



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 132 OF 2011
(AS CONSOLIDATED WITH PETITION NO. 197 OF 2012)

BETWEEN

FLORENCE AMUNGA OMUKANDA.....1ST PETITIONER

FRANCIS KHASHIYI IVAYO.....2ND PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF POLICE.....2ND RESPONDENT

THE PERMANENT SECRETARY,

THE MINISTRY OF INTERNAL SECURITY

AND PROVINCIAL ADMINISTRATION.....3RD RESPONDENT

JUDGMENT

Introduction

1. In December 2007, general elections were held in Kenya. The people of Kenya went to the polls to vote for their president as well as their representatives in Parliament. Following the announcement of the presidential election results in which (now retired) President Kibaki was declared the winner by the Electoral Commission of Kenya, (as it was known then), violence erupted in various parts of the country. Among the areas most affected by violence were some parts of Rift Valley Province, Kisumu, Nairobi and Nakuru areas.^[1] As a result of the violence 3 561 people were injured, 117 216 instances of destruction of property were reported and there were 1 113 deaths. Out of this, 405 deaths were caused by gunshot wounds which allegedly, the Kenyan Police Force was responsible for, according to the Waki Report. ^[2]

2. This petition relates to the events of post election violence of 2007/2008. The petitioners have filed the consolidated petitions claiming that their fundamental rights and freedoms were violated during the post-election violence. They have therefore instituted the petitions seeking compensation from the State for the

violation of their rights and freedoms as well as damages for the alleged pain and suffering they have since undergone.

The parties

3. The 1st petitioner, **Florence Amunga Omukanda**, is a female adult. During the post-election violence, she was a resident of Kibera-Langatta District within Nairobi County. She used to work as a househelp. The 2nd petitioner, **Francis Khahiyo Ivayo**, is a male adult and was similarly a resident of Kibera – Langatta District at the time of the post-election violence. He offers pastoral services to the Altar Restoration Ministry located in Kibera area and does a part time job as a tailor.

4. The 1st respondent, the Hon Attorney General, is the Chief Legal Adviser to the Government vested with the authority to defend civil suits against the Government.

5. The 2nd respondent, the Commissioner of Police [now known as the Inspector General of Police] is the head of the Kenya Police Service.

6. The 3rd respondent, the Ministry of Internal Security and Provincial Administration [now known as the Ministry of Internal Security and Coordination of National Government] is the executive branch of Government responsible for the internal security.

The Petitions

7. The 1st petitioner filed the undated Petition on 12 August 2011. In her petition she claims that the failure of security apparatus to protect her property from wanton destruction and burning by illegal gangs violated her right to property as enshrined under Article 40 of the Constitution. She also states that the arson attack on her house led to the death of her daughters M A and S A and thus violated their right to life as provided for under Article 26 of the Constitution. It is also her contention that her right to equal protection of the law as stipulated under Article 27 had been violated. It is her claim that the government failed to prioritize deployment of police in Kibera thus exposing her to violence. Lastly her claim is hinged under Article 47 of the Constitution. In that regard she states that she had a legitimate expectation that the police would provide her with an action that would be responsive, expeditious and efficient during the period of post election violence.

8. In her petition therefore she seeks the following orders;

(a) A declaration that the petitioner's right to protection of property as enshrined and contemplated in Article 40 of the Constitution, Article 14 of the African Charter on Human and People's Right and Article 17 of the Universal Declaration of Human Rights both as espoused in Article 2 of the Constitution were violated by the negligent passive conduct of the 2nd and 3rd Respondents.

(b) A declaration that the 2nd and 3rd Respondents compromised or violated the rights to life and the legitimate expectation of the Petitioner's under Article 26 of the Constitution, Article 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.

(c) A declaration that the Petitioner's Rights to equality and freedom from discrimination as enshrined in Article 27 of the Constitution, Article 7 of the Universal Declaration of Human Rights and Article 3 of the African Charter on Human and People's Rights were violated by the 2nd and 3rd Respondents negligent acts of omission and dereliction of the statutory obligations bestowed upon their respective offices.

(d) A declaration that the Petitioner's Rights to equality and freedom from discrimination as enshrined in Article 27 of the Constitution, Article 7 of the Universal Declaration of Human

Rights and Article 3 of the African Charter on Human and People's Right were violated by the 2nd and 3rd Respondents by failing to include her in the list of victims and beneficiaries of the IDP support Programme.

(e) A declaration that the Petitioner's right to legitimate expectation of police action that was responsive, expeditious and efficient during the post election violence as contemplated as espoused in Article 47 of the Constitution gravely violated

(f) A declaration that with the information and advice from the NSIS on possible of violence in several parts of the Country including the Petitioner's locality, the 2nd and 3rd Respondent's were incomplete dereliction of he duties and obligation contemplated under section 14 of the Police Act, section 8(c) of the Administrative Police Act and the general Constitutional mandate of the said offices.

(g) A declaration that as a result of the breach of rights enumerated above, the petitioner suffered damages, pain and suffering.

(h) A declaration that the Petitioner is therefore entitled to special, general and exemplary damages against the Respondents herein jointly and/or severally.

(i) The special damages are thus:-

a) Medical Report.....Kshs 3,500

b) Future Medical expenses comprising of skin grafting...Kshs 100,000

(j) An order for compensation as enshrined and provided for under Article 23(e) of the Constitution made up of special damages for the expenses incurred and the damages for destruction of the Petitioner's property, General damages and exemplary damages pursuant to the declaration prayed in prayer (g) above

(k) Costs and interest.

9. The 2nd petitioner filed his undated petition on 11 May, 2012. He claims that his fundamental rights to human dignity and right to have that dignity respected and protected as enshrined under Article 28 of the Constitution has been violated by the actions of the police due to the fact that he was attacked and subjected to violence by a police officer. It is his claim that his right to security of the person as contemplated under Article 29 of the Constitution was violated. He also claims that the police acts amount to torture and therefore violates his right not to be subjected to torture.

10. He therefore seeks the following orders;

(a) A declaration that the Petitioner's rights to the security of his person as enshrined and contemplated in Article 29(c), (d) & (f) of the Constitution, Article 5 of the African (Banjul) Charter on Human and People's Rights and Article 5 of the Universal Declaration of Human Rights Article 7 of the International Convention on Civil and Political Rights and Article 1 of the Convention against torture and other cruel inhuman or degrading treatment or punishment were violated by the reckless and negligent actions of the 2nd Respondent's agents and for servants.

(b) A declaration that the Petitioner's right to Human Dignity and the right to have that dignity protected and respected was as enshrined under Article 28 of the Constitution of Kenya were violated by the state through its agents and/or servants.

(c) A declaration that the Petitioner's Right as expressly provided under Article 25(a)

of the Constitution was violated in that the state failed to guarantee protection from limitation of the said rights.

(d) A declaration that the police failed to uphold their mandate and obligations under the Police Act (Cap. 84, Laws of Kenya).

(e) A declaration that of the actions by the police and/or treatment of the Petitioner by the police were reckless, negligent, cruel and inhuman and in complete disregard of his rights to the same.

(f) A declaration that the Respondents and the Government of Kenya are responsible through the doctrine of ‘Respondent Superior’ for the actions of the perpetrators of the various violations of the Petitioner’s rights.

(g) A declaration that as a result of the breach and/or violation of the rights enumerated in paragraphs (a), (b), (c) and (d) above, the Petitioner suffered damage, pain and suffering.

(h) A declaration that the Petitioner is therefore entitled to special, general and exemplary damages against the Respondents herein jointly and/or severally.

11. The particulars of special damages were provided as hereunder

(a) Future medical costs.....Kshs.80,000.00

(b) Medical Report.....Kshs. 3,500.00

(c) Medical costs..... ... Kshs. 53,390.00

TOTAL Kshs. 133,390.00

Factual background

12. The facts leading to this petition can be summarized as follows:

13. The 1st petitioner was on 30 December 2007, at about 4.00am attacked by unknown assailants while she and her two children were peacefully asleep in her house located in Laini Saba in Kibera. Her house was burnt from outside and she and her children were unable to escape since the house had been locked by the assailants from outside. She was entrapped in the fire, lost consciousness and fell into a coma which lasted almost over 2 months. On regaining consciousness, she found herself at St. Mary’s Hospital. She was then informed by a friend that her children had burnt to death during the arson.

14. Thereafter she was transferred to Kenyatta National Hospital where she was attended to. She was discharged after two days since she did not have adequate funds to cater for the medical expenses. She was then taken to Nairobi Women’s Hospital by well wishers and a humanitarian organization which agreed to defray her medical expenses. On being discharged from Nairobi Women’s Hospital she continued with medical check-ups at Kenyatta National Hospital. She claimed that she reported the incident to the local chief in September 2010.

15. As a result of the said attack, she suffered pain, trauma, loss and damages, to wit;

(a) Her body sustained 80% burns which comprised severe burns on the face, head, left upper limb forearm, hand, back of the left side of the chest and trunk, right hand, abdomen and back.

(b) All her household effects were destroyed including her daughters’ birth certificates.

(c) The attack led to the morbid death of her two daughters namely, **M A** (then aged 8 years) and **S A** (then aged 3 weeks).

(d) The experience left the petitioner suffering post-traumatic stress disorder.

(e) She suffered loss of livelihood thereby leaving her in an ever vicious cycle of struggle and destitution.

(f) Due to the blemishes on her body, the Petitioner has been unable to enjoy the benefits of the marriage institution and consequently loss of consortium.

16. The 2nd petitioner on his part averred that on 17 January 2007 or thereabout at about 3.00 p.m. during the infamous 2007-2008 post-election violence, while purchasing groceries in a fruit vendor's 'kiosk' in Kibera, Darajani area, a group of armed police men alighted from a train and they started shooting in the air and throwing tear gas canisters indiscriminately. As a result, he and several residents took cover inside the houses which were close by. However, one of the police officers frenziedly embarked on destroying the fruits and vegetables 'kiosks' whereupon a lady owning one of the 'kiosks' came out of her hiding and demanded to know why the police officer was maliciously damaging her property. The said police officer turned against the lady and started assaulting her using the butt of his gun.

17. The 2nd petitioner rushed to where the confrontation had ensued and requested the police officer to stop the assault and it is then that the police officer threatened to shoot the 2nd petitioner and he retreated with a plea of mercy. However, the 2nd petitioner heard a loud bang and it is then he realized that he had been shot at the back. He lost consciousness and was in a coma for three 3 days at Masaba Hospital in Kibera. He was later transferred to St. Mary's Hospital where an operation was done to remove the bullet which had been lodged in his lower back. As a result of the gunshot wounds, he had to attend various sessions with doctors at an estimated cost of Kshs. 80, 000 and the doctor's prognosis was that he was predisposed to intestinal obstruction. He states that as a result of the negligent and reckless actions of the police officer, he sustained serious injuries and suffered pain, loss and damages.

Consolidation

18. By consent of the parties, on 15 November 2012, Petition No. 132 of 2011 and 197 of 2012 were consolidated and the lead file became Petition No. 132 of 2011.

The Petitioners' case

1st petitioner's case

19. According to the 1st petitioner, the attack on her house was instigated and/or engendered by the infamous 2007-2008 post-election violence that rocked the country with worst affected areas being inter alia the Kibera slums where the petitioner resided with her family. During the ensuing violence unleashed by illegal gangs operating within Kibera several houses adjacent to the petitioners' were equally burned and/or razed to the ground.

20. In her view, the government failed to protect her as it did not station police officers near her house. She stated that instead, police officers were stationed at Darajani and Olympic, 3-4 Kilometers away. She opined that had the police been close by she would have been protected. She claims that there was prediction by the National security Intelligence Service (NSIS) that chaos would erupt in various parts of the country. She submitted that the State bears the responsibility for the violence and destruction meted out on her by third parties. She relied on the decision of the European Court of Human Rights in **Osman vs. The United Kingdom**^[3] where it was held that the State had a positive obligation to protect the lives and properties of citizens. It is therefore her contention that the state is obligated to take effective measures to prevent private violations of human rights.

21. In her view, upon receiving prior notice of violence, the government was duty bound to ensure that the residents of Kibera and all other hot-spot areas were protected through sufficient deployment of armed security personnel. On the principle of due diligence, she placed reliance on the case of **Zimbabwe Human Rights NGO Forum vs. Zimbabwe** [4] and **Hajrizi Dzemaji vs. Yugoslavia**. [5] She also cited the decision of **The Minister of Safety and Security vs. Ian Gordon Bryn Hamilton** [6] and **Minister of Safety and Security and Another vs. Carmichele** [7] and **Charles Murigu Murithii & 2 Others vs. Attorney General** [8]

22. It is her case that as a result of the failure of the police to protect her house, her inalienable right to protection of property as enshrined and contemplated in Article 40 of the Constitution, Article 14 of the African Charter on Human and People's Rights and Article 147 of the Universal Declaration of Human Rights (both as espoused in Article 2 of the Constitution), were infringed by the State.

23. She also claims that her children's right to life and right to security of the person as enshrined under Article 26 of the Constitution, Article 4 and 6 of the African Charter on Human & People's Rights and Article 3 of the Universal Declaration of Human Rights, were violated. That the police abdicated from their duty towards the Petitioner as mandated in the Police Act because they failed to take positive steps to protect her deceased children and thus violated Article 53(d) of the Constitution of Kenya.

24. It is her further contention that the wilful neglect by the police of their duties as espoused in the *Police Act* [9] was in breach of her right to equal protection of law, Article 27 of the Constitution of Kenya, Article 7 of the Universal Declaration of Human Rights and Article 3 of the African Charter on Human and People's Rights. In that regard she claims that the areas that were most affected by post-election violence or the places which bore the full burnt of the post election violence in Nairobi were the areas with low income dwellings or the slums. To her, the fact that NSIS had warned of the likelihood of the rampant violence in the said localities obliged the police and the government security agencies to put into place preventive security measures in order to protect the inhabitants of the said dwellings.

25. She further averred that the Government through the Ministry of special Programmes infringed on her right to protection from discrimination as provided in Article 27 of the Constitution, Article 7 of the Universal Declaration of Human Rights and Article 3 of the African Charter on Human and People's Rights by failing to include her in the IDP support programme and therefore compensate her with the recommended sum of Kshs 10,000 despite her entitlement to the same.

26. On the issue of legitimate expectation, she claimed that she had a legitimate expectation that the police would give her an action that was responsive, expeditions, effective and efficient in assailing the 2007/2008 post-election violence. She relied on the case of **Association of Victims of Post Electoral Violence and Interights vs. Cameroon**[10] as well as **Mahmut Kaya vs. Turkey**. [11]

27. It is the 1st petitioner's contention that as a result of the incident she has suffered immense physical and emotional pain and also her life has drastically changed since her physical abilities as a young girl were profoundly prejudiced. She therefore urged this Court to order compensation for violation of her rights.

28. According to the 2nd petitioner, the police were negligent and reckless in shooting him as he had not committed a crime. He claims that the gory details of his encounter with the police on the fateful day are captured in the Waki Report[12] which report he exhibited. In support of his case, he produced the original medical documents from Masaba Hospital. At the time he was discharged he claimed he still had the bullet lodged in his body. As a result King's College helped him to go to Mbagathi Hospital for removal of the bullet. The said bullet was later removed at St Mary's Hospital after which he visited Dr. Wambugu who examined him and prepared a medical report for him.

29. Because of the injuries he sustained, he averred that his life has become miserable and he is no longer able to provide for his family and instead relies on his wife to take care of the family. He has therefore filed this suit seeking compensation from the Government.

30. His testimony was supported by the evidence of Jane Munywoki who testified that on 17 January, 2008 she was present when the 2nd petitioner was shot. According to her deposition, she was a vegetable and fruit vendor operating a “kiosk” in Kibera around the Darajani Area. On that day she was at her “kiosk” attending to customers when a train carrying armed police officers passed by the railway line heading to Gatwekera Area. After a while the same train passed by again heading to where it had previously come from and stopped whereupon the police officers alighted from the train and started to shoot in the air and indiscriminately throwing tear gas canisters at anyone in sight. The witness then ran and hid by a corner near a house that was incomplete from where she could see the police officers.

31. According to her, one of the police officers started stepping on her vegetables and fruits and she came out of the hiding incensed by his actions and demanded to know why he was unjustifiably destroying her ‘source of livelihood’. Instead of responding the said officer held her by the neck and demanded to know why she was obstructing police action. While she was arguing with the police officer, the 2nd petitioner came out of his hiding place and requested the police officer to release her. Instead of doing so the police officer hit her with the butt of his gun on the chest and she fell down and became unconscious. When she regained consciousness, she realized that the police had left and noticed the 2nd petitioner was lying down close by with blood on his clothes and upon checking him closely, realized he had been shot at the lower back. The witness then screamed for help and some people who had been slowly milling around sought to assist. Together they carried the 2nd petitioner and took him to the Chief’s Camp where they left him in the hands of the administrative police who promised to take him to hospital. On later inquiry, she was informed that the 2nd petitioner had been taken to Masaba Hospital.

32. The witness added that the 2nd petitioner was shot once in the hip though she could not tell whether he was shot on the left side or right side. According to her many people helped to take him to the chief. She disclosed that she was stepped on by the police officer and stated that there were many police officers.

The Respondent’s case

33. The Respondents, in response to the petition filed a replying affidavit sworn by **Herbert Wafula Khaemba**, a Superintendent of Police, who at the time of the deposition was based in Embu. He stated that he was employed in the Police Force in 1976 as a recruit constable and rose through the ranks to his present rank of Senior Superintendent of Police No 216103. Prior to his current position, he was the Officer Commanding Police Division Kilimani Police Station between 2005 and 2008 during the Post-Election Violence.

34. He stated that post-election violence had started in the morning of 31 December, 2007 at 12.20 am with a report that the OCS Kilimani, C. I Rotich and his team were confronted by a group of rioters at Kibera Laini Saba who stoned the Station Motor Vehicle, G.K A 422E Toyota land cruiser and completely damaged the wind screen. According to the same records, the second entry in the OB during the same period was of police officer Corporal Ngetich, who reported a shooting incident where a police officer on patrol within Kibera Laini Saba were forced to shoot some rounds of ammunitions in the air to scare away a group of about 100 youth who were throwing stones at the police. A further reported incident was that of police officers returning from Kibera signed by Corporal Ngetich reporting that from the previous day, the whole of Kibera had experienced running battles between police officers and the rioters where approximately 50 kiosks were set on fire in Kibera Laini Saba, Makina and Karanja Road.

35. According to the deponent, from other OB extracts it was clear that there were skirmishes in Kibera generally during the post-election violence and many people lost property. He however described as unfounded the 1st petitioner’s contention that the police were not present in hot spot areas and in particular in Kibera area. To him, the police were present and were also victims of the violence as evidence from the shattered windscreen of the G.K vehicle when the patrol team tried to calm the situation in Kibera.

36. It was however deposed by the officer that from the reports received by the Kilimani Police Station concerning the loss or injury to persons during post-election violence none was in relation to the incident

concerning Florence Amunga Amukanda, the 1st petitioner herein and that not even her relatives reported on her behalf. Further, the then area chief confirmed that the 1st petitioner did not report the incident to him. According to the records of the Chief, Mr. Patrick Adagi Adiira, he opened his register on 14 January, 2008 with 243 cases reported to the area chief, and none of the complainants appeared to be Florence Amunga Amukanda, the 1st petitioner herein.

37. He also stated that the then area chief did not know of or witness the two children of the 1st petitioner perish in a fire. He stated that the records of up to June 2008, did not reflect the 1st petitioner's case. He therefore concluded that her case was not reported anywhere. The deponent averred that the Chief, one Mr. Richard Juma Ochola who wrote a note in support of the injuries of the petitioner, stated that the petitioner had gone to him later after he had compiled the list of the Internally Displaced Persons (IDPs) and those who had been affected by the post-election violence and requested him to include her as one of the victims of post-election violence. To the officer, if indeed the 1st petitioner suffered injuries and lost her children as claimed, the same could have been reported to the police by either her husband or any of her relatives on her behalf.

38. The deponent reiterated that the police force was deployed in hot spot areas and in particular Kibera areas as personnel from GSU, Administration Police and officers from Murang'a North Division were deployed to quell the skirmishes.

Determination

39. Even if the facts of these petitions are substantially different, we cannot lose sight and we must take judicial notice of the fact that the petitions before us relate to the post-election violence of 2007/2008 that broke out in some parts of the country following the announcement of the presidential results.

40. We must also recognise at the outset that the petitioners have exclusively relied on the provisions of the Constitution 2010 which was promulgated on 27 August, 2010. In seeking to rely on the said instrument, the petitioners have relied on the provisions of section 6 of schedule 6 to the Constitution 2010 which provides as follows:

Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.

41. In our view, nothing turns on this provision as the provision simply reserves the existing rights and obligations. What it means is that the rights and obligations which existed under the retired Constitution are not obliterated by the mere fact of the promulgation of the current Constitution.

42. At this stage the issue is whether this petition can be determined on the basis of the Constitution 2010 whereas the cause of action arose under the repealed Constitution. In the **Charles Murigu Murithii** [13] case this court, while considering a similar situation, held that new rights that were not recognized under the repealed constitution could not be enforced in a case where the facts complained of occurred during the era of the repealed constitution. The Court reasoned that that was because the Constitution 2010 does not operate retrospectively. This finding has also been reiterated in other cases such as **Duncan Otieno Waga vs Attorney General** [14] and also in **B.A & Another vs Standard Group Limited & 2 Others**. [15] It therefore follows that this petition must be determined on the basis of the provisions of the repealed Constitution.

43. With that understanding in mind, and having considered the Petitions, the Affidavits on record, oral testimony and the submissions made on behalf of the parties, we find that three key issues emerge for our determination in so far as the Petitioners' case is concerned and they are as follows:

- (i) Whether the State/Respondents owed the Petitioners a duty to protect them during post-

election violence of 2007/2008.

(ii) Whether the Respondents violated the 1st Petitioner's fundamental rights to protection of property, right to life, security of person, equal protection of law, fair administrative action and children's rights.

(iii) Whether the Respondents' violated the 2nd petitioners right to security of person and human dignity.

(iv) Whether the Petitioners are entitled to the reliefs sought.

Whether the State owed the Petitioners duty to protect them during post election violence.

43. On this aspect of the Petition, the question before us is whether the respondents through the police had a duty to protect the petitioners from any violence. It was the submission of the 1st petitioner that due to the fact that NSIS had warned of the likelihood of the rampant violence in hot-spots areas, the government and security agencies were obliged to put into place preventive security measures in order to protect the inhabitants of the said dwellings. The 1st petitioner in particular claimed that the police failed to protect her as they did not station police officers near her house. Instead police officers were stationed at Darajani and Olympic, 3-4 Kilometres away from her house. In her view, had the police been close by, she and her children would have been protected.

44. On his part the 2nd petitioner claimed to have been subjected to violence by the same police officers who are obligated to protect him.

45. The State protects its citizens through the police service. The police service is the organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as prevention and detection of crime including the apprehension of offenders.^[16] Under the provisions of the Constitution 2010, the police still have this obligation. Article 245(8) of the Constitution empowers Parliament to enact legislation giving effect to that provision. Consequently, Parliament enacted the *National Police Service Act* as Act No. 11A of 2012 under which the functions of the police are found at section 24 of the Act. ^[17]

46. In our view this obligation placed on the State to protect the lives and properties of the people stems from a holistic and philosophical interpretation of Article 1 of the Constitution. ^[18] The people's sovereign power is delegated to the three State organs. In the context of the petitions it means that the petitioners delegated their sovereign power, including the power to protect their property and lives, to the State. The State has, in turn, set out certain organs tasked with ensuring that the authority delegated to it is performed in accordance with the wishes of the people who have delegated the same to it and we have already found that organ to be the police service. As a result of this understanding between the government and the governed, the latter no longer have the power to take up arms and defend themselves save for limited situations which call for self defence.

47. It is our view that section 14 of the Police Service Act and now section 24 of the National Police Service Act impose a negative obligation on the part of the Government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the said agencies to protect the people from threat of violation of the said rights and fundamental freedoms. To this extent and as to whether the state is liable for violations of fundamental rights and freedoms by private and or third parties, we are guided by the decision in **Association of Victims of Post Electoral Violence and Interights vs. Cameroon** ^[19] where it was held that:

“The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a state to guarantee the protection of the

rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the charter which would be attributable to this state even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals....According to the permanent jurisprudence of the commission, Article 1, imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.”

48. This principle of positive obligation has also been recognised by the European Court of Human Rights in **Mahmut Kaya vs. Turkey** [20] where it was held that:

“the court recalls that the first sentence of article 231 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.....this involves a primary duty of the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from criminal act against individual.”

49. Happily, for us, in relation to Kenyan law we will not be reinventing the wheel. The issue as to whether the police owed its citizens a duty to prevent the post election violence was elaborately discussed by a three judge bench in the **Charles Murigu Murithii case** where it was held that:

“..... having determined that the state has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order, we have come to the inevitable conclusion that the state would in appropriate cases be held liable in cases where violations of the rights enriched in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated.”

50. As to how the duty of care would be activated, the court in that case found that the police had an obligation to facilitate and create a peaceful environment which would ensure that every citizen enjoyed his fundamental rights and freedoms. The Court also examined the extent of that obligation and concluded that the police had a general duty of care to all its citizens. However, the police would be held liable to a citizen when that individual can demonstrate that the police owed him a special duty of care. As to how an individual can demonstrate that special duty of care that would make the police liable, the learned judges in the **Charles Murigu Murithii case** stated that;

“the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which Police protection had been assured.”

51. We agree with that principle and we do not see any reason to depart from it. We must however add

that the said special relationship or the assurance by the police need not be express. It may in fact be inferred from the circumstances of the case so that where for example a report is made to the police of an attack and the police without any justifiable reason refuse to act, it may be deemed that they have abdicated their duty to protect a victim whose report ought to have given rise to a special relationship.

52. For the report to be admitted so as the positive obligation may arise, it was held in **Mahamut Kaya Case** [21] that:

“.....for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a Third Party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.....”

53. The above principle was also recognised by the European Court of Human Rights in the case of **Osman vs. The United Kingdom**[22] that:

“...in the opinion of the court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the contest of their above-mentioned duty to prevent and suppress offences against the person...it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life of an identified individual or individuals from criminal acts of a third party which, judged reasonably, might be have been expected to avoid that risk...”

54. This principle goes hand in hand with the principle of due diligence and in this respect in **Zimbabwe Human Rights NGO Forum vs. Zimbabwe** [23] it was observed that:

“The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuse of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by aliens has subsequently been applied in regard to acts against nationals of the state. The doctrine of due diligence requires the governmental apparatus and in general, all the structures through which public power is exercised, so that they are capable of juristically ensuring the free and full enjoyment of human rights.....”

55. We are guided. The principle emerging above is that once the necessary ingredients are found to exist, the positive obligation of a state is discharged only if it can be proved that it produced tangible results geared at preventing the infringement of human rights. In this respect in the case of **Association of Victims of Post Electoral Violence and Interights vs. Cameroon**[24] the Court held that:

“.....pertaining to the case in point, considering the definition of the legal nature indicated above, the commission is of the view that the obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the state of Cameroon claims to have, did not produce the expected result, namely that of guaranteeing the protection of human rights. For the post Electoral event which gave rise to serious violations against the lives and property of the citizens would not have taken place if the state which, through its investigations knew or should have known about the planning of the said event, had taken the necessary measures to prevent their happening”.

56. Applying the above principles to this case, it is the submission of the petitioners that the police had been provided with information by NSIS that there would be violence during or after the post-election violence. To prove that allegation, reliance was placed on the Waki report which was produced in evidence. In the said report, it is stated that:

“Of all state security agencies the NSIS was, it seems, with the possible exception of the military, best prepared. Evidence was received to the effect that not only did the service gather information and data about what could potentially occur around the 2007 elections in terms of violence but developed a range of reports highlighting the issues and provided them to senior government officials as well as the police, military, prisons and other agencies. The NSIS produced both regular and special reports including hotspots/flash points up-dates, situation reports, weekly and fortnightly reports and briefs, security briefs at provincial and district level as well as NSAC reports regularly throughout the months leading up to the general elections. As early as September 2007, these reports warned of impending election related violence in clearly specified areas and provided a continuing alert process though updated assessment of potential PEV”.[\[25\]](#)

57. The Waki Report was submitted as evidence by the petitioners. The respondents did not object or challenge the findings therein as regards the warning made by NSIS on possible violence. In any event, the issue as to whether the police had reports of the impending violence was confirmed by the respondents through their only witness DW1 Mr. Herbert Wafula Khaemba, a superintendent of police No. 216103, who prior to this was the Officer Commanding Police Division Kilimani Police Station between 2005 and 2008 during the post-election violence. He testified that he had received from the NSIS intelligence that **‘if results were announced and were not in favour of one group, there would be chaos’**. On cross examination he stated that 10 days before the elections he had taken measures to counter the possible violence by deploying officers of General Service Unit (GSU) platoon, Administration Police (APs) and regular police to Laini Saba area in Kibera area.

58. Given this testimony, it is clear to us that the police had done their best in the obtaining circumstances to contain the situation. At this point we can do no better than reiterate the observations made in the **Charles Murigu Murithii case**. [\[26\]](#) In that case the court took judicial notice of the the poor ratio of police officers against the population in Kenya. It stated that it would be unreasonable to expect the police to guard individual homes or property on a 24hour basis. Instead, what is required is to demonstrate that the police organized the need to offer the required protection. Applying this finding in this case, we must appreciate the testimony of Mr. Wafula who testified that the police had prior intelligence information regarding possible attacks in Kibera. He explained how the respondents acted on the information by deploying more officers in Laini Saba area in Kibera though the officers were overwhelmed. He gave instances of where the police were confronted by a group of rioters who even stoned a police vehicle GKA 422E and completely damaged its windscreen. This evidence leads to one conclusion; the police did all they could in the circumstances to mitigate and contain the violence in Laini Saba area in Kibera.

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

60. Having determined that the State has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order, we now turn to determine the next question; whether any of the petitioners’ rights were violated as alleged by the failure of the police to protect the petitioners during the post-election violence.

Whether the respondents’ violated the petitioner’s rights.

61. It is the 1st petitioner’s contention that the State, through the Police Service and officers, violated her constitutional right to security of person by failing to protect her and her two children against invasion by attackers following the announcement of the results of the presidential elections of 2007. As a result, she

claims that her fundamental right to own property, her children's right to life, her right to equal protection of the law, her right to fair administrative action and her children rights were violated.

62. In response to this contention, the respondents submitted that they did all that was expected of them and therefore did not violate the 1st petitioner's constitutional rights as alleged.

Right to property

63. Section 70 of the repealed Constitution protected privacy of the 1st petitioner's home and also protected against deprivation of her property without compensation.^[27] Similarly, section 75 of the repealed Constitution protected against compulsory acquisition of any property in the following terms;

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for

the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

(4) and (5) (Deleted by 13 of 1977, s. 3.)

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2)—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property—

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required,

and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of—

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(7) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys

provided by Parliament.

64. The 1st petitioner's claim against the Respondents is that had they offered her protection of her property her house would not have been burnt by the assailants. In that regard we must therefore in reference to the evidence before us consider whether the 1st petitioner's right to property has been violated.

65. In her petition and also in her oral testimony, she testified that she was peacefully sleeping in her house when it was burnt from outside. She was unable to escape since the house had been locked from outside. She testified that she reported the incident to the area chief. We saw the 1st petitioner testify in court, we observed her and saw that she had evidence of serious burns on her body. Despite that finding we are unable, based on the evidence placed before us, to find that the injuries inflicted upon the 1st Petitioner resulted from the post-election violence or that she lost her children as a result thereof. We find that there are so many inconsistencies and deficiencies in her evidence hence she was unable to prove her claim to the required standards. We say so for the following reasons;

66. Firstly, it is her contention that she reported the incident after she was discharged from the hospital to the local Chief in September 2010,. She admitted that she did not report the incident to any police station. This fact was confirmed by Mr. Wafula who testified that there was no report recorded in relation to the incident concerning the 1st petitioner. He also stated that the chief at the time, Mr. Patrick Adagi Adiira, had confirmed that out of the 243 cases reported to him, none of the complainants was the 1st petitioner or any of her relative. It is clear to us therefore that the 1st petitioner did not report the incident to the chief. Had she done so, the same would have been documented out of the 243 cases that were already in the knowledge of Mr. Adiira and also there would be an Occurrence Book (O.B) report at the police station. We say so because Mr. Wafula explained during cross-examination that when an incident is reported to the chief, he is duty bound and he must report the particular incident to a police station which is then booked in an OB. Given that to date there does not exist an OB in regard to the burning of the 1st petitioner's house, we are unable to find that the 1st petitioner reported the incident as she alleged.

67. Secondly, even if we are to accept that she did actually report the incident, DW1 testified that one Mr. Richard Juma Ochola who was the subsequent chief for Laini Saba, had explained that the 1st petitioner had approached him way later after he had compiled the list of Internally Displaced Persons (IDPs) and those who had been affected by the post-election violence and had requested him to include her as one of the victims of post-election violence. We have seen the letter produced and marked as '**annexture FA1**' in the 1st Petitioner's affidavit. The letter is written by Mr. Ochola the chief of Laini Saba at the time. It is dated 6 September 2010. This letter proves to us that she reported the incident to the chief two years and 9 months after the alleged arson. In that regard, we have more questions than answers, for instance what took her so long to report the incident if at all?

68. Thirdly, she testified that neighbouring houses were also burnt. How come she did not call any of her neighbours whose houses had also burnt at that time to testify as her witnesses?

69. Fourthly, we have seen the undated letter marked as '**annexture FA2**' from Nairobi Women's Hospital. It is stated therein that a friend explained to her that her belongings got burnt together with her children, and she was rescued and taken to St. Mary's Hospital by well-wishers. Why is it that she did not invite her friend to testify or any of the well wishers who took her to the hospital after she fell unconscious?

70. Fifthly, the 1st petitioner testified that she was a victim of post-election violence and also a member of Kenya IDPs Association. However, she did not provide any tangible evidence in that regard. If at all she is a member of that association, why could she not call any of the officials or members to corroborate her testimony?

71. Lastly, we have also found discrepancies in her testimony and evidence before us. She testified that

she was admitted at Masaba Hospital for two months and later on transferred to Kenyatta Hospital where she was admitted for two days before being discharged for inability to pay her bill and then transferred to Nairobi Women's Hospital. The letter from the Chief dated 6 September 2010 states that she was admitted at Kenyatta National Hospital for a period of four months.

72. Thus far, it is clear that the 1st petitioner has failed to prove that her house was burnt down as well as the fact that she suffered the alleged injuries as a result of post-election violence. In the circumstances, we are unable to find in her favour and we have given the reasons as to why.

Right to life and children's rights

73. Right to life was protected under section 71(1) of the repealed constitution in the following terms;

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

74. The state has an obligation to protect the life of its citizens. The question that this Court has to decide is then whether the State, through the Police violated the right to life of the 1st petitioner's children by failing to protect them during the violence.

75. It is the 1st petitioner's case that when the fierce fire erupted, she went where her two children were sleeping and sat by their bed while holding them. However, she lost consciousness till two months later when she found herself at St. Mary's Hospital where she was informed that her children were burnt to death. Sadly, despite these serious allegations, there was no tangible evidence that demonstrated that she indeed had two children and that they were burnt in a fire during post-election violence. No birth certificates or even notification of birth were produced to confirm her contention. It is not lost to us that she testified that all her documents were burnt in the house. She also stated that she had given all her documents to some people who had promised to assist her but they disappeared without trace.

76. We recognise the unfortunate position she is in. But this is a court of law that decides matters based on the evidence before it. Even if she does not have the documents, there are many other ways she would have proved her case. Melisa was 8 years old at the time. She must have been attending school, so why would she not avail academic records from her school to support her claim? She would also have brought a witness to testify that they knew her and her children who died after being entrapped in the fierce fire. The letter from the chief dated 6 September 2010 states that her children Melisa and Selena died after being burnt and were buried at Langata cemetery by well-wishers. Why did she not produce burial permits or death certificates to prove that fact? Even if those documents were not available, why would she not call any of the well-wishers who buried the children as witnesses to testify? Even if we were to believe her testimony, she further contradicted herself and the information she had earlier given to the Chief. She did so when she stated that one of the children died while undergoing treatment at Kenyatta National Hospital. Why then would she not avail medical reports or treatment sheets, or any information from the hospital that would corroborate that fact?

77. Given all these inconsistencies and deficiencies in the testimony and oral evidence, we are unable to find that the 1st Petitioner had two children who died in a fire during post-election violence. It follows that this finding also disposes of the issue of violation of children's rights as provided for under Article 53 of the Constitution. [\[28\]](#)

Equal protection of the law and protection against discrimination

78. It was the 1st petitioner's averment that the Government through the Ministry of Special Programmes infringed on her right to protection from discrimination as provided in section 82 of the repealed Constitution by failing to include her in the IDP support programme and therefore compensate her with the recommended sum of Kshs 10,000.00 despite her entitlement to the same.

79. On non-discrimination, section 82(2) of the repealed Constitution provided as follows:

“Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority”.

Black’s Law Dictionary [29] defines discrimination as follows:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

80. In **Peter K. Waweru vs. Republic** [30] discrimination was defined in the following terms:

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

81. In his decision in **Nyarangi & 3 Others vs. Attorney General**[31] Nyamu, J (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification... The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following: - (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”

82. In the above case, the learned Judge went on to express himself as follows:

“Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly an unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the

Constitutional definition of the word “discriminatory” in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”

83. The said decision was cited with approval in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others** [32] where it was held that:

“It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in **President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41** as follows:- “We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context.” At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component....In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality.”

84. This was the position adopted in **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** [33] cited in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General** [34] in which the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

85. We shall start with the claim that the State's actions or inaction through its organs violated the 1st Petitioner's right under section 82(2) of the Repealed Constitution in that she was not treated in the same manner in which other internally displaced persons were treated in terms of payment of reparation of damages. In our view where the State makes a decision to treat persons who have undergone a particular calamity in a particular manner, and treats other persons who have undergone similar experience in a different manner may amount to forbidden discrimination. By similar experience we mean that the experience may not be exactly the same but such experience as would fall within the genus of the experience those who are being considered for reparation of damages underwent. In our view in a case such as this where the 1st petitioner claims that as a result of the post-election violence victims who were internally displaced were being compensated, to decline to consider the 1st petitioner for reparation of damages would amount to discrimination assuming that she proves her claims. In other words, internal displacement ought not to be considered solely on the basis of physical displacement but ought to encompass those who suffered emotional displacement as well. As to who merits to be considered for reparation of damages is a matter for consideration by the State based on investigation done as well as evidence.

86. Based on the evidence before us, we have not been persuaded to conclude that the 1st petitioner was a victim of post-election violence and we have elsewhere above said why. We must however state that we saw her in court and we sympathise with her. She may have failed to prove her case in this court but that does not rule out completely the fact that she was a victim of post-election violence. To date her claim has not been investigated. Where a person claims that he or she falls within the class of persons that ought to be entitled to reparation of damages it behoves the State to investigate the said claims and make a decision thereon. In other words where an allegation of violation of constitutional rights and fundamental freedoms are alleged particularly against State actors, the State is enjoined to investigate the same. This was the position adopted by the Inter-American Court of Human Rights in **Velasquez Rodriguez vs Honduras**,[\[35\]](#) in which the Court stated that:

“The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”.

87. We agree that the State has a general duty to investigate human rights violations and in the instant case, the Respondents have not indicated what steps they have taken to investigate the 1st Petitioner's claim that she falls within the class of persons that ought to be considered for reparation of damages. In that regard, we shall therefore make appropriate remedy at the end.

Whether the 2nd petitioner's fundamental rights were violated

88. Upon the eruption of violence in Kibera, security officers were sent there to maintain law and order. They were armed. The 2nd petitioner's evidence was that when he was on and about with his day, he saw a police officer beat up a woman one Jane Munywoki, who was known to him as she was a member of his church. When he went to him to inquire as to why he was beating her up, he was shot instead. He sustained injuries and this claim is supported by his evidence as well as that of his witness Dr Wambugu, who stated that upon being shot the 2nd Petitioner lost consciousness immediately and sustained gunshot injuries which necessitated a laparotomy to exact the bullet. He however had made adequate recovery though he was indisposed to intestinal obstruction at least once in his lifetime due to adhesions following laparotomy. The doctor recommended that a provision be made to manage this condition at an estimate cost of Kshs 80,000.00. The doctor's opinion was however that there was no total permanent incapacitation.

89. There is no evidence of provocation at all on the part of the 2nd petitioner that would have led to the

shooting. His evidence was not controverted in any way. In any event, Mr. Wafula confirmed the 2nd petitioner's testimony when he stated that there was an OB entry by a police officer, a corporal Ngetich, who had reported a shooting incident where police officers on patrol within Kibera were forced to shoot in the air to scare away a group of about 100 youth who were attacking the police by throwing stones at them.

90. However, the 2nd petitioner did not report the matter to the police. His reason for not doing so was rather flimsy and that was that the police would protect their own. Had the 2nd Petitioner's evidence been controverted, he would have had an uphill task proving the same in light of his failure to report the same. Nonetheless, his failure to report an incident to the police does not necessarily deprive him a favourable finding if apart from reporting there is credible evidence on the basis of which the Court can find liability against the respondents.[\[36\]](#)

91. We have no option but to believe the 2nd petitioner in this case and we find that the shooting of the 2nd petitioner was negligent, unlawful, illegal and with use of excessive force. The respondents are therefore liable for the act of the said officer. We find that they violated the 2nd petitioner's rights to human dignity, which though not expressly protected under the repealed Constitution, is, as was held in **Charles Murigu Murithii Case**, the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. We also find that his right to security of person was similarly violated. In so holding we are guided by the decision of **Stephen Iregi Njuguna vs. Hon. the Attorney General** [\[37\]](#) where the Court of Appeal expressed itself as follows:

“The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary and that the deceased was shot by them by accident. From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus had shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased, particularly when there is evidence of PW 2 that the people whom the police could have been chasing were not shooting back and were unarmed. As it is there is no evidence on the record to show that the people the police were chasing, if a chase there was, were criminals; that they were dangerous criminals and were particularly dangerous to the police. It is all the learned Judge's own flight of imagination. The easiest thing which these police officers could have done, if they were so minded, was for one of them to appear in court and explain that the shooting was necessary and that the deceased was shot by an unfortunate accident. They chose not to do so. In the event the respondent cannot escape liability.”

92. A similar finding was made in **Sengendo vs. Attorney General** [\[38\]](#) where it was stated:

“It is stated that the attack on the plaintiff was illegal. In the state of evidence before the court, there is nothing to show that there was any provocation by the plaintiff or any justification for the attack. The attack was a flagrant infringement of the plaintiff's legal rights to personal safety. The description and the details given by the plaintiff of the attack, which the court accepts as truthful, show that the intention of the attack could have been none other than to cause grievous injuries to the plaintiff and for the purposes of this suit it is unnecessary to discuss whether or not the motives and intentions showing the state of mind of a person committing an attack should be enquired into. The evidence before the court has established that the plaintiff was intentionally and illegally attacked by the soldiers...In the circumstances of the case it is fair and proper inference to draw that the soldiers posted at various points and armed with rifles were there to control an emergency which had arisen due to an attempt to assassinate the then President, Dr. Milton Obote. There is evidence that before the plaintiff reached the point where he was attacked, he had been stopped by soldiers at three points on the way where he had been questioned and searched.”

93. As to the extent of the liability the court stated;

“Therefore it is held that the soldiers were acting in the course of duty when they attacked the plaintiff...The act of the soldiers was clearly wanton, unlawful and unjustified one. An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable. In all these cases in which the question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is a room for a difference of opinion...Upon the facts of this case the act of the soldiers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed with rifles and posted at the place where the attack took place.”

And the court concluded that:

“Therefore the defendant is vicariously liable for the act of the soldiers, and the plaintiff is entitled to claim general and special damages from the defendant”.

94. Having found as we have, the next issue is what remedy is available to the 2nd petitioner.

Remedy available to the 2nd petitioner

95. It is now an established principle that violations of fundamental human rights must be remedied Kriegl J. Properly captured this in the Constitutional Court of South Africa case of **Ntanda Zeli Fose vs. The Minister of Safety and Security** [39] where he expressed himself that:

“..... our object in remedying these kinds of harms should, at least be to vindicate the constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference.” It suggests that certain harms, if not addressed, diminish our faith in the constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution—its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement and strike effectively at its source....”

96. We are in agreement with the learned judge. The 2nd petitioner has sought special, general and exemplary damages as compensation for violation of his fundamental rights. He claimed special damages of Kshs. 133, 390.00. He proved the same and they were not controverted. He is therefore entitled to special damages.

97. As regards general damages, we must use our discretion in awarding the same. We shall do so being guided by precedent of other similar cases. In **Peter Otieno Ouma vs. Attorney General** [40] the plaintiff, a 23 year old student at Nairobi Institute of Business Studies was similarly shot and lost consciousness. He was hospitalised for 5 months at Kenyatta National Hospital and later transferred to National Spinal Injury Unit where he spent 3 months. His injuries were classified as fracture of thoracic vertebrae T12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function. On 11 June 2010, he was awarded Kshs. 4,000,000.00 as general damages.

98. Similarly, in **Peter Omari Ogenche vs. Attorney General** [41], a case which similarly arose from a

shooting incident related to the same post-election violence, the plaintiff, a 27 year old who was engaged in part time taxi driving and car washing, was shot and became paraplegic with urine and stool incontinence. He had a residual bullet entry scar L1 region. He had an impaired bladder muscle tone and therefore had to use an indwelling catheter to assist in collecting urine bag due to the loss of urine control. As a result, he was unable to walk; control stool and urine; and engage in active sexual life. He was predisposed to recurrent chest and urinary tract, and skin infections and therefore required frequent medical check-ups, special bed which can be turned by hydraulic or electric system and regular physiotherapy and splints to stabilise the spine. He was awarded Kshs. 3,500,000.00 on 10th June 2010 for pain suffering and loss of amenities.

99. In another case of **George Efedha Madora vs. Attorney General**[\[42\]](#) the Plaintiff was awarded Kshs 3,500,000.00 for pain and suffering. The plaintiff had sustained fracture of thoracic vertebrae t12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function.

100. From the above decisions, it is obvious to us that the injuries suffered by the 2nd petitioner here were not as serious as in the above cases.

101. As regards exemplary damages, the 2nd petitioner did not give any grounds as to why the same should be awarded. In the absence of such grounds, we shall not award him exemplary damages. Instead we shall grant him a global amount that would vindicate his fundamental rights and freedoms.

Findings

102. Having considered the two petitions which are the subject of this judgement we make the following findings:

1. **That while our sympathies are with the 1st Petitioner we find that she has failed to prove to our satisfaction that the Respondents compromised or violated her rights to property, life, equality and freedom from discrimination and the legitimate expectation and therefore her claim to damages fails.**
2. **That the Respondents are under a constitutional obligation to investigate the 1st Petitioner's claim that she is entitled to be included in the list of victims and beneficiaries of the IDP Support Programme.**
3. **That the 2nd Petitioner's right to security of persons and human Dignity and the right to have that dignity protected and respected were violated by the police and that the actions by the police and/or treatment of the Petitioner by the police were reckless, negligent, cruel and inhuman and in complete disregard of his fundamental right to security of person and human dignity.**
4. **That the 2nd Petitioner is entitled to an award of special and general damages.**

Disposition

103. For all the foregoing reasons, we make the following orders:

(i). We direct the Respondents to investigate the 1st Petitioner's claim that she is entitled to be placed in the list of victims and beneficiaries of the IDP Support Programme and subject to the results of the said investigations take appropriate steps. Save for this direction the 1st Petitioner's petition is disallowed.

(ii) We award the 2nd Petitioner Kshs 2,000,000.00 for general damages for pain suffering and loss of amenities, Kshs 80,000.00 for future medical costs, Kshs 53, 390.00 for medical costs and Kshs. 3, 500 for medical report. We also award him interest on

each limb at Court rates from the date of this judgement until payment in full.

(iii). On costs, since we have found that the Respondents failed in their duty to investigate the 1st Petitioner's claim, the petitioners will have the costs of these petitions.

104. This judgment has taken far too long to deliver, a regrettable situation which was caused by circumstances beyond our control. We unreservedly apologise to the Parties and Counsel.

Dated at Nairobi this 18th Day of August 2016

ISAAC LENAOLA

MUMBI NGUGI

G V ODUNGA

JUDGE

JUDGE

JUDGE

Delivered by:

G V ODUNGA

JUDGE

[1] See The Commission of Inquiry into Post Election Violence Report (commonly known as Waki Report) released on 15 October 2008.

[2] See Waki Report page 350 to 451.

[3] (87/1997/871/1083).

[4] (2006) AHRLR 128 ACHPR (2006).

[5] (Complaint No. 161/2000).

[6] (Case No. 457/2002).

[7] [2004] 4 LRC.

[8] (2015) eKLR.

[9] Cap 84 Laws of Kenya (now repealed).

[10] Case No. 272 of 2003.

[11] Application No. 22535/93, European Court of Human Rights.

[12] See Page 202-203 of the Waki Report.

[13] (2015) eKLR.

[14] Petition No 94 of 2012.

[15] 2012 e KLR.

[16] See Section 14 of the Police Act.

[17] Section 24 of the National Police Service Act provides that the functions of the national police service are as follows:

- a. *Provision of assistance to the public when in need;*
- b. *Maintenance of law and order.*
- c. *Preservation of peace;*
- d. *Protection of life and property;*
- e. *Investigation of crimes;*
- f. *Collection of criminal intelligence;*
- g. *Prevention and detection of crime;*
- h. *Apprehension of offenders;*
- i. *Enforcement of all laws and regulations with which it is charged; and*
- j. *Performance of any other duties that may be prescribed by the Inspector-General under this Act any other written law from time to time.*

[18] Article 1 of the Constitution states;

“1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

2 The people may exercise their sovereign power either directly or through their democratically elected representatives.

3. Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution-

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the judiciary and independent tribunals.”

[19] (272/2003) at para 88 and 89.

[20] Application No. 22535/93, European Court of Human Rights.

[21] Id note 20.

[22] 87/1997/871/1083 para 33.

[23] 2006) AHRLR 128 ACHPR (2006) para 147.

[24] Id note 19.

[25] See Waki Report at page 361.

[26] Id note 16.

[27] Section 70 of the repealed Constitution provided as follows:

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

- a. Life, liberty, security of the person and the protection of the law;*
- b. Freedom of conscience, of expression and of assembly and association; and*
- c. Protection for the privacy of his home and other property and from deprivation of property without compensation;*

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the right and freedom of others or the public interest.”

[28] Article 53 of the Constitution provides that:

(1) Every child has the right—

- (a) to a name and nationality from birth;*
- (b) to free and compulsory basic education;*
- (c) to basic nutrition, shelter and health care;*
- (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;*
- (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and*
- (f) not to be detained, except as a measure of last resort, and when detained, to be held –*
 - (i) for the shortest appropriate period of time; and*
 - (ii) separate from adults and in conditions that take account of the child’s sex and age.*

(2) A child’s best interests are of paramount importance in every matter concerning the child.

[29] Eighth Edition.

[30] [2006] eKLR.

[31] HCCP No. 298 of 2008 [2008] KLR 688.

[32] [2011] eKLR.

[33] [2006] eKLR.

[34] [2011] eKLR.

[35] Judgment of 27 July 1985.

[36] See **Kenya Pipeline Co. Ltd vs. Erick Ouma Ogendo Kisumu HCCA No. 49 of 2004** where Karanja J discussed the importance of reporting a matter to the police as follows:

“A police abstract is essentially a record of the particulars of an event reported to the police and the actual date or intended action to be taken. The evidence of the investigating officer would merely be a confirmation of the police investigations carried out and the finding thereof. Whereas such evidence may be vital in a criminal case, there would be doubt whether the same applies to a civil case.”

[37] Civil Appeal No. 55 of 1997 [1995-1998] 1 EA 252.

[38] [1972] EA 140.

[39] Case CCT 14/96.

[40] Nairobi HCCC No. 337 of 2008.

[41] Nairobi HCCC No. 196 of 2008.

[42] Civil Case No.197 of 2012.