



Kiarie & another (Suing as the legal administrators of the Estate of the Late Richard Machora Kiarie) v Inspector General of Police & another; Independent Policing Oversight Authority (IPOA) (Interested Party) (Petition 25 of 2021) [2023] KEHC 18903 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION 25 OF 2021
TM MATHEKA, J
JUNE 14, 2023**

BETWEEN

**LUCY WANJA KIARIE 1ST PETITIONER
JAMES MUNGAI KIARIE 2ND PETITIONER
SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
RICHARD MACHORA KIARIE**

AND

**THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
THE HON ATTORNEY GENERAL 2ND RESPONDENT**

AND

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

JUDGMENT

1. The Petitioners have filed this Petition in their capacity as Legal Representatives of the estate of Richard Machora Kiarie (the deceased) and according to them, Administration Police Officers arbitrarily and unlawfully killed the said deceased and by so doing, the 1st and 2nd Respondents are vicariously liable for violating Articles 2(1), 10(1), 19, 20(1), 21(1), 24, 25, 26, 27, 28, 29, 35, 48, 49, 50(1)(a), 51(1), 245 of *the Constitution*, Articles 3 & 5 of the Universal Declaration of Human Rights, Articles 6(1), 7, 9(1)-(5), 10(1), 14(1) of the International Covenant on Civil and Political Rights (ICCPR), Articles 4, 5, 6 & 7 of the Banjul Charter and Sections 10, 49(13), 24, 51(1)(e), 49(5), 61(1)(2) & 95 of the *National Police Service Act*.



2. The Petitioners allege that on 19th January, 2019 at around 4.30am, the deceased, driving a tuk tuk Registration Number KTWA 892V left his Kawangware home for work to ferry passengers plying the Satellite-Riruta-Dagoretti (Ndonyo) Route. That as soon as he got onto the main road at Adonai and turned towards Dagoretti, Police Officers attached to Riruta Police Station fired shots at him through the back; the deceased bled severely and he was surrounded by police officers who ordered him to get out of the tuk tuk; He fell down to a kneeling position. They searched the tuk tuk then turned to him and fired at him at point blank, then left him to bleed on the ground. An hour later he succumbed to the injuries.
3. The Petitioners seek the following reliefs: -
 1. A declaratory order that the deceased person herein through his representatives, the petitioners, are entitled to effective remedies as guaranteed under Article 23 (a) and (e) of *the Constitution* for the violations of fundamental rights and freedoms.
 2. A declaratory order that the Deceased Rights guaranteed under Articles 24, 25, 26, 27, 28, 29, 48, 49, 50(1) & (2) (a) and 51 (1) of *the Constitution* of Kenya, 2010 & Articles 1,3,4,5 & 10 of the Universal Declaration of Human Rights; Articles 3 A,6 (1),7, ((1) -(5),10(1) & 14(2) of the International Covenant on Civil and Political Rights ICCPR & Articles 4,5,6 & 7(1) of the African (Banjul) Charter on Human and People's Rights were violated.
 3. Declaration that the 1st respondent is liable for the acts of the Police Officers who used brutal force which violated and infringed the rights and fundamental freedoms in the bill of rights, enshrined under Articles 24,25,26,27,28,29,48,49,50(1) & (2) (a) and 51(1) of *the Constitution* of Kenya 2010 & Articles 1,3,4,5 & 10 of the Universal Declaration of Human Rights; Articles 3 (A),6(1),7,9(1)-(5),10(1) & 14(2) of the International Covenant on Civil and Political Right ICCPR; Articles 4,5,6 & 7(1) of the African (Banjul) Charter on Human and Peoples' Rights and more particularly as described in parts E & F hereof.
 4. Declaration that the 1st Respondent ordered, permitted, condoned, tolerated, facilitated and/or encouraged the intentional and/or criminally negligent use of excessive and lethal force against the Deceased contrary to constitutional checks put in place under Articles 2(1),10(1),19,20(1),21(1), 238,244 and 245 of *the Constitution* of Kenya.
 5. Declaration that the 1st respondent acted in contravention of Article 24 of *the Constitution* by unlawfully and without any justification, by limiting the rights of Richard Machora Kiarie guaranteed under Articles 24 of *the Constitution*.
 6. Declaration that the 1st Respondent acted in contravention of the guiding principles enshrined under Article 238(1) (b) of *the Constitution* of Kenya, 2010 by disrespecting the rule of law, democracy, human rights and fundamental freedoms.
 7. Declaration that the action and inactions of the police officers and the National Police Service were in contravention of the express provisions of Article 244 (d) of *the Constitution* that requires the National Police Service to



train its staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity.

8. Declaration that the 1st Respondent failed in his duty to exercise proper command over his officers and to train his staff/officers to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and to foster and promote relationships with the broader society and therefore failed in his constitutional mandate to exercise proper command over the National Police Service as mandated under Article 245 of *the Constitution* of Kenya, 2010.
 9. Declaration that failure to provide emergency medical care to the victim before he succumbed to the multiple gunshot wounds is a violation of the Rights guaranteed under Articles 24, 25, 26, 27, 28, 29, 48, 49, 50(1) and (2) (a) and 51(1) of *the Constitution* of Kenya, 2010 & articles 1, 3, 4, 5 & 10 of the Universal Declaration of Human Rights; Articles 3(A), 6 (1), & ((1)-(5), 10(1) & 14(2) of the International Covenant on Civil and Political Rights ICCPR; Articles 4, 5, 6 & 7(1) of the African (Banjul) Charter on Human and People's Rights.
 10. Declaration that the action and inaction of the Police Officers was in contravention of the provisions of the *National Police Service Act*, and particularly Under Sections 24, 49(5), 51(1) (e), 61(1), (2), 10, 49(13) and Section 95.
 11. An order for Exemplary Damages for violations particularised above.
 12. An order for general damages against the Respondents jointly and severally for loss of dependency, loss of expectation of life, pain and suffering.
 13. An order for special damages for actual expenses for Post Mortem, Funeral Expenses, Procuring Death Certificate, travel expenses and legal fees for grant of letters of Administration, all at Ksh. 150,000/=
 14. An order for the Respondents to bear Costs of this Petition and interests.
4. The Petition is supported by an Affidavit of James Mungai Kiarie, brother to the deceased sworn on 6th October, 2021. He adopted his affidavit in evidence and was cross-examined on the same. I will come to it later.
 5. In opposing the petition the Respondents filed their Grounds of Opposition dated 13th May, 2022 saying the following -
 1. That the petition is wrongly instituted in the High Court of Kenya at Nakuru as against the place of Cause of Action which arose in Nairobi.
 2. The Affidavit in support of the Petition be struck off as it consists of Hearsay which is inadmissible in evidence.
 3. There is no evidence that the Petitioners carried out any investigations to warrant a finding on the shooting and killing of the person subject of the petition and therefore the petition is premature and based on biased findings and the Petition is therefore an abuse of the court process and should be struck off.



4. The Petition is full of glaring conjectures and unsubstantiated allegations against the Respondents. That is to say that the Petitioners have failed to demonstrate to the required degree of precision which fundamental rights have been infringed.
5. The petition drafted is fatally defective, incompetent and thus an abuse of Court process.
6. The Interested Party swore a Replying Affidavit through one Benedict Otieno, Senior Investigator, on an undated date. He deponed that the interested party learnt of the case of the Late Richard Machora Kiarie through electronic media and initiated investigations into the same on its own motion as mandated by the IPOA Act on 20th January, 2019 by recording statements from witnesses and from family members who included the petitioners.
7. He averred that as the investigating officer herein, he had been in constant communication with the deceased's family on the conduct of the case but the investigations had since stalled due to an issue to do with examination of the firearms that were used during the incident, and that he had informed the petitioners of this fact. He stated that the Interested Party was pursuing other means of resolving the issue.
8. It was his view that the petition was premature as investigations were yet to be completed in order to supply the Petitioners with a substantive report on the outcome. And in any event upon conclusion of the investigations, the 1st interested party would take the appropriate action required and inform the petitioners of the same.
9. It was his view that the petition does not disclose any reasonable cause of action and that no relief has been sought against the 1st interested party, thus the petition should be dismissed with costs.
10. The petition was heard by way of oral evidence. The Petitioners case was supported by the evidence of three witnesses.
11. PW1 James Mungai Kiarie testified that Richard Macharia Kiarie (the deceased) was his elder brother. In his Affidavit sworn on 6th October 2021 he testified that he had obtained a grant of letters of administration ad litem to enable him file this petition. He testified that the deceased was at the material time a tuk tuk driver within Satellite Area, as he lived at Adonai in Riruta. He himself was employed as a tuk tuk driver in Bahati Nairobi.
12. On 19th January 2019, he learnt from another brother Sammy Ndung'u that, he; Sammy had received several phone calls from people telling him to rush to Riruta because there was information a certain tuk tuk driver by the name Kirui was very sick. He too received some information from one Mwangi a.k.a. Herat, that his brother Macharia was very sick and he should go to Kawangware immediately.
13. Using his tuk tuk they went to Kawangware, upon arrival they found other tuk tuk operators engaging with police in running battles. They had parked their tuk tuks blocking the gate to the police station. There was smoke and tear gas filling the air. He called Herat, who came and led them through the crowds, and into the police station. They were allowed into the police station and the 1st thing he saw was his brother Machora's tuk tuk registration number KTW 892V white in colour parked next to a police land cruiser. He noted that the back net of the tuk tuk had a hole which he later learnt was a bullet hole. There was blood on the front of the tuk tuk and a lot of blood on the floor of the tuk tuk on the driver's side. He began feeling sick, his brother Ndung'u began wailing and was taken away by Herat.



14. He saw a spent cartridge on the floor of the tuk tuk, the tuk tuk had been towed as evidenced by the rope tied to the front of the windscreen. He looked at the police land cruiser. He saw it was blood stained and when he moved closer to check it out, he was stopped by uniformed and armed police. His cousin, one Thomas, arrived. He began to ask questions of the police demanding to see Machora. The police chased them out.
15. 300 metres from the police station he could see what appeared to be the scene, there were blood stains and what appeared to be bullet marks on the tarmac road. He learnt from a certain old man whose name he did not know that he had witnessed the shooting and he heard gunshots and people shouting shuka chini! Lala chini! Mikono juu! He also learnt from other persons at the scene that his brother lay on the tarmac bleeding, guarded by police officers. It is when two passersby identified him and told others that the crowd formed, prompting the police to haul the deceased into their land cruiser to the police station.
16. He also learnt that there had been an alleged attempted robbery which the police responded to and in the process shot the deceased.
17. He testified that the chairman of the Sacco that the deceased belonged to addressed the media, he depones that it is during this media briefing that the police took advantage, opened the gate, pushed off the tuk tuks blocking the gate, and the land cruiser carrying his brother's body fled. They followed it to the city mortuary where they found that the police had booked in their brother as an "unidentified African male". The body was on the floor so they paid for him to be placed on the raised slab. He observed that his brother had been shot through the eye, shoulder, chest and stomach area.
18. At the mortuary he was joined by other relatives and friends. They gave the correct name to the morgue attendant and were issued with a receipt. They went back to the house of the deceased and collected a few items and left.
19. They later witnessed the post mortem, and he produced a copy of the report. Deceased was buried on 26th January, 2019 the cause of his death, multiple injuries due to multiple gun shots. He testified that his brother had two (2) children who depended on him, together with his parents. That these persons were deprived of their bread winner. The family suffered mental anguish, psychological torture and loss.
20. They were later directed to Independent Policing Oversight Authority (IPOA) offices and were issued with OB No. IPOA/CMN/165/20. They followed up with IPOA for 1 ½ years with no outcome. They have received threats, and that is why they came to court.
21. They had incurred funeral expenses, costs obtaining the grant ad litem, costs travelling to and from IPOA offices, the police station etc. He produced documentary evidence in support of the petition, documents to show that the deceased had purchased the tuk tuk from one Stephen Maurice Ochieng, photos of the tuk tuk with the bullet hole at the police station, receipt for mortuary fees, the post mortem report.
22. On cross examination he told the court that they were seeking justice for his brother and his children that he now had to take care of his children and those of his brother as well. He told the court that there was an investigation into the shooting of his brother but they did not know whether it was completed. He told the court that the landlord of his brother did not witness the shooting but that he opened the gate for his brother, saw him leave in his tuk tuk, heard gunshots, and then voices. He said this man was not going to testify in the case. He said IPOA conducted the investigations and it is possible they knew who had shot his brother. He said he saw holes on the ground where the shooting had taken place, and according to him they were evidence of close range shooting. That he googled and saw this



- information. He said there was a video shot by one of the tuk tuk operations in the area showing his brother lying on the ground, but this person refused to testify for fear of his life. He also testified that the person who allegedly sold his brother the tuk tuk was not a witness in this case.
23. He said he earned Kshs. 3,500/= per day from his tuk tuk.
24. He told the court that upon reporting to IPOA they were given an investigating officer by the name Humphrey. They felt that Humphrey was not assisting, so they were assigned another by the name Benedict but he only told them that the gun had been traced. He said that the same police station that was involved with the shooting was the same one investigating the case and that there lay the problem.
25. In support of the petition he produced the following documents;
- i. Grant ad litem- P. Exhibit 1.
 - ii. His Identification card- P. Exhibit 2
 - iii. Chief's letter- P. Exhibit 3
 - iv. Transfer documents, KRA PIN, deceased ID, Tuk tuk sale agreement & a log book- P. Exhibit 4
 - v. Tuk tuk photograph- P. Exhibit 5
 - vi. Tuk tuk's certificate of insurance- P. Exhibit 6
 - vii. Morgue Receipt of Ksh.500- P. Exhibit 7
 - viii. IPOA OB No. extract – P. Exhibit 8
 - ix. Post Mortem Report dated 23.1.2019- P. Exhibit 9.
 - x. Funeral Programme – P. Exhibit 10
 - xi. Witness Tuk tuk's log book- P. Exhibit 11
 - xii. Letter to IPOA – P. Exhibit 12.
26. PW2 Samwel Ndung'u Kiarie was brother to the deceased and to PW1. In his affidavit sworn on 3rd September, 2021 his testimony was not very different from that of PW1, save that he testified that he received calls from various people and proceeded to the scene in his brother James Mungai Kiarie's tuk tuk. He also testified to earning between Kshs. 1,500/= and Kshs. 3,500/= per day as a tuk tuk driver. He demonstrated that the deceased was a member of Vision Tut Tuk Operators Limited, Sacco for tuk tuk operators. He produced the deceased's membership number as P. Exhibit 14.
27. He said he was pursuing compensation for his brother's children. He stated that the deceased was a member of Vision Tuk tuk operators Ltd.
28. On cross examination he said it was apparent that the deceased was shot from behind. When he was following up the case with IPOA he began to receive death threats on his phone. He said he did not report the threats to the investigating officer/IPOA, but simply stopped following up. He stated that IPOA did not refuse to give him information but there was a time they asked him whether he did not have any other thing to do other than visit IPOA offices.
29. PW3 Lucy Wanja Kiarie testified that the deceased was her 1st born son and she was living with his two (2) children whom he supported. In her affidavit sworn on 3rd September,2021 she testified how she received a call from one of her sons, James Mungai, that he had received a call that the deceased was very



- ill. She said the whole incident was on television, and people began streaming to her home. After burial, she was advised to follow up with IPOA and the family tasked Samuel Ndung'u to take the front line.
30. She demonstrated how she made numerous trips to Nairobi to pursue her son's certificate of death and follow up with IPOA. She finally got the certificate of death, post mortem report, she seeks compensation for her grandchildren and for her son for violation of his constitutional rights. She produced their certificates of birth P. Exhibit 15. She said the mother of the deceased children's whereabouts is unknown and produced a letter from the chief in proof as P. Exhibit 16. She also produced a burial permit as P. Exhibit 17, Death certificate as P. Exhibit 18 and receipts for funeral expenses as P. Exhibit 19.
 31. On cross examination she said that the problem with IPOA was the inordinate delay of the matter.
 32. At the close of the Petitioner's case, the respondents and the interested party closed their case without calling any witness.
 33. Thereafter the advocates for the respective parties filed their submissions.

The Petitioner's Submissions

34. The petitioner filed their Submissions on 10th November, 2022.
35. On whether the suit is premature, the Petitioners' Counsel submitted that the same is not about criminal culpability of the deceased and it's not pegged on the investigations being carried out by the interested party. For this proposition, reliance was placed on Kenya National Commission on Human Rights & Another v Attorney General & 3 Others [2014] eKLR where the alleged perpetrators were charged with murder and the case was still pending before the High Court, court dealing with the petition was of the view that circumstantial or presumptive evidence, was important where the State had acted to suppress all evidence or where the investigator and protector was in fact the alleged perpetrator of the violation. The court found that it had sufficient facts to determine the petition without awaiting the outcome of the pending murder trial.
36. The petitioners also relied on Law Society of Kenya & 2 Others vs Attorney General & 2 Others [2018] eKLR where the court stated that liability of the state for the wrongful violations of rights arising out of the actions of its officers must be determined under proceeding in that behalf before a civil court such as this one.
37. The petitioners submitted that based on averments by the interested party about ongoing investigations without giving timelines when they would be concluded they could not be faulted for giving up and filing this petition also taking into consideration the limitation period for lodging claims over personal injuries.
38. With respect to whether the Petitioners witnesses' account of the events that took place on the morning of 19th January, 2019 are admissible, the Counsel submitted in the affirmative. She submitted that PW1 & PW2 gave a detailed account of how the deceased met his untimely death and that the deceased's landlord, friend and co-worker whom they referred to, flatly refused to come forth and adduce their evidence in court for fear of victimisation by the Police.
39. Counsel submitted that it is a matter of public notoriety that Kenyans, by far and large, are mighty fearful of going on record, personally or collectively and raising issues against police officers; that this fear prevented eye witnesses from coming forth to testify against Riruta Satellite Police Officers and therefore the secondary account given by the petitioners meet the exception to the hearsay rule as provided under Section 33 of the Law of Evidence Act, Cap 80 Laws of Kenya.



40. As to whether the petitioners have made out a case against the respondents for infringement of various fundamental rights of the deceased, counsel submitted that the petitioners had made out their case against the respondents on a balance of probabilities. It was submitted that there is a probable reason that police officers stationed at Riruta Police station killed the deceased for the following reasons: -
1. The police refused James Kiarie and his brother Samuel Ndungu to view the body that was lying in the police Land Cruiser at the police station.
 2. The police did not involve the brothers in the removal of their Kin's body to City Mortuary or any other Mortuary of the family's choice.
 3. The Police, having established the identity of the deceased did not register the body as belonging to one Richard Machora Kiarie but as an "unidentified male".
 4. The police did not commence any investigations into the death of the deceased.
 5. The police neither advised the family of the deceased to make an official complaint on the killing of their kin nor opened an inquest file to establish who killed the deceased.
 6. The police did not substantively controvert the damning evidence against them herein and further did not take any steps upon learning of the deceased's death. To bolster this position reliance was placed on Kenya National Commission on Human Rights & another vs Attorney General & 3 others [2014] eKLR where the court faulted the police officers who had been accused of shooting the deceased for not answering to that allegation and Stephen Iregi Njuguna vs Attorney General [1997] eKLR where the court stated that the police do not have an 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. The court further stated that the onus of proof shifted to the police to prove that shooting was necessary after it was established that the deceased therein died as a result of the police firing but having failed to discharge that burden they cannot escape liability.
 7. The police failed to escort the body for post mortem as they do in all other murder cases.
41. It was the petitioner's further submissions that pursuant to Article 245 of *the Constitution*, Section 8, 10 and 66 of the *National Police Service Act* the Inspector General of Police bears full responsibility for the unlawful and or criminally negligent actions of the Riruta Satellite Police Officers.
42. Regarding the remedies available to the petitioners, Counsel submitted that the petitioners are entitled to declaratory reliefs and the damages sought.
43. On damages, the petitioners submitted that they are entitled to the same. They relied on the case of Kenya National Commission on Human Rights & another vs Attorney General & 3 Others (supra) where the court held that where violation have been proved and where especially loss of life has been occasioned by a callous act on the part of anyone, more so, the protector of those rights, compensation is warranted.
44. On general damages the petitioners prayed for a global sum of Kshs. 5,000,000/=. In support of this position they relied on: -



1. Kenya National Commission on Human Rights & Another vs Attorney General & 3 Others (supra) – where the court awarded a global sum of Kshs. 2 million to each of the deceased for breach of right to life.
 2. Andrew Wasike Munyole vs Attorney General & Another [2016] eKLR where the court awarded the petitioner Kshs.3 Million as general damages for being held unlawfully in custody for more than 24 hours; infringement of right to freedom from torture and inhuman degrading treatment, infringement of right to protection against arbitrary search and for malicious prosecution.
 3. Zipporah Seroney & 5 Others vs Attorney General [2020] eKLR- where the court awarded the petitioners Kshs. 17,000,000/- as general damages for the violation of the constitutional rights and fundamental freedoms of the deceased.
45. The petitioners prayed for Kshs. 2 million as exemplary damages.
46. Under Damages for loss of dependency, expectation of life and for pain and suffering, the Petitioners submitted that the deceased was an enterprising tuk-tuk rider earning Kshs. 3,000/= per day and that he was in good health and would have worked up to 60 years. They sought Ksh. 19,656,000/= (being 26 working days in a month x 12 months in a year x 21 years he would have worked).
47. For special damages they sought a total sum of Ksh. 98,800/=.
48. They further sought that respondents be ordered to bear costs and interest of this petition relying on Zipporah Seroney & 5 Others vs Attorney General (supra) where the court stated:
- “ According to Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 the award of costs is purely at the discretion of the court. However, the court in exercising the discretion is required to take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. In this case, I find no reason why the petitioners’ success in the matter should not be accompanied by an award of costs. As such, the Respondent shall meet the petitioners’ costs for these proceedings.”

Respondents’ Submissions

49. The Respondents submitted that the police officers received a distress call from Nairobi area control room requiring them to respond to a scene at Adonai area whereby a church was being broken into. They headed there and before they reached the scene they were informed that the thieves had left using a tuk tuk. Within the same locality they met a tuk tuk and decided to intercept by stopping the rider but instead he made a U-turn and three men jumped out of the tuk tuk shooting at the officers. That the officers responded and fatally shot the rider as others escaped.
50. They submitted that upon searching the tuk tuk, registration number KTWA 982 V, they recovered 14-inch TV, a DVD, a tin snip cutter, a homemade pistol and a spent cartridge of 9mm.They averred that the scene was visited by the OCS and OC Crime Riruta and the recovered items were taken to Riruta police station though they were not identified as the ones stolen from the church.
51. The respondent also submitted that the petitioners failed to state with reasonable precision which constitutional rights were violated, threatened, denied or infringed. They cited the case of Anarita Karimi Njeru vs Republic 1976-1980 KLR 1272 where the court held that when a petitioner approaches the court for redress of a violation of a constitutional right he must with precision state



the right, the provision of constitution under which that right is provided and the manner in which he alleges that the right has been violated.

52. The petitioners submitted that the above position was adopted by the court in Court of Appeal in the case *Mumo Matemu vs Trusted Society for Human Rights Alliance & 5 Others* [2013] eKLR.
53. They submitted that this petition does not disclose a constitutional issue.
54. It was the Respondents' submissions that the petitioners are seeking for directives and determinations that are available under the *Civil Procedure Act* Cap 21 and Civil Procedure Rule. They asserted that the matters arising herein are normally prosecuted through a civil claim, which claim for negligence is time barred and is couched as a petition by the petitioners.
55. They further submitted that the petition as argued is not sustainable as it is one for general and exemplary damages and therefore the petitioners needed to lead oral evidence to prove their claim. Reliance was placed on *Dickson Ambuye Chebuye Ambeyi vs National Police Service & Another* [2020] eKLR where the court stated that in any claim for general damages, the party claiming must formally prove their claim and that couching such a claim as a constitutional suit does not provide the parties with a shortcut in cases of this nature.
56. The respondents argued that damages in a constitutional petition are not meant to be restorative in nature but are meant to give just satisfaction.
57. They urged this court to apply the principles enunciated in *Peter Ngari Kagume & 7 Others vs Attorney General* [2009] eKLR Lord Woolf in his paper "The Human Rights Act 1998 and Remedies in M Andenes and D Fairgrieve (eds), *Judicial review in International Perspective*: 11(2000), pp 429-436 suggested the possible principles to be followed while granting relief or a remedy where fundamental rights have been infringed. The principles are: -
 1. If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.
 2. The court should not award exemplary or aggravated damages.
 3. An award should be "of no greater sum" than that necessary to achieve just satisfaction.
 4. The quantum of the award should be "moderate" and "normally on the low side" by comparison to tortious awards.
 5. The award should be restricted to compensating the victim for what happened "so far as the unlawful conduct exceeds what could lawfully happen...."They submitted that the appropriate remedy for constitutional violations is a declaration by the court that certain rights have been violated, however there are circumstances in which a declaration alone would not satisfactorily vindicate the constitutional violations in issue. For this proposition reliance was placed on *Trinidad and Tobago vs Ramanoop (Trinidad and Tobago)* [2005] UKPC 15.
58. Regarding general, special and punitive damages, the Respondents submitted that the same fall within the discretion of the court as was elaborated in *Dick Joel Omondi V Hon. Attorney General* [2013] eKLR.



59. Regarding punitive damages the respondents submitted that the court in the English case of *Rookes vs Barnard* [1964] AC 1129 pointed out that punitive damages should be awarded; in cases of oppressive, arbitrary or unconstitutional action by servants of the government, where the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and where exemplary damages are expressly authorised by statute.
60. In conclusion they submitted that remedies sought should not be granted because the petitioners have failed to prove this case to the required standard and the petition ought to be dismissed with costs.

The Interested Party's Submissions

61. The interested party contended that the allegation raised by the petitioners that it has failed to conduct and complete investigations into the death of the petitioner's kin that were allegedly as a result of the police action was an issue that was not pleaded before this court. On whether the petitioners could introduce new issues through their submissions, the interested party argued that it is now settled law that a party cannot introduce new issues and is bound by its pleadings. For this proposition reliance was placed on *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd* [2018] eKLR, *Independent Electoral & Boundaries Commission & another vs Stephen Mutinda Mule & 3 Others* [2014]eKLR, Supreme Court of Appeal in the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3
62. The interested party also submitted that the petitioners had not sought any orders against it in their pleadings.
63. The interested party argued that the petitioners have not demonstrated how their rights had been violated by the interested party and urged the court to dismiss the petition against it.

Analysis & Determination

64. Upon consideration of the Petition, the responses and rival submissions and authorities relied upon, the following issues arise for consideration: -
 1. Whether the petition is premature.
 2. Whether the affidavits filed in support of the Petition should be struck out.
 3. Whether the petition meets the threshold of a Constitutional Petition.
 4. Whether the petitioners are entitled to the orders sought.
 5. What should be the award of damages?
 6. Who should bear the costs?

Issue No.1 - Whether the petition is premature

65. The respondents and the interested party argue that the petition is premature as there is no evidence on the shooting and killing of the deceased and that investigations into the death of the deceased are on-going. This argument that the petition is premature is based on the fact neither the Police nor IPOA have completed their investigations in the killing of the deceased.
66. However it is not in dispute that the deceased was shot by police officers. The respondents submissions are based on the claim that police officers shot the deceased in the course of their duty while responding to a burglary alert. There is no doubt that the cause of death were the gunshot injuries sustained as a result of shooting by the police officers. The fact itself is enough to warrant this petition. I echo the



words of Lenaola J (as he then was) in Kenya National Commission on Human Rights & another vs Attorney General & 3 others [2014] eKLR;

27. Circumstantial evidence, indicia and presumptions in such proceedings may therefore be considered, so long as they lead to conclusions consistent with the facts. Circumstantial or presumptive evidence, in my view, is important where the State has acted to suppress all evidence or where the investigation and protector is in fact the alleged perpetrator of the violation. This is the case before me.
 28. I am satisfied that I have before me sufficient facts that can lead me to a determination of the Petition without having to await the outcome of the murder trial. (emphasis added)
67. On the facts this case is not dissimilar from the above quoted case. That investigation by IPOA are alleged to be pending, there is nothing to show that the National Police Service is investigating the case. There is the appearance of fact that the investigator and the protector, the state, is suppressing the evidence. What is a *mwananchi* supposed to do? On the evidence before me, the circumstances of the matter, I am satisfied that there are sufficient facts to proceed without having to await the investigations by IPOA.
68. The police officers shot the deceased. I did watch the video clips attached to the petition in the aftermath of the shooting. His relatives showed up at the police station. They were denied any opportunity to view his body. The police dumped the deceased's body as that of an unknown african male at the City Mortuary without involving the said family members yet they were available. These are facts that are uncontroverted by an explanation that is not consistent with the facts. The family has waited since 2019 and almost 5 years down the line there has been nothing on the alleged ongoing investigations. I believe this amounts to what the learned judge above referred to as where the investigator and the protector suppress the evidence. The police are protectors, who also have investigative powers, where they fail, IPOA is the body given the mandate to investigate them. In this case neither carried out its mandate, hence the petition is far from being premature.

Issue no.2 -Whether the affidavits filed in support of the Petition should be struck out

69. The Respondents have asked this court to strike out the Affidavit in support of the Petition on grounds that it consists of hearsay evidence which is inadmissible.
70. In Court of Appeal case of Kinyatti vs Republic[1984] eKLR it was stated;
4. Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.
 5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.
 6. Hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused.



7. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.
8. Some seemingly hearsay evidence may be proved to be original evidence when the fact that it was made, as distinct from its truth by taking the following into account:
 - (a) was the statement made or not
 - (b) it is relevant to an issue, regardless of whether it is true or false
 - (c) if it affects the credit of a witness by either being consistent or inconsistent.

71. It is not denied that some of the statements made by the Petitioners are about what other people told them. On the other hand these affidavits were filed with the petition as is required by the law and rules in which the petitioner and witnesses give the substance of the evidence on oath, the contents of the affidavits were tested when the Petitioners and their witnesses testified and were cross examined on the contents. The mere facts that they may contain some hearsay evidence cannot be a ground to strike out the affidavits.

Issue No.3 - Whether the petition meets the threshold of a Constitutional Petition

72. As a matter of principle, constitutional petitions must be pleaded with some measure of precision and specificity as to what provision of *the Constitution* has been violated and in what manner. In *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] eKLR the court stated as follows:

Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance.

73. This is the principle that was set out by *Anarita Karimi Njeru vs Republic* [1979] KLR the court observed as follows: -

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

74. The petitioners clearly set out the violations of *the Constitution*:

- a. The right to dignity, security of the person, protection from inhuman, degrading, treatment or punishment.
- b. The right to access justice, the rights of an arrested person, the rights of a person deprived of their liberty, the right to be presumed innocent until proven guilty, the right to a fair trial.



- c. The right to life.
- d. The duty of the police to uphold the rule of law, respect for human rights and fundamental rights in the execution of their duties of pursuing security of the nation; the duty to foster and promote good relations with society.
- e. The duty of IPOA to provide information.

The petitioners set out specifically the violation of rights against the deceased –

- i. Article 28 of *the Constitution* states Human dignity Every person has inherent dignity and the right to have that dignity respected and protected. The deceased’s right to dignity, freedom from torture cruel and inhuman treatment/punishment as provided for under Article 24, 25 and 28 of *the Constitution* of Kenya, Article 5 of the UDHR, 7 of the ICCPR, 5 of the Banjul Charter.

Thus the police did by shooting and leaving the deceased to bleed and while sprawled on the road – whether or not he was a criminal – as at that time he was still innocent until proven guilty his being a suspect did not give the police the blank cheque to deal with him in the manner they did. They would have removed him to a hospital. Even the manner in which they treated his body after he died was not right.

- ii. Article 26 provides for the Right to life (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. The shooting by police officers and subsequent death of the deceased deprived him of his right to life and there was nothing to demonstrate that it was in accordance with any written law..
- iii. Right to access to justice as a suspect and a person under the custody of police, to be presumed innocent until proven guilty, to have his case heard in a court of law as at Article 48, 49, 50 and 51 of *the Constitution* of Kenya. The police claimed that the deceased was a suspect of a burglary case – that there was a shootout between them and persons who were armed in the deceased’s tuk tuk. This claim was never established by the police/IPOA – if indeed there was a shootout – then the evidence would have been available at the scene – in the form of spent cartridges – to just confirm that indeed that fact was true – absence of that and any investigation the deceased’s right to access justice in all its forms – as a suspect, as a person in police custody – were violated.

Violations by police

Article 238 and 244 of *the Constitution* of Kenya.

The National Police Service is bound by the provisions of *the Constitution* of Kenya 2010 to comply with constitutional standards on human rights and fundamental freedoms. The officers involved in this case breached the mandatory provision of *the constitution* requiring them to pursue national security in compliance with the law, and respect for the rule of law, human rights and fundamental freedoms while fostering and promoting relationships with the larger society. In shooting Richard Machora Kiarie and killing him in the manner they did, in the manner in which they treated the PW1 and PW2 and other members of the family, in the manner in which they treated Richard Machora Kiarie after shooting him – the police violated these principles and must be held to account.

Violation by IPOA



It is evident from the record that IPOA has to date not given any information to the petitioners on the investigations it was carrying out hence violation of the right to access the information the petitioners required to pursue justice on behalf of the deceased.

75. I find that the petition passes the precision test.

Issue No. 4 - Whether the petitioners are entitled to the orders sought.

76. Based on the Petitioners' and Respondents' submissions, it is apparent that the shooting was done by the Police Officers.

77. The State has an obligation to protect its citizens through the police service. The police service is the organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as prevention and detection of crime including the apprehension of offenders as per the National Police Service Act.

78. The evidence is that the deceased was in the course of his business when he was unlawfully and/or illegally shot by the police officers. The Respondents on their part confirmed the police officers shot the deceased in the course of responding to the scene where the church had allegedly been broken into. It was their position that when they stopped the tuk tuk in which they had been apprised the thieves were using, the rider made a u turn and three men jumped out of it shooting at them. The respondents did not place any evidence before the court to support the allegations of responding to a crime scene. They did not file any Replying Affidavit in response to facts raised by the petitioners in their petition and as such the evidence of the Petitioners were uncontroverted. As it stands there is no justification for the Acts by the Police officers.

79. The Court of Appeal in Stephen Iregi Njuguna vs Hon. The Attorney General Civil Appeal No. 55 of 1997 [1995-1998] 1 EA 252 expressed itself as follows:

“The police do not have an 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 and that the deceased was shot by them by accident. From the circumstances it is obvious that the deceased died as a result of the police firing. So the onus had 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, particularly when there is evidence of PW 2 that the people whom the police could have been chasing were not shooting back and were unarmed. As it is there is no evidence on the record to show that the people the police were chasing, if a chase there was, were criminals; that they were dangerous criminals and were particularly dangerous to the police.”

80. In the present case there is no evidence that the deceased indulged in any criminal activity as purported by the Respondents. There is no evidence also that he was armed and as such there was no justification as to why he was shot by the police officers. Evidently the shooting of the deceased was negligent, unlawful, and illegal and the 1st and 2nd respondents are therefore vicariously liable for the acts and omissions of the police officers.



81. In *Muwonge vs Attorney General of Uganda* [1967] EA 17, it was held by the then East African Court of Appeal that:

“... Therefore the sole principle of law which should be applied in determining whether the Attorney General is responsible for the acts of this policeman is: Were those acts committed in the course of the duty of the policeman, no matter whether they were committed contrary to the general instructions”...A policeman may still be acting in the course of his duties if the manner in which he carries out his duty is a wrong one; but nevertheless he is still carrying it out...The policeman who caused this death did so by following what he thought was a rioter entering into the house and firing wantonly into the house, not caring whom he killed or injured, is merely a wrong manner, a wrong mode, of carrying out the policeman’s duty and therefore the Attorney General is liable. In all these cases in which a question arises as to whether a particular act is or is not done in the course of employment, it is a question of fact, a question of degree. In almost every case there is room for a difference of opinion.”

82. They violated the deceased’s rights to human dignity, which, (see *Charles Murigu Murithii & 2 Others v Attorney General* [2015] eKLR) is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. The petitioners are therefore entitled to prayers Nos. 1, 2, 3, 5,6, 9 & 10,11, & 13 of the Petition. However, prayers Nos. 4,7 & 8 cannot be granted for reasons that no facts were placed before the Court to warrant their grant and no submissions were also made in that regard.

83. Regarding prayer No.12, the same in my view cannot be granted by a Constitutional court. A constitutional court can only grant general damages for infringement of constitutional rights and fundamental freedoms and not on matters that can be litigated in a civil court.

Issue No.5 - What should be the remedies

84. The Petitioners invoked Article 23(3) of *the Constitution* which provides for the remedies that can be awarded in a Petition such as this.

“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.”

85. The Petitioners have sought both declarations and awards for damages.



86. In *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 Others* (Civil Appeal 243 of 2017) [2021] KECA 328 the court of appeal looking at an appeal on damages in a Constitutional Petition stated

The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop vs The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not conned to an award of compensatory damages in the traditional sense as follows: “When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to react to the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

87. And in the Constitutional Court of South Africa in *Ntanda Zeli Fose vs The Minister of Safety and Security* Case CCT 14/96 Kriegler J expressed himself thus:

“... our object in remedying these kinds of harms should, at least be to vindicate *the constitution*, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference.” It suggests that certain harms, if not addressed, diminish our faith in *the constitution*. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of *the constitution*—its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement and strike effectively at its source...”

88. I gather that damages awarded are not just about compensation but the way in which the defence of *the Constitution* and its values. Its breach must be deterred.

89. With respect to Exemplary damages; In *Bank of Baroda (Kenya) Limited vs Timwood Products Ltd* Civil Appeal No. 132 of 2001, the Court of Appeal citing *Obongo & Another vs Municipal Council of Kisumu* [1971] EA 91 and *Rookes vs Banard & Others* [1964] AC 1129 held that in Kenya punitive or exemplary damages are awarded only under two circumstances, namely;

- (i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and
- (ii) where the defendant’s action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.



90. Further, the award of exemplary damages is at the discretion of the court depending on the circumstances of the case.
91. Jeremiah ole Dashii Pallangyo vs Attorney General & 4 others [2021] eKLR- the court found that the conduct of the police was oppressive, arbitrary and unconstitutional. Consequently, it awarded the petitioner Kshs. 1,000,000/= as exemplary damages.
92. I am persuaded that the conduct of the police officers in this matter was oppressive and unconstitutional. The shooting of Robert Machora Kiarie, dragging him out of the tuk tuk and letting him bleed to death while they watched over him calls for aggravated damages.
93. Regarding General Damages :The general rule is to award a lump sum for all the violations as it would be difficult to separate the violations. They all happened at the same time. However, the greater weight of the violations falls against the 1st and 2nd respondents and I persuaded the authorities cited herein that a sum of Kshs. 4 million would suffice.

With respect to the interested party I would have awarded a sum of Kshs. 500,000/= if it had been prayed for.

94. On Special Damages :The petitioners pleaded the sum of Ksh 98, 000 but Kshs.500 for morgue, Kshs. 90,000 legal fees legal fees for grant ad litem and travel receipts amounting to Kshs.3,500/= .
95. In Conclusion: the Petition succeeds and the following orders issue:

1. A declaration that Richard Machora Kiarie’s fundamental rights and freedoms Rights guaranteed under Articles 24,25,26,27,28,29,48,49,50(1) & (2) (a) and 51 (1) of *the Constitution* of Kenya,2010 & Articles 1,3,4,5 & 10 of the Universal Declaration of Human Rights; Articles 3 A,6 (1),7, ((1) -(5),10(1) & 14(2) of the International Covenant on Civil and Political Rights ICCPR & Articles 4,5,6 & 7(1) of the African (Banjul) Charter on Human and People’s Rights were violated and his representatives, the petitioners, are entitled to effective remedies as guaranteed under Article 23 (a) and (e) of *the Constitution*.
2. A Declaration that the 1st respondent is liable for the acts of the Police Officers who violated and infringed the rights and fundamental freedoms of Richard Machora Kiarie in the bill of rights, enshrined under Articles 24,25,26,27,28,29,48,49,50(1) & (2) (a) and 51(1) of *the Constitution* of Kenya 2010 & Articles 1,3,4,5 & 10 of the Universal Declaration of Human Rights; Articles 3 (A),6(1),7,9(1)-(5),10(1) & 14(2) of the International Covenant on Civil and Political Right ICCPR; Articles 4,5,6 & 7(1) of the African (Banjul) Charter on Human and Peoples’ Rights.
3. A Declaration that in the shooting and killing Richard Machora Kiarie, and the subsequent actions by police officers involved 1st Respondent acted in contravention of the guiding principles enshrined under Article 238(1)(b) of *the Constitution* of Kenya,2010 by disrespecting the rule of law, democracy, human rights and fundamental freedoms.
4. A Declaration that failure to provide emergency medical care to Richard Machora Kiarie the victim before he succumbed to the multiple gunshot wounds violated the Rights guaranteed under Articles 24, 25, 26, 27, 28, 29,48,49,50(1) and (2) (a) and 51(1) of *the Constitution* of Kenya ,2010 & articles 1,3,4,5 & 10 of the Universal Declaration of Human Rights; Articles 3(A),6 (1),&,((1)-(5),10(1) & 14(2) of the International Covenant on Civil and Political Rights ICCPR; Articles 4,5,6 & 7(1) of the African (Banjul) Charter on Human and People’s Rights.



5. A Declaration that the acts and omissions of the Police Officers was in contravention of the provisions of the *National Police Service Act*, and particularly sections 24,49(5),51(1)(e),61(1), (2), 10, 49(13) and Section 95.
6. An order for Exemplary Damages against the respondents jointly in the sum of Kshs. 1,000,000/= .
7. An order for general damages against the Respondents jointly for the violations herein above for Kshs. 4,000,000/=
8. An order for special damages for actual expenses at Kshs. 94,000/=
9. The rest of the prayers are declined.
10. The Petitioners will have costs.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 14TH DAY OF JUNE 2023.

.....
MUMBUA T. MATHEKA,

JUDGE.

Court Assistant Mwiwa

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