not known from which AP post also his motor cycle registration KMDU 813 and is also missing. He is now seeking police assistance.”

The mobile phone records placed the 3rd petitioner’s phone 0702xxxxxx with those of the AP Officers Makhoha, Mbau and Njoroge in the same location of **Sokoni arcade** and through adjacent location **Kawangware** at the time of arrest between **1609 – 1643hrs** on 1/6/16 and thereafter between **1643 - 1659hrs** at Ngong Race Course area of the sub-County Administration Police headquarters shortly after alleged arrest of the petitioners except for Njoroge who is at **1636hrs** was at **Sokoni Arcade** until **1646 hrs** when he moves to **Kawangware**. This coincides with the evidence of PW1 who stated that the arrest was effected by the three Officers but the said Njoroge rode away in the Petitioner’s motor cycle. The arrest and detention at the sub-County Head quarters is proved by this data record.

e) The mobile phone data record and the animated chatter of mobile communication between the 3 AP officers implicated in the arrest and their convergence at 4.30am at Uthiru Shell area where one of them, Njoroge, who allegedly rode off on the 3rd Petitioner's bike at the arrest had been for hours since 1956hrs. This contrasts with the evidence of the officers statement given by Makhoha on behalf of his fellow officers Kennedy Mburu Njoroge, Simon Kinyanjui Mbau, and Symon Rotich, and by James Kahari, orally in cross-examination and by affidavit and Lekadja DW1 that the 6 officers had been on patrol on 1/6/16 and not arrested the petitioners and had dispersed at 10.00pm that night. The phone data does shows the three officers implicated in the arrest working well past 10.00pm into the morning when they converge at 4.31am on 2/6/16 at Uthiru Shell.

f) The obvious inertia by the DCIO to conduct in investigations into the disappearance of the 2nd and 3rd petitioners by failure to obtain phone records and CCTV data for the area and related events of the death of Guka, despite the deference to him for the investigations by the OCS Muthangari, AP sub-county Commander and the OCPD for the area; and

g) The unconvincing case of lack of CCTV camera on the ground that they had been over run when the DCIO only went for these after the court order yet the OCS Muthangari indicated in evidence that when confronted with the alleged case of arrest by AP officers, he had deferred the investigations to the DCIO on 7/6/2016, only 6 days after the incident, because he had capability to access mobile phone data records for the persons involved. The court would accept the evidence of the in charge of the CCTV control centre that the police did not make any request for the relevant CCTV; only the IPOA and Attorney General had requested for the data albeit too late on 24th August 2016.

h) Alterations in the Firearms register, the AP Daily Arms Issue Book with regard to alleged return of the AK47 issued to Mr. Simon Mbau on 1/6/16 smacks of cover-up. The record clearly shows that the time in for the return of the AK47 rifle was defaced and awkwardly made to read 1226hrs. The time for his alleged colleagues Joseph Lekadja was also altered from a time within 16xxhrs (apparently 1655hrs) to an awkwardly written **2235hrs and that of Kennedy Njoroge from 1700hrs to 2200hrs and for James Kahari from 1700hrs to a ridiculous 2269hrs!** Interestingly, Simon Mbau is at **1543hrs** issued with what was alleged to be a replacement Ceska pistol which is returned at 0600hrs on 2/6/16, the date itself altered from 1/6/16, and the place of work is indicated as day patrol unlike the earlier issue of AK47 which was given for Lock up duties with Lekadja, Njoroge and Kahari at respectively 0621, 0622 and 0612 on 1/6/16. Interestingly, the Safaricom mobile phone data records places Mbau at Kawangware between **15.42 – 16.41hrs** on 1/6/16 in Kawangware before he moves to Ngong Sports club and race course areas. So he could not have signed for the replacement Ceska pistol at **1543hrs** at the AP sub-County Headquarters as shown on the firearms register! What occasioned the clear case of cover-up?

On the evidence presented before the Court, I find the petitioner's case more probable than the Defence version of events that they had not arrested the 2nd and 3rd petitioners and, consequently, find it proved on a balance of probabilities that the (3) police officers Sgt Makhoha Simiyu, Simon Mbau and Kennedy Njoroge arrested and detained the two petitioners subjects of these *habeas corpus* proceedings.

36. In accordance with Article 49(1) (f) of the Constitution, the arresting officers were obliged to produce the two petitioners before a court within 24 hours. This constitutional obligation was breached by the three police officers when they failed to produce the arrested persons before a court on the 2nd June 2016, and consequently, the 2nd and 3rd petitioners were detained without trial within the meaning of Article 29 of the Constitution. And the petitioners are consequently entitled to damages for unlawful arrest and detention without trial under Article 29 of the Constitution.

The subsequent disappearance of subject after arrest by the officers

37. The Indian case of *Pardi v. Madhya Pradesh & 2 others [2013]* involving the arrest by forest officers and subsequent disappearance of a girl is on point. Investigations must be conducted into this case of police cover up, to determine what became of the petitioners after they were arrested by the AP officers, and the persons involved in the cover-up with a view to criminal prosecution before the appropriate court.

38. *Who is going to carry out the investigations into the matter which involves the police officers?* In **Hemed**, this court considered that the involvement of the Kenya National Human Rights Commission and the Independent Police Oversight Authority (IPOA) would open the investigations to integrity and as this may still be the case today, the Court must grant liberty to the two bodies to join, if desired, any investigations directed by the court.

39. However, the court must lay the constitutional responsibility for the matter where it squarely belongs with the 3rd respondent Inspector General of Police for whom constitutional sanction for default or misfeasance of his duties may be imposed.

40. The Court cannot enter into speculation as to the petitioner's insinuations of possibility of killing of the 3rd Petitioner on account of personal differences with his alleged father in law named as Augustine Mutegi which was unlawfully sneaked into the matter through the submissions without any evidence adduced. As I observed in **Mombasa Constitutional Petition 76 OF 2012, SDV TRANSAMI KENYA LIMITED AND 19 OTHERS VERSUS THE ATTORNEY GENERAL & OTHERS**, the principle on submissions is that "***there shall be no evidence by submissions – that is, attaching to the written submissions filed in a matter evidence which ought to have been put in evidence by affidavit or oral testimony is invalid way of production of evidence. See decision of the Court of Appeal (Nambuye, Ouko and Kiage, JJA.) in Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited [2014] eKLR.***" The Court must, therefore, reprimand the Counsel for the petitioners for the mischievous attempt to poison the mind of the Court without admissible evidence being laid before it.

Constitutional and statutory responsibility with regard to the disappearance of the petitioners.

41. The Inspector of Police is under Article 245 of the Constitution mandated with the command over the National Police Service established under Article 243 with functions prescribed in Article 244; and the National Police Service Act by section 28 of National Police Service Act 2011 establishes the Directorate of Criminal Investigation one of whose functions under s. 35 (b) of the Act is to:

“(b) Undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime and Cybercrime among others.”

42. Under section 24 (e) of the National Police Service Act “investigation of crimes” is listed as one of the functions of the Kenya Police Service, one of two Policed Services making together with the Administration Police Service, the National Police Service under the command of the 3rd Respondent. It having been demonstrated by the evidence adduced before the court that the police officers responsible for the investigation of the disappearance of the petitioners and the apparent homicide of “Guka” Hamaton Ibaki, respectively by the DCIO and the OCS Muthangari Police Station, pursuant to section 386 of the Criminal Procedure Code, the Court may, under Article 23 of the Constitution, properly issue a Judicial Review order to compel the 3rd respondent through his relevant offices to perform their constitutional and statutory duty relating to the investigation of crime, as it concerns the petitioners 2 and 3 herein. The Court must order by a suitable Judicial Review order of Mandamus to compel the 3rd respondent IG and his Directorate of Criminal Investigation established under Police Act and other responsible officers to perform their duties under the constitution and the law.

43. As a Rule of Law country it must suffice to order for Mandamus to compel Police to investigate the matter and take appropriate action consistent with the finding of the investigations. The practical reality where impunity abounds may, however, not inspire too much confidence and since the Court must give Orders, not suggestion or advice, needless to state, should the IG and the Director of Criminal Investigation or other relevant officer, abscond their statutory duty or refuse to carry out the investigation as directed by the court by the judicial review order of Mandamus suitable sanction of the Court may be invoked, not the least of them being Article 245 (7) petition for removal of the IG and prosecution for contempt of court under the Contempt of Court Act, 2016.

Opportunity for the implicated police officers to be heard in the matter.

44. As noted in paragraph 6 of the court’s **Ruling of 9th August 2016**, two officers implicated in the matter, namely the Sgt. in charge Benson Makhoha and James Kahari of the lockup team and the driver of the Motor vehicle GKA 875X together with the AP Commander for the sub-county filed replying affidavits and were cross-examined on by the Counsel for the Petitioner before the Court:

*“6. The respondents filed three Replying Affidavits by Inspector of Police Daniel Miruka, Administration Police Officer Benson Simiyu Makokha and Administration Police Officer James Kahari, **the substance of which is to deny ever arresting and detaining the 2nd and 3rd petitioners on the 1st June 2016 as alleged by the petitioners or at all, and that they had only got the information about the matter on 21st July 2016 from media reports that the petitioners had filed a petition in the High Court. Upon request by the counsel for the petitioners, the deponents of the three replying affidavits were cross-examined before the court on their contents.**”*

45. The police officers implicated had clearly an opportunity to be heard in the matter and together took benefit of that opportunity by granting Sgt. Makhoha authority “to plead and act” for them whereupon he filed the Replying Affidavit on their behalf, whether by affidavits filed by Makhoha. They, however, did not make oral testimony before the Court at the oral hearing as directed by the Court and they cannot be heard to say that they were not heard or given an opportunity to be heard in this matter.

CONCLUSION

46. The High Court as the Constitutional Court has a duty under Article 23 of the Constitution to address denial or violation or infringement of, or threat to rights and fundamental freedoms in the Bill of Rights. The Judiciary is the custodian of the Judicial authority of the People of Kenya under Article 1 (3) (c) of the Constitution must take lead role, when applying and interpreting the Constitution, to uphold and promote the National Value and principle of the Rule of Law entrenched under Article 10 of the Constitution and, through it, help combat the spectre as well as reality of impunity in the State and society of Kenya.

47. It is the height of impunity if Police Officers who are constitutionally charged with the duty to maintain law and order and to enforce the law for the protection of life, liberty and property and observation of the human rights and freedoms were to arrest persons for whatever transgressions of the law only for such arrested persons to subsequently disappear and the Police to deny ever arresting such persons, cover up their actions and get away with it. It is cheating Justice.

48. Not only should such Police Officers be held personally liable in a criminal process for their offences against the person but the State must be held vicariously liable for the unlawful actions of its employees.

49. While the adjudication of the criminal aspect of the matter for conviction and punishment as appropriate of such officers as are ultimately found responsible must take place consistently with the right to fair trial through the Criminal Courts established for the purposes, the liability of the State for the wrongful violation of rights arising out of the actions of its officers must be determined under proceeding in that behalf before a Civil Court. See *Hemed’s case*, supra, in which the Petition only prayed for the order of *habeas corpus*.

Prayer for compensation

50. In this case the petitioners have sought compensation violation of rights and fundamental freedoms of the petitioners in addition to the prayer for production of the persons or bodies of the persons who are the subject of *habeas corpus*. Proceedings. As prescribed in section 193A of the Criminal Procedure Code:

“193A Concurrent Criminal and Civil Proceedings

*Notwithstanding the provisions of any other written law, **the fact that any matter in issue to any Criminal Proceeding is also***

directly or substantially in issue to any pending Civil proceedings shall not be a ground for any stay, prohibition or delay of the Criminal Proceedings.

[Act No. 5 of 2003, section 79]”

51. The Court has found that the arrest of the 2nd and 3rd Petitioners by the Administration Police Officers named Simiyu Makokha, Simion Mbau and Kennedy Njoroge has been proved on a balance of probabilities to the required high standard of proof applicable to this Petition. The arrests have not been shown to have been justified on account of investigation of any crime, and were indeed denied, and the Court must find that the arrests were arbitrary, unlawful and unconstitutional violation of the victims’ rights to liberty and to protection from detention without trial, under Article 29 of the Constitution.

Appropriate relief

52. In accordance with section 193A of the Criminal Procedure Code, criminal prosecution and investigating for that purposes are unaffected by this petition. The 2nd and 3rd Respondent – DPP and Inspector General of Police - are at liberty and obligation under the Constitution to investigate and prosecute such crimes as are established by such investigations. In view of the fact that the officer charged with investigation in this matter, the DCIO Kabete, demonstrated reluctance or inability to investigate the matter despite report and deference to him by the officers in charge of station, (OCS) Muthangari police station and the Police Division Commander, Kabete and the Administration Police Sub-County Commander, Dagoretti, the Court must in devising an appropriate order for the matter before it, within the mandate of Article 23 of the Constitution, make a prescription of the Judicial Review order of **Mandamus** to compel the 3rd respondent Inspector General of Police investigate the matter with a view to criminal prosecution of persons found culpable of any offences by the said investigation.

53. Judicial review must be available where a public body fails to exercise a constitutional or statutory duty. The Court exercises judicial authority of the people of Kenya, and the question in the mind of the court when considering appropriate must be what would the people of Kenya do if they had to exercise their Sovereign judicial authority directly? They would direct the DPP and the Inspector General of Police to act pursuant to their constitutional mandate. The Court in exercise of the delegated judicial authority of the people of Kenya under Article 1 (3) (c) of the Constitution hereby directs the DPP and the IG, the 2nd and 3rd respondents to conduct investigations as appropriate and to bring to justice the persons found to have participated in the disappearance of the 2nd and 3rd petitioners.

Compensation for breach of constitutional rights

54. Unlike in *Hemed*, supra, there was properly before this Court an application for compensation for breach of constitutional rights of the subjects of *habeas corpus* herein. For the violation of the 2nd and 3rd Petitioners’ rights under Article 29 of the Bill of Rights on (1) **arbitrary arrest and deprivation of freedom** the court shall award Ksh.2,500,000/-, and (2) **detention without trial**, that is unlawful detention without being produced in court for trial in accordance with the Constitution and the law, the sum of Ksh.2,500,000/-, making the total sum of **Ksh.5,000,000/= for each of the two petitioners**.

55. The 3rd respondent Inspector General of Police *through his officers of the Directorate of Criminal Investigations* must be directed by an order of judicial review to specifically carry out their constitutional and statutory mandate for the investigation of crime by conducting full and in-depth investigations into the disappearance of the 2nd and 3rd Petitioner, following arrest by his Administration Police Officers and thereafter, in conjunction with the 2nd Respondent, to prosecute all persons found capable or complicit in the matter and or otherwise close the Investigations in accordance with the Law.

ORDERS

56. Accordingly, for the reasons set out above, the Court makes the following orders on the Petition dated 21st July 2016:

(1) The Petitioner’s Petition herein for an order of **habeas corpus** is declined as there was no evidence that the Respondents **presently** had custody of the 2nd and 3rd Petitioners.

(2) On a balance of probabilities to a standard of proof appropriate to the serious allegation of deliberate **disappearance** of a person, the Court finds that the 2nd and 3rd petitioners were on the 1st June 2016 arrested by Administration Police Officers Benson Simiyu Makhoha, Simon Mbau Muriithi and Kennedy Mburu Njoroge and thereafter disappeared in unclear circumstances, which must be investigated and appropriate action taken in the circumstances.

(3) The 3rd Respondent shall pay on behalf of the National Police Service of the Government of Kenya **Ksh.5,000,000/= each** for the two petitioners - the 2nd and 3rd petitioners - to be paid to petitioners’ respective mothers, Beatrice Kajairo and Sarah Khadi Muyera – as compensation **for breach of the petitioners’ rights Article 29 of the Constitution against deprivation of freedom arbitrarily and without just cause, and detention without trial upon arrest by the Administration Police Officers**.

(4) A Judicial Review **Order of Mandamus** will issue to the 3rd Respondent Inspector general of Police directing him to carry out their constitutional and statutory function of investigation of crime under Article 245 of the Constitution, and section 24 (e) of the National Police Service Act, and to the 2nd Respondent Director of Public Prosecution thereafter to consider the results of the investigation and to prosecute persons found culpable for any offence.

(5) For avoidance of doubt and in deference to the 2nd Respondent DPP’s independence, authority and discretion under Articles 157

(10) and (11) of the Constitution to consider whether or not any prosecution is in the public interest and interests of the administration of justice, **the Court does not make any orders for the prosecution of any person implicated in these proceedings.**

(6) The costs of the Petition shall be paid by the 3rd Respondent to the Petitioners.

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EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF APRIL, 2018.

E. C MWITA

JUDGE

Appearances

Mr. Amol with Mr. Otieno, Advocates for Petitioners.

Ms. Kamande with Ms. Mwangi, State Counsel for the 1st and 2nd Respondents.

N/A for the 2nd Respondent.