



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 83 OF 2011

BETWEEN

MBURU NJUGUNA (Suing

on behalf of the Estate of

JOHN MACHARIA MBURU (Deceased)) PETITIONER

AND

THE CHIEF KOROGOCHO LOCATION .. 1ST RESPONDENT

THE MINISTER OF STATE

FOR PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

THE DIRECTOR OF

PUBLIC PROSECUTION 4TH RESPONDENT

JUDGMENT

Introduction

1. John Macharia Mburu was a young man, aged 23 years, eking out a living in the sprawling Mathare slums before his life was cut short. His father, the petitioner, claims that the deceased was arrested, subjected to torture and then killed by armed administration police officers in violation of his rights and fundamental freedoms.
2. The petitioner is the administrator of the estate of John Macharia Mburu (“the deceased”) and his claim is set out in the petition dated 11th May 2011 and amended on 30th October 2012. The petitioner’s case was supported by the affidavit of Mburu Njuguna. He called five witnesses; Rose Mukonyo Kimeu, Mwangi Abdi Omar, Mburu Njuguna, Dr Kanyi Gachie and Sarah Wangari Mburu.

3. The respondents opposed the petition through the replying affidavit sworn on 2nd May 2012 by Police Constable Isaac Kimutai, a police officer attached to Kariobangi Police Station who testified. Rebecca Khisa Balungu also testified on the respondents' behalf. The 4th respondent filed an affidavit sworn on 2nd April 2013 by Gitonga Muriuki, a prosecution counsel.

Petitioner's Case

4. Rose Kimeu (PW1) testified that on 21st August, 2009 at about 10.00am, the deceased, Simon Mbugua ("Mbugua") and other customers were drinking local alcoholic brew in her house which doubles up as a canteen. While there, four administration police officers attached to the Korogocho Location Chief's Camp came and took away the deceased and Mbugua. They also collected her husband's panga. She recalled the names of three officers as Sammy, Galgalo and a female officer known as *Madam*. She stated that she knew them as they always passed by. At about 2.00pm she heard gunshots whereupon she rushed out of the premises and found people claiming that people who were in her canteen had been shot. She rushed to the scene, which was near the Chief's camp, but could not see what was happening.
5. Sarah Wangari (PW5), the deceased's sister, testified that she was at PW1's canteen drinking with the deceased and Mbugua on that morning. As she was leaving, she saw Galgalo and Sammy, whom she knew, enter PW1's house. When she returned she was told by a young boy that the police officers had left with the deceased and Mbugua. When she was shown where they were headed, she decided to follow them. She testified that she saw the police officers slapping the men with a panga. Galgalo spotted her and ordered her to join them two of them.
6. PW 5 further testified that they were taken to the Chief's camp while being kicked and told '*harakisheni harakisheni*'. They were locked in the cell for a while. Later the deceased and Mbugua were called out, made to lie on their stomachs and beaten with a *jembe* handle. Minutes later, the female officer known as *Madam* came and started stepping on the two. Galgalo came and left with the two men to a place unknown. After the deceased and Mbugua had left, she was called to the reception by an officer called Muhia. He interrogated her about the deceased and other people. She was thereafter ordered to collect litter within the chief camp compound and released. On her way home she was informed by Mwangi Abdi Omar (PW2) that the deceased and Mbugua had been killed.
7. Mwangi Abdi Omar (PW2) is a resident of Korogocho. He lives near PW1. He testified that on the material day at about 9.00 am, he saw five police officers who included a female officer. Only one of the officers was in uniform. He recognised two officers as Sammy alias 'Keeper' and Galgalo. The officers went into PW1's house and after about 20 minutes they came out with the deceased and Mbugua handcuffed. One of the officers had a panga which he used to slap the two arrested men. The female officer then told PW5 to accompany them. He further testified that he followed them to the Chief's Camp where they were locked up at about 11.00 am. He went back to his place.
8. PW2 later heard gun shots and screams from women. He could not get to the scene where the gun shot were heard as a police officer told him to go back. He decided to go to *Baba Tabu's* plot near the river. The plot is surrounded by iron sheets which had holes from which he observed what was going on at the river. He testified that he saw Galgalo shooting the deceased and Mbugua. He stated that he heard the lady police officer encourage Galgalo saying '*maliza hawa*' (*finish this people*). Galgalo then took a knife, smeared it with blood and placed it on Mbugua's body. He also took something that resembled a gun and placed it on deceased's body. When other officers came, Galgalo showed them the bodies as they took photographs.
9. The petitioner (PW3), the deceased's father, testified that on the material day, he was informed by his wife that the deceased had been killed. He was informed of the circumstances of the deceased's death at PW1 and one Musyoka who was in PW1's canteen with the deceased.

10. Dr Andrew Kanyi Gachie (PW4), a consultant pathologist and forensic specialist who examined the deceased's body testified that he conducted a post mortem of the deceased's body on 31st August 2009 at the City Mortuary. He confirmed that the body was identified as that of the deceased. He observed the following injuries:
- a. *Injury No. 1 - A gunshot entry wound on the right side of the mouth measuring 0.5 cm in diameter. The wound was circular in shape and had inverted edges. The projectile had penetrated through the oral cavity fracturing the jaw bone and exited on the left pre-oracular area and it created an exit wound 2.5 cm diameter. The wound was about 2cm from the left ear. The rest of the head was otherwise normal.*
 - b. *Injury No. 2 - A gunshot entry wound at the mid back which measured 0.5 cm diameter. The bullet entry had penetrated through the chest wall and exited on the side of the chest wall. It created an exit wound of about 3 cm diameter. As the bullet passed through the chest it perforated the lower lobe of the lung and the heart.*
 - c. *Injury No. 3 – An injury on the left upper arm. A gunshot entry wound on the medial inner aspect of the arm. It measured 0.5 cm in diameter. It penetrated and fractured the humerus bone and exited on the outer aspect of the left upper arm. The exit wound was 3 cm diameter.*
 - d. *Injury No. 4 - Injury in the lower limb and consisted of a gunshot entry wound on the left buttock. The wound measured about 1cm. it penetrated through the muscle and soft tissue and exited on the anterior part of the lower limb. The exit wound was 3cm.*
11. Apart from the gunshots there were no other injuries on the body. PW4 noted that deceased suffered gunshot wounds to the head, chest, upper and lower extremities coupled with extensive injuries to the heart and lungs. He concluded the cause of death was haemorrhage due to multiple gunshot wounds. He was of the opinion that the bullets were fired at an intermediate range by a high velocity gun. He produced his post-mortem report dated 10th September 2009 (Exhibit 1) to that effect.

Respondents' Case

12. PC Isaac Kimutai (RW2) is a police officer who was charged with investigating the events of 21st August 2009. He took over the conduct of the investigation on 24th September 2010. He summoned witnesses and took statements from persons who were present and relatives of the deceased. He established that according to the statements he had received, administration police officers were on patrol when they encountered six armed thugs who were trying to rob the occupant of a motor vehicle belonging to a bread company. The deceased and Mbugua were among the thugs. There was exchange of fire between the thugs and the police officers resulting to the killing of the deceased and Mbugua. After completing the investigations, he recommended to the 4th respondent that an inquest be conducted to establish the cause of death.
13. PC Kimutai testified that the only bullets that were recovered were from the bodies of the deceased and Mbugua and that they had not been subjected to a ballistic examination. The toy pistol that was recovered was not subjected to ballistics analysis while the knife was not dusted for finger prints. He revisited the scene on 24th October 2010 and drew a sketch plan. He stated that when he visited the scene earlier he could not see the point where the deceased's bodies were from Baba Tabu's house. He produced an extract of the Occurrence Book for the Korogocho Chief Camp for 21st August 2009 which did not contain the deceased's name. His inquiries regarding the bread van were not successful since the Company had a new manager who did not have any information on the robbery. RW2 also produced the post mortem reports for the deceased and Mbugua, the sketchplan for the area and an incident report written by RW1 addressed to the District Officer, Kasarani.
14. RW1, the senior assistant chief, Langata Division, testified that on the material day she was called by the local Assistant Chief and informed that there had been an exchange of fire between administration police and as a result two thugs who had attempted to rob a bread van were gunned

down as they tried to cross River Gitathuru at Baba Dogo. She immediately went to the scene which was near the Gitathuru River where she found the two bodies. The thugs had a pistol and a knife on them. She informed the District Officer and the police from Kariobangi Police Post came and took the bodies away to the mortuary. She denied that the deceased and Mbugua were detained at the Chief's Camp as their names were not recorded in the Occurrence Book. She testified that the chief office is small and the way in which it was partitioned she would have seen the deceased and Mbugua had they been arrested. She stated that she did not receive any complaints from PW5 or any other person about mistreatment.

Determination

15. In addition to the depositions and oral testimony, both parties have filed written submissions to assist the court make its determination.
16. Although the petitioner makes reference to the Constitution, the incident subject of this suit occurred on 21st August 2009 before the promulgation of the Constitution. As the Constitution is not retrospective, the provisions of the former Constitution must govern the determination of the case and as such this judgment will proceed on that basis (see ***Samuel Kamau Macharia v Kenya Commercial Bank SCK Appl. No. 2 of 2012 [2012]eKLR***).
17. It is not in dispute that the deceased was shot and died as a result of bullet wounds. What is in dispute is the circumstances under which he was shot and whether the deceased's right to life was violated by the respondents. The right to life is one of the central rights recognised in international human rights instruments. **Article 4** of the ***African Charter*** provides that, "*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of the person. No one may be arbitrarily deprived of this right.*" This provision echoes **Article 3** of the ***Universal Declaration of Human Rights*** which states, "*Everyone has the right to life, liberty and security of person.*" **Article 6(1)** of the ***International Covenant on Civil and Political Rights*** also states that, "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*"
18. International treaty and case law from international human rights bodies and tribunals has provided an exposition of the content of the right to life. International courts and tribunals have generally recognised the foundational nature of the right to life and have interpreted it broadly. The Human Rights Committee in ***General Comment No 6: The Right to Life***, notes that the right to life, '*is a right which should not be interpreted narrowly*' and '*cannot properly be understood in a restrictive manner.*' The Africa Commission in ***Forum of Conscience v Sierra Leone Communication 223/98*** held that, "*The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.*"
19. The former Constitution protected the right to life under **section 71** which provides as follows;
 71. (1) *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.*
 - (2) *Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case-*
 - (a) *for the defence of any person from violence or for the defence of property;*
 - (b) *in order to effect a lawful arrest or prevent the escape of a person lawfully detained;*

- (c) for the purpose of suppressing a riot, insurrection or mutiny; or
- (d) in order to prevent the commission by that person of a criminal offence, or if he dies as result of a lawful act of war.

20. The provisions of **section 71** of the former Constitution are given effect by **section 14** of the **Administration Police Act (repealed)** which provides as follows,

An officer may use firearms, if and to such extent only as is necessary, against-

- a. *Any person in lawful custody charged with or convicted of a felony, when that person is escaping or attempting to escape.*
- b. *Any person who by force rescues or attempts to rescue another from lawful custody.*
- c. *Any person who by force prevents or attempts to prevent the lawful arrest of himself or any other person:*

Provided that resort shall not be had to the use of firearm-

- i. *Under paragraph (a) unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he shall give warning to such person that he is about to use firearms against him and such warning is unheeded.*
- ii. *Under paragraph (b) or paragraph (c) unless the officer has reasonable ground to believe that he or other person is in danger of grievous bodily harm or that he cannot otherwise prevent such rescue, or as the case may be, effect such arrest.*

21. Likewise **section 21** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides as follows;

21(1) In making an arrest the police officer or other person making it shall actually touch or confine the body of the person to be arrested, unless there be a submission to custody by word or action.

(2) If a person forcibly resist the endeavour to arrest him, or attempts to evade the arrest, the police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

22. The collective effect of these provisions is that a person may be deprived of his right to life using reasonable force when effecting a lawful arrest, preventing escape from lawful custody and or the of commission of crime.

23. Before I proceed to consider whether the respondents are liable, I think the issue of the burden of proof must be addressed. Counsel for the Attorney General, Mr Mohammed, submitted that the petitioner bears the burden of proof. He asserted that under the **sections 107 and 108** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, he who alleges must prove. He submitted that the petitioner had the duty to prove its case on the balance of probabilities. He cited the case of **Kirugi and Another v Kabiya and 3 Others [1987] KLR 347** where the Court of Appeal held that the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.

24. Once the petitioner has established, on the balance of probabilities, that the death of the deceased was as a result of police action, the burden of proof that the death was as a result of one or more of

the exceptions provided in the Constitution is on the State. In **Stephen Iregi Njuguna v Attorney General, Civil Appeal No. 55 of 1997 (1995-1998) 1 EA 252**, the Court of Appeal stated the position thus, *“The police do not have any 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...From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus has 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...”*

25. The totality of the petitioner’s evidence as narrated by PW1, PW2 and PW5 is that the deceased and Mbugua had been drinking at PW1’s canteen when they were picked up by named administration police officers and taken to the Chief’s Camp. The State’s case is that the deceased and Mbugua were shot by the police officers were pursuing a gang of thugs who had attempted to rob a bread delivery van. In these circumstances, the burden of proof falls on the State to show, on a balance of probabilities, that the killing was justified under the Constitution and the law.
26. The State’s case is supported by the evidence of RW2 who carried out investigations and concluded that the deceased was part of a gang and was shot by the police in hot pursuit. His evidence, I find, is merely opinion based on statements of witnesses who were not called. The State did not produce, as evidence, the statements of the witnesses who were interviewed and no account or reason was given why the identified police officers, who would have given an account of what happened, were not called to testify. I also find it difficult to understand why the State could not marshal independent testimony to confirm the robbery which occurred in broad daylight. In **Nguku v Republic [1985] KLR 412**, the Court of Appeal observed, *“That where a party fails to produce certain evidence, a presumption arises that the evidence produced, would be unfavourable to that party.”* This observation is founded on common sense and I accept it.
27. RW1’s evidence is that she came to the scene after she was called and informed of the incident by the Assistant Chief. Upon arrival she called the police from Kariobangi Police Station to come and collect bodies. Her description of the state of the bodies was as follows, *“The bodies of the deceased were apart. They were lying face down. I could see the face of one. There was a gun on top of one and a knife on top of the other.”* In so far as the gunfire exchange between the thugs and the police is concerned, her evidence is unhelpful as she did not witness it.
28. RW1’s testimony regarding the position of the two bodies is relevant in assessing the facts surrounding the incident particularly when compared to that of the PW 4, the pathologist. The evidence of the pathologist and the post-mortem report, which I have outlined at paragraph 10 above, is that injury No. 1, No. 2 and No. 3, could only have been inflicted by a person facing the deceased from the front or side. It is unlikely that the infliction of such injuries would cause the deceased to fall face down as if he was shot from the back. The injuries are therefore inconsistent with the deceased falling face down which would suggest that the deceased were shot from the back. The respondent’s contention that the deceased could have been shot while being pursued is not credible.
29. I also find and hold that RW1’s testimony on the position of the bodies does not support the respondents’ case. First, the medical evidence of the bullet entry wounds makes it implausible that the deceased would have fallen on his face. Second, the fact that the toy gun and knife were on top of the bodies shows that the bodies appeared to have been re-arranged or at least tampered with. This may have been to make it look like the deceased was running away when he was shot.
30. In light of PW4’s evidence and the likelihood that the bodies were tampered with gives credence to PW 2’s account that he saw the deceased being shot by Galgalo at close range. The respondents disputed that PW 2 could have seen the scene of the shooting from his vantage point at *Baba Taabu’s* place. Even if I discount the fact that PW3 could not have seen the shooting, the evidence of the deceased and his friend being arrested from the PW1’s canteen in broad daylight by known officers and then dying as a result of gunshot wounds gives credence to the petitioner’s case that

they were killed in cold blood.

31. The respondents' case is not helped by the fact that PW 2 recalled that police officers came to the scene of crime and took photographs. RW2 did not produce photographs taken by the Scene of Crime Officers. These photographs would have been useful in determining the position of the bodies, the gun and the knife. RW2 testified that there were bullets recovered from the deceased body but no ballistics examination was carried out to confirm whether the gun shots were fired by the police officer or thugs. All this evidence would have been useful determining whether the shooting was legal or not. The fact that such crucial evidence was neither examined by experts nor presented leaves the court to draw adverse inference that the shooting of the deceased outside the bounds permitted by the law.
32. The respondents' case that the deceased was part of a gang that robbed a van is further undermined by the fact that the extract of the Korogocho Chief Camp Occurrence Book for the material date did not contain a record of the incident despite the fact that Administration Police Officers within the jurisdiction were involved in the shooting and two people were killed. The Occurrence Book at least corroborates the fact that there is an officer called APC Galgalo. Although RW1 wrote an incident report dated 21st August 2009 addressed to the District Officer, Kasarani Division, the same was not based on her own observation but rather what she was told happened. After all she arrived after the incident has occurred. Sadly, the people who told her what happened were not called to testify.
33. In order for the court to determine whether lethal force was justified in the circumstances, the court would have to assess the facts which could only be provided by the respondents. In this regard, I find support in **section 112** of the **Evidence Act** states that, "*In any civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.*" The burden of proof that the deceased's death was lawful and not the result of unlawful action lies squarely on the State. The evidence I have outlined above is clear that the State has not discharged its burden of showing that the death of the deceased was as a result of lawful action. I therefore find and hold that the State is liable for the violation of the deceased's right to life protected by **section 71(1)** of the former Constitution.
34. The petitioner avers at paragraph 10 of the petition that the deceased was tortured at Korogocho Chief's Camp in violation of **section 74(1)** of the former Constitution. It provides that, "*No person shall be subject to torture or to inhuman or degrading punishment or other treatment.*" The generally accepted definition of torture is to be found in the **United Nations Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment** which defines torture as; "*any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*" This definition of torture has been adopted by our courts in **Republic v Minister For Home Affairs and Others ex parte Sitamze [2008] 2 EA 323** and **Frankline Kithinji Muriithi v Loyford Riungu Muriithi and Others Nyeri CA Civil Appeal No. 43 of 2013 [2014] eKLR**.
35. International human rights standards provide that there is a negative obligation to refrain from subjecting people to torture or to inhuman or degrading treatment or punishment. There is a positive obligation on public authorities to intervene to stop torture, inhuman or degrading treatment or punishment as soon as they become aware of it. There is also an obligation not to expose a person to torture or inhuman or degrading treatment or punishment and a positive obligation on States to investigate any allegations of torture or of inhuman or degrading treatment or punishment.

36. The evidence of PW5 is that the deceased and Mbugua were beaten the Chief's Camp. PW2 and PW5 testified that they saw the deceased and Mbugua being beaten by the police officer while being taken to the Chief's Camp. In my view the deceased was subjected to inhuman and degrading treatment. The evidence of RW1 is that their arrest was not recorded in the Occurrence Book and that it was unlikely that they were in custody without her knowledge. As I stated earlier, the Occurrence Book did not contain a record of the alleged robbery that occurred on 21st August 2009, it is also possible that the arrest of the deceased was deliberately left out. I find and hold that the petitioner has established a case of inhuman and degrading treatment against the State.
37. Before I proceed to determine the relief available I wish to deal with the objection by the respondents that this petition would prejudice the police officers considering that an inquest had not been conducted by the 4th respondent. I agree with the petitioner's submission that the purpose of an inquest conducted under **Part XII (sections 385 to 388)** of the *Criminal Procedure Code* is to establish the circumstances of the death (see **Re Joyce Mumo Mackenzie (Deceased) Machakos Rev. No. 8 of 2009 [2009]eKLR** and **Charles Munyeki Kimiti v Cpl Mwenda and Others Nyeri CA Civil Appeal No. 129 of 2004 [2010]eKLR**). While the findings resulting from the inquest may assist the Director of Prosecutions determine whether or not there is probable cause to prosecute wrongdoers, it does not determine liability for the violation of fundamental rights and freedoms or the liability of any person. The right of a person to seek relief from the High Court protected by **section 84** of the former Constitution is not subject to any limitation and is in fact without prejudice with respect to any other action which is lawfully available.
38. While on the subject of the inquest, the petitioner has prayed that, "*An order of mandamus do issue to compel the 4th respondent to investigate and prosecute the administration police officer responsible for the blatant and unlawful violation of fundamental rights and freedoms of John Macharia Mburu.*" The incident subject of this suit occurred in August 2009 and this suit was filed in June 2011. By the time this suit came up for trial, an inquest has not been conducted to investigate the death of the deceased. According to the Replying Affidavit of Gitonga Muriuki sworn on 2nd April 2013, the Director of Public Prosecution only received notice of the of the investigation file by a letter dated 15th August 2012. It is only by a letter dated 15th March 2013, over six months later, that the Office of the Director of Public Prosecutions responded on the following terms;

Director,

15th March 2013

Criminal Investigations Department,

P O Box 30036,

NAIROBI

RE: KARIOBANGI POLICE STATION INQUEST NO. 18/2009

DECEASED: 1) JOHN MACHARIA ALIAS DOMIANO

2) SIMON MBUGUA KAMAU ALIAS MBOCH

I have been directed by the Director of Public Prosecutions to acknowledge receipt of your letter dated 15th August 2012 forwarding the above police file to our office for perusal and advice.

From the outset, it appears that the investigating officer did not diligently investigate this matter and in particular, getting witnesses who were present during the incident to record statements. A very good example is the driver of the Broadways motor vehicle. It has not been explained whether the investigating officer visited the company and perhaps got the driver to record a

statement.

The investigating officer alleges that the Administration Police officers who were involved in this case were transferred. He does not state where they were transferred to and which efforts he has so far made to get them. I have also keenly noted that the scene of crime personnel took photographs at the scene but the same were not availed together with the police duplicate file.

In view of the above, it is my consideration that this matter was not fully investigated. I propose that the above key areas be covered by way of further investigations and the file be re-submitted to our offices within the next seven (7) days of the letter for further directions.

Proceed accordingly.

Your duplicate police file is returned herewith.

PROSECUTION COUNSEL

FOR: DIRECTOR OF PUBLIC PROSECUTIONS

39. The observations of the Office of the Director of Public Prosecutions in the letter buttress the findings I have made above. The failure to promptly investigate death breeds impunity and undermines the right to life. The length of time it has taken may prejudice the State's obligation to ensure the perpetrators of the illegal acts are brought to book. There is no reason why the police took over three years to inform the Director of Public Prosecutions of the incident. This state of affairs is also a violation of the right to life. In ***Zeitun Juma Hassan (suing on behalf of Abdul Ramadhan Biringe (deceased) v Attorney general and 4 Others Nairobi Petition No. 57 of 2011 [2014]eKLR***, I observed that, “[23]Apart from ensuring that the every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws (See ***Osman v United Kingdom [2000] 29 EHRR 245***). There is also a procedural obligation to conduct an effective official investigation into any death resulting from the use of force and any death resulting from the State's failure to protect the right to life. The purpose of such investigations is to ensure that domestic laws protecting the right to life are applied, and also to hold state officials accountable, to bring all the facts to public notice, to rectify any dangerous practices and to give relatives of the deceased and the public the reassurance that any lessons learned from the death might save the lives of others.”

40. The respondents' counsel have properly pointed out that the once the matter was brought to the attention of the Director of Public Prosecutions, he examined the matter and called for further investigations. Under **Article 157** of the Constitution, the Director of Public Prosecutions exercises independent authority to institute and undertake criminal prosecutions on behalf of the State. I therefore agree the decision in ***Cape Holdings Limited v Attorney General and Another Nairobi HC Misc. 240 of 2011 [2012]eKLR*** where the court stated, “[I]n my view it is up to the police to investigate the complaint and it solely for the DPP and no one else after the investigations has been completed to decide whether the complaint discloses any criminal offence(s) requiring prosecutions ..” I further find that no case has been made out by the petitioner against the DPP to warrant the grant of an order of mandamus.

Relief

41. As a result of the violations, the petitioner seeks declarations for the violation of the deceased fundamental rights and freedoms. The petitioner prays for the award of damages on the basis of the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

42. **Section 84** of the former Constitution empowers the High Court to, “*make any orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).*” In ***Dominic Arony Amolo v Attorney General Nairobi HC Misc. 494 of 2003 [2003]eKLR*** the Court held, inter alia, that the Constitution intended to create a new remedy for the contravention of constitutional rights without reference to and beyond the scope of what was available in the common or private law sphere. The Court is thus empowered to grant any remedy unmoored from the shackles of common law or statute to remedy a violation of the Bill of Rights. Shields J., in ***Marete v Attorney General [1987] KLR 690*** appreciated the jurisdiction of the Court to provide relief for the violation of constitutional rights in the following words, “*The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84. Both section 74 and section 84 are similar to the provisions of other Commonwealth Constitutions. It might be thought that the newly independent states who in their constitution enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.*” It is therefore not necessary for the petitioner to prove actual loss of dependency under the ***Fatal Accidents Act*** or actual loss to the estate under the ***Law Reform Act*** although the principles which are applicable to common law cases may provide some guidance as to the amount of damages.

43. Counsel for the petitioner submits that the deceased died as a result of a callous act by agents of State. There was no justification for such an act and in my view assessment of damages on the basis of the common law principles may not do justice to the case in vindicating the rights of the deceased and recognising the violation of constitutional rights. A global award would be most appropriate in the circumstances. I consider an award of **Kshs 2,000,000.00** as general damages appropriate in the circumstances.

44. I thank counsel for their diligence in prosecuting and defending this matter. If I have not referred to all the authorities and arguments it is not because they were wanting in any respect.

45. The final orders are therefore as follows;

- a. **I declare that the rights and fundamental freedoms of John Macharia Mburu (deceased) under section 71(1) and 74 of the former Constitution were violated by administration police officers after being subjected to cruel and inhuman treatment and consequent death as a result of shooting on 21st August 2009.**
- b. **The 2nd respondent shall pay the petitioner Kshs. 2,000,000.00 as general damages with interest thereon at court rates from the date of this judgment.**
- c. **The 2nd respondent shall pay the costs of the petition.**

DATED and DELIVERED at NAIROBI this 19th May 2014.

D.S. MAJANJA

JUDGE

Mr Nyasimi with him Mr Kiarie instructed by Nchogu, Omwanza and Nyasimi Advocates for the petitioner.

Mr Mohammed, Litigation Counsel, instructed by the State Law Office for the 1st, 2nd and 3rd respondents.

Ms Spira, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions.