



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 36 OF 2015

**IN THE MATTER OF ARTICLES 20, 27, 28, 29, 40, 47 AND 49 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOM UNDER ARTICLES 20, 27, 28, 29, 40, 47 AND 49 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ARBITRARY SEARCH, WHIMSICAL ARREST AND DENTENTION OF
PEACEFUL CITIZENS AND DESTRUCTION OF PROPERTY BY THE AGENTS OF THE
COUNTY GOVERNMENT OF KISII AND THE KENYA POLICE**

BETWEEN

WILFRED GISEBE GISEBE.....1ST PETITIONER

MARY BITENGO MOGARE.....2ND PETITIONER

JOSEPH MONG'ARE NYAMBANE.....3RD PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KISII.....1ST RESPONDENT

KENNEDY NYAMBOGA.....2ND RESPONDENT

THE POLICE SERVICE COMMISSION.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioners are adults of sound minds and residents of Daraja Mbili area within Kisii Town in Kisii County. The 2nd petitioner is the wife of the 1st petitioner while the 3rd petitioner worked for the 1st petitioner as a security guard.

2. The 1st and 3rd respondents are juristic persons while the 2nd respondent is a male adult and an

employee of the 1st respondent in the enforcement department.

3. The petition concerns claims of arbitrary search, whimsical arrest and detention of peaceful citizens and destruction of property by agents of the 1st and 3rd respondents.

The petitioners case

4. The 1st petitioner's claim is that on or about the midnight of 5th/6th May 2015, a gang of more than 6 officers of the 3rd respondent and more than 10 agents of the 1st respondent under the command of the 2nd respondent raided his home and guest house that was being guarded by the 3rd petitioner and forcibly broke down his doors using crude tools such as hammers, metal bars and heavy stones in an operation conducted ostensibly to flush out 'beggars' from Kisii Town.

5. That the respondents, without any justifiable cause arrested the 1st petitioner's two disabled guests alongside the 3rd petitioner whom they assaulted and insulted. That the agents of the 1st and 3rd respondents, still under the command of the 2nd respondent, also raided the petitioner's private residential house wherein the 2nd petitioner and her nine year old daughter were sleeping and ransacked the entire house while at the same time issuing threats and insults to the 2nd petitioner.

6. The petitioner avers that the actions of the respondents were unlawful actuated by malice and violated his rights to protection of property, the 2nd petitioner's right to privacy, equal treatment before the law and the right not to be subjected to inhuman or degrading treatment.

7. It is alleged that the 3rd petitioner's rights to liberty and not to be subjected to inhuman and degrading treatment were also infringed.

8. It is the petitioners' case that the impugned actions of the respondents not only violated their constitutional rights but were also unreasonable and contrary to the petitioners' legitimate expectation.

9. The petitioners now seek the following reliefs in their petition dated 5th August 2015:

a) The honourable court do declare that the respondents have jointly and severally, infringed the petitioners' rights under Articles 20, 27, 28, 29, 40, 47 and 49 of the constitution of Kenya.

b) Exemplary damages and costs of the petition.

10. Apart from the petition, the petitioners relied on their respective supporting affidavits sworn on 5th August 2015, together with the affidavits of ELIJAH ONDIEKI OMWAMBA and SEME OMOKE.

11. The 1st and 2nd petitioners also filed further affidavits dated 27th July 2016 in which photographs marked WGG 01 (a) – (g) were attached in support of the 1st petitioner's claim that his doors, locks and windows were destroyed by the respondents during the raid.

12. In the petitioners' written submissions filed on 26th August 2016, their advocates M/s N. E. Mogusu & Associates advocates submitted that there were two issues for determination the first one being whether the respondents raided the 1st petitioner's property and secondly whether the petitioners' fundamental rights and freedoms under Articles 28, 29, 40, 47 and 49 of the constitution were violated.

13. *The petitioners reiterated the contents of the petition and supporting affidavits and submitted that the 3rd respondent did not, in its replying affidavit, deny that the 1st and 2nd respondents' enforcement officers carried out an operation at Daraja Mbili area to flush out criminals. The petitioners urged the court to make a finding that the illegal raid took place.*

14. On the 2nd issue, the petitioners submitted that the photographs exhibited in their affidavits provided sufficient proof of not only the fact that the raid to the 1st petitioner's premises took place but that his property was grossly damaged without justification, hence depriving, limiting and hindering the 1st and 2nd petitioners' right to own property in line with **Article 40 (1) of the constitution**.

15. The petitioners asserted that their rights to fair administrative action under **Article 47** were infringed as the respondents did not furnish them with written reason/notice why the illegal raid was conducted in their premises. The petitioners sought an award of Kshs. 5,000,000/= for the violation of their right to fair administrative action while relying on the findings in the case of **Isaac Gathungu Wanjohi vs the Attorney General & others High Court Petition No. 154 of 2011**.

16. The petitioners also stated that their rights to privacy under Article 31 of the constitution was infringed following the unlawful midnight raid and search of their private premises. The petitioners prayed for an award of Kshs. 1,000,000/= for the breach of their right to privacy while relying on the decision in the case of **Samura Engineering Ltd and 10 others vs Kenya Revenue Authority [2012] eKLR** wherein an award of Kshs. 800,000/= was made for violation of Article 31 of the Constitution.

17. It was submitted that the 2nd petitioner's right to privacy under **Article 28 of the constitution** was violated following the insults that the respondents hurled at her during the raid. It was the petitioners' contention that the insults also contravened **Article 10 of the constitution, Article 1 of the Universal Declaration of Human Rights and Article 5 of the African Charter on Human and Peoples rights** to which Kenya is signatory.

18. The petitioners contended that 3rd petitioner's rights of an arrested person were infringed following his arrest which was without cause. It is the 3rd petitioner's case that he was not informed of the reason for his arrest and neither was he arraigned before any court of law on any charges. The petitioners sought an award of Kshs. 1,000,000/= for this violation.

The 1st and 2nd Respondents' case.

19. On 29th February 2016, the 2nd respondent who describes himself as the 1st respondent's director of trade and Industrialisation, swore a replying affidavit in opposition to the petition. He avers that he has been wrongly enjoined in the petition as he was not involved in the alleged raid of the 1st petitioner's house. He accused the petitioners of peddling falsehoods and added that the petition was vexatious, malicious, unmerited and actuated by malice against him. He states that at no time did any officer from the 1st respondent's office engage in any raid at Daraja Mbili area or at the 1st petitioner's premises and adds that the petitioner's pleadings are vague.

20. Mr. Onsembe, counsel for the 1st and 2nd respondent submitted that the 1st and 2nd respondents were wrongly enjoined in the petition as they had no role to play in an operation that was being carried out by the 3rd respondent. He added that there was no evidence to support the petitioners' allegation that the 1st and 2nd respondents played any role in the alleged raid. He further submitted that the petitioner did not prove that he was operating any business in the form of a guest house and that there was no iota of evidence to suggest that the petitioners' rights had been infringed. It is the respondents' case that the petitioners did not establish that the 3rd respondent acted at the behest of the 1st and 2nd Respondents' so as to justify the petitioners' claim that the raid was conducted under the command of the 2nd respondent. He urged the court to reject the petitioners' case in its entirety.

3rd respondent's case

21. The 3rd respondent opposed the petition through the replying affidavit of Mohamed Amin, the Officer Commanding Police Division Kisii, dated 10th May 2016. He states that on 6th May 2015 at about 1 a.m.,

the County Government guards and enforcement officers together with the 3rd respondents officers from Kisii Police Station conducted a raid at Daraja Mbili area within Kisii Township upon receiving verifiable information from County enforcement officers to the effect that a group of disabled persons believed to be from Tanzania were engaged in illegal begging business and were housed at the petitioner's residence. That a raid was then conducted at Daraja Mbili area that resulted in the arrest of 18 Tanzanians who were subsequently charged in court.

22. He attached copies of charge sheets to his replying affidavit which was marked "MA-1". He reiterated that the operation was carried out in accordance with the law and that no property was damaged. He further stated that the petitioners did not lodge any complaint to the 3rd respondent over the said raid. It was 3rd respondent's case that the police have a constitutional and statutory duty to enforce the law and carry out their duties within the ambit of the law.

23. M/s Winny Ochwal, advocate for the 3rd respondent submitted that the fundamental rights enshrined under Article 40 of the Constitution are not absolute but are subject public interest and the rights and freedoms of others in which case the court needs to do a balancing act in order to protect each person's rights. She relied on the case of **National Citizens Forum Initiative and 3 Others vs Governor of the County of Nairobi and 4 Others Petition No. 397 of 2013** in which it was held:

"a police officer is entitled to effect an arrest without a warrant so long as he has reasonable grounds for entertaining the suspicion at a material time. Subsequent events may show that the officer was in error at the time but the arrest will not thereby be rendered unlawful."

24. She also quoted **Lord Diplock in Dillion vs O'Brien and Davis (1887) 16 COX CC 245** where he stated:

"In the case of an arrest, reasonable grounds for belief of guilt at the time of arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive."

25. On the claim that the petitioners' property was destroyed in the raid, the 3rd respondent submitted that this claim was not proved as mere pictures do not prove that it is the 3rd respondent who was responsible for the destruction. Furthermore, the petitioners did not lodge any complaint with the police over the alleged destruction.

26. On the right to fair administrative action, the 3rd respondent submitted that all the people arrested in the raid were arraigned in court in Kisii CMCRC No. 1239 of 2015 where the arrested person's right to a fair trial was observed.

27. On the right to privacy and dignity, the 3rd respondent cited he provisions of **Section 29 of the Criminal Procedure Code** which stipulates as follows:

"29. Arrest by police officer without warrant

A police officer may, without an order from a magistrate and without a warrant,

arrest—

(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;

(b) any person who commits a breach of the peace in his presence;

(c) any person who obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

(d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;

(e) any person whom he suspects upon reasonable grounds of being a deserter from the armed forces;

(f) any person whom he finds in a highway, yard or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit a felony;

(g) any person whom he finds in a street or public place during the hours of darkness and whom he suspects upon reasonable grounds of being

there for an illegal or disorderly purpose, or who is unable to give a satisfactory account of himself;

(h) any person whom he suspects upon reasonable grounds of having been concerned in an act committed at a place out of Kenya which, if committed in Kenya, would have been punishable as an offence, and for which he is liable to be extradited under the Extradition (Contiguous and Foreign Countries) Act (Cap. 76) or the Extradition (Commonwealth Countries) Act (Cap. 77);

(i) any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on that person, any implement of housebreaking;

(j) any released convict committing a breach of any provision prescribed by section 344 or of any rule made thereunder;

(k) any person for whom he has reasonable cause to believe a warrant of arrest has been issued.”

28. Miss Ochwal submitted that 3rd respondent had credible information that illegal immigrants were being housed by the 1st petitioner. She also submitted that the allegations of insults and assault during the raid were not proved.

Determination

29. The petitioners and the 3rd respondent are basically in agreement with the facts of the case as set out in the petition save that the 3rd respondent denies that its officers violated the rights of the petitioners while effecting arrest on persons who were said to be illegal immigrants. Even though the 1st and 2nd respondents deny any involvement in the raid that is the subject of this petition, the 3rd respondent's deponent stated on oath that on 6th May 2016, police officers from Kisii Police Station carried out a raid at Daraja Mbili area upon receiving verifiable information from County Government enforcement officers to the effect that a group of disable persons from Tanzania were engaging in illegal begging business in Kisii town and were housed at the 1st petitioner's residence. The averments of the 3rd respondent's deponent were not rebutted by the 1st and 2nd respondents and therefore, I find that there was some level of truth on the circumstances that led to the raid at Daraja Mbili. I similarly find that the said raid and arrest actually took place as was confirmed in the 3rd respondent's replying affidavit.

30. Having found that the raid and arrest at Daraja Mbili area actually occurred, the question which this court has to determine in this petition is firstly, whether the said raid infringed on fundamental rights and freedoms of the petitioners under Articles 20, 27, 28, 29, 40, 47 and 49 of the constitution, and secondly, if the petitioners are entitled to an award of exemplary damages and costs of the petition.

31. On the first issue of infringement of the fundamental rights of the petitioners; the threshold of proof in constitutional petitions was stated in the landmark case of **Anarita Karimi Njeru vs Republic (1979) KLR 154** wherein it was stated:

" We would however, again stress that 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 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."

32. The 3rd respondent has taken the view that it was mandated by the law to carry out the arrest of foreigners, who were illegally present within Kisii town and in doing this, the police acted in accordance with the law and cannot be faulted for performing their legally mandated functions. The 3rd respondent added that the raid at Daraja mbili resulted in the arrest of 18 Tanzanians who were subsequently arraigned in court and charged with the offence of being in the county illegally as shown in the copy of charge sheet that was attached to the 3rd respondent's replying affidavit as anenxture "MA1"

33. The 1st petitioner confirmed that 2 (two) Tanzanians were indeed arrested from his guest house and to my mind, this confirms that the 1st petitioner had either knowingly or unknowingly housed persons who were on the police wanted list. As correctly submitted by Miss Ochwal, an individual's fundamental rights are not absolute, but are limited or subject to Public Interest and rights and freedoms of others.

34. In the instant case, the petitioners did not expect the police and other law enforcement agencies to turn a blind eye to the presence of illegal immigrants or suspicious persons within Kisii Town and take no action against them despite the danger that such persons may cause to other peace loving citizens.

35. The 3rd respondent's claim that all the arrested persons were arraigned before the court of law at Kisii was not rebutted by the petitioners and I therefore find that he respondents acted within the law in arresting the persons suspected of being illegally in Kisii Town or in engaging in illegal activities. This court take judicial notice of the fact that in this age and era of terrorism that has become a phenomenon all over the world, the presence of illegal foreigners, be they disabled or not, may be a security issue and therefore a matter of grave concern that cannot be taken lightly by law enforcement agencies.

36. Turning to the petitioners' claim that his property was damaged during the arrest thereby violating his right to own property as enshrined under Article 40 (3) of the Constitution, I find that this claim was not proved to the satisfaction of this court. All the petitioners did was to attach copies of photographs showing a building, locks and some broken windows. There was however, nothing to show that the building belonged to the petitioner or that the broken locks and windows were part of the said building. Similarly, the 1st petitioner did not furnish any proof of the claim that he owned a guest house in which he carried out legitimate lodging business so as to prove his claim that he has suffered loss of business following the arrest of his two disabled guests. Further, in respect to the claim of loss of business, the 1st petitioner needed to show that he was licensed to carry out the guest house business, he also needed to present his bank/financial statements to prove the loss. This was not done, there was no valuation/assessment report done to prove the damage allegedly occasioned to his house and I therefore find that the petitioner did not discharge the threshold of proof envisioned in the **Anarita Karimi Njeru case (supra)**. There is no material upon which this court can make a finding that the petitioner's property was destroyed or that he has suffered loss of business.

37. On infringement of the Right to privacy, **Article 31 of the constitution** stipulates as follows:

"31. Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

**(c) information relating to their family or private affairs unnecessarily required or revealed;
or**

(d) the privacy of their communications infringed.”

38. The right to privacy enshrined in our constitution includes the right not to have one’s person or home searched, ones property searched or possessions seized. Searches have the potential to infringe the right to privacy and must therefore be conducted within the statutory safeguards which regulate the way in which state officials enter private homes of ordinary citizens. It is these constitutional and statutory safeguards that distinguish a democratic state from a police state. (see **Ministry v Interim National Medical and Dental Council & Others CCT 13/1997 [1998] ZACC 10 at para 25 per Sachs J.**)

39. In the instant case, the 1st petitioner stated that the respondents raided his guest house where they arrested 2 of his guests and further raided his private residence which they ransacked without any justification.

40. On its part, the 3rd respondent contended that the raid at the petitioners’ premises and Daraja Mbili area at large was properly conducted and it led to the arrest of 18 foreigners who were later arraigned in court. The 3rd respondent’s case was that the police are justified to effect an arrest even without warrants as long as they have reasonable grounds to entertain the suspicion. The respondents further stated that they had received verifiable information from the 1st respondent to the effect that there were foreigners conducting illegal begging activities within Kisii Town.

41. As I have already stated in this judgment, the police cannot be faulted for performing their statutory duties to protect public interest and maintain law and order. However, while I find that the police were justified to raid the 1st petitioner’s guest house that allegedly housed the foreigners, I find no justification for the raid in the 1st petitioner’s private residence which the police reportedly ransacked without finding anything. The 3rd respondent has not justified the raid on the 1st petitioner’s private residence. I find that the 1st and 2nd petitioners’ rights to privacy was infringed when their home was raided by the police commando-style in the dead of the night. I do not think that the police are allowed, in an open and democratic state, to storm into a person’s private residence in the dead of the night and ransack the said house under the guise of flushing out foreigners. It is also worthy to note that no foreigner was found in 1st petitioner’s house. In a nutshell, I find that no material has been placed before this court by the respondents to show, that they were entitled to conduct a warrantless search of the petitioners’ home.

42. Turning to the 2nd petitioner’s claim that she was assaulted and insulted during the alleged raid, I find that the said claim was also not proved. There was no medical evidence in support of the alleged assault and neither was the nature of the insult meted out against her disclosed.

43. On the right to fair administrative action, **Article 47 of the constitution** stipulates as follows:

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

44. The petitioners argued that the respondents did not furnish them with the reasons for the raid at their premises, arrest and that this infringed on their rights to fair administrative action. Closely related to the right to fair administrative action was the 3rd petitioner's right of an arrested person. The 3rd petitioner stated that he was not informed of the reasons for his arrest. On their part, the respondents contended that all the suspects arrested on the night of 5th May, 2015 were arraigned in court and a charge sheet was attached in their affidavit to prove this. The claim by the 3rd respondent that the suspects were charged in a court of law was similarly not denied by the petitioners. No evidence has been presented by the petitioners to show that the 3rd petitioner was indeed arrested as alleged or whether the criminal proceedings instituted against the arrested suspects have been dismissed or are still pending or cannot be prosecuted by reason of the respondents' acts. I am therefore unable to establish how or whether the petitioners' rights to a fair hearing or right of an arrested person were infringed. In sum, the petitioners did not set out how Article 47 has been infringed by the respondents.

Remedies

45. Having found that the respondents acted with impunity and violated the Article 31 of the constitution, the remedies available to the petitioner under **Article 23 (3) of the constitution** are;

a) **"A declaration of rights**

b) **An injunction**

c) **A conservatory order.**

d) **A declaration of invalidity of any law that dies, violates, infringes, or threatens a right of fundamental freedom in the bill of rights and is not justified under article 24.**

e) **An order for compensation.**

f) **An order of judicial review.."**

46. The above article vests in the High Court a wide discretion to frame appropriate relief according to the circumstances of each case. The petitioners prayed for a declarations of infringement of their rights under the constitution, damages and costs of the petition. I have already found the respondents liable for violating the petitioners' rights but a declaration to that effect alone will not be sufficient to make good the petitioners' claim. I am of the view that an award of compensation will give more effect to that Bill of Rights.

47. The principles applicable to award of damages for constitutional violations under the Constitution were explained exhaustively by the Privy Council in the famous case of **Siewchand Ramanoop v The AG of T&T**, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

48. Per Lord Nicholls at Paragraphs 18 & 19:

"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle

it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award."

49. In **Tamara Merson v Drexel Cartwright and Ag (Bahamas) Privy Council Appeal No. 61 of 2003** the Privy Council held that in some cases, a suitable *declaration* may suffice to vindicate the right which has been breached.

50. Taking cue from the above decisions, the Privy Council in **Alphie Subiah v The Attorney General of Trinidad and Tobago** Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that:

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

51. In the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others** - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as

far as possible to be served when considering an appropriate remedy.”

52. In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported)**, where the Court held that:

“It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

53. The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, 2003 SCC 62 to include, a remedy that will :

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

54. Going by above decisions and jurisprudence, it is clear to me that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, which discretion, is limited by what is “*appropriate and just*” according to the facts and circumstances of a particular case. As stated in the above cited cases, the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. In some cases therefore, the appropriate determination will be the making of a declaration only, which is a powerful message that has a deterrence effect on future violations, will suffice to meet the ends of justice. It however of critical importance that the courts discretion in making the award be exercised with rationality and proportionality. In certain instance, an award of reasonable damages may be called for in addition to the declaration.

55. In light of my findings on the various issues set out in the judgment, I am satisfied that the 1st and 2nd petitioners made out a case of their rights, under Article 31(a) and (b) of the constitution, against the respondent and the award of damages that commends itself to me for the said violation is the sum of Kshs. 500,00.00 My final findings, for the avoidance of doubt, are as follows:

a) I declare that the 1st, and 2nd petitioners’ rights to privacy protected under Article 31(a) and (b) of the Constitution were violated by the respondents' arbitrary invasion and search of their home.

b) I award Kshs. 500,000.00 damages to the 1st and 2nd petitioners jointly.

c) The respondents shall pay the costs of this suit.

d) The 3rd petitioner’s suit is dismissed with no order as to costs.

Dated, signed and delivered in open court this 3rd day of April, 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Godi for Mogusu for the Petitioner
- Ochwangi for the 3rd Respondent
- Mr. Ondari for the 1st and 2nd Respondents
- Omwoyo: court clerk