



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 604 OF 2013**

**BETWEEN**

**ESTHER WAITHERA KIBE**

*(Suing as Administrator of the Estate*

*of*

*William Gitonga Njau (Deceased).....1<sup>ST</sup>*

**PETITIONER**

**MICHAEL NJOROGI GATAUWA**

*(Suing as Administrator of the Estate of*

*Joseph Thiong'o Njoroge (Deceased).....2<sup>ND</sup>* **PETITIONER**

**MARY NYAMBURA MUNGAI**

*(Suing as Administrator of the Estate of*

*Joseph Maina Mwangi (Deceased).....3<sup>RD</sup>* **PETITIONER**

**MERCY NYAMBURA MWAURA**

*(Suing as Administrator of the Estate of*

*Harry Gideon Thuku Kimemia (Deceased).....4<sup>TH</sup>* **PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners have filed this Petition in their capacity as Administrators of the estates of William Gitonga Njau, Joseph Thiong'o Njoroge, Joseph Maina Mwangi and Harry Gideon Thuku Kimemia (the deceased persons) and according to them, Administration Police Officers arbitrarily and unlawfully killed the said persons and by so doing, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are vicariously liable for violating certain provisions of the Constitution particulars of which shall be rendered herebelow.

### **Factual background**

2. The Petitioners allege that on 10<sup>th</sup> March 2010, the deceased persons named above were shot dead by Administration Police Officers along Naivasha Road, Kawangware within Nairobi County for no clear reason.

3. Consequently, seven Administration Police Officers were charged with the offence of murder of the deceased persons and in a Judgment dated 18<sup>th</sup> December 2012, the High Court in **Republic v Ahmed Mohamed Omar and 5 Others Criminal Case No. 14 of 2010** convicted 6 of the 7 Administration Police Officers of the said offence of murder and on 19<sup>th</sup> December 2012, they were all sentenced to death.

4. The Petitioners thereafter lodged the present Petition dated 30<sup>th</sup> December 2013, in which they claim that the Police Officers violated the deceased persons' right to life and freedom of security and integrity of the person, particularly the prohibition against cruel and degrading treatment. They also hold the Respondents liable for damages resulting from the alleged unlawful killings.

5. In the meantime, the condemned officers had appealed their convictions and sentences to the Court of Appeal which on 27<sup>th</sup> June 2014, delivered a Judgment in **Ahmed Mohamed Omar and 5 others v Republic Criminal Appeal No. 414 of 2012** where it overturned the decision of the High Court and instead held that the accused persons had acted in self-defence and therefore quashed the murder conviction and set aside the death sentences before ordering the release of the Administration Police officers.

### **The Petitioners' case**

6. The Petitioners rely on four supporting affidavits sworn by each Petitioner, both dated 30<sup>th</sup> December 2013 and I note that although all the parties herein entered consent to file their written submissions on 16<sup>th</sup> February 2016, the Petitioners failed to do so and accordingly, I ordered that Judgment be delivered based on the matters on record.

7. It is the Petitioners' case therefore that at the time of their deaths, the four deceased persons were taxi drivers in Nairobi County and on 10<sup>th</sup> March 2010, as they were peacefully carrying out their business on Naivasha Road in Kawangware, they were arbitrarily and unlawfully shot dead by Administration Police Officers. They claim that the deceased persons did not provoke the said officers and there was no reasonable justification for the act of shooting them.

8. With regards to the violation of constitutional rights, the Petitioners claim that the arbitrary and unlawful shooting of the deceased persons was in violation of their fundamental right to human dignity, the right to security of the person especially the right not to be subjected to any form of violence, cruel, inhuman or degrading treatment and the right to life as contained in the repealed and current Constitutions.

9. The Petitioners also allege that the unlawful shooting was in violation of the statutory powers of the Administration Police Service under the repealed **Administration Police Act, Cap 85 of the Laws of Kenya**.

10. The Petitioners further state that once the seven (7) Administrative Police Officers were charged with the murders of the deceased persons in **Republic v Ahmed Omar & 6 Others High Court Criminal**

**(Murder) Case No. 14 of 2010** and on 18<sup>th</sup> December 2012, the High Court having found 6 of the 7 accused persons guilty of murder and accordingly sentenced them to death, then the High Court's decision illustrates that the officers unlawfully and without any reasonable justification shot the deceased persons and violated their rights. They therefore seek special damages in funeral expenses as follows:

- a) 1<sup>st</sup> Petitioner- Kshs.151, 050
- b) 2<sup>nd</sup> Petitioner- Kshs.126, 330
- c) 3<sup>rd</sup> Petitioner-Kshs.166, 700
- d) 4<sup>th</sup> Petitioner-Kshs.171, 205

11. In addition, the Petitioners' state that as a result of the arbitrary and unlawful killings of the deceased persons, they have suffered loss as dependants of the said deceased persons and claim general and exemplary damages in that regard.

12. In her affidavit, the 1<sup>st</sup> Petitioner, specifically avers that her deceased husband was supporting his immediate family, his parents and his siblings, all of whom have lost the right of dependency and thus claim the same. The 2<sup>nd</sup> Petitioner also states that his deceased son had several dependants including his parents, his wife, son and siblings. The 3<sup>rd</sup> Petitioner deposed that she and her children were all dependants of her deceased husband. Likewise, the 4<sup>th</sup> Petitioner avers that the deceased had five dependants-her and her 4 children.

13. The Petitioners for the above reasons, seek the following prayers:

***a) A declaration that the arbitrary, callous, brutal and fatal shooting of the peaceful and unarmed deceased persons by Administration Police Officers was a gross violation of their fundamental right to life and fundamental freedom as to security and integrity of the human person particularly the prohibition of all forms of violence against the person including cruel, inhuman and degrading treatment in violation of Sections 70(a), 71(1) and 74 (1) of the former Constitution (equivalent to Articles 26(1) and (3); and 29 (c) and (f) of the Constitution of Kenya, 2010).***

***b) General damages for violation of the fundamental rights of the deceased persons to life, to the security and integrity of the human person particularly freedom from cruel and inhuman treatment and for loss of expectation of life and loss of dependency of the estates of the deceased persons.***

***c) Special damages in funeral and related damages.***

***d) Exemplary/vindictory/aggravated and/or punitive damages for arbitrary, callous, oppressive and highhanded conduct of the police officers.***

***e) Costs of the petition.***

***f) Interest on all monetary awards.***

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case**

14. The Respondents rely on a replying affidavit sworn on 2<sup>nd</sup> October 2014 by Mr. Fred Mwei, the Principal Deputy to the Deputy Inspector General of Police (Administration Police Service), as well as their written submissions dated 8<sup>th</sup> July 2016.

15. The Respondents oppose the Petition on the following grounds:

*a) The alleged violators being police officers were acting in self-defence as provided under Section 17 of the Penal Code Cap 63 of the Laws of Kenya and Section 20 of the Police Act Cap 84 of the Laws of Kenya.*

*b) The Petition should be dismissed for failure to plead with precision the constitutional provisions which the respondents have allegedly violated being the rights under Articles 27(1), 28 and 29 of the Constitution.*

*c) The Petitioners are trying to revive a matter that was already adjudicated upon where the alleged violators of the deceased persons fundamental human rights and freedoms were tried in the High Court in Republic v. Ahmed Mohamed Omar and Others High Court Criminal Case No. 14 of 2010 and in the Court of Appeal in Ahmed Mohamed Omar and Others v. Republic Criminal Appeal No. 144 of 2012 where the murder conviction was overturned.*

*d) The grounds that the Petition is premised on are speculative.*

16. The Respondents further urge that the Administration Police Officers acted in self-defence when they shot the deceased persons and directed the Court's attention to **Section 17** of the **Penal Code**, which sets out the common law principles of self-defence. They also cite **Palmer v. Republic [1971] A.C, R. v Deana 2. Cr. APP. R. 75, CCA; Alingal Kunhinayan v Republic [1905] I.L.R 28 Mad. 454;** and the Kenyan case of **Republic v Joseph Waweru Macharia Criminal Case No. 58 of 2010** where the courts recognised that self-defence was allowed in instances where a person shows that the apprehension of danger, or the danger facing him was imminent or serious to require an action to avert it and that the person need not be struck in order to strike back in self-defence.

17. The Respondents also submitted that in the High Court and the Court of Appeal, the officers presented evidence that they had identified themselves in front of the deceased persons as Administration Police Officers and commanded them to surrender but they refused to do so. In addition, they submitted that the said officers shot twice in the air, yet the deceased persons, who were armed, continued to advance towards them. It is furthermore the Respondents' case that there were several weapons found next to the bodies of the deceased persons which fact had made the Administration Police Officers reasonably believe that their lives were in danger hence the action that they took.

18. The Respondents therefore contend that the officers acted in self-defence, in line with **Section 28** of the **Police Act** and the **Kenya Police Manual, 1980** which provide that a police officer may use his firearm where he has reasonable grounds to believe that he or other persons are in danger of grievous bodily harm.

19. In addition, according to the Respondents, the Petitioners have not set out, with precision and particularity, the alleged violations of the Constitution. They also argue that the Petitioners have not met the principles for setting out constitutional violations outlined in the **Anarita Karimi Njeru v Republic (1976-1980)** as restated in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012** because their Petition and supporting affidavits only allege violations of **Articles 26(1) and (3), 27(1) and (2), 28 and 29(c) and (d)** of the **Constitution** but does not set out the particulars and manner in which the said rights and freedoms were violated or infringed upon.

20. The Respondents also contend that several witnesses in the High Court and the Court of Appeal rebutted the alleged infringement of rights that the Prosecution had put forth in the trial and appeal, respectively.

21. The Respondents further urge that if the Court finds that the alleged violations were not set out to a reasonable degree of precision then the Petition does not disclose a cause of action and must be dismissed. They submitted that in the alternative, if the Court finds that a violation of **Article 26(1)** of the **Constitution** has been precisely stated, the same was rebutted when the accused persons raised their

defence of self-defence.

22. In conclusion, the Respondents submitted that since the Petitioners have failed to establish a case against the Respondents they are not entitled to general or exemplary damages in compensation and that the claim for damages for loss and suffering is too remote in a constitutional Petition and the same should have been filed as a civil claim under the **Fatal Accidents Act, Cap 32** of the **Laws of Kenya**.

23. For the above reasons, the Respondents pray that the Petition should be dismissed.

### **Determination**

24. I have read the pleadings and written submissions and the following are the issues for determination:

- a) *Whether the Petitioners have precisely set out their cause of action in the Petition.*
- b) *Whether the Respondents violated **Sections 70(a), 71, 74(1)** of the **Repealed Constitution** or **Articles 26(1) and (3), 27(1), 28 and 29(c)** of the **Constitution 2010**.*
- c) *Whether the Respondents are liable to pay the Petitioners special, general and exemplary damages.*
- d) *What remedies, if any are available to the Petitioner?*

As issues Nos. (a) and (b) are inter-related, I will address them together.

#### **i. Whether the Petitioners have precisely set out their cause of action in the Petition and whether Sections 70(a), 71, 74(1) of the Repealed Constitution and Articles 26(1) and (3), 27(1), 28, 29(c) of the Constitution 2010 have been violated.**

25. In the above regard, the crux of the Respondents' case is that the Petition must be dismissed because the Petitioners have not precisely set out their cause of action to warrant any intervention by this Court and they hold the view that the Petitioners have only listed the provisions of the Constitution that they allege the Respondents have violated but have failed to describe the particulars and the manner in which the Respondents have violated them. To the contrary, the Petitioners state that the arbitrary and unlawful shooting of the deceased persons was in violation of theirs and the deceased persons' fundamental right to human dignity, the right to security of the person especially the right not to be subjected to any form of violence, cruel, inhuman or degrading treatment and the right to life as contained in **Sections 70(a), 71 (1) and 74(1)** of the **former Constitution** and **Articles 26(1) and (3) and 29 (c) and (f)** of the **Constitution, 2010**. That therefore the Petition is sound and the Court should proceed and determine it based on those facts.

26. On my part, I note that in **Anarita Karimi Njeru (supra)**, the High Court addressed the question of precision of allegations of violations of the Constitution by stating;

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

27. While **Anarita Karimi** was a pre-2010 Constitution decision, the same position was amplified by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012; [2013] eKLR**, where the Court held that-

*“(41)... In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with*

***exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”***

28. In that context, I have analysed the Petition and the Affidavits sworn by the Petitioners and I note that the title of the Petition indicates that the Petitioners allege a contravention of **Sections 70(a), 71 (1) and 74 (1)** of the **former Constitution** which are almost equivalent to **Article 26(1), (3), 27 (1), (2), 28 , 29(c) and (d)** of the **Constitution 2010**. At paragraph 6 of the Petition, the Petitioners claim that the unlawful shooting of the deceased persons was in violation of the latter’s right to human dignity, right to security of the person particularly the right not to be subjected to any form of violence, cruel, inhuman and degrading treatment and the right to life as guaranteed in the former and current Constitutions. This assertion is also replicated in prayer (i) thereof.

29. In addition the above allegations are recorded at paragraphs 6, 7 and 8 of the supporting affidavits of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners, respectively.

30. As I noted earlier, the Petitioners did not file written submissions, despite entering a consent with the Respondents to do so. Further, the allegations as raised in the Petition are very similar to the allegations raised in affidavits and on the issue of the violation of the right to life, dignity, the right to security of the person especially the right not to be subjected to any form of violence, cruel, inhuman or degrading treatment, the Petitioners argue that the High Court’s Judgment in the murder trial of the 6 Administration Police Officers should be applied to show that indeed the said Police Officers unlawfully killed the deceased persons because they were found guilty of murder.

31. To my mind, the above statements in both the Petition and the Supporting Affidavits are sufficient for this Court and the Respondents to know the Petitioners case. I do not understand the **Annarita Karimi case** to have demanded more than that of any Petitioner filing a constitutional petition hence the rider in **Mumo Matemu’s case** that mathematical precision is not expected of such a pleading.

32. Having so noted, what is the evidence of the allegations made with regard to the violations of **Section 70(a), 71, 74(1)** as well as the provisions of **Articles 26(1) and (3) 28 and 29(c) and (f)** of the **Constitution 2010**? The only evidence so far as I can see is a reliance on the Judgment of the High Court in **Criminal Case No.14 of 2010** which was later overturned by the Court of Appeal which upheld the defence of self-defence as pleaded by the Administration Police Officers. It must in that regard be noted that the High Court Judgment was subsisting at the time the Petition was filed but was overturned during pendency of the Petition.

33. This then leads to the question whether a Judgment in a criminal case is conclusive evidence of the violation of rights in a constitutional petition and as I understand the law, there are differences in the standard of proof applied in criminal cases and in constitutional cases. In criminal cases, the standard of proof is beyond reasonable doubt and in constitutional cases, like civil cases, the standard of proof is on a balance of probabilities. Further, the **Evidence Act Cap 80** of the **Laws of Kenya** addresses the status of judgments as evidence as **Section 44 (1)** provides thus:

***“A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.”***

In addition, **Section 47A** provides:

***“A final judgment of a competent court in any criminal proceedings which declares a person to be guilty of a criminal offence shall, after expiry of the time limited for an appeal against such***

***judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

34. The above provisions indicate therefore that a Judgment is only conclusive of the matters that are before a particular Court and to the extent relevant to any subsequent proceedings including on the guilt of a convicted person. Further, in the case of **Zeituni Juma Hassan Petitioning on behalf of the Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 Others [2014] eKLR**, Majanja J dealt with a similar question as in the one before me and where the Petitioner in that case had argued that the Respondents unlawfully violated her deceased husband’s right to life and freedom from inhuman and degrading treatment. Her deceased husband had died while in custody at a Migori police station. The Judge found that “...*an acquittal in a criminal case does not extinguish civil liability....An acquittal is not proof of innocence nor does it operate as a discharge from liability in civil proceedings.*” I note that the Petitioner in that case had however testified and produced two witnesses, including a doctor, who had carried out a post-mortem examination on the deceased person whereas the Respondents also presented witnesses including the Police Officers that were in-charge of the Migori police station at the material time. The Court then evaluated the evidence before it and addressed the issue whether the Respondents had violated the deceased’s constitutional rights.

35. I agree with the findings of the learned Judge but on the contrary, the facts and submissions in the case before me differ from the above mentioned case because the Petition is quite brief and the Petitioners did not present evidence or arguments other than the Petition itself, to show that the Respondents violated the deceased person’s rights. No witnesses were called and no submissions were made to support the bare facts in the Petition. More fundamentally, the decision that was relied on was overturned by the Court of Appeal which, in upholding the defence of self-defence, found that the deceased taxi operators triggered the actions that led to their deaths. How then can the High Court Judgment, later overturned, without any further evidence be conclusive evidence of violation of fundamental rights as alleged?

36. Without saying more, there is not credible evidence placed before this Court to support the bare facts in the Petition and therefore issues Nos. (i) and (11) above must be answered in the negative.

**ii. Whether the Respondents are liable to pay the Petitioners special damages, general damages and exemplary damages**

37. The Petitioners seek general damages for the violation of fundamental rights, special damages in funeral and related expenses (1<sup>st</sup> Petitioner-Kshs.151,050, 2<sup>nd</sup> Petitioner-Kshs.126,330, 3<sup>rd</sup> Petitioner-Kshs.166,700 and the 4<sup>th</sup> Petitioner-Kshs.171,205) as well as punitive damages for the arbitrary conduct of the police officers. To the contrary, the Respondents urge that the Petitioners’ claim for damages is too remote and they should have instead filed a suit under the **Fatal Accidents Act**.

38. From what I have stated above, the claim for damages as a result of the violation of constitutional rights will not succeed because the Petitioners have not proved their claim to the required standard and I need not delve into the matter any further and the next question to answer is whether the Petitioners may only have a claim under the **Fatal Accidents Act** as argued by the Respondents.

39. In that regard, **Section 3** of the **Fatal Accidents Act** provides that an action can be brought under the Act;

***“Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death was caused under such circumstances as amount in law to felony.”***

40. **Section 4** also provides for the claims under the Act to be brought for the benefit of the family of the deceased. Further, **Section 6** stipulates that funeral expenses may be awarded by way of damages in

certain cases. In this instance, it is clear from the record that the Petitioners are also seeking damages for funeral expenses which they incurred in burying their deceased relatives.

41. However, having so stated, I note that the Petitioners have not raised a claim of negligence or otherwise under the **Fatal Accidents Act**. In addition, they have not provided sufficient evidence or shown this Court that indeed the Respondents violated the rights of the deceased persons. In short, the claim under the **Fatal Accidents Act** is misplaced in the present circumstances and cannot lie.

### **Conclusion**

42. This Petition was casually drafted, and the Petitioners also seem to have lost interest in it hence the failure to file submissions when ordered to do so. Precious judicial time need not be wasted on matters where the claimant has abandoned a claim for whatever reasons. I digress as the matter is at an end.

### **Disposition**

43. There being no merit in the Petition dated 30<sup>th</sup> December 2013 is dismissed.

44. Let each Party bear their own costs.

45. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2017**

**E. CHACHA MWITA**

**JUDGE**