REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 113 OF 2006

BETWEEN

THE STANDARD NEWSPAPERS LIMITED.....1ST PETITIONER

BARAZA LIMITED.....2ND PETITIONER

AND

HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE MINISTER INCHARGE OF

INTERNAL SECURITY.....3RD RESPONDENT

AND

THE INTERNATIONAL COMMISSION

OF JURISTS…….....…….....INTERESTED PARTY

JUDGMENT

Introduction

1. The petition before me has been brought pursuant to the provisions of sections 70, 74, 75, 76, 79 and 84(1) of the repealed Constitution. The facts and events leading to the filing of this petition are largely in the public domain and were a matter of public notoriety at the time of their occurrence. They revolved around a 'raid' on the petitioners, media houses operating a newspaper and a television station respectively, and seizure of their equipment and publications by the respondents' agents.

2. The issue that the petition raises for determination is whether the search and confiscation of the petitioners' broadcasting and communication equipment or publications was in violation of their fundamental rights.

3. The 1st petitioner is a limited liability company and the owner and registered publisher of a

newspaper known as '*The Standard'*. The 2nd petitioner is the owner and operator of an independent television station known as the Kenya Television Network (popularly known by the name "KTN") which at the time of the events forming the subject of this petition carried on its broadcasts from premises situated at I & M Bank Towers in Nairobi. The petitioners share common directorship and shareholding and are subsidiaries of the *Standard Group Limited* ("Standard Group"). I shall hereafter refer to the petitioners collectively as "Standard Group."

The Petitioners' Case

4. The facts of the case as presented by the petitioners can be found in the supporting depositions of **Nelly Matheka**, the petitioners' Company Secretary, sworn in support of the petition on 6th March 2006 and **Justus Bororio Nyamwaya**, a Production Supervisor of the 1st petitioner sworn the same day.

5. They are that on or about 0015 hours on the morning of 2nd March 2006, heavily armed and hooded officers of the 2nd respondent operating under the instructions of the 3rd respondent unlawfully raided the offices of the 2nd petitioner situated on the 6th, 13th and 17th floors of the I & M Bank Tower and vandalised and destroyed the KTN's broadcasting and other equipment. They allege that the officers further proceeded to arbitrarily arrest, detain, torture and degrade the employees of the 2nd petitioner and further confiscated KTN's broadcasting and other equipment thereby shutting down its transmissions.

6. On the same date at about 0120 hours, the officers of the 2nd respondent who were hooded and armed raided Standard Group's premises along Likoni Road, and broke down doors, thereby gaining access to the Standard Group's printing press. It is the petitioners' claim that during the raid, the petitioners were not given an opportunity to ascertain or verify any of the items which were seized from the premises and at the date of filing the petition, despite demand, had not been provided with an inventory of the items collected from the premises.

7. In their petition dated 6th May 2006, Standard Group complained that the raids and wanton destruction and vandalism of their equipment and confiscation of their property was an affront to the rule of law and in gross violation of their rights as enshrined in the Constitution. It is the petitioners' case that the raids were carried out by the 2nd respondent's officers under the supervision of the 3rd respondent without any search warrants or lawful orders and without any colour of right; and that the said raids caused them substantial loss and inflicted maximum reputational, business and material damage.

8. The petitioners contend that the raid was a gross violation of their fundamental rights and freedoms under sections 70, 75, 76 and 79 of the Constitution. They contend further that burning of the 1st petitioner's newspapers by the 2nd respondent's agents and the dismantling of its printing press is an affront to the rule of law, an interference with the 1st petitioner's freedom and a gross violation of its fundamental rights and freedom to communicate ideas and information without interference as conferred by section 79(1) of the Constitution.

9. They also contended that the arbitrary confiscation of their desktop computers, hard disks containing important information, programmes, fax machines and telephone equipment crippled their ability to do their legitimate business and discharge their duties to their readers, viewers and the public at large.

10. The petitioners seek several reliefs) *among others:*

I. ***A declaration that the entry, search and other acts perpetrated by officers of the 2nd respondent at the petitioners' premises on 2nd March 2006 was unlawful, illegal and in breach of the provisions of section 70 of the Constitution of Kenya and a violation of the Petitioners'***

fundamental rights and freedoms under Sections 76(1) and 79(1) of the Constitution of the Republic of Kenya.

II. ***A declaration that the burning of copies of newspapers and the confiscation and/or taking away of properties belonging to the Petitioners by the officers of the 2nd respondent under the instructions of the 3rd respondent on 2nd March 2006 was an affront to the rule of law and a violation of the 2nd respondent's fundamental rights under sections 75(1) and 76(1) of the Constitution of the Republic of Kenya.***

III. ***A declaration that the acts perpetrated by the 2nd and 3rd Respondent in respect of the 1st and 2nd Petitioners' premises is a direct assault on the Petitioners' freedom of expression and a contravention of section 79(1) of the Constitution of the Republic of Kenya.***

IV. ***A declaration that the switching off of the 2nd petitioner's television transmission by the Respondents' agents is an affront to the rule of law and a violation of the 2nd petitioner's fundamental right and freedom to communicate ideas and information without interference under section 79(1) of the Constitution of the Republic of Kenya***

V. ***A declaration that the burning of the 1st petitioner's newspapers by the 2nd Respondent's agents and the dismantling of its printing press is an affront to the rule of law, an interference with the freedom of the 1st Petitioner and a gross violation of the 1st petitioner's fundamental rights and freedom to communicate ideas and information without interference as conferred by section 79(1) of the Constitution***

VI. ***A declaration that the vandalizing and the confiscation of the Petitioners' assets and property is illegal and in gross violation of the Petitioners' rights to protection from deprivation of property as enshrined in section 75(1) of the Constitution***

VII. ***A declaration that the breaking down of doors and the ingress into the Petitioners'' broadcasting station and printing press respectively is illegal and unconstitutional in gross violation of the Petitioners' Constitutional rights under section 76(1) of the Constitution***

VIII. ***A declaration that the illegal raids of the Petitioners' premises, the search and detention of their employees amounts to subjecting the Petitioners and their employees to torture, inhuman and degrading punishment and treatment in gross violation of their Constitutional rights under section 74(1) of the Constitution***

IX. ***A declaration that the confiscation and taking of possession of the Petitioners' properties is illegal and contrary to the provisions of section 75(1) of the Constitution***

X. ***A declaration that the illegal and unlawful interference with the Petitioners' communication systems including e-mail, fax, fixed line and mobile telephone is a breach of Petitioners; fundamental rights under Section 79 of the Constitution of the Republic of Kenya and is otherwise a gross abuse of the Petitioners confidentiality and its fundamental right to its freedom to receive ideas and information without interference.***

XI. ***Exemplary damages as this Honourable Court would deem appropriate in the circumstances.***

The Respondents' Case

11. The respondents oppose the petition and have filed an affidavit sworn by John Kariuki Njagi, an Inspector of Police attached to the special Crimes Prevention Unit in the Department of Criminal on 13th June 2006, together with written submissions dated 7th March 2012.

12. Inspector Njagi deposes that on 1st March 2006, sometimes before mid-night, information was received by the Director of Criminal Investigations Department (CID) from various sources including Government Intelligence that the petitioners were in the process of publishing in their electronic and print media reports which were likely to threaten national security and unity; and that the said reports were likely to cause disaffection among the communities in Kenya.

13. Following the reports, the Director, CID, instructed officers from the Special Crimes Prevention Unit to conduct a search at the petitioners' premises on the same date; that after conducting the search, they recovered records containing very sensitive information which, had it been published,

would have threatened national security.

14. Inspector Njagi averse further that during the search by the Special Crimes Prevention Unit, no heavy arms were used but the officers carrying out the search were undercover Police Officers whose identity required protection because the officers were likely to be used in similar operations. He denied that there was destruction of the petitioners' broadcasting and other equipment as alleged or that the petitioners' staff were harassed but admitted to taking some equipment that contained sensitive information likely to threaten national security. He maintained that the search was conducted due to information received from various sources and denied receiving directions from the Minister in the Office of the President in charge of Internal Security as alleged by the petitioners.

15. The respondents contend that the search was legally carried out and an inventory of the seized items prepared, but that the petitioners declined to sign the same when requested to do so and a copy was therefore left at their premises.

16. They contended, further, that the Special Crimes Prevention Unit had no opportunity to obtain search warrants as their intention was to prevent the commission of the offence; that the raid was justified as the petitioners were about to commit crimes contrary to Part 11 of the **Penal Code (Chapter 63 of the Laws of Kenya)** and that the police officers were empowered under **section 20** of the **Police Act** to enter any premises and carry out a search if they had reason to believe that there is information or some necessary reason to help the police to conduct their duties under the Act.

17. It was further submitted on behalf of the respondents that fundamental rights and freedoms were not absolute but subject to the respect for the rights and freedoms of others and for the public interest. The respondents relied in this regard on the case of **Kerosi Ondieki –vs- Minister of State for Defence & Another High Court Petition No. 181 of 2010** for the proposition that no right or fundamental freedom is absolute; that it may be limited by the law or by other reasonable and justifiable considerations; and that the right of the petitioners to air and publish any content is limited by the law and by the public interest. The respondents therefore asked the Court to dismiss the dismiss the petition with costs.

18. The respondents challenged the affidavit sworn by Nelly Matheka arguing that it lacked evidential value as it was based on hearsay and offended the provisions of **Order XVIII** of the **Civil Procedure Rules**, in particular **Rule 3** which confines affidavits to what the deponent is able of his own knowledge to prove.

Submissions by the Interested Party

19. The International Commission of Jurists (ICJ), which was permitted to participate in these proceedings as an interested party, is a not-for-profit association of jurists whose object is the promotion and protection of the rule of law, human rights and democracy. It derives its membership from the legal fraternity.

20. ICJ supported the petitioners' case. In an affidavit sworn by its vice chairperson, Mukami M. Mwangi, ICJ stated that the 2nd respondent's action could not be said to be sanctioned by any law and that it was the responsibility and duty of courts of law to check such excesses by the State and to grant remedial action to protect the aggrieved parties.

Determination

21. The facts in this matter are largely not in dispute. There was a search carried out at the petitioners' premises by hooded police officers in the wee hours of the night of 2nd March 2006. It is also not in contention that communications and broadcasting equipment was seized by the police officers, and the 1st petitioner's newspapers destroyed. Indeed, these facts are admitted directly or tacitly

by the respondents in the affidavit of Inspector Njagi whose contents I have set out briefly above. The point of divergence relates to the manner in which the search and seizure was carried out, and whether the actions of the respondents in carrying out the said search and seizure violated the petitioners' rights.

The Law with Regard to Search and Seizure

22. The primary legislation governing search and seizure in Kenya is the Constitution and the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. **Section 76** of the repealed constitution, which was in force when the events forming the basis of this petition occurred, contained the constitutional provisions with regard to searches and stated as follows:

"(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

23. It, however, provided at section 76(2) that:

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

a. ***that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit;***

b. ***that is reasonably required for the purpose of promoting the rights or freedoms of other persons;***

c. ***that authorizes an officer or agent of the Government of Kenya, or of a local government authority, or of a body corporate established by law for public purposes, to enter on the premises of a person in order to inspect those premises or anything thereon for the purpose of a tax, rate or due or in order to carry out work connected with property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or***

(d) that authorizes, for the purpose of enforcing the judgment or order of a court in civil proceedings, the entry upon premises by order of a court, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

24. Essentially, though not expressly stating so, section 76 of the former constitution protected the right to privacy, which is now expressly guaranteed by **Article 31** of the Constitution which states:

"Every person has the right to privacy, which includes the right not to have-

a. ***their person, home or property seized;***
b. ***their possessions seized;"…***

25. The respondents take the position that they were authorized by law to enter and search the petitioners' premises. The statutory procedure for conducting search and seizure by police officers can be found in **Section 118** of the **Criminal Procedure Code** (CPC) which stipulates as follows:

"Where <u>it is proved on oath</u> to a Court or a Magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, <u>the Court or a Magistrate may by written warrant (called a</u>

search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a Court having jurisdiction to be dealt with according to law." (Emphasis added)

26. This provision was in force at the time the events in question in this petition occurred, and it was the only legal basis on which police officers could enter upon and search private premises. Three important requirements are evident from this provision. First, what the provision makes clear is that prior to conducting a search and seizure, police officers were required to obtain a search warrant; and that such warrant was then, as is the case now, to be issued by a judicial officer upon proof on oath that there is reasonable suspicion of commission of an offence. Police officers or other state agents could not, and cannot now, without such warrants, lawfully enter upon and search any premises, nor can they carry away any property without the authority of the Court.

27. Secondly, as is also clear from the provisions of the Criminal Procedure Code set out above, the onus is on the person seeking the search warrant to prove the necessity for such warrant. In **Vitu Limited –vs- The Chief Magistrate Nairobi & Two Others**, **H.C. Misc. Criminal Application No. 475 of 2004** the court (Osiemo J.) remarked that:

"It is therefore expected that when a police officer or any other investigator approaches the Court for a warrant, there must be reasonable suspicion of an offence being about to be committed or having been committed …"

28. Thirdly, the section contemplates that any evidentiary material that may be obtained from the place in respect of which the warrant has been issued is to be ***placed before the Court,*** and it is the Court to determine the mode of disposal thereof. In the words of Ojwang J. (as he then was) in the case of **William Moruri Nyakiba & Another -vs- Chief Magistrate Nairobi & 2 Others, Misc Crim Appli 414 of 2006 [2006] eKLR:**

"I would not consider the word "application" always to mean a formal, written application set for service upon interested parties. For the purpose of Police investigation of crime, an application made is likely in the first instance to be informal – and this, in the light of both s.19 of the Police Act and s.118 of the Criminal Procedure Code, only needs to be accompanied by a statement on oath. Any evidentiary material retrieved on that basis is required under the law to be part of a responsible criminal-investigation process which links up with criminal prosecution." (Emphasis added).

Police Powers

29. Section 14(1) of the Police Act (Chapter 84 of the Laws of Kenya, now repealed), which was also in force at the time the events the subject of the dispute took place, set out the powers and mandate of the police. It provided as follows:

"The [Police] Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged."

30. In the discharge of such functions, **section 19** provided that:

"A police officer may lay any lawful complaint before a Magistrate and may apply for a summons, warrant, search warrant or such other legal process as may lawfully be issued against any person."

31. Applying the above constitutional and statutory provisions to the facts before me, it is clear that the police acted in contravention of both. If they suspected the commission of a crime by the

petitioners, they could quite properly have applied to a Magistrate and provided the requisite material to enable the court issue them with search warrants. In the words of **Osiemo, J**. in **Vitu Limited -vs- The Chief Magistrate Nairobi & 2 Others** (supra):

"Since Police duties are not judicial functions, then in the performance of [their] duties, it is anticipated that warrants or [summonses] may be required and for this reason Parliament in its wisdom enacted section 118 of the Criminal Procedure Code (Cap. 75) and section 19 of the Police Act (cap. 84)."

32. The respondents have sought refuge in **section 20** of the now repealed Police Act, under which it was possible for police officers to search without a warrant in certain circumstances. The section was in the following terms:

20. (1) When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on which he expects the thing to be and there search or cause search to be made for, and take possession of, such thing:

Provided that -

(i) the officer shall carry with him, and produce to the occupier of the premises on request by him, his certificate of appointment;

(ii) if anything is seized as aforesaid he shall forthwith take or cause it to be taken before a magistrate within whose jurisdiction the thing was found, to be dealt with according to law.'

33. In the present case, the offence that the respondents claim to have triggered the raid on the petitioners' premises is one created under **section 66** of the **Penal Code.** This section criminalizes publication of alarming publications including any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace.

34. **Section 119** of the **CPC** provides that a search warrant may be issued on any day and may be executed on any day between the hours of sunrise and sunset, although the court may by the warrant authorize the police officer or other person to whom it is addressed to execute it at any hour. **Section 120** places a duty on a resident or person in charge of a building to allow a police officer free ingress thereto and egress therefrom and afford all reasonable facilities for a search on production of the warrant. Mr Ohaga, counsel for the petitioners, submitted that a police officer who chooses to enter and search without a warrant is required under Section 20 of the Police Act to set down in writing the reason for the belief, which should have been produced in court. Counsel urged that **Section 66(2)** provides a defence but that no opportunity was provided for the petitioners to put forth the defence nor was any attempt made to place before the Court what was to be published by the petitioners.

35. The respondents have conceded that they carried out the raid on the petitioners' premises on the morning of 2nd of March 2006, carried out a search therein and seized certain items from there. As the provisions of the law considered above demonstrate, the said search was carried out illegally and in clear contravention of the law. Even if one were to rely, as the respondents seek to do, on the provisions of **Section 20** of the now repealed **Police Act** in order to justify their acts, it is evident that the provisions of the section were also not complied with by the Police. What was required under the section was that the material seized without a warrant be presented before the magistrate within whose jurisdiction the thing was found, '***to be dealt with according to law***.' This

had not been done by the time the petition before me was filed, nor has it been done to-date.

36. The respondents have argued that there is no fixed time frame within which to present the material seized before a magistrate. However, this submission is untenable. Where no time frame within which something is to be done has been provided, then it would be expected that such thing is to be done without unreasonable delay as provided under section 58 of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya**. It cannot be that seven years after the raid, the respondents want the court to believe that they still intend to present the material they seized from the petitioners before a court of law.

37. I am therefore constrained to agree with Counsel for the petitioners that the respondents' justification of their actions is, in the circumstances, unsustainable. Their acts in carrying out the raid on the petitioners'' premises had no lawful justification. It remains to consider whether their acts violated any of the rights of the petitioners guaranteed under the Constitution.

The Right to Privacy

38. It is a necessary incident to democracy that citizens must be protected from unjustified intrusions of privacy and property by agents of the state. Otherwise, arbitrary state actions could severely affect the personal freedoms and associated fundamental rights that are intended to be a predominant feature of democratic society. While I agree that the right to privacy is not absolute and must be balanced against the intended purpose for intrusion, such limitation should not be one that will risk stripping off the very core of the right or freedom. The manner in which the search and seizure is carried out must not expose persons to further violation of other rights. I am persuaded in this regard by a consideration of the provisions of international conventions to which Kenya is a party, as well as judicial precedents on this issue from other jurisdictions.

39. **Article 17** of the **International Convention on Civil and Political Rights (ICCPR)** seeks to guard against arbitrary search or other infringement on the right to privacy by providing as follows:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

40. In South Africa, the Constitutional Court, while dealing with the question of search and seizure in the case of **The Investigating Directorate: Serious Economic offences and others v Hyundai Motor Distributors (Pty) Ltd and Others In Re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (CCT1/00) [2000] ZACC 12,** observed as follows:

[54] …There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process. <u>On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy.</u> A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights." (Emphasis added)

41. **Section 8** of the **Canadian Charter of Rights and Freedoms** stipulates that: *"Everyone has the right to be secure against unreasonable search or seizure".* In the case of ***Hunter v Southam*** **(1984) 41 CR (3d) 97 (SCC)** and ***R v Collins*** ***(1987) 56 CR (3d) 193*** (SCC), it was held that the

purpose behind Section 8 is to protect the privacy of individuals from unjustified state intrusions and that this interest in privacy was however limited to a "reasonable expectation of privacy".

The **Fourth Amendment** of the United States Constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

43. In the case of **Bivens v Six Unknown Fed. Narcortis Agents, 403 U.S. 388 (1971)** the Supreme Court of the United States noted as follows with regard to the protection;

"An agent acting –albeit unconstitutionally-in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own….Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

44. I wholly agree with the sentiments expressed in the decisions from various jurisdictions set out above.

45. While it is true that police have a duty to prevent commission of crimes, they must, just like everyone else, abide by the law, and there must be due process in everything that they do in exercise of their mandate to prevent the commission of crime. To hold otherwise would be to say that the rules and dictates of democracy are too tedious to observe and an unnecessary inconvenience; and this would result in anarchy and negate the very core principles of our Constitution.

46. Similarly, the notion of 'public interest' and 'national security' are in my view multi-faceted and capable of varied interpretations. For example, while it is in the public interest that crime be prevented and investigated and those found guilty brought to book, it is also in the public interest that citizens are not subjected to arbitrary searches and seizures that in essence act to violate other fundamental rights and freedoms and make a mockery of the constitutional protection to privacy. In this regard, I adopt the holding in the case of ***Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another Civil Appl. No. 54 of 2006 [2006]e*KLR** where it was stated as follows;

"But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public… We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing…"

47. I therefore do find and hold that the respondents violated the petitioners' rights under section 76 of the former constitution.

Freedom of Expression/Freedom of the Media

48. **Section 79** of the Constitution secured the right to freedom of expression in the following terms;

"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference and freedom from interference with his correspondence."

49. Unlike the current Constitution, the repealed constitution did not provide for the express freedom of the media. The 2010 Constitution is more progressive in terms of media protection and jealously guards the freedom of communication and the media. **Article 34** provides for freedom and independence of electronic, print and all other types of media.

50. However, I am persuaded that the provisions of the former constitution, while not couched in the very express terms of the new Constitution, were intended to allow free expression and operation by the media. Consequently, in my view, the seizure of the petitioners' broadcast and printing equipment, which as the Court has found, was carried out in contravention of the law, no doubt interfered with the petitioners' right to broadcast information and was therefore a denial of freedom of expression guarded under section 79 of the Constitution.

Violation of Section 74 and 75

51. The petitioners have alleged violation of their employees' rights under section 74. They seek a declaration that their members of staff were subjected to torture, inhuman and degrading treatment. No evidence, however, has been placed before the court to demonstrate the alleged violation, and I therefore make no findings with regard thereto.

52. The petitioners have also alleged violation of their right to property under Section 75 of the former constitution. They have alleged, and it has been conceded by the respondents, that certain equipment was carried away from their premises. The evidence with regard to what was taken is, however, quite contested. The petitioners allege that they were not allowed to take an inventory, while the respondents allege that an inventory was made but that the petitioners refused to sign it. With such limited and contested averments, I am unable to make a specific finding with regard to the alleged violation of the right to property then guaranteed under section 75 of the former constitution.

Conclusion

53. As indicated elsewhere in this judgment, I have come to the conclusion that the search and seizure carried out by agents of the respondents against the petitioners on the night of 2nd March 2006 was arbitrary and in breach of the petitioners' rights under section 76 and 79 of the former constitution. Even assuming that the reasons for carrying it out, as alleged by the respondents, were justifiable under the proviso to section 76, which this Court cannot determine as no evidence with regard thereto was placed before it, it was nonetheless an unlawful search as it violated the law and the due process requirements with regard to search and seizure. Which then leads to a consideration of the appropriate relief to grant to the petitioners for the violations.

54. This Court is mandated, under section **84(2)(b)** of the former constitution, to ***"make such 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)."***

55. In considering the relief to grant in this matter, I take into account the fact that the events complained of in this matter took place over a matter of an hour or so on the night of 2nd March 2006. Further, I have taken into consideration the fact that there is pending before the Civil Division of this Court a civil suit in which compensatory damages are sought. This fact emerged during the hearing of this petition when Counsel for the petitioners submitted that there is pending before the Court **High Court Civil Case No 989 of 2006** filed in respect of the separate claim for special damages. Unfortunately, no pleadings in respect of the suit were placed before me to enable me determine the exact nature or import of the suit, and I will therefore not venture to

comment on it. Indeed, I believe that it would have been proper for both claims to have been brought or handled together in light of the fact that the Court seized of the civil claim has jurisdiction to determine questions regarding the alleged violation of the petitioners' constitutional rights.

56. The petitioners have asked the Court to grant exemplary damages for the confiscation of their equipment and what they term as wanton destruction and vandalism upon their property. They relied on the case of ***Rookes v Barnard*** **[1946] 1 All E.R.** for the proposition that exemplary damages are to be used to restrain arbitrary use of state power. In this case, it was stated that exemplary damages in tort may be awarded where there is oppressive arbitrary or unconstitutional actions by the servants of the Government; and where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff.

57. They also relied on the New Zealand case of **Simpson & Another v Attorney General (1994) 3 LRC 202 at 215,** where it was stated, at page 215**,** that

"…in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided".

58. The respondents oppose the claim for exemplary damages, arguing that such damages are awarded on account of the motive for the conduct of the respondents, and that in this case, the respondents' motive was in accord with their statutory duty aimed at saving the public from ethnic animosity.

59. It is worth noting that exemplary damages are sought not to compensate the victim for the impugned action but to punish and serve as an example to the perpetrator and act as a deterrent for any such future conduct. The High Court has held that exemplary and aggravated damages are inappropriate remedies where unconstitutional action is the subject of challenge. In the case of ***Benedict Munene Kariuki & 14 Others vs. The Attorney General, Nairobi*** **Petition Number 722 of 2009 (2011) eKLR,** the Court (Majanja J.) observed as follows;

"In my view, these cases under Section 84 of the Constitution are cases concerning the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in Obongo v Kisumu Municipal Council (Supra) was a case in tort so that the issue of "unconstitutional action" was an additional factor the Court would consider in awarding exemplary damages. I shall therefore not award exemplary damages."

60. Similarly, in declining to award exemplary damages, Lenaola J. in ***Gitobu Imanyara & 2 others v Attorney General, Petition 78 & 80 & 81 of 2010 [2013] e*****KLR**, cited with approval the case of ***Wachira Waihere vs. the Attorney General*** **HC Misc. App.No.1184/2003 (O.S.)** found it inappropriate to award exemplary or aggravated damages acknowledging change in the government, and the attempts at dealing with human rights violation. The court observed at Para. 55 of its judgment as follows:

"This holding [Wachira Waihere case] encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today's Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya's Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-payer. Further I note that the Petitioners were not labouring for the "Second Liberation" in order to get momentary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognized."

61. For similar reasons, it is my finding that the order of exemplary damages is not an appropriate relief to grant in the circumstances. I note that considerable progress has been made towards the protection of fundamental rights and freedoms, including protection of the media, beginning with the promulgation of the Constitution of Kenya 2010 and the guarantees to the media contained therein. The situation has changed considerably for the better over the last seven years, and I see no need to 'punish' the State or unduly burden the tax payer by way of high awards in damages. Moreover, I have taken into account the pending civil suit seeking special damages for the alleged vandalism of the petitioners' broadcasting and other equipment which if successful, will mitigate the petitioners' losses.

62. However, in view of my findings that the acts of the respondents were unlawful and violated the petitioners' rights under the provisions of section 76 and 79 of the former constitution, I believe an award of general damages is merited. In considering what amount to grant for the violations, I am guided by past decision in this regard. In the **Gitobu Imanyara** case which I have referred to above, the Court, in granting a global sum in general damages for the violation of the petitioner's rights by state agents, stated as follows:

"[67] In awarding general damages I am persuaded by the holding in Dominic Arony Omolo vs. Attorney General. H.C. Misc. Application No.494/2003, where it was held that monetary compensation must be reasonable and fair and taking into account all the circumstances of each case.

63. Taking all the circumstances of this case into account, including the pending civil case arising out of the same facts, my final orders are as follows:

a. **I declare that the petitioners' rights under sections 76 and 79 of the constitution were violated by the respondents' action of arbitrary search and seizure.**
b. **I award the petitioners a joint global sum of Kenya Shillings Five Million (Kshs 5,000,000.00) in damages.**
c. **The amount shall attract interest at court's rates until payment in full.**

64. The petitioners shall also have the costs of this petition.

Dated, Delivered and Signed at **Nairobi this 17th day of October 2013.**

MUMBI NGUGI

JUDGE

Mr. Ohaga and Mr. Odera instructed by the firm of Ochieng, Onyango, Kibet & Ohaga & Co. Advocates for the Petitioners

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the Respondents