



**Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others
(Constitutional Petition 18 of 2014) [2023] KEHC 17591 (KLR) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION 18 OF 2014**

FA OCHIENG, J

MAY 9, 2023

BETWEEN

CITIZENS AGAINST VIOLENCE (CAVI) 1ST PETITIONER
INDEPENDENT MEDICO-LEGAL UNIT (IMLU) 2ND PETITIONER
HELLEN ATIENO OYUSO 3RD PETITIONER
EUNICE KABOSO ORWA 4TH PETITIONER
HUDSON BOB LIBABU LUMWAJI 5TH PETITIONER
VINCENT KIPNGENO KOECH 6TH PETITIONER
WINROSE CHEBET SANG 7TH PETITIONER
BENEDICT ODIWUOR ONYANGO 8TH PETITIONER
ALICE ATIENO OCHIENG 9TH PETITIONER
MAURICE OTIENO ALUSO 10TH PETITIONER
WALTER OOKO THABAKA 11TH PETITIONER
TOBIAS WANGA ODHIAMBO 12TH PETITIONER
PROTUS ONYANGO OBARE 13TH PETITIONER
BERNARD KIPLIMO RONO 14TH PETITIONER
NICHOLAS ODHIAMBO NYANGWESO 15TH PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
INDEPENDENT POLICING OVERSIGHT AUTHORITY 3RD RESPONDENT



RULING

1. Vide a judgment dated and delivered on 20th July, 2020, this Court rendered itself on the petition lodged by the petitioners. In that judgment, the court found that the 5th and 9th petitioners' rights to information and effective remedy were trampled upon by the 1st and 4th respondents; and that with regards to the 12th petitioner it was the police who unlawfully and brutally shot him and that police failed to discharge their obligation to investigate and to prosecute the perpetrators of the unlawful shooting. The findings are contained in paragraphs 101 - 105 of the judgment as follows:
 - “ 101. I find that the 1st and 4th Respondents violated the Rights of the 1st and 3rd Petitioners, to information and to Effective Remedy.
 102. As regards the 12th Petitioner, I find that he tendered sufficient evidence to show that it is the police who shot him. The police action was unlawful and brutal. It violated the 12th Petitioner's Right to Security of the Person.
 103. I also find that the police failed to discharge their obligation to investigate and to prosecute the perpetrators of the unlawful shooting of the 12th Petitioner.
 104. Finally, in respect to the Petitioners who did not tender evidence before this court, I find that their respective claims must fail against all the Respondents.
 105. I so find because this is not a case in which all the Petitioners were together at one particular place, when the matters complained of took place. If the circumstances in which the incident took place were same for the Petitioners, the findings on the issue of liability would apply in uniform manner, for all the Petitioners.”
2. It then follows that this ruling is then confined to the wrongs occasioned on the 5th, 9th and 12th petitioners as proved against the 1st and 4th respondents as the case may be. The relevant parties have filed their written submissions on the issue of quantum which I summarize as hereunder.
3. For the 5th, 9th and 12th petitioners, the submissions address 7 key thematic areas. On special damages, counsel submitted that with regards to the 5th petitioner, counsel conceded that even though a prayer for special damages was made to the tune of Kshs. 70, 700, the 1st and 4th respondents not having been found liable for the killing, they cannot be condemned to pay the damages which were related to funeral expenses. As for the 12th petitioner, it was counsel's submissions that the difference between receipted expenditure of Kshs. 161, 680 and the claimed amount of Kshs. 170,000 was explained in evidence as being the cost incurred in seeking the services of traditional healers who do not issue receipts. Counsel urged the Court to take judicial notice of the operation of traditional healers and proceed to award the claimed amount of Kshs. 170,000.
4. Counsel for the 5th, 9th and 12th petitioners also submitted that the guiding principle for the award of general damages is not only to compensate but should also act as a deterrence to repetition of breach, and for punishing those responsible and for ensuring effective policing of constitutionally guaranteed rights. To buttress this line of argument, counsel placed reliance on the High Court decision in *Robert Kisiara Dikir & 3 Others v Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others*



- [2010] eKLR. On the issue about the breach of the right to access to information and effective remedy, counsel urged that a sum of Kshs. 5,500,000 to each of the 5th, 9th and 12th petitioners was reasonable in the circumstances as the violations were still ongoing. Counsel relied on the case of Dr. Sam Ntheya CEO Nairobi Womens Hospital & Another ex parte Christine Nzula; Commission on Administrative Justice (Interested Party [2020] eKLR where the Court awarded Kshs. 1,000,000 for breach of the right to information as well as the cases of Dennis Itumbi v Attorney General & 2 Others [2018] eKLR where an award of Kshs. 5,000,000 was made for violation of the right to information.
5. As regards the violation of the right to security for the 12th petitioner, counsel for the petitioners submitted that the petitioner was entitled to a substantive award to vindicate the violation of the right to security. Counsel referred the Court to the decisions in Florence Amunga Omukanda & Another v AG & 2 Others [2016] eKLR, Monyoro Mong'are Shem & Another vs. Timothy Nyagaka Nyagaka [2021] eKLR and Macharia Francis Mundui & Another v Joel Wanje [2017] eKLR to submit that an award of Kshs. 5,000,000 was reasonable. Counsel also submitted that an award for exemplary damages was also called for to the tune of Kshs. 2,000,000 for each of the 5th, 9th and 12th petitioners. To this end, counsel relied on the case of Gitari Cyrus Muraguri vs. Attorney General [2011] eKLR to submit that exemplary damages are awarded where there is an oppressive, arbitrary or unconstitutional action by servants of the state. Finally, counsel prayed for award of costs for the petition as well as interest, general and exemplary damages. He also prayed for interest on the costs at court rates until payment is made in full.
 6. Ms. Callen Masaka, Principal Litigation Counsel made submissions on behalf of the 1st, 2nd and 4th respondents. In her submissions, counsel argued that the violations of the 5th, 9th and 12th petitioners' rights by the 1st, 2nd and 4th respondents were neither arbitrary nor deliberate but were borne of various mitigating circumstances which were beyond the control of the respondents. Counsel argued that 5th and 9th petitioners' right to information and effective administrative remedy was hinged on an inquest and investigations which had already been lodged and the respondents therefore lacked the power to fast track such actions hence the delay. On the question concerning the breach of the right to security of the 12th petitioner, counsel submitted that the actions of the police in the circumstances was in response to spontaneous attacks and the use of ammunitions was called for in the circumstances. She also attributed part of the liability to the 12th petitioner who she submitted was injured as a result of her participation in the demonstrations. On whether the petitioners were entitled to the damages sought, counsel relied on the Court of Appeal decision in Gitobu Imanyara & 2 Others vs. Attorney General (2016) eKLR to enunciate the applicable principles to the award of damages in constitutional petitions. She submitted that monetary awards must not only be confined to compensatory awards. Counsel also referred the court to the decision of the High Court in Daniel Waweru Njoroge & 17 Others vs. Attorney General (2015) eKLR for the principles to be taken into account when assessing quantum of damages. In conclusion, counsel urged the court to consider making other awards available other than monetary compensation; but that if monetary awards are deemed fit, the court should be guided by the circumstances of this case and the applicable principles.
 7. Having taken into consideration all the submissions by both counsel, the main issue for determination at this point is whether the 5th, 9th and 12th petitioners are entitled to the damages sought; and if so, what quantum, individually. In addressing the first issue as to whether the 5th, 9th and 12th petitioners are entitled to the damages sought justice demands that I be guided by the principles and considerations that guide the Court in assessing awards for damages in constitutional petitions as is the one before me.
 8. An action, such as the one before me, brought under Article 23 of *the Constitution* seeking enforcement, protection and preservation of fundamental rights is one borne of the realms of public law. Traditionally, the objectives of public law can be regarded as an acknowledgement that civilization



is founded upon the power of the public. The fundamental rights and freedoms of citizens are not only guaranteed but are also protected and preserved. The rights are guaranteed through the constitutional and statutory provisions providing for the rights; they are to be protected by the various state ministries, departments and agencies (MDAs) so charged by the enabling statutes; and it is to be preserved by the Judiciary by way of a declaratory order or in some instances, penalizing the wrongdoer and fixing the liability for the public wrong on the State when it has failed in its public duty to protect the fundamental rights of the citizen. Monetary awards in damages in such cases is to be understood as a relief by an order of making 'monetary amends' under the public law for the wrong done in breach of public duty, or by not protecting the fundamental rights of the citizen, or by subjecting the citizen to acts which amount to infringement of *the constitution*.

9. I am appreciative of the cases cited by both parties in this regard. To avoid repetition, I am inclined to rely on the case cited by the respondent, *Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR* but quote from a different paragraph where the Court of Appeal, upon undertaking comparative analysis of pronouncement from various jurisdictions, stated thus:

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

10. Adopting this as the applicable guide, I proceed to assess what relief is appropriate and just for each of the petitioners.
11. The violation to the constitutional rights of the 5th and 9th petitioners was with regards to the right to information and effective remedy. The two rights herein are provided for under Article 35 and 48 of *the Constitution* of Kenya respectively. Whereas the 5th and 9th petitioners contend that the breach by the 1st and 4th respondents in this regard was enormous and still continues, the respondents on the other hand contend that the breach was not arbitrary and that an inquest had been lodged and the speed of the said inquest was not within their control. At this point I wish to point out that contrary to the respondents' submissions that the 4th respondent is conferred independence under Article 245(2) (b) of *the Constitution*, such independence in the discharge of duties is not absolute; it is subject to the Constitutional values and principles which includes rule of law, human dignity, good governance and accountability among others.
12. I have considered the various authorities cited by the petitioners in this regard. This court had made a finding that the rights to information and effective remedy was breached with respect to the 5th and 9th petitioners. However, the submissions by the respondents on the mitigating circumstances in their bid to comply, are necessary in addressing the issue of quantum. Indeed, the respondents had lodged an inquest, which proceedings are controlled not by the respondents but by the court's



diary. No evidence has been adduced to attribute any delay on the part of the respondents to lodge such an inquest. I take cognizance of the remedial steps taken by the respondents to comply with the petitioners' constitutional rights demands. In the circumstances, and guided by the principles in the cases cited by the petitioners on quantum, an award of Kshs. 500,000 to the 5th and 9th petitioners each for the violations of the right to information is hereby made.

13. With regards to the breach of the right to effective remedy, an order is hereby issued that the proceedings of Inquest No. 79 of 2007 be heard and determined on priority basis.
14. For the 12th petitioner, the infringement concerned the right to security and the right to effective remedy as well as special damages. The 12th petitioner was shot on the leg and which leg was eventually amputated. During the hearing, the shooting was successfully linked to the actions of the officers of the 4th respondent. The said petitioner was previously employed as a boda boda rider. He made the report to Migori Police Station, coupled with numerous follow ups all of which yielded no fruits. The respondents have denied having deliberately occasioned the infringement; and instead alluded to rampant and spontaneous eruption of violence which left their officers with no option but to resort to the use of live ammunitions. I have considered the cases cited in this regard. I agree with the submissions on behalf of the 12th petitioner and the cited authorities on quantum for breach of the right to security. In the circumstances, I make an award of Kshs. 4,000,000 for breach of the 12th respondent's right to security; and award of Kshs. 500,000 for failure to accord the failure to investigate and prosecute the perpetrators of the offence against the 12th petitioner. I further order that the 4th respondent to fast track the investigations into the circumstances of the shooting of the 12th petitioner. As for special damages, I will award that which was pleaded and was also proved; being, Kshs. 161, 680.
15. On exemplary damages, I wish to reiterate that the assessment of damages is a discretionary relief. That being the case, a court is required to take into consideration public policy as well as the interest of the society as a whole. Alive to these facts as properly urged by the respondent, it is my view that an award of exemplary damages is not just and appropriate in this case. My finding herein is attributable to the heavy burden which will be occasioned by such an award to the innocent tax payer and secondly due to the improved political environment and the positive steps taken by the government in dealing with human right violations. Unlike the period preceding the promulgation of the 2010 Constitution, government institutions have become pro-active in dealing with human rights violations both historical and current. I hold the view that the people of Kenya have learnt valuable lessons from some of the tough experiences we have been through. There is therefore no need for me to "make an example" by awarding exemplary or punitive damages.
16. As for costs of the petition, I have no reason to depart from the norm, that costs follow the event. Furthermore, considering the prolonged duration that this case has taken in the corridors of justice; and being a case pitching citizens against state agencies funded through public coffers, the 1st and 4th respondents shall bear the costs against the 5th, 9th and 12th petitioners.
17. The final awards of this Court are as follows:
 - i. The 5th respondent is awarded Kshs. 500,000 for breach of the right to information;
 - ii. The 9th respondent is hereby awarded Kshs. 500,000 for breach of the right to information;



- iii. The 12th respondent is hereby awarded Kshs. 4,500,000 (being general damages); and Kshs. 161,680 (being special damages) for breach of the right to security and effective remedy;
- iv. An order is hereby issued directing the 4th respondent to personally oversee the prompt investigation of the circumstances leading to the shooting of the 12th respondent;
- v. The cost of this petition to be paid by the 1st and 4th respondent; to the 5th, 9th and 12th petitioners.

18. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2023.

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FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

