



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.244 OF 2016

**IN THE MATTER OF MYSTERIOUS AND ENFORCED DISSAPPEARANCE OF WILLIE
KIMANI – ADVOCATE, JOSEPHAT MWENDWA AND JOSEPH MUIRURI**

BETWEEN

LAW SOCIETY OF KENYA.....1ST APPLICANT
WILLIE KIMANI.....2ND APPLICANT
JOSEPHAT MWENDWA.....3RD APPLICANT
JOSEPH MUIRURI.....4TH APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT
INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
SAFARICOM LIMITED.....4TH RESPONDENT

AND

INDEPENDENT POLICING OVERSIGHT

AUTHORITY.....1ST INTERESTED PARTY
INTERNATIONAL JUSTICE MISSION.....2ND INTERESTED PARTY

RULING

On 30th June 2016, the 1st Petitioner, Law Society of Kenya petitioned this court on behalf of Willie Kimani (2nd Petitioner), Josephat Mwendwa (3rd Petitioner) and Joseph Muiruri (4th Petitioner) seeking various orders from the court. The petition is predicated on **Articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 25(d), 28, 29, 48, 50, 159, 59(1), 165, 259, 238, 239, 242, 244 and 245** of the **Constitution of Kenya**, the

International Convention on Civil and Political Rights, the International Convention for the Protection of all Persons from Enforced Disappearances, the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, Universal Declarations of Human Rights, Section 10 of the National Police Service Act, Section 4 of the Law Society of Kenya Act and Section 389 of the Criminal Procedure Code. The first prayer was that the court issues an order directing the 4th Respondent to produce before the court the mobile phone and call records and the Base Transmitting Station (BTS) records and BTS records and logs of the 2nd, 3rd and 4th Petitioners between the periods of 9.00 a.m. on 23rd June 2016 and 30th June 2016. The Petitioners further sought a declaration that the right to *habeas corpus* is guaranteed under **Article 25(d)** of the **Constitution** and cannot therefore be limited. In that regard, the Petitioners prayed for an order from the court to compel the Respondents to produce the persons and bodies of the 2nd, 3rd and 4th Petitioners. The Petitioners also prayed for an order of compensation and reparation for the violation of the fundamental rights of the 2nd, 3rd and 4th Petitioners as provided for under the **Constitution**.

Contemporaneous with filing the petition, the Petitioners filed an application under certificate of urgency seeking more or less the same orders that they have sought in the petition. They sought an order of the court to compel the 4th Respondent to supply the 1st Petitioner with the phone call records and BTS records and logs in respect of the mobile phone numbers of the 2nd, 3rd and 4th Petitioners from 9.00 a.m. on 23rd June 2016 to 30th June 2016. The Petitioners prayed for the court to issue a writ of *habeas corpus* for the Respondents to produce the 2nd, 3rd and 4th Petitioners within 24 hours of the court issuing the order. They further prayed that the petitioners be awarded cost of the application. The application is supported by the annexed affidavit of Mercy K. Wambua, the Chief Executive Officer and Secretary of the 1st Petitioner.

The application was placed before this court on 30th June 2016 under certificate of urgency. This court duly certified the application as urgent. It directed the Petitioners to serve the Respondents with the application so that the same is heard on the following day i.e. 1st July 2016 at 9.00 a.m. The Petitioners complied with the directions of the court and duly served the Respondents. On the hearing date, the Respondents requested for time to file their respective responses to the application filed by the Petitioners. Dr. Khaminwa for the 1st Petitioner was however opposed to the case being adjourned to another date. He was of the view that since the matter involved the safety and lives of the 2nd – 4th Petitioners, the court should proceed and hear the *habeas corpus* application *exparte*. The 1st, 2nd and 3rd Respondents represented by Mr. Kemo and Mr. Kuria urged the court to give them time to file a response in view of the weighty matters that had been raised by the Petitioners.

Mr. Kemo represented to the court that although he was acting on behalf of the 2nd and 3rd Respondents, he was equally concerned and was interested to know the whereabouts of the 2nd Petitioner. He was personally known to him. At that point of the proceedings, Mr. Kemo submitted that there was no evidence that the 2nd – 4th Petitioners were ever in the custody of the police. No records reflected their presence in the place that the 1st Petitioner had indicated the 2nd - 4th Petitioners were last seen. On his part, Mr. Kiptiness for the 4th Respondent informed the court that the 4th Respondent was willing to supply the information sought by the 1st Petitioner provided they were given specific phone numbers upon which the information was sought. From the outset, he informed the court that it was not necessary to enjoin the 4th Respondent in the proceedings as it would comply with order issued by the court provided it was information within its possession.

After this preliminary hearing, the court was persuaded of the urgency of the matter. The compelling reason was that the issue in dispute involved the liberty of citizens. With a view to addressing the concerns raised by the petitioners regarding the disappearance of the 2nd - 4th Petitioners, this court ordered the 3rd Respondent to provide an interim report to court on the disappearance of the 2nd – 4th Respondents. This is what the court said:

“(since) the 2nd, 3rd and 4th Applicants (Petitioners) have not been seen since 23rd June 2016, it is imperative that the Inspector General of Police and the Director of Criminal Investigations provide the court with an interim report on what investigations they have undertaken since the disappearance was reported to them. This court is concerned that unless the relevant authorities treat this matter with urgency and the seriousness it deserves, the families of the 2nd, 3rd and the 4th Applicants will be in the dark as to their whereabouts, and what effort, if any, is made to secure their safe return to their families. It is in that regard that I order the Inspector General of Police and the Director of Criminal Investigations to provide an interim report to this court by 2.00 p.m. today so that the court can issue further directions.”

As regard the 4th Respondent, the court declined the request by the 4th Respondent to be stuck out as a party in these proceedings. It directed the 4th Respondent to provide the information and data sought by the 1st Petitioner with a view to assisting the 1st Petitioner trace the movements of the 2nd – 4th Petitioners from the time of their disappearance to the time the 1st Petitioner moved the court.

When the court reconvened at 2.30 p.m., Mr. Kemo informed the court that bodies suspected to be those of the 2nd – 4th Petitioners had been seen at Ol Donyo Sabuk River. Two of the bodies had been retrieved. One of the bodies was at the time yet to be retrieved. Police officers were at the scene at the time making effort to retrieve the third body. The Director of Criminal Investigation had ordered the arrest of the Administration Officers based at Syokimau Chief’s Camp. They were suspected to be connected with the disappearance of the 2nd – 4th Petitioners. Two of the suspects had been arrested at the time. Other suspects were being sought. At the time this court reserved the case for this Ruling, two other suspects had been arrested. The four Administration Police Officers have already been arraigned before the High Court facing the charge of the murder of the 2nd – 4th Petitioners.

As regards the interim report that the court required the 3rd Respondent to provide to court, Mr. Kemo informed the court that one of the investigating officers, IP David Cherop was present in court and would give a statement under oath as to what investigations the police had undertaken since the report of the disappearance of the 2nd – 4th Petitioners was made to the police. He told the court that a report of the disappearance of the three (3) petitioners was made to the Director of Criminal Investigations on 25th June 2016 by a member of staff of International Justice Mission. This is where the 2nd Petitioner worked. The Director of Criminal Investigations directed the complaint to be investigated by the Flying Squad, Nairobi Area. IP. David Cherop was assigned to investigate the case. He interviewed the reportee. He then went to Syokimau Chief’s Camp. According to his investigation, he established that on the 23rd June 2016, the three petitioners went to Mavoko Law Courts. The 2nd Petitioner was the advocate of the 3rd Petitioner. The 3rd Petitioner was facing criminal charges before the said court. The 4th Petitioner was a taxi driver who had been hired to take the advocate to court. After the hearing of the case, no one knew what happened to the three. They simply could not be traced.

At about 4.30 p.m., while a witness was passing by a road near the Syokimau Chief’s Camp, he saw someone call him. The person was inside a container which had been converted as a holding cell by the Administration Police based at the Camp. The conversion of this container into a holding cell had not been approved i.e. the container was not gazetted as a place where suspects could be held pending their production before court. He confirmed that inspite of this, the Administration Police at the Camp held suspects in the said container pending their transfer to Mlolongo Police Station. The witness realized that the person calling him from the container was in distress. He did not want any person within the Chief’s Camp to know that he was communicating with a passerby. The person inside the container then threw a tissue paper wrapped in an electric component to the witness. When the witness opened the tissue paper, he saw that the person inside the container required that he contacts two persons whose mobile phone numbers were in the paper.

It was obvious to the witness that the person inside the container was in distress and in fear. The witness attempted to contact the two persons whose numbers he had been provided with but was unable to reach

them. Eventually he was able to contact one of them. Unfortunately, his message was not taken seriously. It was only when the three petitioners failed to return back home, that those close to them started worrying. It was in that regard that a report was made to the police. It was apparent from the statement made by IP Cherop, that due to inertia on the part of the police, investigations stalled. Notwithstanding that the investigator got information that the three petitioners, or at least one of the petitioners was in the container at Syokimau Chief's Camp, it was apparent that the Administration Police Officers at the said Camp were not interrogated to establish the veracity of the information given to the investigator by the witness. It is tragic that even when this information was within the knowledge of the police, the initial statements issued by the police consisted of denials. The police denied that the three petitioners were ever in their lawful custody. It was instructive that the detention of the three petitioners at the said Police Camp was not recorded in the Occurrence Book. There was therefore no official record of the presence of the three petitioners at the said Chief's Camp.

According to the 1st Petitioner, the events leading to the three petitioners' detention had its antecedent in an incident that took place on 10th April 2015. On this day at about 2.00 p.m., Josephat Mwendwa (the 3rd Petitioner)(Mwendwa) was riding a friend's motor cycle as a pillion passenger. They were riding a road near the Syokimau Chief's Camp. They were stopped by Administration Police Officers who were dressed in civilian clothes. From the affidavit sworn in support of the application, it was not clear what happened after the two had been stopped. What was however without doubt was that Mwendwa was shot in his arm by one of the Administration Police Officers. The said police officer transported Mwendwa to hospital and thereafter placed him in police custody.

He was subsequently charged with three criminal counts of being in possession of narcotic drugs, gambling in a public place and resisting arrest by a police officer.

Mwendwa was charged before the Mavoko Law Courts in **Criminal Case No.2020 of 2015**. It is the 1st Petitioner's case that the charges brought against Mwendwa were contrived, fraudulent and trumped up by the Administration Police with a view to concealing or covering up the fact that the said Administration Police Officers had without justification shot and wounded a civilian. Mwendwa was aggrieved by this turn of events. He reported the shooting incident to the Independent Policing Oversight Authority (IPOA). The complaint was taken up by IPOA who commenced investigations. It was apparent that some of the Administration Police Officers alleged to have been involved in the shooting were interrogated by officers from IPOA. From the submission made before court by IPOA, it was evident that the investigation of the complaint was frustrated by lack of cooperation by the Administration Police hierarchy. According to the 1st Petitioner, the lodging of the complaint to IPOA by Mwendwa resulted in repercussions that led to the involvement of the 2nd Petitioner (Willie Kimani) and to their subsequent disappearance and murder.

The 1st Petitioner stated that after the Administration Police Officers based Syokimau Chief's Camp became aware that Mwendwa had lodged a complaint of the shooting with IPOA, they applied pressure on Mwendwa to withdraw the complaint that he had lodged. The pressure was relentless. Mwendwa was steadfast in his determination to have the shooting and his subsequent arraignment before court to be investigated by IPOA. With a view to further "*persuading*" Mwendwa to withdraw the complaint, the same Administration Police Officers on 13th December 2015 arrested Mwendwa in the wee hours of the night. While on transit to Mlolongo Police Station, the same Administration Police Officers threatened to shoot and kill Mwendwa unless he withdrew the complaint lodged with IPOA. When he refused to withdraw the complaint, Mwendwa was charged with six counts under the **Traffic Act**. He was charged *inter alia* with, riding a motor cycle without a helmet, riding a motorcycle without a reflective jacket, carrying excess passengers, carrying uninsured passengers, riding uninsured motorcycle and riding a motorcycle without a driving licence.

According to the 1st Petitioner, all these charges were fraudulent and malicious. The charges were specifically brought against Mwendwa to intimidate him, firstly, to forbear from pursuing his complaint with IPOA and secondly, to drop his claim for compensation resulting from the injury that he sustained from the shooting. The 1st Petitioner is emphatic that the second set of charges, just as the first charges

brought against Mwendwa were fabricated. This was because at the time the second set of charges were filed against Mwendwa, he was still recuperating from the gunshot injury that he had sustained and could therefore not ride a motorcycle.

The intimidation and harassment of Mwendwa did not stop there. On 16th February 2016, after attending a session at Mavoko Law Courts, he was picked by two men who alleged that they were Directorate of Criminal Investigation Officers. He was again taken to Mlolongo Police Station and interrogated on allegations that he was involved in a robbery where violence was alleged to have been used. No charges were preferred against Mwendwa. It was this incident that eventually prompted Mwendwa to seek assistance from International Justice Mission. This was how Willie Kimani came to represent Mwendwa.

From the statement made by IP Cherop before this court, it was apparent that after initially visiting Syokimau Chief's Camp on 25th June 2016, he took no further action in furthering the investigations in the case. This court was unable to discern whether this inaction was due to lethargy, lack of logistical support, lack of cooperation by the police hierarchy or it was due to sheer ineptitude. What was clear was that when the 1st Petitioner took up the case on behalf of the other petitioners, the dynamics of the case completely changed. On the day that the application was listed for hearing before this court, IP Cherop informed the court that bodies suspected to be those of Mwendwa, Muiruri and Willie Kimani had been found at Ol Donyo Sabuk River.

It became apparent to the court, from the previous conduct of the police in the case of Mwendwa, that there was justifiable apprehension that the police would not be able to properly investigate the case with a view to bringing the culprits involved in the disappearance and subsequent murder of the three petitioners to book. This was especially so in light of the fact that the suspects were police officers. With a view to securing the integrity of the investigation, this court issued several directions. The directions included the requirement for an interim report to be presented to court regarding the steps that the police and the Director of Public Prosecutions were taking with a view to ensuring that justice was accorded to the case. The court further ordered that post mortem of the bodies of the three petitioners be undertaken in the presence of a representative of the 1st Petitioner. The court also required the Director of Criminal Investigations Mr. Ndegwa Muhoro, Mr. John Kariuki, the Head of Serious Crimes and Mr. Said Mohamed, the Head of Flying Squad to attend court with a view to giving assurance to the court as to the integrity of the investigations. The State did not oppose any of the directions given by the court.

Post mortem on the bodies of the now deceased petitioners was performed by Dr. Johansen Oduor, the Chief Government Pathologist, Dr. M. Njau and Dr. Andrew Kanyi Gachii. Dr. Gachii was instructed by the 1st Petitioner to be present during post mortem by the Government Pathologists. From the reports presented to court, it was clear that the deceased petitioners were tortured before they were killed. Willie Kimani's cause of death was head injury due to blunt force trauma, Josephat Mwendwa's cause of death was due to head, neck and chest injuries due to blunt force trauma and Joseph Muiruri's cause of death was ligature strangulation and head injury due to blunt trauma. From the post mortem reports, it was clear that the deceased petitioners met a violent death in the hands of their killers.

In compliance with the summons issued by the court, Mr. Ndegwa Muhoro, the Director of Criminal Investigations, Mr. John Kariuki, the Head of Serious Crime Investigations and Mr. Said Mohamed, the Head of Flying Squad appeared before court on 5th July 2016. The three officers were required to give an assurance to the court as to the integrity of the investigations. This is what Mr. Ndegwa Muhoro told the court:

“When we got the information, we were dealing with the matter of abduction, after the discovery of the bodies I nipped in the homicide team to work with the investigators. I requested the Director of Public Prosecution to donate counsel to work with investigators. We want the case to be prosecuted. I have senior officers leading in this investigation. Mr. Kariuki is In-charge of investigations, Criminal Investigation (CID) Headquarters. Mr. Said is In-Charge of Flying Squad. We have taken a step forward. We have invited FBI – Evidence Response Team – it was involved from yesterday. We want to invite the expertise to process the evidenced material. We

want an independent voice in terms of the collection of the evidence. We have placed some of the witnesses under Witness Protection. I have given instructions that we assess witnesses as they come and will give them protection. I will ensure that there will be no interference with investigation from any quarter. Within 14 days I will ensure that the investigation is completed. If we complete the investigation before 14 days, we will send the suspects to take plea.”

The 1st Petitioner was not satisfied with the assurance given by the Director of Criminal Investigations. Counsel for the 1st Petitioner was of the view that they should be allowed to cross-examine the Director with a view to ascertaining the level of commitment by the police in light of past instances where people have died under dubious circumstances and the police was unable to get to the bottom of the respective cases by successfully prosecuting the culprits. The 1st Petitioner also requested the court to allow it to instruct a private investigator to investigate the case with the police. The Director of Public Prosecutions was of the view that the mandate of the court in this particular case did not extend to other cases but rather to the case at hand which the police had so far made commendable progress in pursuing all the necessary leads. He was of the view that given at the time the fact that the police were still investigating the case, it was premature for the court to call upon the Director of Criminal Investigations to account for the evidence gathered and whether such evidence met the legal threshold.

The Director of Public Prosecutions argued that the Director of Criminal Investigation should be given an opportunity to conclude the investigations before handing in a final report to the court. It is at that point that the court can give directions as to the way forward noting that there were already suspects who had been arraigned before court and therefore the criminal charges facing them should not be prejudiced or compromised by these proceedings. As regard to whether the 1st Petitioner can be allowed to hire private investigators to assess the evidence gathered by the police, the Director of Public Prosecution was of the view that the police should be allowed to execute its mandate as provided by the **Constitution** to conduct investigations. The 1st Petitioner should await the trial where the law allows them to participate in the trial. This court directed the Director of Criminal Investigations to submit a final report in respect of the investigations conducted. The report was submitted to the court on 20th July 2016. Copies of the report were availed to the parties to the proceedings.

The Director of Public Prosecutions explained that the police had concluded investigations. Four suspects had already been arraigned before the trial court. Plea was taken on 18th July 2016. The accused pleaded not guilty to the charge. The Director of Public Prosecutions was of the view that the court should terminate the *habeas corpus* proceedings because the bodies of the deceased petitioners had been recovered and identified suspects taken to court to answer to charges of murder. The Director of Public Prosecutions urged the court to exercise caution not to make orders that would prejudice the trial now pending before the High Court. On its part, the 1st Petitioner was of the view that the final report submitted by the Director of Criminal Investigations was wholly inadequate. The 1st Petitioner urged the court to give them the opportunity to evaluate the evidence gathered by the police with a view to determining whether there were areas with loopholes that will enable the culprits escape criminal liability.

The 1st Petitioner also asked the court to grant it leave to amend the petition so as to include facts which had arisen since the petition was filed. In particular, the 1st Petitioner desired to amend the petition to set out the particulars relating to the circumstances which the deceased petitioners died, and further, to plead a claim for compensation on behalf of the families of the deceased petitioners as a result of their unlawful killing. The 1st Petitioner argued that the *habeas corpus* application was but one limb of the prayers sought by the petitioners in the petition. The 1st Petitioner was emphatic that the fact that the bodies of the deceased petitioners had been recovered did not imply that the proceedings had terminated. The petitioners had sought other prayers in the petition which had not been ventilated.

There are several issues that came to the fore for determination by this court. The first issue for determination is whether the application lodged by the petitioners, being essentially *habeas corpus* proceedings, should be terminated now that the bodies of the deceased petitioners were found. It should be noted that when the petitioners lodged the petition before this court, theirs was a case of suspected

enforced disappearance by a member of government agency. **Article 25(d)** of the **Constitution** provides thus:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

(a) ...

(b) ...

(c) ...

(d) the right to an order of habeas corpus.”

Article 22(1) of the **Constitution** grants any person the right to institute court proceedings if such person is of the view that a right or fundamental freedom in the Bill of Rights is ***“denied, violated or infringed, or is threatened.”***

Article 21(2)(a) of the **Constitution** provides that another person can bring proceedings on behalf of the person whose right or fundamental freedom in the Bill of Rights has been infringed. In that regard therefore, the 1st Petitioner has the requisite *locus standi* to prosecute this petition on behalf of the 2nd, 3rd and 4th Petitioners.

Section 389(1) of the **Criminal Procedure Code** provides that:

“The High Court may whenever it thinks fit direct –

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

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

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

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

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

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

In **Masoud Salim & Another –Vs- Director of Public Prosecutions & 3 Others [2014] eKLR** Mureithi J recognized the importance which the **Constitution** places the right of habeas corpus. This is what he had to say:

“30. The right to an order of Habeas Corpus is one of the rights in the Bill of Rights which cannot be limited. The other rights that cannot be limited are set out in Article 25 of the Constitution of Kenya 2010 are the right to freedom from torture, and cruel, inhuman or degrading treatment, freedom from slavery or servitude and the right to fair trial. The heightened status of these rights as against other constitutional rights and freedoms in the Bill of Rights is emphasized by this protection from any limitation.

31. The premium upon which the people of Kenya places on the right to habeas corpus is also emphasized by the fact that until the promulgation of the Constitution of Kenya 2010, the right to habeas corpus was guaranteed only by statutory provisions under section 389 of the Criminal Procedure Code on directions in the nature of habeas corpus. Under the new Constitution, the right to habeas corpus is entrenched in the Bill of Rights under Article 51(2) in the following terms:

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

In the present application, the circumstances which the three deceased petitioners were held can be described as not only unlawful but also in breach of their constitutional right to liberty. What made it worse was that the deceased petitioners were confined outside the authority of the law. According to the facts placed before this court, the three deceased petitioners were apprehended by Administration Police Officers as they were travelling back from Mavoko Law Courts. From the evidence, the three deceased petitioners left Mavoko Law Courts at about midday on 23rd June 2016. It was not clear from the evidence where the three deceased petitioners were taken to. What is without doubt was that at about 4.30 p.m. a witness riding along the road near a container (which had been converted into a holding cell by the Administration Police Officers based at Syokimau Chief’s Camp), heard someone make calls of distress from the container.

The person threw a piece of paper from the container. On reading it, the witness realized that the persons inside the container were indeed in distress. The message in the piece of paper was to the effect that the persons inside the container feared for their lives and required immediate intervention to be made by the two persons whose names and mobile numbers appeared in the piece of paper. The witness’ attempt to contact the two persons was not immediately successful because the witness did not have sufficient airtime to make the calls. Later that evening, he was able to make the calls. This was on Thursday. The persons who received the information did not take action until the following day when they took action.

The 2nd Petitioner’s employer, International Justice Mission immediately contacted the Director of Criminal Investigations and lodged a complaint. They were referred to the Flying Squad in Nairobi. The initial report was that of abduction. From the statement given in court by one of the investigating officers, it was clear that the investigations were stymied first, by the denial by the Administration Police Officers based at Syokimau Chief’s Camp of the fact that they had ever held in their custody the three deceased petitioners and secondly, by lack of seriousness in which the police treated the complaint of the deceased petitioners disappearance when it was lodged by the 2nd deceased petitioner’s employer. To his credit, the investigator visited Syokimau Chief’s Camp on 25th June 2016. This was on Saturday. However, what is most distressing is that nothing appears to have been done to advance the investigations between the 25th June 2016 and the 30th June 2016 when the 1st Petitioner took up the case and applied pressure on the 3rd Respondent to take action.

What was unconscionable on the part of the 3rd Respondent is the information it relayed to the public to the effect that the three deceased petitioners were not at the material time in their custody even after one of its investigators had established from a witness that one of the deceased petitioners was detained in the container at Syokimau Chief’s Camp on 23rd June 2016 as at 4.30 p.m. The denial by the police at the time that the deceased petitioners were ever in their custody was based on the patently false premise that the records kept by the Administration Police Officers attached to Syokimau Chief’s Camp, particularly the Occurrence Book (OB), did not indicate the presence of the deceased petitioners at the said Chief’s Camp. What bothered this court is why the police hierarchy believed their officers at the said Chief’s Camp and not the witness who had recorded a statement confirming the presence of the deceased petitioners at the said Chief’s Camp.

In such circumstances, there was justification in the suspicion by members of the Law Society of Kenya and the relatives of the deceased petitioners that there was a scheme by the police to conceal the truth as to the whereabouts of the deceased petitioners. This lethargy by the police to aggressively pursue the lead

which was given to them by the witness who confirmed the presence of the deceased petitioners in the container at Syokimau Chief's Camp is inexplicable. In the premises therefore, the 1st Petitioner was justified in seeking an immediate and urgent relief from the court in the nature of the order of *habeas corpus*. The 3rd Respondent's initial denial that the deceased petitioners were in its lawful (or unlawful) custody did not aid this court or the relatives of the deceased petitioners to know the truth about the abduction, illegal detention and subsequent murder of the deceased petitioners. The subsequent explanation by the 3rd Respondent that the concerned Administration Police Officers were rogue and were acting beyond the authority conferred to them by the law is not satisfactory. The facts of this application clearly disclose the existence of a culture of impunity in the Police Service that enabled such acts as were perpetrated by the concerned Administration Police Officers to take place. Unless the conditions that breeds and feeds such mentality are weeded out from the Police Service, such occurrence as happened to the deceased petitioners is bound to be repeated.

From the foregoing, it is evident why the court issued the orders that it did during the course of the proceedings. The Director of Public Prosecutions questioned the procedure adopted by the court in light of its understanding of what he understood to be the scope of *habeas corpus* proceedings. The Director of Public Prosecution was of the view that once the bodies of the deceased petitioners were discovered and identified, then, the court ought to down its tools and dismiss the application. With the greatest respect to the Director of Public Prosecutions, his understanding of the scope of the application filed by the petitioners is misplaced. This is because, apart from the writ of *habeas corpus*, the petitioners sought other prayers in the application.

As appreciated by the court in **Masoud Salim & Another –Vs- Director of Public Prosecutions & 3 Others [2014] eKLR**, unlike in the past when a party seeking orders of *habeas corpus* relied solely on statutory provisions, since the promulgation of the **2010 Constitution**, the writ of *habeas corpus* is now a constitutional imperative. In the present application, other than the order of *habeas corpus*, the petitioners invoked the jurisdiction of this court under the **Constitution** with a view to getting appropriate remedies in enforcement of the rights and fundamental freedoms of the deceased petitioners. **Article 20(3)** of the **Constitution** enjoins this court, in applying the provisions of Bill of Rights to, *inter alia*, adopt the interpretation that most favours the enforcement of a right or fundamental freedom. **Article 21(1)** of the **Constitution** places a fundamental duty upon the State and every State organ (i.e. the courts and the Director of Public Prosecution) to ***“observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.”***

In the present application and the petition upon which the application is predicated, the petitioners craved the court's intervention to protect the deceased petitioners rights and fundamental freedoms as stated in the **Constitution** and as contained in International Instruments such as the **International Convention on Civil and Political Rights**, the **International Convention for Protection of all Persons from Enforced Disappearances**, the **Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment** and the **Universal Declaration of Human Rights 1948**. By dint of **Article 2(6)** of the **Constitution** these international instruments that Kenya is signatory to, form part of the Laws of Kenya.

Once it was established that the deceased petitioners were killed as a result of actions of police officers, whether acting with or without authority, it incumbent upon this court, in enforcement of the deceased petitioners' right to be protected from enforced disappearance, to issue further orders with a view to ensuring that the investigations to nab the culprits were thoroughly and exhaustively carried out without interference or undue influence from any quarters. This was especially so in light of the fact that the suspects in the disappearance and death of the deceased petitioners are police officers. Although the request for the writ of *habeas corpus* was technically spent with the discovery and identification of the bodies of the deceased petitioners, the petitioners' application raised fundamental issues that this court had jurisdiction to address in this Ruling.

The facts of this application brought to the fore the fundamental role played by advocates in the administration of justice and in the upholding of the Rule of Law. From the pleadings and affidavits filed and submission made, this court came to appreciate the role played by Willie Kimani Advocate in the

advancement of the Rule of Law and the protection of human rights and fundamental freedoms as enshrined in the **Constitution**. Without the likes of Willie Kimani who was prepared to boldly and fearlessly enforce human rights and fundamental freedoms, the Bill of Rights as contained in the Constitution will just be but mere platitudes. Since his days at the University, Willie Kimani distinguished himself as a lawyer who understood the precepts of justice to mean serving those indigent Kenyans who were unable to secure legal counsel when in conflict with the law. In that regard, Willie Kimani, upon his admission to the bar in 2011, shunned the lure of financially lucrative law practice but instead opted to specialize in representing those indigent Kenyans who were victims of police brutality and other police malpractices.

Willie Kimani courageously, and without fear of his own safety, investigated and documented cases of police brutality while he worked with a Non-Governmental Organization (NGO) and later with Independent Policing Oversight Authority (IPOA). He continued this role when he was employed by his last employer International Justice Mission (IJM). It was in that role that he took up the case of Josephat Mwendwa who was obviously a victim of police brutality and malpractice. It was while acting in his capacity as an advocate that Willie Kimani met his death. No advocate thinks or ever imagines that he can be killed in the course of his duty. An advocate's weapons are: the Constitution, the Statutes, precedents and the skill and knowledge acquired to present his or her case before the court or a tribunal with a view to advancing his or her client's case. In the course of his or her work, an advocate will forcefully but courteously argue his or her client's case. The advocate's manner of presentation of his or her client's case may sometimes be vigorous and aggressive but at the end of it all, it will not cause enmity or discord with the opposing counsel. That is the reason why advocates take pride in addressing each other in court as Learned Friends. It is not within the contemplation of an advocate, such as Willie Kimani, that armed with his tools of trade as mentioned above he will meet his death while representing a client. The legal fraternity was justifiably shocked, traumatized and dazed that anyone could imagine or have the audacity to devise a scheme to kidnap, illegally detain, torture and eventually kill Willie Kimani.

The role of an advocate in enforcement of the Bill of Rights and Human Rights is recognized by the **Constitution**. **Article 50(2)(g)** of the **Constitution** specifically provides that any person facing a criminal charge before a court of law, as part of the exercise of his constitutional right to fair trial, is entitled to choose and be represented by an advocate of his choice. Such accused person is entitled to be informed of this right at the time he is arraigned before court. **Article 50(2)(h)** of the **Constitution** provides that where it is established that substantial injustice would otherwise result, an accused person shall be entitled to have an advocate assigned to him at the State's expense. **Section 43(1)** of the recently enacted **Legal Aid Act** provides thus:

“A court before which an unrepresented accused person is presented shall –

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

(c) inform the service to provide legal aid to the accused person.”

It is therefore clear that without an independent, committed and effective law profession, the realization of the rights and fundamental freedoms envisaged under the **Constitution** will be a mirage. Judges and prosecutors cannot effectively perform their respective mandates without advocates. The **8th United Nations Congress on Prevention of Crime and Treatment of Offenders** adopted a universal instrument titled *“Basic Principles on the Role of Lawyers, 1990”*. **Principle 16** of this instrument provides thus:

“Governments shall ensure that lawyers (a) are able to perform all their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any

action taken in accordance with the recognized professional duties, standards and ethics.”

Principle 17 requires the State to provide a lawyer who is threatened as a result of discharging his function with adequate security. In a training manual published by the office of **The High Commissioner for Human Rights in cooperation with The International Bar Association** titled **“Professional Training Series No.9, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A Manual on Human Rights for Judges, Prosecutors and Lawyers”** at Page 152 states that:

“Another important rule is laid down in Principle 18, according to which “lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.” The question of lawyers’ identification with their clients has been dealt with by the Special Rapporteur on the independence of Judges and lawyers, who in 1998 for instance stated that he viewed “with concern the increase number of complaints concerning Governments’ identification of lawyers with their clients’ cause”, adding that lawyers, “representing accused persons in politically sensitive cases are often subjected to such accusations.” However, “identifying lawyers with their clients’ causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyer concerned.””

Article 2(5) of the **Constitution** provides that the general rules of International Law shall form part of the Laws of Kenya. **Article 2(6)** of the **Constitution** states that:

“Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.”

This court therefore holds that **“The Basic Principles on the Role of Lawyers 1990”**, being an international instrument, is recognized as part of the Laws of Kenya in accordance with **Article 2(5)** and **(6)** of the **Constitution**.

In the present application, it was clear that Willie Kimani was killed in the course of performing his duties as an advocate. On the particular day that he was kidnapped and later unlawfully detained before subsequently being killed, he had attended the Mavoko Law Courts as the advocate of Josephat Mwendwa who had been charged with various traffic offences. The 4th Petitioner was a taxi driver who drove Willie Kimani to court. It is not beyond realm of speculation that Willie Kimani, his client and the taxi driver met their deaths because of the complaint that had earlier been lodged by Josephat Mwendwa with IPOA concerning the gunshot injuries that he had sustained in the hands of a police officer. It cannot also be ruled out that Willie Kimani was killed because he was identified with his client’s case.

There was distinct lack of enthusiasm by the police to investigate the disappearance of the deceased petitioners when the incident was reported to them. The police belatedly took action when the Law Society of Kenya and Civil Society took up the deceased petitioners’ cause. Unfortunately for the deceased petitioners, by the time action was taken it was too late. They had already been killed and their bodies dumped in Ol Donyo Sabuk River. This court therefore holds that Willie Kimani Advocate was killed while performing his duties as an advocate. Willie Kimani should be recognized as a champion of Human Rights and the Rule of Law who was killed in line of duty.

Another issue that was brought to sharp focus by the disappearance, illegal detention and subsequent killing of the deceased petitioners is in regard to whether the reforms put in place within the Police Service since the promulgation of the **2010 Constitution** has had any significant effect. There was recognition that over the years, the then police force had acquired a reputation for lack of accountability, distrust by the citizenry, corruption and lack for respect for human rights in the course of performance of their duties as a Police Force. Of particular note, were accusations that some elements of the Police Force were complicit in extra-judicial executions and enforced disappearances. The Police Force was accused of lethargy in investigation of cases in respect of incidences of abuses of human rights. Part of this was explained by the fact that the Police Force was then under-resourced and lacked essential tools, such as forensic laboratories, to enable them effectively discharge their mandate.

An area of special concern was lack of accountability of the Police Force because of a non-existent external oversight body to address complaints raised by members of the public against the police. The report by the **Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions in Kenya** presented to the **United Nations' Human Rights Council** on 26th May 2009 noted as follows:

“33. External oversight of the police – through ombudsmen, oversight boards, or other institutional models – is essential in any system designed to ensure police accountability. The Kenya police have long lacked such oversight, and this is a key systemic flaw ensuring impunity and continued killings.

34. While the police have demonstrated little will to promote real accountability, they should in fact be the first to support improved oversight. It would permit them to demonstrate to the public that they are professional, transparent and trustworthy.”

The Government of Kenya did constitute a **Task Force on Police Reforms** subsequent to the promulgation of the **2010 Constitution**. The Task Force chaired by Justice (Rtd) Philip Ransley noted in paragraph 4.4.6 of the report titled ***“The Need to Establish an Independent Policing Oversight Authority”*** that the highest number of complaints received from members of the public in regard to any public office relates to the police and how it discharges its mandate. At Page 89 of its report, the Task Force observed that:

“To address the many complaints against the police, an ensure accountability of the police service, the Task Force has carefully considered whether to function of the Policing Oversight Authority should be discharged by the Police Service Commission as is the case in Nigeria or other existing institutions such as the Kenya National Commission on Human Rights as is the case in Uganda, or the Public Complaints Standing Committee. The justification for this kind of arrangement is cut down on cost by avoiding a multiplicity of institutions. The Task Force has considered all these options and it is convinced that a dedicated Independent Policing Oversight Authority is necessary in Kenya. Such an oversight is one form of accountability among several that are critical for democratic policing.”

In its recommendation at Page 90, the Task Force noted that:

“The Task Force is of the view that this will enhance accessibility and improve transparency and accountability of the police and the police complaint system thereby enhancing, the image of the police, the understanding by the public of the work that the police do and its relationship with members of the public. The establishment of the oversight is further expected to improve the quality of internal investigations of the police, reassure the members of public that the police will investigate complaints thoroughly and fairly, discourage police misconduct and improve policies and procedures. Police will have the opportunity to learn from the various complaints received and enhance professional standards. With the oversight in place and the knowledge that its conduct and performance are under constant scrutiny and can be questioned, it is expected that the police will be motivated to work more efficiently and professionally.”

The government accepted the recommendation made by the Task Force. The **Independent Policing and Oversight Authority Act** was enacted in 2011. It came into force on 18th November 2011. The Independent Policing Oversight Authority (IPOA) was established pursuant to the enactment. **Section 7** of the **Act** grants IPOA power to investigate the Police Service, *inter alia*, on its own motion or on receipt of complaints from members of public concerning the conduct of members of the Police Service in respect to their work. Such investigations shall include any death or serious injury while in police custody (see **Section 25(1)** of the **Act**).

In the present application, evidence was placed before this court that Josephat Mwendwa was shot and injured by a police officer. Mwendwa had been stopped by police officers who were not in uniform. After being shot, Mwendwa was taken to hospital by the police officers before he was later charged with several offences. Mwendwa was not satisfied with this treatment by the police. He lodged a complaint

with IPOA. IPOA investigated the matter. It was clear from the evidence that was presented before this court that IPOA was frustrated in its investigations by the police. In fact, it was this lodging of the complaint with IPOA that led to the harassment, intimidation and later abduction and killing of Mwendwa, his advocate and the taxi driver.

During the hearing of this application, submissions were made before this court to the effect that the Police Service had the constitutional mandate as provided under **Article 245(4)(a)** of the **Constitution** to investigate, without direction from any person, any particular offence or offences. While that may be the case, there has been public outcry regarding the manner which the Police Service investigates criminal complaints made against members of the Police Service. The Police Service has variously been accused of conducting shoddy investigations, being lethargic and generally skewering investigations so that such accused police officers are eventually not called upon to account for their misconducts or misdeeds. The case of the deceased petitioners was not any different. The Law Society of Kenya was justifiably apprehensive that the Police Service could not be trusted to investigate the case concerning the disappearance, illegal confinement and subsequent killing of the deceased petitioners.

It was clear to this court that part of the difficulty that IPOA had in investigating Mwendwa's complaint was the obvious lack of cooperation accorded to IPOA by the Police Service hierarchy. It seems that the attitude of the Police Service hierarchy is that IPOA is an irritating body, which at best should be ignored and at worst should be obstructed from fulfilling its mandate under the **Independent Policing Oversight Authority Act**. It is shocking that some elements in the Police Service still think that they can operate without civilian oversight or that the Police Service is a closed shop where a civilian authority mandated by law cannot inquire into misconduct by its members. As observed in the two reports cited above, it is to the benefit of the Police Service for members of the public to have confidence that any complaint lodged against a member of the Police Service shall be investigated and accorded the seriousness that it deserves.

In that regard, it was apparent to this court that if the Police Service had accorded due cooperation to IPOA when it was investigating the complaint lodged by Mwendwa, in all likelihood, the deceased petitioners would still be alive today. It is to the interest of the Police Service to fight impunity within some members in its ranks. Trust and confidence is built by members of the public having faith that the Police Service will execute its mandate professionally and transparently. It is the duty of every Kenyan and the Police Service itself to ensure that the reforms envisaged when the Police Service was established is not frustrated. The death of the deceased petitioners should, hopefully, be a watershed in the way complaints on misconduct by some police officers are investigated. For the families of the deceased petitioners, it will offer scant consolation that because of the intervention by the Law Society of Kenya and Civil Society, the case of deceased petitioners has been accorded due attention in its investigation.

In conclusion, this court, upon evaluating the facts of this application and the submission made by Learned Counsel, is of the considered opinion that the application for writ of *habeas corpus* has been spent. During the hearing of the application, this court was able to ensure that an investigation regarding the disappearance, illegal detention and subsequent killing of the deceased petitioners was accorded due attention and seriousness by the concerned authorities. The 1st Petitioner requested this court to allow it to amend the petition so as to include new developments that occurred subsequent to the filing of the petition. The 1st Petitioner desires to set out, more elaborately, and in detail a claim for compensation on behalf of the families of the deceased petitioners. That request is in order. The 1st Petitioner is hereby granted leave to amend its petition. The amended petition shall be filed and served upon the Respondents within 14 days from today's date.

The hearing of the petition shall be before the Constitutional and Human Rights Division of this Court. This file shall accordingly be transferred to that Division of this Court. Another request that was made by the 1st Petitioner was for court to allow it to participate in the trial of the suspects that is now pending before the High Court. The issuing of such order by this court is not necessary since under **Section 4(1)(b)** of the **Victim Protection Act 2014**, the 1st Petitioner and the families of the deceased will, as a matter of right, have audience before that court. As a matter of abundant caution, this court did not name any of the suspects or ascribe any guilt to any individual on account of the fact that there is a pending trial before

court. The observations made by this court were strictly limited to the matters in issue in the application. The application that was canvassed before this court was not a criminal trial.

It would constitute a failure on the part of this court if it concludes this Ruling without thanking the Advocates who appeared before it. They undertook research and made submission that was able to assist the court to reach a just finding. The Advocates are: Dr. Khaminwa, Prof. Sihanya, Mr. Ndegwa Njiru, Mr. Kanjama, Mr. Gitari and Mr. Guantai for the Law Society of Kenya and the deceased petitioners, Mr. Mutuku, Mr. Kemo, Ms. Mwaniki and Ms. Aluda for the Director of Public Prosecutions, Mr. Kiptiness and Ms. Mweu for the 4th Respondent, Ms. Chibole for the Attorney General and Mr. Olola and Mr. Kiptoon for the Independent Policing Oversight Authority. That's the Ruling of the Court. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF AUGUST 2016

L. KIMARU

JUDGE