



**Mutua & another v Gitau & 2 others (Petition E294 of 2022) [2024] KEHC 14443 (KLR)
(Constitutional and Human Rights) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E294 OF 2022

LN MUGAMBI, J

NOVEMBER 21, 2024

BETWEEN

**LUCAS MUTUA 1ST PETITIONER
MONICA KATILO 2ND PETITIONER**

AND

**EVANS GITAU 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

The superiors of a police officer are not liable for the actions of a police officer where those actions did not occur as part of execution of his/her duties

The petitioner’s case was that the 1st respondent’s act of unlawfully removing the petitioners from their house violated their constitutional rights. The court found that there was no rebuttal or any form of justification for the 1st respondent deposing the petitioners from their house and having them spend the night with their child out in the streets for a week. That arbitrary action violated the petitioner’s inherent dignity as human beings, it was an affront to their right of privacy, and freedom and security of the person. The court held that the liability for the violation squarely lay on the 1st respondent and there was no evidence that at the time the 1st respondent was acting on his superiors’ instructions. Those actions did not occur as part of execution of the 1st respondent’s duties.

Reported by Kakai Toili

Constitutional Law – national security organs – National Police Service – liability of superior officers for the actions of police officers’ actions which did not occur as part of execution of their duties –whether the superiors of a police officer were liable for the actions of the officer where his/her actions did not occur as part of execution of his/her duties.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – rights to inherent dignity, privacy and freedom and security of the person - whether forceful removal of a couple



and child the from their house by a police officer and having them spend the night out in the streets violated their rights to inherent dignity, privacy and freedom and security of the person – Constitution of Kenya, articles 28, 29 and 31.

Civil Practice and Procedure – pleadings – petitions – failure to file responses to a petition - what was the effect of failure by respondents to file responses and submissions to a petition.

Brief facts

The 1st petitioner deponed that on May 23, 2021; his wife, the 2nd petitioner, called him and informed that a police officer, the 1st respondent, who was stationed at Mutuini Police Station, had invaded their house. At that moment, the 2nd petitioner was forced to leave the house with their 4-year-old child. The 1st respondent then locked their house with a new padlock and seized the house keys rendering them homeless and had to stay in the streets for a week. Afterwards the 1st respondent called him and directed him to go to Mutuini Police Station with a ‘mbuzi’ in order to get their house keys. The 1st petitioner claimed that the 1st respondent did not inform him whether he had committed any crime neither did he state the reason for displacing them by taking hold of their house keys.

The 1st petitioner alleged that his pleas to the 1st respondent to return the keys fell on deaf ears. Aggrieved, the 1st petitioner reported the matter at Mutuini Police Station. The 1st respondent was then summoned by their Commanding Officer at the Station and ordered to return the petitioners’ house keys. The petitioners argued that the 1st respondent’s actions as were done in bad faith since no justification was given for the conduct. The petitioners sought for among other reliefs; an order for compensation for the violation of the petitioners’ fundamental rights; and an order for compensation for the respondents to jointly and severally compensate the petitioners in form of general damages for the anxiety, mental anguish, suffering, humiliation as well as distress that were vested on the petitioners.

Issues

- i. Whether the superiors of a police officer were liable for the actions of the officer where their actions did not occur as part of execution of their duties.
- ii. Whether forceful removal of a couple and child the from their house by a police officer and having them spend the night out in the streets violated their rights to inherent dignity, right of privacy and freedom and security of the person.
- iii. What was the effect of failure by respondents to file responses and submissions to a petition?

Held

1. There were no responses and submissions to the petition by the respondents despite evidence of service as detailed in the affidavit of service confirming service of pleadings on all the respondents. That fundamentally meant that the allegations of fact in the petition were unopposed.
2. Constitutional petitions must be pleaded with reasonable degree of precision indicating the manner in which the alleged violations happened. The petition as pleaded met the threshold. It had set out the specific constitutional provisions that the 1st respondent by his conduct violated and had also detailed the facts that gave a description of how those violations were carried out.
3. Concerning proof, there was no rebuttal or any form of justification given by any of the respondents against the brutal and reprehensible conduct that the 1st respondent did of deposing the petitioners from their house and having them spend the night with their child out in the streets for a week. That arbitrary action violated the petitioner’s inherent dignity as human beings and was a direct violation of article 28 of the Constitution. It was also an affront to their right of privacy under article 31 of the Constitution to invade their home without notice and unjustifiably eject them.
4. The treatment that the petitioners were subjected to of being thrown out into the streets for a week was a violation of the right to freedom and security of the person under article 29 of the Constitution considering the risk of physical harm that the 1st respondent action exposed them to and also the psychological and mental torture that they endured for the duration in question.



5. The liability for the violation squarely lay on the 1st respondent and there was absolutely no evidence that at the time the 1st respondent was acting on his superiors' instructions. The 1st respondent was on a frolic of his own and his superiors/employers had nothing to do with his actions. Those actions did not occur as part of execution of the 1st respondent's duties.
6. The quick intervention by the 1st respondent's superior absolved the employer from the 1st respondent's unconstitutional and unlawful conduct against the petitioners. There was no wrongdoing on the part of the 2nd and 3rd respondent in regard to the unlawful and unconstitutional conduct of the 1st respondent in the circumstances.

Petition partly allowed.

Orders

- i. *A declaration that the 1st respondent infringed on the rights of the petitioners as guaranteed by articles 28, 29(d) and 31(a) of the Constitution.*
- ii. *An order was issued for compensation to the tune of Kshs 700,000 to be borne individually by the 1st respondent.*
- iii. *Costs of the petition.*

Citations

Cases

Kenya

1. *CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others* Petition 13 (E015) of 2022; [2023] KESC 68 (KLR) - (Explained)
2. *Gwer & 5 others v Kenya Medical Research Institute & 3 others* Petition 12 of 2019; [2020] KESC 66 (KLR) - (Explained)
3. *Kaijenja, Peter Mauki & 9 others v Chief of the Defence Forces & another* Constitutional Petition 102 of 2014; [2019] KEHC 7530 (KLR) - (Explained)
4. *Konchellah v Sunkuli & 2 others* Civil Application 26 of 2018; [2018] KESC 58 (KLR) - (Explained)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
6. *MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)* Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR) - (Explained)
7. *Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976-1980] KLR 1272 - (Explained)
8. *Nthungi v Attorney General* Civil Case 6031 of 1991; [2013] KEHC 5244 (KLR) - (Explained)
9. *Nyakwana, Evans Otieno v Cleophas Bwana Ongaro* Civil Appeal 7 of 2014; [2015] KEHC 8440 (KLR) - (Explained)
10. *Omweni, Moses Tengeya v Commissioner of Police & another* Civil Appeal 243 of 2011; [2018] KECA 344 (KLR) - (Mentioned)
11. *Rubiu, Alice Wanjiru v Messiac Assembly of Yahweh* Civil Appeal 521 of 2019; [2021] KEHC 13098 (KLR) - (Explained)

Texts

Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn

Statutes

Kenya

1. Constitution of Kenya articles 25; 28; 29(f); 31; 39(3); 40; 43(1)(b); 53- (Interpreted)
2. Evidence Act (cap 80) sections 107; 108; 109; 112 - (Interpreted)

Instruments



1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. Universal Declaration of Human Rights (UNDHR), 1948

Advocates

None mentioned

JUDGMENT

Introduction

1. The Petition dated May 30, 2022, is supported by the 1st petitioner's affidavit in support of even date.
2. The substance of this Petition as supported by the averments in the petitioners' affidavit is that the 1st respondent's act of unlawfully removing the petitioners from their house violated their constitutional rights. Consequently, the petitioners seek the following relief:
 - i. A declaration do issue that the respondent(s) infringed the rights of the petitioners as guaranteed by articles 31, 43(1)(b), 25, 28, 39(3), 40, 29(f) and 53 of the Constitution.
 - ii. An order for compensation for the violation of the petitioners' fundamental rights as provided for in the Constitution by the respondent(s).
 - iii. An order for compensation for the respondents to jointly and severally compensate the petitioners in form of general damages for the anxiety, mental anguish, suffering, humiliation as well as distress that were vested on the petitioners.
 - iv. Costs and interests thereon at court rates.

Petitioners' Case

3. The 1st petitioner depones that on May 23, 2021; his wife, (the 2nd petitioner), called him and informed that a police officer, Evans Gitau (the 1st respondent) who was stationed at Mutuini Police Station, had invaded their house.
4. At that moment, the 2nd petitioner was forced to leave the house with their 4-year-old child. The 1st respondent then locked their house with a new padlock and seized the house keys rendering them homeless and had to stay in the streets for a week.
5. Afterwards the 1st respondent called him and directed him to go to Mutuini Police Station with a 'mbuzi' in order to get their house keys. He makes known that the 1st respondent did not inform him whether he had committed any crime neither did he state the reason for displacing them by taking hold of their house keys.
6. He alleges that his pleas to the 1st respondent to return the keys fell on deaf ears. Furthermore, that the 1st respondent blocked his phone number due to his persistent phone calls.
7. Aggrieved, the 1st petitioner reported the matter at Mutuini Police Station. The 1st respondent was then summoned by their Commanding Officer at the Station, to explain why he had displaced the petitioners. The 1st petitioner states that the 1st respondent did not give any explanation and was ordered to return the petitioners' house keys.
8. The petitioners take issue with the 1st respondent's actions as were done in bad faith since no justification was given for the conduct. As a consequence, the petitioners contend that the 1st



respondent violated their rights under articles 28, 29(f), 31, 39(3),40, 43(1)(b) and 53 of the [Constitution](#).

respondents' Case

9. The respondents' did not file responses and submissions to the Petition as none is in the courtfile or Court Online platform (CTS).

Petitioners' Submissions

10. Blayer and Company Advocates on the petitioners' behalf filed submissions dated August 9, 2023. The issues for argument were identified as: whether the petitioners' rights under articles 28, 31,39(3), 40, 43(1)(b) and 53 of the [Constitution](#) were violated and whether the petitioners are entitled to the reliefs sought.
11. The petitioner submitted that the 1st respondent's action of unlawfully entering the petitioners house, invaded their right to privacy. Equally that seizure of their house keys violated their right to accessible and adequate housing.
12. It was further stated that the 1st respondent treated the 2nd petitioner and their child in an inhumane and degrading manner and as they were even forced to live on the streets. It is argued that this is contrary to every person's right to human dignity and freedom from cruel treatment, physical and psychological torture. This right is similarly protected under the [Universal Declaration on Human Rights](#) (UDHR) and [African Charter on Human and People's Rights](#). Counsel in a nutshell was certain that the 1st respondent's actions violated the petitioners stated constitutional rights.
13. Reliance was placed in *Nthungi v Attorney General* (KEHC 6004 (KLR) where it was held that:

“I am persuaded by and find support in this view from several decisions of courts in South Africa, whose Constitution, in terms almost identical to articles 28 of the [Constitution](#) of Kenya, provides at Section 10 that; Everyone has inherent dignity and the right to have their dignity respected and protected. In both Kenya and South Africa, human dignity is recognised not only as a value that underlies a democratic society, but it is a right capable of enforcement. In *Dawood and another v Minister of Home Affairs and others* (CCT35/99) [2000] ZACC 8 the Constitutional Court of South Africa stated that:

‘Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.’

14. Like dependence was placed in [Moses Tengeya Omweno v Commissioner of Police & another](#) [2018] eKLR.
15. In light of the foregoing, it was the petitioners submission that they are entitled to compensation in form of general damages for the mental anguish, suffering, humiliation and distress that they had to



endure. Counsel as such submitted that owing to the breach of fundamental rights, the petitioners' are entitled to a sum of Kshs 10,000,000. Reliance was placed in MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust [2017] KEHC 1496 (KLR) where it was held that:

“That judgement be and is hereby entered in favour of the first petitioner against the respondents jointly and severally for a global sum of Kshs 4,000,000 by way of general damages.“

16. Like dependence was placed in *Nthungi v Attorney General (supra)*.

Analysis and Determination

17. From the pleadings and submissions by the petitioner, the issues that arise for determination are:
- i. Whether the petitioners' rights under articles 28, 29(f), 31, 39(3),40, 43(1)(b) and 53 of the Constitution were violated by the respondents; and
 - ii. Whether the petitioners are entitled to the relief sought.
18. It is pertinent to note that there were no responses and submissions to the Petition by the respondents despite evidence of service as detailed in the affidavit of service confirming service of pleadings on all the respondent sworn by Blayer Martin Nabende on April 22, 2021.
19. This fundamentally means that the allegations of fact in the Petition are unopposed. The guidance of the Supreme Court dealing with such a state of affairs was laid down in the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli, Elijah Mbogo & Independent Electoral and Boundaries Commission [2018] KESC 58 (KLR) in which the Court explained as follows:

“(9) A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the replying affidavit, it follows that even the Written Submissions purportedly filed by the 1st respondent on August 17, 2018 are of no effect. Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the replying affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn replying affidavit. Also, there are no grounds of objection raising any specific points of law of any preliminary or jurisdictional nature. The upshot is that as the 2nd and 3rd respondents had categorically stated that they do not oppose the application, the court will be excused for therefore deeming the application as being unopposed entirely.

[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue



in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this court.”

20. Taking cue from the Supreme Court It is thus incumbent upon this court to consider whether the petitioners’ case has been established hence the first issue, namely:

Whether the petitioners’ rights under articles 28, 29(f), 31, 39(3), 40, 43(1)(b) and 53 of the Constitution were violated by the respondents;

21. Of significance in all Constitutional Petitions is the holding in *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272 later reaffirmed by the Supreme Court and the Court of Appeal that laid down the threshold that Constitutional Petitions which must be pleaded with reasonable degree of precision indicating the manner in which the alleged violations happened.

22. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR stated:

“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.”

23. Over and above pleading the Petition in the manner specified above, the Supreme Court in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) also underscored the need for providing the requisite proof in support allegations. The Court held:

“(49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden...”

24. Equally, in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)...



16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013]eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

25. This position was also reiterated in *Alice Wanjiru Rubiu v Messiac Assembly of Yahweh* [2021] eKLR in which the court held:

“22. I also refer to The *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes



evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

26. I have examined the petition closely and it is clear to me that the petition as pleaded meets the threshold of *Anarita Karimi Njeru (supra)*. It has set out the specific constitutional provisions that the 1st respondent by his conduct violated and has also detailed the facts that give a description of how those violations were carried out.
27. Concerning proof, there was no rebuttal or any form of justification given by any of the respondents against the brutal and reprehensible conduct that the 1st respondent did of depositing the petitioners from their house and having them spend the night with their child out in the streets for a week. This arbitrary action violated the petitioner’s inherent dignity as human beings and was a direct violation of articles 28 of the *Constitution*. It was also an affront to their right of privacy under article 31 to invade their home without notice and unjustifiably eject them. Additionally, the treatment that the petitioners were subjected to of being thrown out into the streets for a week was a violation of the right to freedom and security of the person under articles 29 of the *Constitution* considering the risk of physical harm that the 1st respondent action exposed them to and also the psychological and mental torture that they endured for the duration in question.
28. I find the Petition proved to the extent stated above. Nevertheless, it is crystal clear to me that the liability for the violation squarely lies on the 1st respondent and there is absolutely no evidence that at the time 1st respondent was acting on his superiors’ instructions. As a matter of fact, the petitioners own account as captured in his affidavit is that when they went Mutuini Police Station and reported the 1st respondent to his superior, the 1st respondent was reprimanded in their presence and ordered to return the keys he had impounded. This demonstrates that the 1st respondent was on a frolic of his own and his superiors/employers had nothing to do with his actions. It is manifest that those actions did not occur as part of execution of the 1st respondent’s duties. The immediate censure of the unlawful conduct by the 1st respondent’s superior in the presence of the petitioner without any response from the 1st respondent is clear evidence that the 1st respondent’s action was completely unjustified and had nothing to do with performance of police duties. The quick intervention by the 1st respondent’s superior absolves the employer from the 1st respondent’s unconstitutional and unlawful conduct against the petitioners. I find no wrongdoing on the part of the 2nd and 3rd respondent in regard to the unlawful and unconstitutional conduct of the 1st respondent in the circumstances.

Whether the petitioners are entitled to the relief sought.

29. Having proved the violation of their rights and fundamental freedoms, it goes without saying that the petitioners are entitled to reliefs.
30. In *Charles Muturi Macharia & 6 others v Standard-Group & 4 others* (SC Petition No 13 (E015) of 2022) Court spelt out the following guidance on the issue of constitutional reliefs:

“(91) By the provisions of articles 22 and 23 of the *Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under article 23 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 articles 24.
- (e) an order for compensation
- (f) an order of judicial review.”

(92) This court in the case of *Gitobu Imanyara & 2 others v Attorney General*, SC Petition No 15 of 2017, described articles 23 as “the launching pad of any analysis on remedies for Constitutional violations”. This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in articles 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”

31. The Superior Court proceeded to note as follows:

“(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in articles 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

(95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim’s constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.



....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

32. Correspondingly, the Court in *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another* [2019] eKLR observed as follows:

“96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion.[46] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the courts. The following principles clearly emerge from decided cases;

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
- iii. This remedy would be available when it is the only practicable mode of redress available;
- iv. Against claim for compensation for violation of a fundamental right under the *Constitution*, the defence of Sovereign immunity would be inapplicable.

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. 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. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

33. Having considered the above authorities, the orders that commend themselves to court are as follows:

- a) A declaration that the 1st respondent infringed on the rights of the petitioners as guaranteed by articles 28, 29 (d) and 31 (a) of the *Constitution*.



- b) An order for compensation to the tune of Kshs 700,000/- to be borne individually by the 1st respondent.
- c) Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST NOVEMBER, 2024.

.....

L N MUGAMBI

JUDGE

