



**IN THE REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 271 OF 2013**

**BETWEEN**

**PATRICK MBUTHIA.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE KENYA POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner, Patrick Mbutia, was engaged in the business of hawking in the City of Nairobi when the events forming the subject of this petition occurred on 26<sup>th</sup> May, 2012. On this day, there was a confrontation between hawkers, police and the Nairobi City Council officers in Nairobi's Kirinyaga road. The petitioner alleges that he was shot by police in the course of the confrontation, as a result of which he sustained injuries to his left leg.

2. He has therefore filed this petition seeking compensation for the injuries suffered, and he alleges violation of his constitutional rights under Articles 25 (a) and 29 of the Constitution.

3. The petition has been lodged against the 1<sup>st</sup> respondent, the Attorney General (AG) in his capacity as the legal representative of the Government in civil matters pursuant to Article 156 of the Constitution. The 2<sup>nd</sup> respondent, the Kenya Police Service, is established under Article 243 of the Constitution, while the 3<sup>rd</sup> respondent is the County Government of Nairobi. The petitioner seeks the following orders:

***1. An order compelling the respondents to severally and jointly compensate the petitioner for:***

***a. The pain suffered as a result of the injury occasioned by the shooting;***

***b. The economic distress suffered by the petitioner and loss of income and expected***

*income; and*

*c. Hospital bills incurred.*

*2. An order that the costs consequent upon this petition be borne by the respondent.*

*3. Such further orders as this Honourable Court shall deem just in the circumstances.*

### **The Petitioner's Case**

4. The petitioner has set out the facts in support of his case in his petition dated 24<sup>th</sup> May, 2013 which was supported by his affidavit of the same date, two further affidavits which he swore on 27<sup>th</sup> May, 2014 and 13<sup>th</sup> January, 2014 respectively; and an affidavit sworn in support of his case by a Mr. Julius Njoya Karigi on 26<sup>th</sup> July, 2013. The petitioner also gave oral evidence in support of his case, and called two witnesses, Dr. Isaac Gikandi Mungai and Mr George Mwangi Nyoro.

5. The facts as they emerge from the petitioner's pleadings are that on 26<sup>th</sup> May, 2012 at around 5.00 p.m., he was going about his hawking business within the City of Nairobi. He was hawking second hand clothes next to Nawas Hotel when the then City Council of Nairobi officers, together with police officers, engaged him and other hawkers in a scuffle in an attempt to restrain them from engaging in their trade. The City Council officers were hurling bottles and clubs at them as they ran away while the police used teargas canisters and fired live bullets at the hawkers as they ran off towards Kirinyaga road near Kipepeo Hotel. According to the petitioner, he and other hawkers ran and hid behind a building, dropping their merchandise in the course of the scuffle.

6. The petitioner states that he thereafter went back to rescue his goods, and in the process of so doing, felt an excruciating pain and numbness on his left leg and was unable to move. He then noticed two holes through his pair of trousers just below his left knee, and his trousers were getting soaked with blood. It was then that he realised that he had just been shot. He was assisted by a colleague by the name of Njoya to a nearby garage from where he was directed to a nearby dispensary for first aid and treatment. His wounds were dressed and he was discharged at around 7.30 pm and taken home.

7. The petitioner averred that while he was at the dispensary, he was informed that one of his colleagues by the name Peter Muhoro had been shot dead. This led to the hawkers holding demonstrations and protests at the Central Police Station. He alleges that in a bid to disperse the hawkers, police had fired six live bullets in the air, two of which found live targets in him and the deceased. These facts, according to the petitioner, were recorded in the Occurrence Book as OB No. 84/26/5/2012.

8. The petitioner deposed that in the course of the next few days, his wounds were dressed at a clinic but they subsequently worsened and he was referred by his colleagues to the Independent Medico-Legal Unit (IMLU). He was attended to by a Dr. Thuo who took photos of the wounds and referred him to the PCEA Kikuyu Hospital where X-rays were taken and he was placed on antibiotics together with alternate dressing of the wounds.

9. The petitioner contends that he suffered so much pain that he was unable to engage in his trade for almost two months, thereby denying him and his family an opportunity to earn a living, as a result of which his family suffered untold economic and psychological distress. He further deposes that to date, his left leg still gets numb and has slightly reduced muscle bulk as compared to the right leg.

10. The petitioner relies on a medical examination conducted by a Dr. Isaac Gikandi Mungai annexed to his affidavit which states that the scars that the doctor examined were consistent with healing bullet wounds, with the superior scar being the entry wound while the inferior scar was the exit wound.

11. The petitioner deposes that the Kenya police officers and City Council officers have formed a habit of using excessive and unwarranted force while dispersing hawkers, leading to injuries and loss of lives, and

he asserts that such acts should be brought to an end. In his view, the police cannot claim to have shot him in order to effect an arrest as they did not arrest him after he was shot.

12. The petitioner further avers that as a result of the events that led to his shooting, the hawkers launched a demonstration and marched to the then Prime Minister's office on 12<sup>th</sup> July, 2012 protesting over alleged police and City Council officers' harassment, torture and killings when chasing hawkers from the Central Business District. He deposes that thereafter, on 13<sup>th</sup> December, 2012, two hawkers were killed by police officers in a clash along Nairobi's River road area.

13. His contention is that the City Council officers have always worked with police officers to disperse hawkers and in the process, they use unwarranted force. His contention therefore is that they are jointly and severally liable for any resultant consequences.

14. It is his case that the actions of the respondents violated his right to freedom and security of the person under Article 29 of the Constitution; and that he was subjected to violence and also treated in a cruel, inhuman and degrading manner. He further asserts that the Kenya Police Service has an obligation under the Constitution to comply with constitutional standards of human rights and fundamental freedoms, to train its staff to the highest possible standards of competence and integrity, and to respect human rights and fundamental freedoms and dignity.

15. In response to the respondents' averments, the petitioner denied the allegations that police officers while on routine patrol were confronted by hawkers who were armed with crude weapons, stones and empty bottles. He also denied that any shots were fired at the police officers, or that the hawkers were looting and destroying property.

16. In his affidavit in support of the petition, Mr. Julius Njoya Karigi, then a hawker within the city of Nairobi (now deceased) supported the petitioner's version of events on the material day. He maintained that the petitioner was shot by a police officer on his left leg, and he helped him to a nearby garage and thereafter to a nearby clinic where he was attended to. Mr. Njoya states that he then left the petitioner and went to visit another of his colleague, a Mr. Peter Muhoro, who had been allegedly shot in the scuffle.

17. Mr. Njoya deposed further that police and City Council officers are known to use excessive force while dispersing hawkers, leading to injuries and loss of lives as a result of their cruelty. He therefore urged the Court to allow the petition.

### **Oral Testimony**

18. In addition to his affidavit evidence, the petitioner testified in Court and called two witnesses. These were Dr. Isaac Gikandi Mungai and Mr. George Mwangi Nyoro.

19. In his oral testimony, the petitioner reiterated the contents of his petition and affidavits in support. On cross-examination by Mr. Mohammed for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the petitioner asserted that he was hawking in River Road together with other hawkers and they were chased by Police and City Council officers. He also stated that he did not know who shot him.

20. On cross-examination by Ms. Matunda, the petitioner's acknowledged that he is aware that it is an offence to hawk without a permit in the Central Business District and that he was wrong to do so. He testified, however, that due to poverty, he was forced by circumstances to hawk within the City. He maintained that he was shot by police officers and blames both police officers and City Council officers since they were together.

21. The petitioner further testified that the doctor who examined him concluded that he had a bullet wound. He denied that he had been shot by a hawker, or that he had seen a hawker with a gun. It was also his testimony that he could not identify the policeman who shot him as there were many police officers and they were far away from the hawkers.

22. The petitioner's second witness was Dr Isaac Gikandi Mungai who testified that he is a general practitioner trained in forensic documentation of injuries. His registration number with the Medical Practitioners and Dentists Board is 7724. Dr. Gikandi testified that he examined the petitioner on 20<sup>th</sup> July, 2012 and concluded that his injuries were consistent with healing bullet wounds. He indicated his findings in a report which he produced in evidence.

23. On cross-examination by Mr. Mohamed for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, he stated that he had prepared the report and emailed it to a Dr Thuo, a programme officer at IMLU, as he was not there to sign it. He also prepared the petitioner's P3 form.

24. In cross-examination by Mr. Mare for the 3<sup>rd</sup> respondent, Dr. Gikandi conceded that he did not take photos of the petitioner at the time of the examination. He also testified that at the time he examined the petitioner, the injuries were two weeks old.

25. The petitioner's third witness, Mr. George Mwangi Nyoro narrated the events of the material day. He testified that as they were running from the police officers and the City Council officers, the petitioner was shot. He and other hawkers bandaged the petitioner and took him to hospital.

26. On cross-examination by Mr. Mohammed, Mr. Mwangi admitted to not seeing the person who shot the petitioner, though he maintained that the petitioner was shot by a police officer.

27. In response to questions from Ms. Matunda, Mr. Mwangi expressed the view that he and the petitioner were not in the wrong place but they did not have permit to hawk within the Central Business District. He contended that they do not have a designated place for undertaking their businesses since designated areas such as Muthurwa are full. Accordingly, it was his testimony that he has never gone for a permit and that their hawking business does not have a permit. In his view, it is not wrong to hawk in the City Centre as hawkers also need to find food. He urged the Court to compensate the petitioner as prayed.

## **The Response**

28. The respondents opposed the petition and filed affidavits in reply. They also called witnesses to give oral evidence.

## **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

29. The AG and the Kenya Police Service filed Grounds of Opposition dated 1<sup>st</sup> November, 2013 and written submissions dated 12<sup>th</sup> February, 2016 in opposition to the petition. They take the position that the petitioner's case is weak, without merit and merely speculative. They contend that the police were simply performing their duties as stipulated under the law in maintaining law and order, and further, that there is no ballistic evidence proving that the alleged bullet that hit the petitioner, if any, emanated from a police gun. It was also their contention that there was no violation of the petitioner's constitutional rights disclosed, and further, that the petitioner is forum shopping as the issues raised in this petition would have been pursued in a civil court.

30. In their oral evidence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents called in Dr Joseph Maundu, a medical doctor attached to the Nairobi Police Surgeon, who testified that he had examined the petitioner. He stated that his examination revealed that the petitioner had two scars on the left lower limb, and he had deduced from his examination that the scars were about 2 years old and had been inflicted by a sharp object.

31. Dr. Maundu further testified that the petitioner had with him some documents from PCEA Kikuyu Hospital where he had obtained treatment. He noted that the petitioner's wounds, which he examined on 21<sup>st</sup> May, 2014 and signed the P3 form, had healed and there were only scars, but he could detect the point of entry and the exit of the object that had inflicted the injury. In cross-examination, he stated that the petitioner did not have a P3 form from another doctor when he examined him, and since his wounds had healed, it was not possible to tell whether the wound was as a result of a gunshot.

32. On cross-examination by Mrs. Kayugira, Dr. Maundu stated that the report the petitioner had with him indicated that he had been shot. While he did not doubt the report, Dr. Maundu testified that in his view, a sharp object with an entry and exit wound can be an arrow, a knife or a bullet.

33. In re-examination, he expressed the view that Dr. Gikundi should have qualified his statement by giving additional information and indicating whether there was any residue after two months, which he did not.

34. In his evidence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' second witness, Corporal Abdi Jibril, testified that on the material day, there was a confrontation between City Council officers and police officers on one side and hawkers on the other. The police joined the confrontation after the Council officers were overwhelmed by the hawkers who were helped by merchants and street boys. He was not on the ground at the time of the confrontation but was on standby at the office.

35. According to Cpl. Jibril, he handled the inquest following the confrontation as a Mr. Peter Muhoro Wanjohi was shot dead. He also captured all the things that happened in the inquest file including the death of Wanjohi and the injury to the petitioner.

36. On cross-examination by Ms. Matunda, he stated that the police officers who were helping the City County officers were armed with G3 rifles, one AK 47, and two shotguns, and rubber bullets were from the police. It was also his testimony that there were shots fired from these guns and the only way to ascertain who shot the petitioner was to recover the bullet head. The only way the bullet head could be obtained was if it remains in the victim's body, and they could therefore not establish which firearms or bullet injured the petitioner.

37. It was also his testimony that as there was a running battle between the police, City Council officers and hawkers, one cannot tell whether the shot came from police officers. He further testified that from their investigations, they could not establish who killed the deceased or injured the petitioner and they recommended that the file be placed before a magistrate for an inquest.

38. On cross-examination by Counsel for the petitioner, he testified that he had taken the firearms referred to in his witness statement to the Criminal Investigations Department as they had been used and that he wanted to confirm which of them had been used to kill the deceased, Mr. Muhoro. He admitted that live ammunition was used in the fracas but he could not say whether the petitioner was shot by a bullet from one of the said guns.

39. On re-examination, he asserted that he was collecting the guns for purposes of the inquest, and not because they were used on the petitioner.

40. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents called Corporal Boniface Oketch. PC No. 8472. PC Oketch testified that there was a confrontation between City Council Officers and hawkers on the material day, and he and his fellow police officers were requested by the Nairobi City Council Government to assist them. As the hawkers were throwing stones and broken bottles at them, they were overpowered and that forced them to fire in the air. That the hawkers regrouped with mechanics and street children and they started throwing stones and broken bottles, and that they damaged property. PC Oketch maintained that nobody was shot as they were firing up, and that the hawkers were carrying crude weapons like *rungus*.

41. PC Oketch further testified that he saw someone with a gun pointing at the City Council officers but he could not tell whether it was a hawker or the street children. His testimony was that it was possible that there were others with guns on the side of the hawkers. He asserted that neither he nor any other officer shot the hawkers.

42. On cross-examination by Ms. Matunda, he took the position that City County Officers are not licensed to carry guns, and that he was at the scene but he cannot confirm who shot the petitioner. Further, that they heard a gunshot but it was from the hawkers' side. He did not see the petitioner on the material day.

43. In cross-examination by Mrs. Kayugira, PC Oketch testified that four police officers were involved in assisting the County officers. Of these four, the witness, Cpl. Boniface Oketch had a G3 rifle while Cpl. Namachanja had an AK 47. The other two had shotguns. He further stated that shotguns, which have rubber bullets, are used to disperse rioters. He also stated that the police used live bullets to fire in the air as they had run out of tear gas canisters.

44. PC Oketch maintained that they did not shoot anyone, though he was later informed that someone was injured and he later learnt that someone died. He also testified that there were cases of looting and breaking into shops recorded.

45. PC Oketch further maintained that he saw a hawker pointing a gun at a City Council Officer and he asked the officer to draw back. He stated that he did not try to shoot the person pointing the gun as he was in the middle of the group, and that the group was at a distance of about 20 metres shouting and yelling at the officers. In his view, the force used against the hawkers was minimal and not excessive as alleged.

46. On re-examination, Cpl. Oketch stated that he did not see anyone get injured at the scene. He also maintained that they did not use force as they fired in the air, and that they used rubber bullets and when they run out of rubber bullets, they resorted to live ammunition.

### **The 3<sup>rd</sup> Respondent's Case**

47. The County Government of Nairobi, which is the successor to the Nairobi City Council, opposed the present petition and filed an affidavit sworn on its behalf by Mr. Karisa Iha, its Legal Affairs Director, on 13<sup>th</sup> March, 2014. Mr. Gideon Musa Nzioka, the Assistant Director, City Inspectorate, Nairobi County, also testified on its behalf. The 3<sup>rd</sup> respondent also filed submissions dated 2<sup>nd</sup> December, 2015.

48. Mr. Iha deposes that the events that led to the alleged injuries to the petitioner were solely and wholly orchestrated by the petitioner and his fellow hawkers who attempted to obstruct and/or resist Police Officers and City Council officers in their duty of enforcing the City Council of Nairobi Bylaws. It was his deposition that the police are always called in when necessary to assist in the enforcement of the bylaws.

49. Mr. Iha argued on behalf of the 3<sup>rd</sup> respondent that its bylaws prohibit hawking; that in the events leading to the present petition, City Council officers were merely carrying out their duties when the petitioner and other hawkers attempted to resist the instructions to leave the streets of Nairobi and engaged the City Council officers in running battles, hence the need for reinforcement from police officers; that the petitioner was injured in the course of the resistance; and it is therefore unwarranted and untrue for him to allege that he was being harassed and tortured by the City Council officers since it was he who failed to comply with lawful orders.

50. It is also Mr. Iha's deposition that it is an offence to carry out hawking within the streets of Nairobi and anyone who does so is a criminal and risks being arrested and prosecuted accordingly. Further, that the police assist in dealing with criminals as City County officers are not adequately armed to arrest resisting and armed hawkers who are overwhelming in number, arrogant and excessively rough.

51. He denied that City Council officers attacked the petitioner with teargas and guns, noting that City Council officers do not possess teargas canisters and guns. In his view, any damage occasioned as a result of the actions of the petitioner cannot be attributed to the police and the City County of Nairobi. Nonetheless, he argued that the petitioner is malicious as against the City County of Nairobi by seeking compensation for injuries sustained as a result of shots he alleged were fired by police officers, arguing that it was the police who treated the petitioner brutally, harassed him and used unwarranted and unreasonable force against him and other hawkers.

52. The 3<sup>rd</sup> respondent's case was that in keeping hawkers off the streets, the City County of Nairobi was

effecting its constitutional mandate as envisaged under the Fourth Schedule of the Constitution and in so doing, it did not violate any of the fundamental rights and freedoms of the petitioner.

53. In his oral testimony, Mr. Karisa Iha denied that the petitioner was shot by City County officers as the said officers do not carry or possess guns. He reiterated that hawking is prohibited within the Central Business District.

54. In response to questions from Mr. Mohammed, he contended that the petitioner and the other hawkers were committing an offence and were committing criminal activities which they do when they invade the Central Business District in the name of hawking. It was also his testimony that the response of hawkers when confronted by County officers was violence; that every time the County is enforcing its bylaws, there are threats of violence as had happened in the present case. He confirmed that in such circumstances, the County usually request the Officer Commanding Police Division (OCPD) Central Police for assistance. Such assistance is requested for every time there is resistance and threat of violence on the part of hawkers, and in the present case, there was not just threat of violence but actual violence, destruction of property and maiming of members of the public.

55. In cross-examination by Mrs. Kayugira, he testified that there is a legal process for dealing with offenders, which does not entail throwing stones and bottles. Further, that where there is a report of invasion of the Central Business District by hawkers, the County officers are commanded to go and drive them from the Central Business District. That the first step in the processes involved talking to them and if they resist, the County requests for the assistance of police officers to aid in their removal.

56. He however, conceded that there was no provision in the bylaws for driving out hawkers from the Central Business District; that while the County officers are usually commanded by their supervisors to go and take action, such action is not defined in the bylaws. It was also his testimony that the County does not bear any responsibility for the acts of police officers.

57. In his testimony, Mr. Gideon Musa Nzioka, who is the Assistant Director of the County's City Inspectorate, testified that in 2006, the Nairobi City Council came up with By-laws, No. 10 and 11 of which restrict hawking within the Central Business District because of the robberies that had been experienced from the year 2004 within the said Central Business District. The effect of the bylaws is that hawking was prohibited within the Central Business District.

58. According to Mr. Nzioka, on the day of the events giving rise to this petition, a large numbers of hawkers, joined by street boys, engaged police officers and City Council officers in running battles. They started looting shops and burning a transformer along Kirinyaga road, leading to a lot of injuries to members of the public.

59. Mr. Nzioka testified that City County officers do not carry guns when enforcing bylaws, and they only called for police assistance when they were outnumbered. He denied that City County officers carry stones and bottles in their confrontation with hawkers, and asserted that they only use minimum force to arrest hawkers.

60. In response to questions from Mr. Mohamed for the state, Mr. Nzioka asserted that owing to their behaviour, the petitioner and his colleagues are not hawkers but criminals. He testified that when he was the Divisional Commander within Nairobi County he was once attacked by hawkers who chopped off one of his fingers, and the County also lost some of its employees. In his view, the people who call themselves hawkers are criminals who are usually armed with guns, pangas, and stones which they use to cause chaos in the Central Business District.

61. In cross-examination by Mrs. Kayugira, he stated that he was one of the officers enforcing the bylaws on the material day but was not the one in charge. He defined minimum force as meaning that any offender on the street is arrested and taken to court, and that in effecting an arrest, the County officers, who carry batons and not stones or bottles, use their hands.

62. Mr. Nzioki further testified that when police officers went to reinforce the County Officers, they went with their own commander, and the County is not responsible for their actions. He denied being aware that anyone had been shot, stating that no such incident had been reported.

### **The Submissions**

63. The petitioner filed submissions dated 16<sup>th</sup> November 2015. He based his claim on Articles 22, 23, 165 and 258 of the Constitution which allow a party to file a petition alleging violation of the constitution or of his rights, and provide the jurisdiction of the Court to hear such a petition. He alleges violation of his rights under Articles 25 and 29 of the Constitution.

64. The petitioner concedes that the burden of proof lies on him to prove, on a balance of probability, that his shooting and injury was a result of police action. Once he does this, then the burden shifts to the respondents to prove that the shooting was justified. He has relied on the decision in **Stephen Iregi Njuguna vs Attorney General, Civil Appeal No. 55 of 1997 (1995-1998) 1EA 252** for the proposition that the police do not have any unqualified licence to resort to shooting and any such shooting is authorized when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary.

65. The petitioner submits that his evidence shows that he was shot, as the report from the doctor who examined him barely two weeks after the incident indicates. He also draws attention to the fact that there was a fracas, and that live ammunition was used. In his view, the circumstances of the case did not warrant the use of live ammunition as the officers could have used teargas and rubber bullets as their intention was to disperse the hawkers.

66. With respect to the culpability of the 3<sup>rd</sup> respondent, the petitioner submitted that it has no proper policy framework for dealing with hawkers. He contends that none of the hawkers was arrested, and that the respondent would rather violently disperse the hawkers than arrest them and have them charged in court. The petitioner therefore submits that it was for this reason that police officers, who must have shot him, were called in to reinforce the officers of the 3<sup>rd</sup> respondent in dispersing the hawkers.

67. The petitioner submitted that he has suffered lots of pain and suffering, and he and his family had suffered economic difficulties. He urged the Court to be guided by the decision in **Lucas Omoto Wamari vs Attorney General and Another [2014] eKLR**, and award him damages to the tune of Kshs.800,000 jointly and severally against the respondents.

68. In his submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondent dated 12<sup>th</sup> February 2016, the AG argued that the petitioner has not shown how his constitutional rights have been violated as required under the principle in **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Meme vs Republic and Another [2004] eKLR**. His submission was that the burden of proof lies entirely with the petitioner. He had not identified the state agents who had allegedly shot him, and as the state has known, identified and recognized agents, it is not enough to say merely that he was shot by police without identifying a specific police officer. Further, that it is not enough to merely say that he was shot by persons whom he believed were police officers without identifying any one of them.

69. It was also the AG's submission that the petitioner produced conflicting medical reports which did not reveal any damage caused by police bullets. Further, that his medical report, testimony and the testimony of his witnesses do not tally and cannot amount to any evidential proof. The AG relied on the decision in **Kirugi and Another vs Kabiya and 3 Others [1987] KLR 347** and **Nguku vs Republic [1985] KLR 412** to submit that where a party fails to produce certain evidence, the presumption is that the evidence is unfavourable to his or her case.

70. The AG further submitted that in order for the Court to determine whether an alleged claim is genuine or not, it would have to assess the facts based on documentary proof as required under section 112 of the Evidence Act, Chapter 80 of the Laws of Kenya. In the AG's view, the petitioner has failed to discharge the burden on him of proving that he was shot by police officers. The AG therefore urged the Court to

dismiss the petition.

71. The 3<sup>rd</sup> respondent, in its submissions dated 2<sup>nd</sup> December 2015, took the position that under Article 24 of the Constitution, the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Where there is a conflict between the public interest and private interest, the public interest must prevail.

72. The 3<sup>rd</sup> respondent further submitted that the petitioner had not adduced any evidence to prove that the injuries he suffered were as a result of a gun shot fired by either the police or City County officers. The medical reports that he had produced showed that the injuries were inflicted by a sharp object, which could have been anything from anywhere.

73. It was also its submission that the petitioner was carrying out illegal hawking and had resisted arrest by fighting back. He cannot therefore claim that unreasonable force was used, as it was not certain whether he was shot by police or his fellow hawkers, whom it alleges were also armed, as no cartilages were found.

74. The 3<sup>rd</sup> respondent further submitted that the reliefs sought by the petitioner could not issue. Its argument was that the petitioner and other hawkers turned violent and even armed themselves against law enforcers. The petitioner therefore, in its view, cannot claim compensation. He had also no license to carry out hawking in the designated areas and he cannot therefore claim that he suffered economical loss. In any event, he had not submitted any proof of how much he used to earn as profit per month to enable the Court assess the loss of income.

75. Finally, it was its contention that special damages must be specifically pleaded and proved, which the petitioner had failed to do. In its view, to allow this petition, in which the petitioner was acting illegally, would allow many litigants to hawk and sue, and it urged the Court to dismiss the petition.

### **Determination**

76. I have read and considered the oral and affidavit evidence of the parties, as well as their submissions and authorities, which I have set out in brief above. From the pleadings and submissions, it is evident that the core issue before the Court is fairly straightforward: whether there was a violation of the petitioner's rights under Article 29 of the Constitution by the respondents. In making this determination, I must consider first whether the petitioner was shot, as he alleges, by police officers who had been called in to reinforce officers of the 3<sup>rd</sup> respondent; if so, whether the shooting was unjustified and therefore a violation of the petitioner's constitutional rights for which the state and the county government of Nairobi are vicariously liable.

77. Article 29 of the Constitution provides that:

***Every person has the right to freedom and security of the person, which includes the right not to be-***

***a. Deprived of freedom arbitrarily or without just cause;***

***b. Detained without trial, except during a state of emergency, in which case the detention is subject to Article 258;***

***c. Subjected to any form of violence from either public or private sources;***

***d. Subjected to torture in any manner, whether physical or psychological;***

***e. Subjected to corporal punishment; or***

*f. Treated or punished in a cruel, inhuman or degrading manner.*

78. While the petitioner has not stated so expressly, it appears that the sub-articles of Article 29 of the Constitution that he alleges violation of are 29 (c) and (f), which guarantee protection from any form of violence “**from either public or private sources**” and the right not to be treated or punished in a cruel, inhuman or degrading manner.

79. The evidence in this petition is fairly consistent in respect to the events of the material day, the 26<sup>th</sup> of May 2012, when the petitioner alleges he was shot. All the parties are agreed that there were confrontations in the City of Nairobi involving hawkers and City Council officers who were assisted by police officers. The police had been called in to assist the City Council officers who had been overwhelmed by hawkers who, according to the respondents, had been joined by street children. It is also common ground that the petitioner had scars on his leg consistent with an injury from a sharp object. The point of disparity is whether the petitioner was shot by police officers, by a fellow hawker, or whether the injuries that were examined by a doctor from UMLU were caused by a bullet or not.

80. The petitioner’s evidence is that when he went back to retrieve his goods which he had dropped in the course of the confrontation with the City Council and police officers, he felt an excruciating pain and numbness on his left leg. He was also unable to move, and he noticed two holes through his trousers just below his left knee. He also noticed that his trousers were getting soaked with blood. From his evidence, it would appear that he did not see who shot him, and his submission is that he must have been shot by the police officers.

81. The petitioner’s further evidence is that he was taken to a clinic by his colleagues after he was allegedly shot, and that he was given first aid, but no evidence has been placed before the Court with respect to his treatment at the clinic. What is before the Court is the report from Dr. Gikandi, who states that he examined the petitioner on 20<sup>th</sup> July, 2012, a month and three weeks after the said injury was incurred.

82. I must confess to some difficulty with respect to the petitioner’s evidence in this regard. The evidence does indicate that he was involved in the confrontation between hawkers and City Council and police officers on 26<sup>th</sup> May 2012. It also indicates that on 20<sup>th</sup> July, 2012, a month and three weeks later, an examination of his leg by Dr. Gikandi showed two wounds on his leg, which Dr. Gikandi concluded were bullet wounds, one an entry and the other an exit wound.

83. When the wound was caused, by what and by whom, it is difficult to tell from the evidence. It would have greatly assisted the Court had the petitioner placed some evidence before the Court relating to his initial treatment on the day of the confrontation at the clinic where he says he was taken for treatment by his colleagues, one of whom was Mr. Mwangi Nyoro and Mr. Karigi Njoya, now deceased. It would also have assisted the Court had the petitioner presented evidence from the clinic where he was initially treated, or called the medical officer who treated him when the wound was fresh. Unfortunately, such evidence was not placed before me.

84. Section 112 of the Evidence Act provides that “***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.***” In this case, it is conceded by all that the alleged injuries may have occurred in the course of a violent confrontation between hawkers, City Council officers and police. The petitioner has averred that he did not realise that he had been shot until after he felt excruciating pain, saw the holes in his trousers, and realised that he was bleeding. He has averred that he was treated on the material day “at the Clinic”, and that over the next few days his wound continued to be treated “at the Clinic.” He has not produced any document from this Clinic, which he does not name.

85. He does, however, produce a letter dated 4<sup>th</sup> June 2012 addressed to the PCEA Kikuyu Orthopaedic Unit in which Dr. Thuo states that his examination reveals “*an obvious bullet wound (entry and exit points) on the peroneal aspect of the left leg*”. In the IMLU **Demographic Data** form (annexure “PM2”), a description of the wound under a photograph of what appears to be the petitioner’s left leg

states ***”Left leg entry and exit gunshot wounds from close range shooting”***. This photograph and the assertion that it was from close range shooting casts doubt on the petitioner’s claim that he was shot by police officers.

86. The evidence before me is that the police officers were some distance, about 20 metres as Cpl Oketch testified in cross examination by Ms. Kayugira. In his oral evidence, the petitioner states that the police officers were far away from the hawkers. It is conceded that there were arms in the hands of the police in the course of the confrontation. In his evidence, Cpl. Jibril stated that on 24<sup>th</sup> August, 2012 he took a G3 rifle, AK47, two shot guns, forty rounds of ammunition and two rubber bullets to the Ballistic Laboratory at the CID headquarters. He further testified that from the results from the CID headquarters, it could not be ascertained what kind of firearm injured the petitioner. Mr Nzioka, the 3<sup>rd</sup> respondent’s witness alleged that he saw a hawker with a firearm.

87. I have considered the evidence of the parties, including the photographs adduced in evidence by the petitioner as annexure ***“PM2”***. None of the parties called evidence to explain the angle of the shooting, but it appears strange that a shot from ‘far’, in the words of the petitioner, 20 metres in the words of Cpl Oketch, can be described as close range, and that the entry and exit wound are on the same side of the leg, the entry wound about 2 inches above the exit wound, and holes in the trousers to correspond to the entry and exit wounds. I am not satisfied that the petitioner has discharged the evidential burden upon him, and in the circumstances, and in the absence of evidence from the Clinic the petitioner alleges he was treated at on the material day, I am unable to find that he was shot by police officers.

88. The petitioner has relied on two decisions in support of his case, both of which involved shootings by police. In the case of ***Njuguna Mburu (Suing on behalf of the Estate of John Macharia Mburu (Deceased) vs The Chief Korogocho Location & Others High Court Petition No. 83 of 2011***, there was clear evidence that the deceased had been taken by two clearly identified police officers, and there were witnesses to the actual shooting of the deceased by one of the officers. Similarly, in the case of ***Lucas Omoto Wamari vs Attorney General High Court Petition No. 294 of 2012***, the petitioner was shot by a police officer whom he could clearly identify. Unfortunately, the circumstances of this case, and the evidence adduced by the petitioner do not support his contention that he was shot by police. In the circumstances, he has not established a violation of his rights under Article 29 of the Constitution, and his petition must fail.

89. In closing, however, I wish to make some observations with regard to the 3<sup>rd</sup> respondent’s defence to this petition. Essentially, its case is that the petitioner and others were engaging in hawking within the Central Business District of the City of Nairobi without a licence to do so, and engaged in violence when required to move from there. The implication being, as I understand its testimony and evidence, that having been in breach of City Council bylaws, the petitioner was somehow the author of his misfortune and cannot allege violation of his rights.

90. Unfortunately, the problem underlying this petition is not as simple as the County Government of Nairobi would like to make it. It speaks of a serious governance failure, an inability by the state to ensure that its citizens have a means of earning a livelihood, and where they seek to provide such a means for themselves, a failure to put in place policies and mechanisms to ensure that there is an orderly system for carrying out such informal businesses as hawking and street vending.

91. The County Government and indeed the state must be alive to the fact that for as long as there are no other means of earning a living, enterprising citizens will engage in hawking. This is not a phenomenon that is limited to Kenya. As was recognised by the Supreme Court of India in the case of ***Sodan Singh and Others vs New Delhi Municipal Committee and Others, 1989 AIR 1988, 1989 SCR (3)1038***:

***“Street trading is an age-old vocation adopted by human beings to earn a living. In the olden days the venue of trading and business has always been the public streets but, in the course of time fairs, markets, bazars and more recently big shopping complexes and fashionable plazas have come up. In spite of this evolution in business and trade patterns the 'street trading' is accepted as one of the legitimate modes of earning livelihood even in the most affluent countries***

*of the world.”*

92. If there is no system in place under which hawkers and street vendors can engage in their businesses in an orderly manner at designated places, they will resort to self help. The violent removal from city streets that the County and its predecessor engaged in is not the answer. Enforcement of bylaws must not turn into a violent, and deadly confrontation between hawkers and city officials. The County government has a duty to ensure that there are sufficient clearly designated places for hawkers, and that they are fully aware of such places.

93. In any event, and having come to the conclusion that there was no violation of the petitioner’s rights under Article 29 of the Constitution, this petition must fail. It is hereby dismissed, but with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 11<sup>th</sup> day of May 2016**

**MUMBI NGUGI**

**JUDGE**

**Ms. Kayugira instructed by the firm of Munyao Kayugira & Co. Advocates for the petitioner.**

**Mr. Mohamed instructed by the State Law Office for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.**

**Ms. Matunda instructed by the firm of Moronge & Co. Advocates for the 3<sup>rd</sup> respondent.**