Mochoronge v Office of the Director of Public Prosecution & 4 others (Petition E001 of 2022) [2023] KEHC 20398 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

PETITION E001 OF 2022

WA OKWANY, J

JUNE 22, 2023

BETWEEN

CHARLES KAMANDA MOCHORONGE ..... PETITIONER

AND

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .... 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

RIKO NGARE ..... 4TH RESPONDENT

MUNGA MBWANA ..... 5TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein, Charles Kamanda Mochoronge, describes himself as a male adult of sound mind residing in Nyamira County.

2. The 1st Respondent is an independent office established under Article 157 (1) of *the Constitution* and the Office of the Director of Public Prosecution Act, with the mandate of conducting public prosecution in the Republic of Kenya.

3. The 2nd Respondent is an officer of the government established under Article 245 of *the Constitution* of Kenya, 2010 and the *National Police Service Act* No. 11A of 2011 to command over the National Police Service.

4. The 3rd Respondent is the Honourable Attorney General of the Republic of Kenya. He is sued as the principal legal adviser of the Government and the representative of the national government in civil court proceedings, under Article 156 of *the Constitution*.

5. The 4th Respondent is a male adult of sound mind, a Senior Superintendent of Police (SSP) and was at the material time to this suit serving as the Officer Commanding Police Division (OCPD) Nyamira. The 4th Respondent is enjoined in this petition having been a complainant against the Petitioner in Criminal Case No. 517 of 2017 before Chief Magistrate's Court at Nyamira.

6. The 5th Respondent is a male adult of sound mind, an Inspector of Police and was at the material time to this suit serving as a police officer attached to the Criminal Investigating Division (CID) Nyamira. The 5th Respondent is enjoined in this petition having been a complainant against the Petitioner in Criminal Case No. 517 of 2017 before Chief Magistrate's Court at Nyamira.

7. The Petitioner filed this Petition against the Respondents seeking the following orders:

    a. A Declaration that the Petitioner's fundamental rights and freedoms from violence, physical and psychological torture, corporal punishment and inhuman and degrading treatment were violated and infringed by members of the National Police Service who acted in their capacity as state officers and agents.

    b. A Declaration that the actions of members of the National Police Service amounted to blatant and gross violation of the Petitioner's fundamental freedom and security especially the right not be subjected to any form of violence, physical and psychological torture, corporal punishment and inhuman and degrading treatment from either public or private sources as provided for under Articles 25 (a) and 29 (c) of *the Constitution* of Kenya.

    c. An Order compelling the 2nd Respondent to institute criminal investigations against the members of the National Police Service who extra judicially shot the Petitioner as per Section 95 of the *National Police Service Act*.

    d. An Order For Compensation for violation and contravention of his fundamental freedoms and rights under Article 23 (3) (c) of the Kenyan Constitution 2010.

    e. An Order For Compensation for pain and suffering inflicted on the Petitioner as a result of the illegal and unlawful actions of the members of the National Police Service.

    f. Exemplary And Aggravated Damages for the psychological loss, pain and suffering.

    g. General Damages for wrongful/unlawful arrest and malicious prosecution of the Petitioner.

    h. Special Damages at Kshs. 610,000/=.

    i. Costs of, and incidental to these proceedings be borne by the Respondents.

    j. Any other relief that this Honourable Court may deem fit and just to grant in the interests of justice and/or that may become apparent and necessary in the course of these proceedings.

The Petitioner's Case

8. The Petitioner avers that he was an Internally Displaced Person (IDP) having been affected by the Post-Election Violence (PEV) witnessed in 2007/2008 following the contested presidential elections.

9. He states that on or about March 2017 the government of Kenya, through the National Co-ordination Consultative Committee on IDPs, passed a resolution to compensate persons affected by the PEV

and that in June 2017, the Petitioner, together with other IDPs from Nyamira County were invited to Kenya Commercial Bank (hereinafter "KCB" or "the Bank") Nyamira Branch to receive their compensation.

10. He avers that he went to the Bank on 30th June 2017, as advised, but that the compensation did not kick off as planned as he was advised that his name was missing from the list and that he would be paid on a later date.

11. The Petitioner avers that he decided to go back home but that while he was walking home from the Bank, he felt a sharp pain on his leg that started to bleed and that he fell to the ground after which good Samaritans rushed him to Nyamira County Hospital where he was, to his surprise, treated for a gunshot wound.

12. The Petitioner avers that he later realized that as he was leaving KCB Bank on 30th June 2017 other IDPs whose names were missing from the list of IDPs to be compensated became agitated and began to picket thus prompting the police to intervene by lobbing teargas and firing gunshots. He adds that the bullet that hit his leg was fired by a member of the Kenya National Police Service.

13. The Petitioner states that the citizens right to picket is provided for under Article 37 of *the Constitution* and that he suffered the following injuries following the gunshots: -

    i. Gunshot wounds to the right thigh.

    ii. Visible (permanent) wounds.

    iii. Surgical cut on the right thigh.

14. The Petitioner further states that the testimonies of the 4th and 5th Respondents before the Lower Court during his trial in the criminal case, indicate that he was shot and that the 2 witnesses saw him receiving treatment for the same at Nyamira County & Referral Hospital. The Petitioner's documentary evidence was corroborated by the averments of an eye witness, Mr. James Masogo, through an affidavit sworn in support of the petition on 18th November 2021.

15. It was Mr. Masogo's averment that the Petitioner was shot and that he was one of the good Samaritans who ferried him to the Hospital for emergency treatment. The Petitioner cited the provisions of *the Constitution*, international and municipal law that confer and protect his rights and fundamental freedoms and the provisions which were violated by the officers of the 2nd Respondent.

16. Article 19 (3) recognizes that each individual is entitled to human rights and fundamental freedoms and specifically provides that the same are not given by the state including the 1st, 2nd and 3rd Respondents.

17. Article 25 of *the Constitution* lists rights and fundamental freedoms which may not be limited by any law which rights include Freedom from Torture and Cruel, Inhumane, or Degrading treatment or punishment.

18. The Petitioner pleaded the particulars of the violations and breach committed by the members of the National Police Service as follows: -

    i. Failure to observe, respect, protect and promote the Petitioner's Human Rights and Freedoms;

    ii. Failure to protect the Petitioner from violence, torture and cruelty;

    iii. Failure to protect the life of the Petitioner and instead endangering his life through their extrajudicial actions;

iv. Failure to act with highest standards of professionalism and discipline among its members when executing their duties;

v. Shooting the Petitioner on the right thigh leaving him with a permanent scar and a partial permanent disability as he is physically impaired;

vi. Subjecting the Petitioner to severe violence, psychological and physical torture, cruelty, corporal punishment and inhuman and degrading treatment.

19. The Petitioner avers that his shooting, by a member of the National Police Service, being agents of the state, subjected him to torture, violence, cruelty, inhuman and degrading treatment and punishment thus violating his rights under Chapter 4 of *the Constitution*, specifically, Articles 25 (a), 28, 29 thereof.

20. He further states that the actions of the police violated the provisions of Article 5 and 7 of the Universal Declaration of Human Rights and the International Convention against Torture and other cruel, inhuman or Degrading Treatment or Punishment.

21. It was the Petitioner's case that he incurred expenses as a result of the injuries that he sustained in the incident.

22. The Petitioner claimed that the police arrested him while he was still undergoing treatment in hospital following the shooting, and that he was thereafter charged before Nyamira Chief Magistrate's Court in Criminal Case No. 517 of 2017 (hereinafter "the Criminal Case") with the following counts/offences: -

i. Count I – Assaulting a Police Officer contrary to Section 103 (A) of the *National Police Service Act*. (The particulars of the case being that on the 30th day of June 2017, the accused within Nyamira Township in Nyamira County jointly with others before court assaulted Riko Ngare a police officer (the 4th Petitioner) who at the time was acting in due execution of duty).

ii. Count II – Assaulting a Police Officer contrary to Section 103 (A) of the *National Police Service Act*. (The particulars of the case being that on the 30th day of June 2017, the accused within Nyamira Township in Nyamira County jointly with others before court assaulted Munga Mbwana a police officer (the 5th Petitioner) who at the time was acting in due execution of duty).

iii. Count III – Creating Disturbance in a manner likely to cause a breach of the peace contrary to Section 95 (1) (b) of the Penal Code. (The particulars of the case being that the accused on 30th day of June 2017 at Nyamira Township in Nyamira County, jointly with others before court created disturbance in a manner likely to cause a breach of the peace by chasing away Kenya Commercial Bank Nyamira Branch Staff who were paying the Internally Displaced Persons at a tent outside the Bank).

23. He avers that his arrest and prosecution was actuated by malice and the charges preferred against him were fabricated with the intention of covering up or pre-empting his case for the violation of his fundamental rights.

24. The Petitioner states that in a judgment delivered in the criminal case on 19th November 2020, the Chief Magistrate's Court found that no evidence had been adduced to show that he committed the alleged offences after which he was acquitted under Section 215 of the Criminal Procedure Code.

25. It was the Petitioner's averment that the 1st, 4th and 5th Respondents prosecuted him without any reasonable cause and that the illegal arrest and malicious prosecution were orchestrated to cover up

the extra judicial shooting. He highlighted the particulars of malice and/or illegality by 1st Respondent as follows: -

i. Failure to do due diligence before preferring any charges against the Petitioner;

ii. Failure to evaluate the evidence and facts presented by the 2nd Respondent before preferring charges against the Petitioner;

iii. Acting on false, misleading and malicious information provided by the 2nd, 4th and 5th Defendants without due diligence;

iv. Failure to protect the rights of the Plaintiff by prosecuting the person who shot the Plaintiff;

v. Colluding with the 2nd, 4th & 5th respondents to subvert justice by using the criminal charges in Criminal Case No. 517 of 2017 to intimidate the Petitioner from taking legal actions against the 2nd Respondent and its members;

vi. Colluding with the 2nd, 4th and 5th Respondents to cover up the human rights violations against the Respondent.

vii. Charging the Plaintiff while well aware that he had not committed any offence.

26. Particulars of malice by 2nd Respondent: -

i. Puzzlingly "arresting" the Petitioner and causing him to be maliciously charged in court without proper and thorough investigations;

ii. Failure to conduct proper investigations before "arresting" and recommending the Petitioner to the 1st Respondent for prosecution.

iii. Acting on false and/or misleading information by the 4th and 5th Respondents to establish the frivolous charges against the Petitioner;

iv. Orchestrating the unlawful "arrest" and charges against the Petitioner with an aim to intimidate the Petitioner from taking legal actions against its officers for extra judicially shooting him;

v. Orchestrating the unlawful "arrest" and charges against the Petitioner with an aim to cover up the violations of the Petitioner's human rights committed by its officers;

vi. Failure to disclose who arrested the Plaintiff;

vii. Failure to protect the Petitioner;

viii. Failure to investigate the officer/member who shot the Petitioner and recommend legal action against him/her as per Section 95 of the *National Police Service Act*.

27. Particulars of malice by 4th & 5th Respondents: -

i. Lodging a false and malicious complaint with the 2nd Respondent against the Petitioner;

ii. Making false statements with the 1st and 2nd Respondents against the Petitioner;

iii. Colluding with the 1st and 2nd Respondents to "arrest" and prefer frivolous charges against the Petitioner with ill intentions to intimidate and prevent the Petitioner from seeking legal action against the members/officers of the 2nd Respondent who shot him;

iv. Colluding with the 1st and 2nd Respondents to "arrest" and charge the Petitioner in order to cover up the violations of his human rights and specifically the extra judicial shooting of the Petitioner;

v. Causing the Plaintiff to be prosecuted while well aware he had committed no offence on 30th June 2017.

28. The Petitioner further averred that as a result of the Respondents' unlawful actions, to wit; extra judicial shooting, unlawful arrest, illegal confinement and malicious prosecution, not only were his fundamental rights and freedoms violated but that he also suffered loss and expenses which he particularized as follows: -

a. Medical expenses – Kshs. 260,000/=

b. Advocate expenses in Criminal Case No. 517 of 2017 – Kshs. 350,000/=.

Respondents' Case

29. The Respondents opposed the petition through Grounds of Opposition dated 30th June 2022 in which they listed the following grounds: -

1. That the Petition offends the doctrine of Constitutional avoidance since the Petitioner's cause of action is substantially a tortious claim of negligence and malicious prosecution barred by limitation of time disguised as a Constitutional Petition.

2. That the Petitioner's cause of action aforesaid is statute time-barred under section 4 (2) of the *Limitation of Actions Act* (Cap. 22 Laws of Kenya) and section 3 (1) of the *Public Authorities Limitation Act* (Cap. 39 Laws of Kenya) having arisen on 30th June, 2017 and 19th November, 2020 respectively.

3. That the Petitioner is guilty of laches, indolence and inordinate delay which cannot be cured by circumventing the Law through a Constitutional Petition.

4. That this Honourable Court lacks the requisite jurisdiction to entertain this Petition by virtue of the limitation of time which goes to the jurisdiction of a Court to hear and determine a suit.

5. That the Petition does not disclose any acts of omission and/or commission of the Respondents in the performance of their Constitutional and Statutory duties under Articles 156, 157, 244 and 245 of *the Constitution* as read together with the *Office of the Director of Public Prosecutions Act*, 2013 and the Office of the Attorney General Act, 2012.

6. That the Petitioner's cause of action against the 4th and 5th Respondents is barred by the provisions of Sections 66 (1) and (2) of the *National Police Service Act*, 2011 which exempts them from incurring personal liability in the course of execution of their Statutory duties under the Act hence they have been improperly enjoined.

7. That the Petition contravenes the doctrine of exhaustion as the Petitioner failed to exhaust the available dispute resolution mechanisms by lodging a formal complaint against the Police with the Internal Affairs Unit of the National Police Service and the Independent Policing Oversight Authority as required under Section 87 (4) (a) of the *National Police Service Act*, 2011 and section 6 (a) of the *Independent Policing Oversight Authority Act*, 2011 respectively.

8. That the Petition does not outline with precision and specificity how the Respondents have violated the Petitioner's Constitutional rights as was espoused under the locus classicus case of Anarita Karimi Njeru v Republic (1979) eKLR.

9. That the Petitioner has not come to equity with clean hands and is seeking to enjoy the benefits of a Court of equity.

10. That the reliefs sought by the Petitioner against the Respondents are misconceived, untenable and are not supported by factual evidence or the Law.

11. That the Petition lacks merit and amounts to a complete abuse of the Court process.

Submissions

30. The petition was canvassed by way of written submissions which the parties respective Advocates highlighted at the hearing as follows: -

The Petitioner's Submissions

31. A summary of the Petitioner's submissions, as presented by his Advocate, Mr. Ondigi, was that none of his averments in the petition were controverted by the Respondents by way of a Replying Affidavit, and that the same should be considered as unchallenged. Mr. Ondigi urged this court to note that at the hearing of the criminal case before the Lower Court the 4th Respondent confirmed that officers of the 2nd Respondent discharged the firearm that shot the Petitioner. It was submitted that by shooting the Petitioner, the 2nd Respondent's officers violated his rights under Articles 28 and 29 of *the Constitution*. It was submitted that Section 95 of the Police Service Act prohibits torture, cruel and inhuman treatment and that the said Act also provides for the circumstances under which the police may use firearms.

32. According to the Petitioner, the circumstances of this case did not warrant the shooting going by the findings by the trial magistrate in the criminal case. The Petitioner noted that the Respondents' Grounds of Opposition only addressed the validity of the claim for malicious prosecution and did not address the issue of violation of his fundamental rights and freedoms under *the Constitution*.

33. The Petitioner submitted that he presented ample documentary and oral evidence to prove that he was shot on the leg by the 2nd Respondent's officers and that he has substantially highlighted the provisions of the law that protect his said fundamental rights.

34. The Petitioner submitted that he reported the Respondent's illegal actions to the Kenya National Commission on Human Rights who, in turn, referred him to the Independent Police Oversight Authority (IPOA) for redress, where he recorded statements together with his witnesses but that as at 23rd August 2020, the said IPOA had not given him feedback on the outcome of its investigations.

35. It was submitted that, by failing to file a Replying Affidavit, to respond to the specific issues raised in the petition, the petitioner's allegations remained unchallenged and that the 2nd Respondent did not establish that its officers were entitled to use the firearm. For this argument, the Petitioner cited the decision in Charles Munyeki Kimiti vs Joel Mwenda & 3 others [2010] eKLR where the Court of Appeal held as follows on the use of firearms: -

> " The law only allows the police to use all means necessary to effect arrest and even then, they are not allowed to use greater force than reasonable or necessary in the particular circumstances.

Having regard to the peculiar circumstances of this case including the fact that deceased sustained multiple gunshot wounds, we draw the inference that the 1st and 2nd respondents had no reasonable apprehension of danger to themselves and that the shooting to death of the deceased was unreasonable use of force, unnecessary and unlawful and liability attaches to their action against their employer – the government."

36. Further reference was made to the decision in Stephen Iregi Njuguna vs Attorney General [1997] eKLR where the court held: -

> " The police do not have an 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 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 evidence of PW2 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 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. It is all the learned Judge's own flight of imagination.
>
> The easiest thing which these police officers could have done, if they were so minded, was for one of them to appear in court and explain that the shooting was necessary and that the deceased was shot by an unfortunate accident. They chose not to do so. In the event the respondent cannot escape from liability."

37. The Petitioner argued that he had discharged his burden of proof on the issue of shooting which burden then shifted to the Respondents to show that they were justified to shoot in executing their work in accordance with the law.

38. The Petitioner also cited the decision in Jeremiah Ole Dashii Pallangyo vs The Attorney General & 4 others [2021] eKLR where it was held

> " 78. Just like the trial court in the criminal trial, I find no evidence that the Petitioner was part of the crowd that was attacking the police assuming such an attack took place. In my view, the act of the security officers in shooting at the plaintiff, although it was a wanton, unlawful and unjustified act, was nevertheless a manner in which they proceeded to carry out the duties for which they were armed and assigned to execute the court orders. Even if the crowd became violent, the police officers ought to have used a less lethal force. They could have used rubber bullets for example or adopted the use of batons which they had. They instead unleased more than 13 rounds of ammunition which was unwarranted in the circumstances. In so holding I am guided by the decision of Stephen Iregi Njuguna v Hon. The Attorney General Civil Appeal No. 55 of 1997 [1995-1998] 1 EA 252 where the Court of Appeal expressed itself as follows: -
>
> > "The police do not have an 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 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 Pw2 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."

79. Therefore, the 1st and 2nd Respondents are vicariously liable for the act of the police, and the Petitioner is entitled to claim general and special damages from the 1st and 2nd Respondents. I have no option but to believe the petitioner in this case and I find that the shooting of the petitioner was negligent, unlawful, illegal and with use of excessive force.

The 1st and 2nd respondents are therefore liable for the act of the said officer. I find that they violated the petitioner's rights to human dignity, which, as was held in Charles Murigu Murithii Case, is the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. I also find that his right to security of person was similarly violated."

39. On the Respondent's objection to the claim for wrongful arrest and malicious prosecution on the basis that the same is time barred, the Petitioner submitted that this is constitutional petition that raises the issues of violation of his rights which cannot be limited by timelines. Reference was made to the decision in the case of Calvin Ouma Magare & 18 others vs the Director of Public Prosecutions & 4 Others [2022] eKLR where, in a petition filed more than 1 year after the conclusion of the criminal trial, the court held: -

> "40. I have considered the reasons advanced by the petitioners for the delay in bringing the instant suit, though ignorance of the law is no defence I acknowledge the circumstance of the petitioners in that they may have not been exposed to the avenue of seeking remedy from the court for alleged malicious prosecution and wrongful arrest. Indeed, it is noteworthy that they admit that this option came to their attention vide a legal aid and awareness that was organized in the area.
>
> 41. In the circumstances it is my opinion that the reasons advanced by the petitioners in this matter in which they alleged gross violation of their human rights and fundamental freedoms suffice for the court to find that the petition is not time barred."

40. It was submitted that the Petitioner's case fulfills all the ingredients for a claim made for malicious prosecution.

41. It was further submitted that the Petitioner has made out a case for the granting of the reliefs sought in the petition.

The Respondents' Submissions

42. The Respondents challenged the jurisdiction of this court to entertain the petition on the basis that it offends the doctrines of constitutional avoidance and exhaustion.

43. It was further, the Respondents' case that the petition substantially constitutes a tortious claim of negligence and malicious prosecution which are statute time barred under Section 3 (1) of the *Public Authorities Limitation Act* and Section 4 (2) of the *Limitation of Actions Act* having accrued on 30th June 2017 and 19th November 2020 respectively.

44. It was further, the Respondents' case that the petition fails the constitutional test of precision as was expressed in the case of Anarita Karimi Njeru vs Republic [1979] eKLR and that the petition does not disclose any acts of omission and/or commission by the Respondents in the exercise of their constitutional and statutory duties.

45. For the argument on the doctrine of constitutional avoidance the Respondents cited the decision by the Supreme Court in Communication Commission of Kenya & 5 others vs Royal Media Services & 5 others [2014] eKLR relied upon in Kiriro Wa Ngugi & 19 others vs Attorney General & 2 others [2020] eKLR where the court held that: -

> " 105. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:
>
> The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.
>
> 106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:
>
> [256] .....The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis." (Emphasis ours)

46. On the principle of the doctrine of exhaustion, reference was made to the case of Geoffrey Muthinga & Another vs Samuel Muguna Henry & 1756 others [2015] eKLR where the Court of Appeal held that: -

> " .....It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the forum of a last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution." (Emphasis ours)

47. It was further the Respondents' case that the essential ingredients of malicious prosecution were not proved by the Petitioner. The Respondents emphasized that the mere fact that the Petitioner was acquitted in the criminal case does not necessarily connote malice on the part of the prosecution.

Reliance was placed on the case of Nzoia Sugar Company vs Fungututi (1988) KLR 399, where the Court of Appeal held that: -

> " Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant but there must be evidence of spite in one of its servants that can be attributed to the company." (Emphasis ours)

48. It was therefore the Respondents' case that the Petitioner is not entitled to any of the reliefs sought as no evidence was adduced to show the manner of violation alleged.

Analysis and Determination

49. I have carefully considered the pleading filed herein and the parties' respective submissions. I find that the following issues fall for this court's determination: -

    1. Whether this court is seized with the jurisdiction to hear and determine this petition and whether the petition is time barred.
    2. Whether the Petitioner established that his fundamental rights and freedoms were violated.
    3. Whether the Petitioner was wrongfully arrested and maliciously prosecuted.
    4. Whether the Petitioner is entitled to the reliefs sought.

Jurisdiction: Doctrine of Exhaustion and Constitutional Avoidance.

Limitation of Actions

50. The Respondents submitted that this court lacks the jurisdiction to hear the petition as it offends the doctrines of exhaustion and constitutional avoidance. The Respondents also argued that the court lacks jurisdiction as the petition is time barred by dint of the provisions of Section 4 (2) of the *Limitation of Actions Act* and Section 3 (1) of the *Public Authorities Limitation Act*.

51. According to the Respondents, the Petitioner was required to exhaust all the available dispute resolution mechanisms such as filing a complaint with IPOA before filing a case in court.

52. The Petitioner, on his part, contended that his Petition was properly filed before this court as a constitutional petition in view of the breaches of his fundamental freedoms and rights. It was the Petitioner's case that he exhausted all the available dispute resolution mechanisms when he filed his complaint before the Kenya National Human Rights Commission and IPOA which complaint did not yield any response or positive results thus leaving him with no option but to file the petition in court.

53. The doctrines of avoidance and exhaustion are intertwined in that exhaustion requires a claimant to exhaust all the available dispute resolution mechanisms before lodging a court case while avoidance is applicable where a courts take the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In this regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

54. In the South African case of S vs Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down

as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in Ashwander vs Tennessee Valley Authority, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.

55. The question which arises is whether the Petitioner's case could have been disposed of through another disputed resolution mechanism without reaching a constitutional issue.

56. I note that Petitioner tendered evidence, through annexure marked CKM-6, to show that he recorded a statement with the Independent and Police Oversight Authority (IPOA) on 23rd August 2020. The said annexure also shows that the Petitioner's witness, Mr. Masogo also recorded a statement with the said body (IPOA). It was also the Petitioner's case that he lodged a complaint against the Respondents with the Kenya National Commission on Human Rights who referred him to IPOA before filing the petition in court. I note that this piece of evidence was not controverted by the Respondents who did not file any replying affidavit to counter the Petitioner's averments.

57. My finding is that the Petitioner established that he did all that he could to pursue other dispute resolution mechanisms envisaged under the doctrine of exhaustion before filing the instant Petition.

58. Be that as it may, and my finding on the issue of a report having been made to IPOA notwithstanding, I still find that under Article 22 of *the Constitution* the Petitioner is entitled to file this petition in court as he did since his claim is founded on alleged breach of fundamental freedom in the Bill of Rights. The said Article 22 (1) stipulates as follows: -

(1). Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

59. Article 165 (1) and (3)of *the Constitution*, on the other hand, stipulates as follows: -

(1) There is established the High Court, which —

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organized and administered in the manner prescribed by an Act of Parliament.

(3) Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

60. I find that while it would have been desirable for the Petitioner's case to be handled by IPOA or KNHRC before being presented in court, such a process could only be possible if the said organizations took up the matter and gave the parties a hearing which does not appear to have been the position in this case. If find that, in the circumstances of this case, the Petitioner was left with no option but to seek court redress.

Limitation of Actions

61. The Respondents submitted that the petition fails the precision tests since the cause of action is substantially a tortious claim of negligence and malicious prosecution, which are time barred by limitation of time, and have been disguised as a constitutional petition. According to the Respondents, this suit ought to have been pursued as a normal civil suit and not before a constitutional court.

62. The Petitioner, on his part, argued that his claim falls squarely under the purview of a constitutional petition as the Respondents had violated his rights and fundamental freedoms under *the constitution*.

63. Section 3 (1) of the *Public Authorities Limitation Act* stipulates as follows: -

(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

64. My finding is that while Section 3 (1) of the *Public Authorities Limitation Act* limits proceedings founded on tort against the government to twelve months from the date on which the cause of action accrued, claims for violation of constitutional rights are not subject to any time limits. This is the position that was taken by the Court of Appeal in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. In the said case, the Court of Appeal considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought but noted the accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process.

65. I am also aware to the decision in the case of Dominic Arony Amolo vs the Attorney General HC Misc. Applic No.494 of 2003 wherein it was held that a claim for enforcement of the Bill of Rights does not fall within any known a cause of action as known to the *Limitation of Actions Act* (Cap 22 Laws of Kenya).

66. The gist of the Petitioner's claim is that the shooting that resulted into his injuries amounted to a gross violation of his rights under *the constitution* and other international Human Rights Conventions and Instruments that prohibit torture, cruel, inhuman, or degrading treatment. I therefore find that the petition is properly before this court as it deals with violation of the Petitioner's constitutional rights alongside the claim under tort for malicious prosecution. I find guidance in the decision in Florence Amunga Omukanda & Another vs Attorney General & 2 others [2016] eKLR where the Petitioner

was shot and the court held that the Petitioner's right to human dignity and to security of a person was violated. In the said case, the court rendered itself as follows: -

> " 91. We have no option but to believe the 2nd petitioner in this case and we find that the shooting of the 2nd petitioner was negligent, unlawful, illegal and with use of excessive force. The respondents are therefore liable for the act of the said officer. We find that they violated the 2nd petitioner's rights to human dignity, which though not expressly protected under the repealed Constitution, is, as was held in Charles Murigu Murithii Case, the foundation of all other rights and together with the right to life, forms the basis for the enjoyment of all other rights. We also find that his right to security of person was similarly violated. In so holding we are guided by the decision of Stephen Iregi Njuguna vs. Hon. the Attorney General [37] where the Court of Appeal expressed itself as follows:
>
> > "The police do not have an 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 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. It is all the learned Judge's own flight of imagination. The easiest thing which these police officers could have done, if they were so minded, was for one of them to appear in court and explain that the shooting was necessary and that the deceased was shot by an unfortunate accident. They chose not to do so. In the event the respondent cannot escape liability."

67. Still, on the issue of jurisdiction, the Respondents submitted that the Petitioner did not establish a causal link between the alleged breach of duty of care and the injuries. The Respondents noted that no ballistic report was produced to show that the bullet that caused the Petitioner's injuries was fired by the 4th and 5th Respondents or any police officer for that matter.

68. My finding is that it was not disputed that the Petitioner suffered a gunshot wound in the fracas that took place on 30th June 2017. A perusal of the proceedings of the Lower Court criminal case reveal that PW1, Police Inspector Munga Mbwana testified as follows: -

> " I saw the accused when he was brought to the hospital. He had a gunshot wound."

69. It was further not disputed that the police responded to a distress call from the bank following unrest from the members of the public, i.e. IDPs, who had gone to the bank ostensibly to receive their compensation money following the PEV of 2007/2008. It would therefore not be far-fetched to conclude that police fired live bullets in their bid to quell the riots or deal with the commotion.

70. Moreover, the Respondents did not claim that anyone else apart from the police fired gunshots on the material day. A police officer, Inspector Munga Mbwana (PW1) testified as follows in the criminal case: -

> " The IDPs became rowdy due to the negative response they received from the Bank. They rioted and stormed inside the bank. That forced the police officers at the bank to fire in the air in order to scare the group."

71. The said officer testified as follows on cross examination: -

> " I didn't arrest the accused. I saw the accused when he was brought to the hospital. He had a gunshot wound. I was not armed at that time."

72. I find that the Petitioner established that he was shot by none other than the 2nd Respondent's officers and that there was therefore a causal link between his gunshot injury and the actions of officers of the 2nd Respondent. I believe the Petitioner's case that his shooting was negligent, unlawful, illegal and with use of excessive force.

73. The 2nd Respondent is therefore liable for the actions of his officers. The Respondents violated the Petitioner's right to human dignity, which is the foundation of all other rights and together with the right to life that forms the basis for the enjoyment of all other rights. In Mutuku Ndambuki Matingi vs Rafiki Microfinance Bank Limited [2021] eKLR it was held that:

> " 50. As regards the right to dignity, in Ahmed Issack Hassan vs. Auditor General [2015] the Court held that:
>
> > "...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated". See Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516."

74. I also find that his right to security of person was similarly violated. I say so because the police have a duty to protect the citizens' lives and property. In this regard, it is trite that the police are only authorized to shoot when it is necessary to do so and the burden therefore rested on the police to demonstrate that the shooting was necessary or that the Petitioner was shot by accident. It is however noteworthy that the Respondents did not discharge this burden and did not file any affidavit to rebut the Petitioner's averments concerning the circumstances that led to the shooting. I find that, in the circumstances of this case, the Respondents cannot escape liability for the shooting. I therefore find that the Petitioner proved, to the required standards, that his fundamental rights enshrined under Article 25 of *the Constitution* which include Freedom from Torture and Cruel, Inhumane, or Degrading treatment or punishment were violated.

Wrongful Arrest and Malicious Prosecution

75. The Petitioner's case was that he was innocently walking home from the bank when he was shot by the 2nd Respondent's officers. He then sought medical treatment at Nyamira County Hospital and it was

while he was undergoing treatment that he was arrested and charged with the offences of assaulting police officers, namely; Riko Ngare and Munga Mbwana; and creating a disturbance.

76. The Petitioner was subsequently tried for the offence and later acquitted of all the charges. He contended that with his arrest and prosecution were unlawful and malicious.

77. The East African Court of Appeal discussed the ingredients to be proved in a claim for damages for malicious prosecution in Mbowa vs East Mengo District Administration [1972]EA 352, as follows:-

> "The action for damages for malicious prosecution is part of the common law of England....The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings..... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth.

b. It's essential ingredients are:

c. The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

d. The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;

e. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

f. The criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge.....

g. The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage.

h. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action. The damage that is claimed is in respect of reputation but other damages might be claimed, for example, damage to property.....The damage to the plaintiff results at the stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings came to an end in his favour, whether finally or not. The plaintiff could not possibly succeed without proving any or all of the first three essentials of malicious prosecution without the fourth which forms part of the cause of action, would not take him very far. He must prove that the court has found him not guilty of the offence charged.....

i. The law in action for malicious prosecution has been clearly defined and in so far as the ordinary criminal prosecution is concerned the action does not lie until the plaintiff has been acquitted of the charge."

78. It was not disputed that the Respondents instituted criminal proceedings against the Petitioner and that the same were terminated in the Petitioner's favour. The issue for determination is whether the Petitioner's arrest and prosecution was malicious and without reasonable or probable cause. In this regard, the court is required to consider whether the Respondents had a reasonable or probable cause to believe that the Petitioner had committed an offence.

79. In the case of Kagane & Others vs Attorney General & Another (1969) EA 643, the court discussed the subject of reasonable and probable cause in malicious prosecution case as follows: -

> "Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.....Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was no reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and in so far as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution.....If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough evidence to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judged by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution. In as much as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example, a

failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possible, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was base."

80. In James Karuga Kiiru vs Joseph Mwamburi & Others Nrb CA No. 171 of 2000 it was held: -

> " to prosecute a person is not prima facie tortuous, but to do so dishonestly or unreasonably is the burden of proving that the prosecutor did not act honestly or reasonably being on the person prosecuted. Malice, however, can either be express or can be gathered from the circumstances surrounding the prosecution. A prosecution can either be mounted based on an offence committed in the presence of law enforcement officers or by way of a complaint lodged by a person to the said officers or agencies. However, the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words the police or any other prosecution arm of the Government is not a mere conduit for complainants. The police must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. I say ordinarily because the mere fact that the version of one of the parties is not considered does not make the subsequent prosecution malicious. However, where the police deliberately decide not to take into account the version of the suspect and acts on a story that eventually turn out to be improbable and which no ordinary prudent and cautious man would have relied upon that failure may constitute lack of reasonable and probable cause for the purposes of malicious prosecution. On the other hand it would be obviously absurd to make a defendant liable because matters of which he was not aware put a different complexion upon facts, which in themselves appeared a good case for prosecution. But neglect to make a reasonable use of the sources of information available before instituting proceedings would be evidence of want of reasonable and probable cause and also malice. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but where there is a reasonable and probable case for a prosecution. Circumstances may exist in which it is right before charging a man with misconduct to ask for an explanation but no general rule can be laid down. In the present case as already held hereinabove the circumstances from which the court can deduce that the arrest and arraignment of the plaintiff was probably justified have not been disclosed to the court. Was for example the plaintiff's version sought with regard to the complaints, if any, made against him? In the absence of any evidence as to the facts and circumstances upon which the defendants relied, the court can only conclude that there was no probable and reasonable cause for charging the plaintiff and that constitutes malice for the purposes of the tort of malicious prosecution."

81. In the instant case, I note that the trial court held as follows when acquitting the Petitioner of the charges he faced in the criminal case: -

> " This court has considered the evidence of PW1, PW2, PW4 and PW5. PW1 and PW2 did not tell this court that the accused person assaulted them. In fact, they said that the person who was the gang leader, and who they arrested, was not before court in the matter at hand. They further stated that they saw the accused person at Nyamira County Hospital being

treated for gunshot wounds. PW4 told this court that the person he arrested on that day was not before this court. PW5 said that he did not know the accused person.

As seen above, the evidence on record does not blame the accused person for doing anything at all. The witnesses did not say what crime the accused person committed on 30th July, 2017. The opinion of this court is that the accused person ought not to have been charged at all in the first place. Since there was no iota of evidence against him. It was not even stated who arrested the accused person since all the witnesses stated that they did not know him and they did not arrest him.

Due to the above reasons, this court finds that the prosecution has failed to prove its case beyond reasonable doubt. The accused person is hereby acquitted, pursuant to section 215 of the Criminal Procedure Code, for the offence of: -

a. Assaulting a police officer while in execution of duty contrary to section 103 (a) of the *National Police Service Act* No. 11A of 2011 as charged under count 1 and count 2; and

b. Creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) of the Penal Code."

82. My finding is that the Petitioner's arrest and prosecution was both unwarranted and malicious. It is clear to me that in their zeal to arrest and prosecute the Petitioner, the police did not bother to carry out any investigations to identify the actual perpetrators of the crime that was under investigation. The malice is shown in the callous manner in which the police arrested an innocent victim of their own gunshots while he was admitted in hospital and still undergoing treatment. It is noteworthy that the police did not even wait for the Petitioner to fully recover before hastily hauling him in court on charges which turned out to be completely false and therefore trumped up. I say so because the police officers who were allegedly assaulted by the Petitioner thereby forming the basis of the criminal charges were categorical that the Petitioner was not involved in their attack. PW2 Senior Superintendent of police testified in the criminal case as follows: -

> "I met the accused at the hospital. I don't know who took him to hospital. I understand that he sustained a gun wound. I shot in the air when the crowd identified me and started throwing stones at me. I didn't see the accused throwing stones."

83. PW4, Sgt. Abdi Duba testified as follows: -

> "I saw PC Walter Mengo struggling with one of the protestors in a bid to arrest the suspect. I rushed outside the mosque to aid PC Mengo next to Huduma Centre. We arrested the suspect. I later came to know that he is called Charles Omwenga. We handcuffed him and later charged him before court. The person we arrested is not before court."

84. A careful perusal of the proceedings in the criminal case reveals that none of the prosecution witnesses, including the police officers who were allegedly assaulted by the Petitioner and the officer who arrested a suspect in the fracas was able to identify the Petitioner as the perpetrator of the crimes that constituted the charges. The question which begs an answer is why the Petitioner was charged with the said offences in the first place when not even the victims of his alleged assault were able to identify him as the assailant before the trial court.

85. The answer to the above question cannot be anything else other than the Petitioner's position that his arrest and prosecution was intended to act as a cover up for the human rights violations committed

against him by the said police officers. I note that there was not even an iota of evidence presented before the lower court to link the Petitioner to the charges he was facing thus leading to his acquittal lending credence to his claim that his arrest and prosecution was actuated by malice.

86. I find that all the essential ingredients of malicious prosecution were proved on a balance of probabilities. I further find that the Petitioner's shooting, arrest and subsequent prosecution occurred in the same transaction or series of events thus forming part and parcel of the claim for violation of his fundamental rights and freedoms.

87. I will however make no award under the heading of wrongful/unlawful arrest and malicious prosecution of the Petitioner as the claim was statute barred having been made after the expiry of 12 months, without leave.

Damages for Violation of Constitutional Rights

88. Having found that the Respondents violated the Petitioner's fundamental rights and freedoms, the next issue for determination is the amount of damages payable for such violation. In doing so, this court will consider awards made in similar comparable past cases.

89. In Florence Amunga Omukanda & another vs 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.

90. In Peter Otieno Ouma vs. Attorney General Nairobi HCCC No. 337 of 2008, a 23 year old student was shot and lost consciousness. He was hospitalised for 5 months at Kenyatta National Hospital and later transferred to National Spinal Injury Unit where he spent 3 months. He suffered fracture of thoracic vertebrae T12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function. The court awarded him Kshs. 4,000,000/= as general damages on 11 June 2010.

91. In Peter Omari Ogenche vs. Attorney General Nairobi HCCC No. 196 of 2008 a 27 year old was shot and became paraplegic with urine and stool incontinence. He had a residual bullet entry scar L1 region, an impaired bladder muscle tone and had to use an indwelling catheter to assist in collecting in urine bags due to the loss of urine control. He lost his ability to walk; control stool and urine; and engage in active sexual life. He was predisposed to recurrent chest and urinary tract, and skin infections and therefore required frequent medical check-ups, special bed which can be turned by hydraulic or electric system and regular physiotherapy and splints to stabilise the spine. He was awarded Kshs. 3,500,000/ = for pain suffering and loss of amenities. (10th June 2010)

92. In George Efedha Madora vs. Attorney General, Civil Case No.197 of 2012 the plaintiff sustained a fracture of thoracic vertebrae t12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function. He was awarded Kshs 3,500,000/= for pain and suffering.

93. In Lucas Omoto Wamari vs Attorney General & another [2014] eKLR, the Plaintiff was shot in his right arm by a police officer and threatened not to report the matter. Later he was arrested and charged with robbery with violence, preparation to commit a felony and escape from lawful custody.

He was acquitted of the said charges and brought a claim for malicious prosecution and violation of his fundamental rights. Majanja J. found that the tort of malicious prosecution had not been proved but awarded Kshs. 500,000/= as general damages for violation of his constitutional rights. On Appeal, the Court of Appeal found that malicious prosecution was proved and held that a global sum of Kshs. 500,000/= was appropriate compensation as damages for malicious prosecution while Kshs. 2,000,000/= was appropriate for the constitutional violations.

94. In the present case, the Petitioner proposed an award in the sum of Kshs. 5,000,000/= as general damages for the violation of his rights. Having regard to the decisions in the above cited cases, the injuries that the Petitioner in this case suffered and the difference in timelines, I find that a global sum of Kshs. 2,500,000 will be adequate compensation as general damages for pain and suffering and for constitutional rights violations. This is because the injuries did not have serious aftermath effects resulting from the Petitioner's gunshot wounds as compared to the injuries in the above cases. There was also no permanent disability as was in the cases cited above.

Special Damages

95. The Petitioner sought special damages for cost of treatment and advocates fees at Kshs. 216,000 and 350,000 respectively. It is trite that a claim for special damages must not only be pleaded but must also be strictly proved. In Banque Indosuez vs DJ Lowe and company Ltd [2006] 2KLR 208 the Court of Appeal held inter alia that;

> "It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves."

96. In the instant case, a perusal of the entire Record unfortunately reveals that there are no receipts or documents proving the claim for special damages. I therefore find that the claim for special damages was not proved and decline to make any orders in that respect.

Disposition

97. Having found that this court has the requisite jurisdiction to hear and determine this petition and; having found that this matter is properly before this court and that the Petitioner has proved his claim against the Respondents, for violation of his fundamental rights and freedoms, I find that the instant petition is merited and I therefore allow it in the following terms: -

    a. A Declaration is hereby issued that the Petitioner's fundamental rights and freedoms from violence, physical and psychological torture, corporal punishment and inhuman and degrading treatment were violated and infringed by members of the National Police Service who acted in their capacity as state officers and agents.

    b. A Declaration is hereby issued that the actions of members of the National Police Service amounted to blatant and gross violation of the Petitioner's fundamental freedom and security especially the right not be subjected to any form of violence, physical and psychological torture, corporal punishment and inhuman and degrading treatment from either public or private sources as provided for under Articles 25 (a) and 29 (c) of *the Constitution* of Kenya.

    c. An Order For Compensation in the sum of Kshs. 2,500,000 (Two Million) for pain and suffering and for violation and contravention of his fundamental freedoms and rights under Article 23 (3) (c) of the Kenyan Constitution 2010.

d. I award the Petitioner the costs of these proceedings.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 22ND DAY OF JUNE 2023.

W. A. OKWANY

JUDGE