



Onunga v Inspector General National Police Service & another; Independent Policing Oversight Authority (IPOA) & another (Interested Parties) (Constitutional Petition E002 of 2023) [2024] KEHC 9836 (KLR) (8 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E002 OF 2023
RE ABURILI, J
AUGUST 8, 2024**

BETWEEN

BENARD OKEYO ONUNGA PETITIONER

AND

**THE INSPECTOR GENERAL NATIONAL POLICE SERVICE 1ST
RESPONDENT**

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

**INDEPENDENT POLICING OVERSIGHT AUTHORITY (IPOA) INTERESTED
PARTY**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
(KNHCR) INTERESTED PARTY**

JUDGMENT

1. The petitioner herein Bernard Okeyo Onunga filed a petition dated 13th April, 2023 against the Respondents for alleged violation of his constitutional rights as guaranteed by Article 28 (Right to dignity), Article 29 (Right to freedom and security of the person), Article 43(1)(a) (Right to the highest attainable standard of health and health care services) and Article 50(1) (Right to a fair hearing) of *the Constitution* of Kenya, 2010.
2. The petitioner sought the following orders:
 - a. A declaration be and is hereby issued that the violent arrest, cruel inhuman degrading an ill treatment inflicted on the petitioner by agents of the 1st respondent constituted violations



of his fundamental right to human dignity and freedom from cruel, inhuman and degrading treatment contrary to Articles 28 and 29 and 43 (1) (a) of *the Constitution* of Kenya 2010.

- b. A declaration be and is hereby issued that the violent shooting of the petitioner without reason by agents of the 1st respondent constituted a violation of his fundamental rights to fair hearing contrary to Articles 50 (1) of *the Constitution* of Kenya 2010.
 - c. A declaration be and is hereby issued that the violent shooting of the petitioner by the agents of the 1st respondent constituted violations of the petitioner's fundamental rights to the best attainable standard of health contrary to Articles 43 (1) of *the Constitution* of Kenya 2010.
 - d. Damages in compensation for the violations suffered in the hands of the 1st respondent.
 - e. A further order for punitive damages jointly against the respondent for the violations of the rights of the petitioner.
 - f. The costs of this petition.
3. The petitioner averred that following the repeat elections ordered after the 2017 General Elections, on the 26th October 2017, while at his home in Kapere Village, Chemilil ward, Kisumu County, he had left his home to go and charge his phone at the nearby trading centre when near Ogen Primary School, he met with running crowds of people who were evading the charging police officers armed with batons, rungs and guns.
 4. It was the petitioner's case that he hid behind some of the buildings at the shopping centre only to be shot at by a police officer who left him for dead and that a good Samaritan took him to Jaramogi Oginga Odinga Teaching and Referral Hospital where he was admitted for 3 days as he got medical attention.
 5. The petitioner averred that he neither provoked nor engaged with the said police officer in any confrontation and that the actions of the police on that day showed that the officers conducted themselves outside clear guidelines of their policies, rule of law, human rights and fundamental freedoms guaranteed by *the Constitution*.
 6. It was his case that he was traumatised by the actions of the police towards him as he was unarmed and further as the officer callously left him for dead as he bled profusely from his head and limbs.
 7. The petitioner testified as PW1 in support of his case reiterating the contents of his petition. In cross-examination, it was his testimony that he reported the incident to Independent Police Oversight Authority, IPOA who started the investigations and later told him that they had filed the subsequent report into court.
 8. PW2, Elvis Omondi Okeya testified in support of the petitioner's case. He stated that he was at the scene on the material day. He corroborated the petitioner's testimony on the incident and further stated that he saw a police officer shoot at the protestors and that the petitioner was shot. It was his testimony that the police were shooting aimlessly and that they rushed the petitioner to JOOTRH.
 9. PW3 Belinda Akoth Magelo testified that on the day of the incident, she was at her business premises when the chaos erupted. She testified that she saw police officers lobby teargas as well as shooting. She testified that someone approached her saying that the petitioner had been shot in the face which she confirmed. That someone gave up their vest to tie the petitioner so as to halt the bleeding. In cross-examination, it was her testimony that she could not tell who shot the petitioner but that she knew that he was shot on the left side of the face.



10. PW4 Ronald Machuka Onkundi adopted his witness statement dated 3rd May 2023 as his evidence in chief wherein he stated that he was informed of a man who had been shot at the shopping centre so the witness was requested to go help take the injured man to hospital and he went, collected his vehicle and took him to hospital. He identified the man on seeing him, as Bernard who was sitting down and bleeding profusely from his left ear. He confirmed that indeed there were demonstrations on that day at the centre and that he had seen and recognized a common blue police lorry for Chemelil Police station, at the centre. In cross-examination, he reiterated that he was the one who took the petitioner to hospital.
11. PW5, Dr. Lucy Ombok testified that on the 16th August 2023, she filled a P3 form for the petitioner who reported to have been shot during the post-election violence on 26th October 2017 by a police officer well known to him. It was her testimony that on examination, it was evident that the petitioner had a healed wound on the left jaw which injury was supported by treatment notes from JOOTRH showing the treatment received for gunshot wound. She testified that the injury was 5 years old and that she classified it as grievous. She produced the P3 form as PExhibit 5.
12. The respondents replied to the petition vide the replying affidavit of one Joshua Nyasimi, a Superintendent of Police dated 14th October 2023 and filed on the 17th October 2023.
13. It was deposed on behalf of the respondents that the petitioner failed to make a report on his alleged shooting to any police station so as to facilitate commencement of investigations and that the petitioner only had the shooting incident booked at Muhoroni sub-county police station on the 8th July 2019, two years after the incident and thus the present matter was in court prematurely due to the petitioner's failure to report the same to the 1st Interested Party or the Internal Affairs Unit for investigation.
14. The respondent further deposed that on the material date of the incident, officers from the prison department were assigned to escort public service vehicles trapped between Kopere and Awasi when they found the road barricaded with rocks and in the process of unblocking the road were accosted by a hostile mob and members of the public who threw stones at them.
15. It was further deposed that the said officers managed to turn back and leave the scene unhurt and without using any live ammunition to shoot anyone.
16. Superintendent Nyasimi testified as RW1 adopting his affidavit as his evidence in chief. In cross-examination, he reiterated that the officers never had live ammunition and only had blanks. It was his testimony that use of firearms is allowed only in justifiable instances.
17. The 1st interested party on their part responded in support of the petition vide a replying affidavit dated 27th June 2023 sworn by one Monica Obegi, an officer with the 1st Interested Party. It was deposed that the petitioner registered the instant complaint with it on the 30th November 2017 vide Complaint Number IPOA/CMU/001807-2017 after which investigations commenced and the 1st Interested party was able to establish that the petitioner had been shot by police officers during demonstrations. She testified as IPW1.
18. The 2nd Interested party responded in support of the petition vide a replying affidavit sworn by Dr. Benard Mugesha sworn on the 4th October 2023 in which it was deposed that the 2nd interested party was aware of the petitioner's case which it investigated and found that the police shot the petitioner as contained in his report produced as 2IP Exhibit 1. Dr. Mugesha adopted his replying affidavit as his evidence in chief. In cross-examination, he testified that the petitioner's claim was registered at their Kisumu office. He testified that the KNCHR had the powers to investigate a complaint or do so suo moto.



19. The parties filed written submissions.

The Petitioner's Submissions

20. It was submitted that the Petitioner survived the shooting, being rushed to a nearby hospital and later transferred to the Jaramogi Oginga Odinga Teaching and Referral Hospital -JOOTRH in Kisumu for specialized medical attention and that though he was alive, he lost his health and well-being, and being medically destabilized also lost his job.
21. The petitioner submitted that following the testimony of RW1, the respondents conceded to knowing that the action taken by the officers was not sanctioned for crowd control as contemplated for such situations and further that there were no facts or evidence supporting the defense mounted by the respondents.
22. It was submitted that the police did not cooperate with relevant authorities to resolve the instant complaint but instead, it attempted to intimidate the petitioner, suppressed the recording of the incident report until 2019 when the state bodies, the interested parties herein, stepped in.
23. It was submitted that the reckless firing of guns and use of excessive force by the police was unlawful and unconstitutional as was held in the cases of I.P. Veronicah Gitahi and Another v Republic [2017] eKLR and Republic v Titus Ngamau Musila Katitu [2018] eKLR.
24. On the issue of quantum, it was submitted that an award to the petitioner of Kshs. 3,500,000 - 5,000,000 would be reasonable as was held in the case of Florence Amunga Omukanda & Another v AG & 2 Others [2016] eKLR and that further, an award in exemplary damages would also be appropriate endorsing the decision in Gitari Cyrus Muraguri v Attorney General [2011] eKLR that restated the judgement in Herman Marine Nderi v Attorney General [2012] eKLR on the submission that exemplary damages are awarded where there is an oppressive, arbitrary or unconstitutional action by servants of the state such as was in the instant matter.

The Respondents' Submissions

25. It was submitted that due to the lack of a ballistic report proving the Petitioner was shot, and by the police, and a fairly conflicting Medical Report, it cannot be drawn that the police shot the Petitioner.
26. The respondents further submitted that though Ms. Monica Kerubo Obegi for the 1st Interested Party stated that their investigations identified that the Petitioner was shot by one of the police officers escorting the public service vehicles, this was not present in authority's report filed in Court and furthermore, that the report indicated it's a preliminary investigation and not full investigations.
27. The respondent submitted that the Petitioner failed to prove that he was shot by agents of the 1st Respondent as he did not provide a ballistic report as a result of his delay in reporting the incident making it impossible for investigations to take place and as such, had not proved violation of his fundamental rights by the 1st respondent and subsequently, his eligibility to all reliefs sought in the Petition also fail.

The 1st Interested Party's Submissions

28. It was submitted that the 1st Respondent through his agents owed a duty of care to the Petitioner as had been upheld in the cases of Court of Appeal in Charles Murigu Muriithi & 2 Others v the Attorney General (2019) eKLR, Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR and the Supreme Court of Appeal of South Africa in the case of Van Eader v Minister of Safety



and Security (2002) ZA SCA 123. Reliance was also placed on the provisions of Articles 244 and 29 (c) of *the Constitution* of Kenya as well as sections 24 (d) and 27 (d) of the *National Police Service Act*, 2011

29. The 1st interested party submitted that as to whether duty of care was breached, the injuries inflicted to the Petitioner were as a direct result of the action of the agents of the 1st Respondent during the repeat general elections on the 26th October, 2017 and that failure by the agents of the 1st Respondent to protect and guarantee the security of the Petitioner and to instead train their guns on the Petitioner occasioning the Petitioner injuries amounted to a breach of duty of care and operated to infringe and violate the rights of the Petitioner guaranteed under Articles 28 and Article 29 *the Constitution* of Kenya, 2010.
30. It was submitted that the respondents were liable for the actions of their agent as was held in the case of *Joel v Morrison*, (1834) 6C & P 501 at p 503.

The 2nd Interested Party's Submissions

31. It was submitted that as a result of the actions of the 1st Respondent's officers, the Petitioner suffered gunshot injuries on his left side of the face and as per his testimony and medical report which amounted to a violation of his constitutional rights as detailed in the petition.
32. Further, it was submitted that the 1st Respondent under Articles 238 (2) (b) and 244 (c) of *the Constitution* is required to comply with the law and with the utmost respect for the rule of law, democracy, constitutional standards of human rights and fundamental freedoms. That in addition, under Article 21 (1) of *the Constitution* the 1st Respondent and his officers or agents have a fundamental duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights.
33. It was submitted that exercising the role granted under Articles 23(1) and 165(3) (b) of *the Constitution* of determining the question whether a fundamental right or freedom in the Bill of Rights has been denied, violated, infringed or threatened; the court find that there were human rights violations against the Petitioner by actions of the 1st Respondent and proceed under Article 23(3) of *the Constitution* to grant appropriate reliefs for human rights violations.

Analysis & Determination

34. I have carefully considered the pleadings, the evidence adduced and the parties' respective submissions. The issue for determination is whether the petitioner has established to the required standard that his constitutional rights were violated as pleaded and if so, by who. Further, whether the petitioner is entitled to the orders sought and if so, what orders.
35. The burden of proof lies on the person who alleges. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:
 - “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



36. Similarly, Section 108 of the *Evidence Act* provides that:
- “The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
37. The Court of Appeal in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, held that -
- “...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act...”
38. In *Wamwere & 5 Others v Attorney General (Petition 26, 34 & 35 of 2019)* Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) the Supreme Court held that:
- “A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”
39. In the instant case, the petitioner alleged violation of his rights guaranteed by Article 28 (Right to dignity), Article 29 (Right to freedom and security of the person), Article 43(1)(a) (Right to the highest attainable standard of health and health care services) and Article 50(1) (Right to a fair hearing) of *the Constitution* of Kenya, 2010 following injuries sustained after he was shot by police officers during the post-election violence that ensued following the calling for a second general election.
40. The evidence presented by the petitioner and the Interested Parties herein clearly corroborated the petitioner’s averments of violation of his right. The medical evidence presented by Dr. Ombok similarly corroborated the petitioner’s claim that he sustained the injuries on the left side of his head as a result of gunshot wound.
41. Juxtaposed against this was the evidence presented by the respondent wherein despite admitting that chaos erupted on the material date as its agents tried to clear the road, the respondents stated that its agents did not use live bullets but were firing blanks. No evidence was adduced by the respondent in support of this allegation, the respondent could have even presented a record of the armory detailing the guns and ammunition issued on that specific date so that the court could ascertain whether the same were blanks or not, but alas the respondents did not do so.
42. The state and its agents are duty bearers as far as protection of life and property of its citizens is concerned.
43. Article 26 of *the Constitution* provides thus in its Sub-Articles (1) and (3):

“(1) Every person has the right to life.

...



(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.”

44. In light of the finding that the petitioner was shot by the police, in the circumstances stated by the petitioner and his witnesses, the burden of proof shifted to the police to establish that the shooting was justified. The Court of Appeal elaborated on this principle in the case of *Stephen Iregi Njuguna v Attorney General* [1995-1998] 1 EA 252 thus:

“The police do not have any unqualified licence to resort to shooting. They are authorized 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...”

45. Additionally, Section 61 of the *National Police Service Act* stipulates that:

“(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by *the Constitution* and this Act by use of non-violent means.

(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.”

46. Rule 1 of the Sixth Schedule under the *National Police Service Act* on the other hand provides that:

“A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended results.”

47. No substantial explanation regarding the shooting was provided by the respondents, other than the claim that the officers utilized blanks instead of live ammunition. There was no evidence by way of an Occurrence Book entry or any other such document to show that the petitioner was suspected of terrorism or that he exchanged fire with the police officers or that he was part of the mob that allegedly attacked the police officers. This is notwithstanding that under the Sixth Schedule, the concerned police officers were expected to secure the scene, collect evidence, investigate and report to the Independent Police Oversight Authority (IPOA) in respect of an incident such as this where the use of firearm occasioned injury.

48. In particular, Rule 2(3) of Part C of the Sixth Schedule of the *National Police Service Act* states that:

“The station commander, or any other relevant direct superior, shall, immediately after the death or serious injury of a person who at the time of his death or injury, was in police custody or under the control of the police or in any way the death or serious injury was the result of police action or inaction which includes anyone who may have been injured or killed being a bystander during a police operation-

a. Take steps to secure evidence which may be relevant to that death;

b. Immediately report the case to the Independent Police Oversight Authority, using means of communication that guarantee there will be least delay, and confirm this in writing no later than within 24 hours after the incident;



- c. Supply the independent Police Oversight Authority with evidence of and all other facts relevant to the matter, including, if available, the names and contact details of all persons who may be able to assist the Independent Police Oversight Authority should it decide to conduct an investigation; and
 - d. Non-compliance with the above shall be an offence.”
49. In this case, the scene in question was under police operation who were quelling riots that followed the repeat elections in 2017. It was therefore the duty of the police, upon such incident of injury taking place, to immediately report to the IPOA and supply evidence or other relevant material to enable the IPOA carry out investigations into the shooting incident.
50. The police did not adhere to the above provisions In the premises, I am persuaded that the shooting of the petitioner was totally unwarranted. The agents of the 1st respondent have a duty of care to carry out their duties properly so as to avoid harming the public whom they are expected to protect.
51. Having reached the conclusion aforesaid, I find and hold that there was a violation of the petitioner’s right guaranteed by Article 28 (Right to dignity) and Article 29 (Right to freedom and security of the person).
52. As to whether the petitioner is entitled to the reliefs sought, Article 23(1) of *the Constitution* gives this Court the jurisdiction, in accordance with Article 165, to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
53. On the reliefs that this court can grant, Article 23 (3) is explicit that:
- “In any proceedings brought under Article 22, a court may grant appropriate relief, including —
- a. a declaration of rights;
 - b. an injunction;
 - c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. an order for compensation; and
 - f. an order of judicial review.”
54. It is now settled that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence in *Law Society of Kenya v Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties)* [2019] eKLR C. Mwita J held that an appropriate relief should be an effective remedy for purposes of enforcing *the Constitution*, human rights and the rule of law. He relied on *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 where it was held that:
- “(19) Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in



the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

55. The petitioner prayed for the following orders against the respondent:
- a. A declaration be and is hereby issued that the violent arrest, cruel inhuman degrading an ill treatment inflicted on the petitioner by agents of th 1st respondent constituted violations of his fundamental right to human dignity and freedom from cruel, inhuman and degrading treatment contrary to Articles 28 and 29 and 43 (1) (a) of the Constitution of Kenya 2010.
 - b. A declaration be and is hereby issued that the violent shooting of the petitioner without reason by agents of the 1st respondent constituted a violation of his fundamental rights to fair hearing contrary to Articles 50 (1) of the Constitution of Kenya 2010.
 - c. A declaration be and is hereby issued that the violent shooting of the petitioner by the agents of the 1st respondent constituted violations of the petitioner’s fundamental rights to the best attainable standard of health contrary to Articles 43 (1) of the Constitution of Kenya 2010.
 - d. Damages in compensation for the violations suffered in the hands of the 1st respondent.
 - e. A further order for punitive damages jointly against the respondent for the violations of the rights of the petitioner.
 - f. The cost of this petition.
56. Having found that the constitutional rights of the deceased were violated, I am satisfied that the declaratory orders in respect of violations of the petitioner’s rights under Articles 28, 29 and 43 (1) (a) are warranted. Those rights in respect of Article 50 (1) (right to a fair hearing) do not suffice and are accordingly declined and dismissed.
57. The petitioners also prayed for damages to be assessed by the Court for violation and contravention of the fundamental rights of the deceased. In this respect, it is to be appreciated that from a constitutional standpoint, an award of damages is not intended to serve a punitive end; but for vindication of a right. See the case of Muslim for Human Rights (MUHURI) & another v Inspector General of the National Police Service & 2 others (Petition E070 of 2021) [2024] KEHC 3233 (KLR) (19 March 2024) (Judgment).
58. Counsel for the petitioner proposed an award of between Kshs. 3,500,000 and 5,000,000 as well as exemplary damages.
59. In Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR, the 2nd Petitioner was shot at the back and though she made adequate recovery, he remained indisposed to intestinal laparotomy. The doctor recommended that a provision be made to manage this condition at an estimate cost of Kshs 80,000.00. The doctor’s opinion was however that there was no total permanent incapacitation. The Court awarded him Kshs 2,000,000/=for general damages for pain suffering and loss of amenities and Kshs 80,000.00 for future medical costs.
60. In Mochoronge v Office of the Director of Public Prosecution & 4 others (Petition E001 of 2022) [2023] KEHC 20398 (KLR) (22 June 2023) (Judgment) quite recent decision, the petitioner was shot on the leg and the injuries did not have serious aftermath. The court granted the petitioner a global sum of Kshs. 2,500,000 as general damages for pain and suffering and for constitutional rights violations.



61. In this case, considering the nature of the violation and the injury suffered which disfigured the petitioner's face, I find that an award of Kshs, 2,000,000 would be sufficient General damages for pain and suffering and for constitutional rights violations.
62. The petitioner shall also have costs of the petition to be assessed.
63. Mention on 26/9/2024 before the Deputy Registrar to confirm filing of the plaintiff's bill of costs.
64. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF AUGUST, 2024

R.E. ABURILI

JUDGE

