



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CONSTITUTION PETITION NO. 12 OF 2013
(Formerly Nairobi Petition No. 503 of 2013)

WARAGA HUSSEIN JIDHAYE.....1ST PETITIONER
AHMED ABDI SHEIK.....2ND PETITIONER
A H.....3RD PETITIONER
ALI MOHAMMED.....4TH PETITIONER
HARUN HAJI.....5TH PETITIONER
IBRAHIM HUSSEIN ABDI.....6TH PETITIONER
HASSAN GALBINUR.....7TH PETITIONER

V E R S U S

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
MINISTRY OF STATE FOR DEFENCE.....2ND RESPONDENT
MINISTRY OF STATE FOR INTERIOR GOVERNMENT
& NATIONAL COORDINATION.....3RD RESPONDENT

JUDGMENT

The seven petitioners herein Wagara Hussein Jidhaye, Ahmed Abdi Sheikh, Abdirizak Hassan, Ali Mohamed, Harun Haji, Ibrahim Hussein Abdi, and Hassan Galbinur filed a petition on 17th October 2013 in Nairobi. The Respondents were named as the Hon. Attorney General, Ministry of State of Defence, and Ministry of State for Interior Government and National Coordination. The court file was later transferred to the High Court in Garissa.

In the petition the petitioners claim that on the 19th and 20th November 2012 the Kenya Defence Forces (KDF) were illegally deployed or deployed themselves to Garissa town following the killing of 3 KDF soldiers in Garissa without the approval of the National Assembly contrary to Article 241(3) of the Constitution of Kenya and that such actions constituted cruelty and a violation of Article 25 of the Constitution in that the petitioners became victims of the illegal attacks by the KDF and suffered serious

injuries including loss of limbs and amputation. They claimed that the actions of the KDF soldiers were widely covered by National and International media.

They sought several orders against the respondents, that is firstly, a declaration that the KDF were bound by the Constitution and had a duty to respect and uphold the Constitution. Secondly, a declaration that the decision to send the KDF was illegal and contrary to Article 241(3) of the Constitution so as to prevent any other future violation of this provision and protect the sanctity of the Constitution. Thirdly, a declaration that the petitioners had been treated or punished in a cruel, inhuman and degrading manner in contravention of Article 29 of the Constitution. Fourthly, a declaration that the petitioners' inherent right to dignity had been infringed contrary to Article 28 of the Constitution. Fifthly, an order be issued for general and exemporary damages to each of the petitioners for the violation by the State officers of their rights. Sixth, that an order be issued for compensation for each of the petitioners, for their specific injuries, pain, suffering and anguish visited upon them at a rate determined by the court. Seventh, that an order be issued by the court for loss of earnings for each of the petitioners as a result of injuries sustained. Eight, that the cost of and incidental to this petition be awarded to the petitioners. Nine, such other orders that this court deems fit.

The petition was initially filed with one supporting affidavit sworn by Ahmed Abdi Sheikh, the 2nd petitioners. However with the permission of the court, further supporting affidavits were filed by Harun Haji, Hassan Galbinur, Waraga Hussein Jidhaye, Ibrahim Hussein Abdi, Abdirizak Hassan, and Ali Mohamed.

Haki na Sheria Initiative a non religious and non political community based organization in Garissa, made an application to be joined in the proceedings as a third party. This application was however rejected by the court in a ruling delivered on 9th June 2014.

The Attorney General the 1st respondent appeared for the respondents. They filed a replying affidavit headed 1st and 2nd respondents replying affidavit sworn by Major Alex Kinyua Mureithi.

The petition proceeded to hearing by way of tendering oral evidence. Harun Haji Mohamed 5th petitioner, testified as PW1. He stated that he was medical doctor running a business in Garissa and that on 19th November 2012 at 12.30 Pm, KDF officers suddenly appeared in town and beat up people without asking anything. He was beaten, and as a consequence, suffered injuries whose marks were still visible.

He stated that the KDF officers met him near his house and though he was a civil servant, they assaulted him without talking to him. He was in a comma for 21 days. He identified his outpatient hospital documents from Garissa Provincial General Hospital in which it was noted that he had suffered injuries and blood loss. He later proceeded to Thika for scanning and head injuries were diagnosed with no brain damage. He was also treated at Garissa Nursing home and X-rays conducted.

He stated that he paid for the medical expenses and bought drugs, and that his blood pressure rose because of the head injuries suffered. He stated that he suffered permanent disabilities and his left hand was consequently not functional.

He obtained a P3 form from the police, and the Supreme Council of Muslims (SUPKEM) looked for a lawyer for him. It was his contention that he could no longer run his business, could not lift heavy objects and as a Kenyan citizen the incident adversely affected his life seriously in that he could not carry out any economic activities and enjoy his life. He stated that the KDF took all documents from his pockets, and relied on the documents filed through his affidavit. He was initially not cross examined as the Attorney General's representative was not present in court.

PW2 was Hassan Galbinur 7th Petitioner who stated that he operated his shop in Garissa town and had a family with two wives and was the sole bread winner. He stated that on 19th November 2012 he saw people running on the road towards his shop.

Immediately thereafter he heard gunshots, closed his shop and walked outside, whereupon about 8 people including himself were shot by the Kenya Defence Forces officers. He was shot on the left shoulder and fell down. His wife was one of the eight people shot.

After a short while, the Kenya Defence Forces officers set the market on fire and shortly thereafter, an ambulance arrived and took them to Garissa Provincial General Hospital where he was x-rayed, and referred to the theater for an operation to remove the bullet head.

He was admitted in hospital for seven days though his wife was discharged that same evening. He showed the court a photograph of the injuries. He said the medical bill was paid by the Government. He was treated for 3 months and referred for further medical treatment in Nairobi, where he was told that the poisonous substances from the bullet had damaged his veins and though he was treated he experienced increased heart beats and was told that it was due to the effect of the bullet.

He testified also that he could not sleep well on the left hand side as the heart beat becomes very high. He came back to Garissa to find that his shop had been destroyed by Kenya Defence Forces Officers, and currently survived through assistance from fellow Muslims in town, and had become poor. He reported the incident to police who issued him with a P3 form.

He asked for compensation for loss of blood, property and emotional suffering. He relied on documents filed with his affidavit. His advocate said they would provide x-rays reports which, however, they did not.

PW3 was Hassan Sheikh Mohammed who was listed in the petitioners advocates written submission but is not one of the 7 petitioners. He lived at Bulla Khalifa in Garissa. He testified that on 19th November 2012 between 12.00 pm and 1.00 Pm, he came from prayers towards home when he met Kenya Defence Forces officers. Without asking him anything they beat everybody. He saw Kenya Defence Forces officers approached from the front and from behind.

They hit him and he fell down and still hit him with rifle butts and clubs. The assault continued until about 5.00 Pm and he lost consciousness. He was later picked up by an ambulance to Garissa General Hospital where he was treated but did not get well and had to seek further medical treatment in town. He identified documents from Garissa General Hospital and another document from a private clinic in Garissa. He said that he was admitted in Garissa Provincial General Hospital for 6 days.

He suffered several injuries, in particular an injury on the left eye and, to date, he could not see properly using the left eye. He also suffered an injury on the shoulder and on the back of the shoulder. He was still undergoing physiotherapy.

His business collapsed and he was now poor. He reported the incident to the police and was issued with a P3 form. He asked the court to peruse the newspaper reports which he identified. He said that he was emotionally disturbed and every morning he had to attend physiotherapy. He asked for justice, compensation for his blood and destruction for his business. He said that he was a young Kenyan and wanted the court to consider his testimony because his life had become stressful.

At this point, counsel for the petitioners stated that he wished to rely on documents annexed to the affidavit of the witness and would avail more documents and produce video evidence. Later the same day, a video clip from KTN was viewed by the court through a laptop. One of the video clips had a recording that several people were injured and that house to house search was conducted by Kenya Defence Forces and that a number of political statements were made. The other video clip from K24 TV recorded that Kenya Defence Forces operation had turned nasty when residents turned on the Kenya Defence Forces officers, that businesses were torched and people wanted compensation. Another CD was on Citizen Television, which recorded that the Military operation turned ugly when Kenya Defence Forces vehicles were stoned and Kenya Defence Forces assaulted civilians and one woman succumbed to injuries and many were treated.

At this stage, counsel for the petitioners stated that they relied on the affidavit of Abdi Waraga (who does not appear to be a petitioner), dated 6th June 2014 as the basis of presenting the video evidence and asked for an adjournment, which was granted.

When the hearing resumed on 1st October 2015, Mr. Sekwe learned state counsel for the Attorney – General for the respondents who was present, stated that there had been a mix up in their office and thought that the case was coming for hearing on 7th July 2015. He thus asked for recalling of the 3 witnesses who had testified for cross - examination. Though the application was opposed by the petitioners advocate, the court allowed the recalling of the three witnesses for cross examination.

PW4 was Waraga Hussein the 1st petitioner a trader for over 20 years who had four dependants. It was her evidence that on 19th November 2012 the market at Garissa was razed down while she was at the market. She ran home and on the next day proceeded to the market to check on her miraa business. As she walked on the side of the road with her daughter she heard gun shots and put her young daughter on her back to proceed home. As she moved she was hit by a bullet on the right leg and fell down with her daughter who was 11 months old.

Good Samaritans assisted her but she was knocked by a speeding vehicle on the tarmac and got injured on her left leg and left jaw and lost consciousness. She only gained consciousness at Garissa Provincial General Hospital and later a woman found her daughter on the road side and brought her to hospital. She remained in hospital for 2 days and was referred to Kenyatta National Hospital where she was hospitalized for a month before a fund raising was conducted to pay for her operation.

She identified the x-ray report on her jaw which she produced as an exhibit. She also produced the x-ray report showing the fracture of her leg as exhibit 2. She said that she had not completely healed and that the metal rod in her thigh was still in place. She said that the treatment at Kenyatta National Hospital cost Kshs 755,000/- . She produced the receipts as exhibit 3 (A) and (B). She identified the admission form at Kenyatta National Hospital which indicated the injuries suffered and produced the same as exhibit 4.

She said she had now gone back to her business assisted by other people but her hospitalization had greatly affected her family as she was the breadwinner. She said that as a consequence of the incident, her landlord threw out her belongings and her children dropped out of school. She asked for compensation for medical bills, blood loss and the suffering brought upon her and her children.

In cross examination she said that in her further affidavit she stated she was hit a by Kenya Defence Forces bullet on 19th November 2012 but in court she said it was 20th November 2012, the next day. She said she was not able to identify the motor vehicle which ran over her. She stated that though she had documents confirming reporting the incident to the police, she did not carry them to court.

In re-examination, she stated that the affidavit was prepared by Garane and Company Advocates who could have made a mistake on the dates. She stated that she relied fully on the affidavits other than the error committed by the advocates. She stated also that the vehicle which hit her was KBQ 261F and that if she had not been shot and fallen down, she would not have been hit by the vehicle.

PW5 was A D H 3rd petitioner a 17 years old boy. He stated that in 2012 he was aged 14 years. That on 20th November 2012 he was in Garissa town to buy a set of stationery for KCPE exams when Kenya Defence Forces surrounded a crowd. It was his evidence that he was not part of the crowd but was near a posho mill which had been burnt by the Kenya Defence Forces. According to him, the Kenya Defence Forces shot at them with bullets and one bullet hit a wall and the metal pieces hit his eye and he fell down. Members of the public took him to Garissa General Hospital, where he was x-rayed and transferred to Kenyatta National Hospital and operated on the eye. He stated that he reported the incident to the Garissa police station and the matter was entered in the OB and a P3 form issued. He produced it as PW5 exhibit no. 1. He stated that he had been visiting Kikuyu Eye Hospital and that they had given him appointments but he was unable to attend to the medical treatment because of lack of funds.

At Kenyatta National Hospital, an operation was done as well as x-ray. He produced the hospital request

form from Kenyatta National Hospital as PW5 exhibit 2. He stated that he was not able to do KCPE that year, but later attended school after losing one year and that, with his damaged eye he could not play happily. He did not have funds for an artificial eye and as such he was permanently disabled. He relied on the affidavit he swore. He stated that the date of 19th November 2012 in that affidavit was a mistake made by his lawyer.

In cross examination, he maintained that he went to town to buy stationery, but also went to the posho mill to see how it was burning. He did not see the person who shot the bullet but maintained that it was Kenya Defence Forces because the incident occurred the day after the KDF shootout incident. He denied signing the affidavit on 19th November 2012.

In re-examination he said that it was his first time to be in court.

PW6 was Ahmed Abdi, 2nd petitioner. It was his evidence that he was conducting business of buying and selling cows for his mother. On 19th November 2012 he was at home when he heard bullets shot outside. His home was near the Garissa Municipal Council offices.

According to him, his brother came out of the house and he followed to look for him and he saw a building on fire at around 6.40 Pm when it was almost dark. A vehicle approached fast and he was shot as he stood there. He stated that he had a video of that incident and that the vehicle was a Government of Kenya Cruiser green in colour. He fell down, tried to rise but fell down again. Young people assisted him to hospital and he realized that he was bleeding seriously from his leg. At Garissa General Hospital a Military Officer was assisting patients but he left and he was given only emergency assistance and taken to Nairobi by ambulance at 10.00 Pm, initially to Nairobi West Hospital. On the first day they removed the bullet.

The next day medical officials said they had to operate the leg to connect a nerve and he remained in hospital for 8 days. He was then taken to Kenyatta National Hospital where the expert a Dr. Kahoro told him that the leg would have to be amputated upto the knee because the lower leg was completely damaged. The leg was amputated on 29th November and he remained in hospital from December to January.

He stated that the bullet affected his memory. He stated that he managed to get an artificial leg from Germany for 11, 000 dollars which could bend at the knee. He stated that he was at the time of testifying 27 years old and that the incident had negatively affected him as he now depended on his mother. He was not married as he had expected to. He asked the court to do justice to him.

In cross examination, he stated that at 6.40 Pm he was video taking photos of the burning house when the vehicle approached from Caltex Petrol Station direction. He stated that he did not identify the vehicle but it was a Government of Kenya vehicle. He stated that there were many young men around but it appeared the Kenya Defence Forces targeted him because he was shooting the video. He stated that a Government of Kenya 110 Land rover passed by before the shooting incident. He stated that in Nairobi he was initially taken to Aga Khan Hospital then Kenyatta National Hospital then Nairobi West Hospital but all this time he was unconscious. He stated that it was his mother who reported the incident to the police at Garissa. He stated that he did not have documents or a P3 in court.

In re-examination, he stated that paragraph 7 of his supporting affidavit was not true as the bullet was removed at Nairobi West Hospital.

At this point it was agreed by counsel on both sides that evidence given by Major Kennedy Kibet Kirui in ***Petition No. 11 of 2013 Idriss Ali & others Vs. AG and others*** would be used in determining this petition as well.

PW1 Harun Haji Mohammed was recalled for cross examination.

He stated that on the 19th November 2012 he came home at 12.30 pm and met 3 Kenya Defence Forces

soldiers lying down in front of his gate while others lay on the other side of the road. He knocked the gate and entered and after 25 minutes he wanted to go to the mosque when he heard a knock on the door and saw Kenya Defence Forces officers through the widow in uniform. His mother told him not to open and when she opened the door, the KDF officers carried her away and about 20 officers entered the house and beat them all over.

According to him, military vehicles were standing nearby. He stated that though the police were present they did nothing. He lost consciousness. He reported the incident to the police on 24th January 2013. He stated that if it was recorded that he reported on 24th November 2012, that was a mistake. He then changed and said that he reported the incident on 24th November 2012 and not 2013. He said that he went to the police station and thereafter was admitted in Garissa General Hospital for 2 days and then at the Islamic Hospital for 2 days and thereafter was not admitted again. He maintained that he could identify the Kenya Defence Forces officers merely by uniform not by face. He said he was unconscious for 24 hours.

In re-examination he said that he was born in 1989 and knew how soldiers dressed. He stated that he could differentiate between Administration police officers and Kenya Defence Forces officers.

PW6 Ahmed Abdi 2nd petitioner was also recalled and produced his P3 form as an exhibit. He was not cross examined on this. He was however cross examined on the signature on his affidavit which he maintained was his and that the assault occurred on 19th November 2012. He stated that he did not know what day of the week it was.

The other witnesses who had testified in the absence of defence counsel were not recalled for cross-examination. The petitioners' case or evidence was then closed.

Dw1 was Major Kenneth Kirui who testified in Petition No. 11 of 2012 as the defence witness. His evidence was adopted in the present petition by consent of counsel on both sides, as stated above in this judgment.

It was his evidence that on 19/11/2012 he was a Captain at Garissa Military Camp and that at about 12 noon, he received communication from Major Muriithi the 2nd in command at the Garissa Military Camp that military officers had been attacked. He was instructed to move to the scene and rescue the injured. He moved to the scene which was a petrol station, with a section of 9 soldiers and on arrival found that 3 soldiers had already lost their lives at the petrol station where they were on duty repairing lorry tyres.

Upon securing the scene he was informed by police officers present that the assailants had been spotted at Bulla Muzuri area in Garissa town. He then dispatched an additional 9 soldiers to accompany police officers to Bulla Muzuri as security to the police officers who were to carry out a search. The search did not yield any arrest however.

It was his testimony that the military officers returned, and that at about 3.30pm, his soldiers returned to camp on foot avoiding to board the motor vehicles due to security concerns, escorted by the police. He testified that they did so because youth in Garissa town had become rowdy, and were burning structures and tyres in town. He stated that on return to camp, the soldiers were subjected to a parade and accounted for all the arms and ammunition with them. According to him, no single bullet was used by the military officers. He agreed that there were shootings on 19th November 2012, and also shooting on 20th November 2012, when other KDF officers were leaving the camp for Wajir. He said youth did not shoot.

In cross examination, he said that the parade procedure and findings were a military matter, and the information on same could be given out. He said that he did not know why the youth targeted the military and not the police who had conducted the operation at Bulla Muzuri. He felt that the reports made by the local County Security and Intelligence Committee and Parliament unfairly implicated the military for no good reason.

It was then agreed by counsel on both sides that they would file written submissions to be highlighted on

a later date.

Each side filed written submissions. Mr. Hassan for the petitioners also made brief highlights of the written submissions. Mr. Mwangi Prosecuting Counsel, holding brief for the Attorney General relied on the written submissions filed.

In brief the submissions of counsel for the petitioners were that the Kenya Defence Forces violated the petitioners Constitutional rights under Article 21, 22 and 26 of the Constitution as well as Article 28. Counsel submitted that the said violations entitled the petitioners to an award of damages, as well as the declarations sought. Counsel added that the 3rd respondent did not enter appearance and as such under Order 10 of the Civil Procedure Rules, judgment should be entered against them.

Counsel for the respondent on the other hand, stated in the written submissions that the petitioners had not tendered evidence to support alleged video clips, newspaper cuttings and articles and as such had not proved their case on the balance of probabilities. Counsel submitted that their single witness major Kirui clearly explained what happened on that day.

Both sides relied on a number of court cases.

I have considered the pleadings filed herein, the evidence on record and the submissions of counsels on both sides. I have also considered the law and the authorities cited to me.

The first issue is whether judgment should straight away be entered against the 3rd respondent, the Ministry of State for Interior Government and National Coordination. Counsel for the petitioners relied on Order 10 of the Civil Procedure Rules to ask that judgment be entered against them, as no appearance was filed on behalf of the said Ministry.

I note that in the first response to the petition by the Attorney General through an affidavit, he stated that it was filed on behalf of the 1st and 2nd respondents. The said affidavit was signed by Major Alex K. Muriithi. However, all other documents filed by the Attorney General relate to all the three respondents. The Attorney – General also throughout the proceedings purported to act for all three respondents. The petitioners counsel did not raise any issue with that throughout the trial.

In my view order 10 of the Civil Procedure Rules, if it is applicable should have been invoked before the start of the hearing of the case. Since the counsel for the petitioners left the case to proceed to full hearing without asking for interlocutory judgment, in my view he cannot ask for entry of judgment against the 3rd respondent for default of entry of appearance in submissions, after evidence has been tendered on both sides, and the case on both sides closed. He is stopped from so doing very late in the day.

Secondly, this is a Constitutional petition, and not an ordinary civil suit. Therefore the rules that would generally apply to civil proceedings do not in my view apply herein. In my view, even if a party does not respond by entering appearance in a constitutional petition, there is no provision under the Constitution, and applicable rules, for entering an interlocutory judgment, and then later going to formal proof. Even if I am wrong on this, I rely on Article 159 (2) (d), which calls on this court to administer substantive justice.

I thus find and hold that the request by the counsel for the petitioners in written submissions to enter judgment against the 3rd respondent is misconceived. I decline the request.

The second issue is whether there was a military action or operation on the 19th and 20th November 2012 and shootings in Garissa town. The petitioners who testified in court have given their accounts in evidence that the military were in the Garissa Township after their 3 colleagues were killed by unknown assailants on that 19th November 2012. The respondents through Major Kirui Dw1, also confirmed that three KDF Officers were killed by unknown assailants on 19th of November 2012 before noon. Major Kirui said that only two groups of soldiers of 9 members each, went to the scene of the incident, and one of the groups of 9 soldiers escorted the police for an operation at Bulla Muzuri area to try and flush out

the assailants, but were unsuccessful. He maintained that the KDF officers, though they came out into Garissa town, did not participate in the operation, except to escort the police who were doing the operation of tracking down the culprits. He testified that in fact it was youth from Garissa who burnt houses and kiosks and tyres in the town.

The petitioners on the other hand said that they vividly saw the KDF officers in uniform in town and that the said KDF burnt the market and also beat up and shot them, both on 19th and 20th November 2012.

The video clip evidence was contested, after the same had been viewed by the court in the absence of counsel for the respondents. It was not produced in court as part of it came from KTN and part of it from CITIZEN TV stations, and the people who recorded the video clips were neither called to testify nor was any explanation given for their failure to do so. In effect that evidence was not produced.

I agree with counsel for the respondents that newspapers reports are not evidence – See ***Macharia wa Kamau & Others Vs. Attorney General [2015] eKLR***. However depending on how the newspaper cutting is produced and explained in court, it can be proper and admissible evidence, otherwise many defamation cases would not succeed.

I also agree that statements made in Parliament Per Se do not give rise to cause of action – See ***Washington Jakayo Midiwo Vs. AG Petition No. 538 of 2012***.

However, proof of an incident can be done in court proceedings perfectly by oral evidence of sight and hearing, without necessarily calling any documentary or audio visual evidence - See sections 62 and 63 of the Evidence Act (Cap.80).

In the present case, with the oral evidence before this court, I am of the view that indeed on the 19th of November 2012, the military from the camp in Garissa came out into the Garissa township and conducted an operation after three of their colleagues were brutally murdered at a petrol station. In addition on 20th November 2012, a shooting incident occurred when other KDF officers left camp to Wajir. Whether or not such operation was officially authorized is a matter for the military to say.

The third issue is whether each of the petitioners was affected by the operation and to what extent. Each of the petitioners was required to prove his/her claim or allegation on the balance of probabilities – See the case of ***Kirugi & Anor Vs. Kabiya & 3 others [1987] KLR 347***.

I start with Waraga Hussein Jidhaye 1st petitioner. She stated in her evidence that she was a business woman and that on 19th of November 2012 there was an incident involving the military in Garissa township. According to her, the market where she conducted her business was razed down and she fled to her home. Next day 20th November 2012, she decided to go and check her shop carrying her young daughter when she heard gun shots and she was hit on the right leg by a bullet and fell down unconscious and was taken to hospital. According to her, her daughter of 11 months was later brought to the hospital by a good Samaritan. She stated that she was run over by a vehicle when she fell after the shooting.

She said that she suffered injuries on the jaw and the leg. She was referred to Kenyatta National Hospital. She was treated and operated upon and the bullet removed from the leg. She claimed to have continued suffering pain and that the cost of operation was Kshs 755,000/-. She relied on exhibits i.e. receipts, which she did not produce.

Other than this petitioner and Abdirizack Hassan the 3rd petitioner, no one else talked of shootings on the 20th of November 2012. She said that she was assisted by good Samaritans and that she reported the incident to police and had documents for it. She however said that she did not carry any of those documents, nor did she rely on the same.

In my view, though this petitioner did not produce documentary evidence, she proved on the balance of probabilities that she was injured by the military operation soldiers on 20th November 2012. She suffered

a bullet injury though part of the injury could as well be due to the traffic accident.

I now turn to Ahmed Abdi Sheikh 2nd petitioner. His evidence was that he conducted business of selling cows for his mother. That on 19th November 2012 while at home, he heard the sound of bullets outside the house and his brother came out. The house was near the Garissa Municipal Council offices and he also came out to look for his brother and saw a business building on fire and went out to take a video. It was about 6.50 Pm and almost dark. As he stood on the road, a motor vehicle passed by very fast and he realized he had been shot and fell down. By then, he was taking a video of the fire. When he tried to stand up he could not stand and realized he had been shot on the leg. He was taken to Garissa General Hospital and given first aid and then taken to Nairobi while unconscious. He was initially taken to Nairobi West Hospital and then to Kenyatta National Hospital where plastic surgery experts told him that his leg had to be amputated as the lower part was completely damaged. His leg was amputated on 29th November and he remained in hospital through December and January.

He stated that he obtained an artificial leg from Germany for US Dollars 11,000/-. It was an advanced artificial leg which could bend. He stated also that he was 27 years old when he testified in court, and that by now he should have been married except for the unfortunate incident. He stated that he thought that he was shot with a bullet by KDF officers because he was taking video photos of the burning building. He said that there were a lot of young men round, however he must have been targeted. He did not have documents or a P3 form in court.

Having considered the evidence on record relating to this petitioner, it is my finding that on the balance of probabilities he has established that he was a victim of KDF shooting on the 19th of November 2012. There is no suggestion from the defence that anybody other than the military was armed that evening. Though the respondents say that the cartridges were not recovered to show whether the bullet came from the military in my view, the petitioner has proved to the standard required in civil cases that he was injured by a bullet from the KDF personnel, even though he did not physically identify them. He described what he was doing very well and that he was shot when a Military or Government vehicle passed in the vicinity at high speed. I find that this petitioner was a victim of shooting in that incident

I now go to Abdirizack Hassan 3rd petitioner. This petitioner was aged 14 years in 2012. According to him, on 20th November 2012 he went to Garissa town to buy a set of stationery for the KCPE examination. He reached near a posho mill and met a crowd of people. He saw Kenya Defence Forces officers emerge who shot at them with bullets and one of the metal pieces of the bullet hit a wall and split into his eye. He was taken to Garissa Hospital and x-rayed and operated upon. He made a report to the police and was given a P3 form which he produced in court as an exhibit. He said that he was given an appointment to go to Kikuyu Hospital but was unable to do so due to lack of funds. He stated that the eye operation was actually done at Kenyatta National Hospital and he produced the request form from that hospital.

He said that he was not able to sit for KCPE exams that year 2012 because of his damaged eye and that he was permanently disabled. He relied on his affidavit but stated that the date 19th of November 2012 appearing in the affidavit was a mistake by his lawyers. He stated that though he did not see the person who shot at him, he was sure that it was the Kenya Defence Forces officers.

I have considered the evidence tendered by this petitioner regarding the circumstances of the shooting incident which he described. His affidavit showed that the incident occurred on the 19th November 2012, but he maintained in court that it was a mistake. He stated that the incident actually occurred on the 20th November 2012. The date indicated in the P3 form was 20th November 2012. He was sent to the Garissa General Hospital on the same 20th November 2012.

The obligation was on the petitioner to establish on the balance of probabilities that the injury was caused by the Kenya Defence Forces officers. He stated that he was injured by a bullet piece. He stated that he was taken to the hospital by standers but none was called to court to testify.

An injury such as the one on the eye of this petitioner need not have been caused by a bullet, or bullet

particle. It could have been caused by something else. In my view this petitioner has not established on the balance of probabilities that the injury in the eye was caused by Kenya Defence Forces officers, or by a bullet particle. His claim will fail.

I now turn to Ali Mohamed 4th petitioner. No evidence was tendered to support the petition of Ali Mohamed. His petition has thus to be dismissed as he failed to prove his allegations or even tender evidence to support his claim.

I now turn to Harun Haji 5th petitioner. He stated that on 19th November 2012 at around 12.30 pm, as he was running his business in Garissa town, Kenya Defence Forces officers emerged and beat them up without asking anything. They found him near his house and though he told them he was a civil servant they did not care. They beat him all over the body and he became unconscious. He relied on an outpatient card dated 19th November 2012. He stated that after treatment at Garissa Provincial General Hospital he proceeded to Thika for a CTscan where a head injury was diagnosed with no brain damage. He was sent to private clinics and was in a comma for 21 days. One of the private clinics he went to was the Islamic African Relief Agency in Garissa. He bought drugs and other items. He suffered permanent disability. He relied on a P3 form which he did not produce as exhibit.

Having evaluated the evidence on record I am of the view that this petitioner has proved on the balance of probabilities that he was injured in the process of an operation by the Kenya Defence Forces in Garissa on the 19th of November 2012. He suffered several injuries and was treated.

I now turn to Ibrahim Hussein Abdi 6th petitioner. I find no evidence in respect of this petitioner. His case has thus not been established through evidence. His claim thus fails.

The last petitioner is Hassan Galbinur 7th petitioner. He stated that he is a businessman and his wife assisted in operating the business. That on the 19th November 2012 while at his shop he saw customers running and they said Kenya Defence Forces were patrolling the area. Outside his shop, eight people including himself were shot by Kenya Defence Forces officers. He sustained injuries. He was injured on the left shoulder and fell down. His wife was one of the 8 injured people. An ambulance later arrived and took him to Garissa General Hospital where he was admitted for 8 days but his wife was discharged the same evening. He was unconscious for 3 months and was still not feeling unwell.

He was referred to Nairobi where the expert doctors told him that the bullets had damaged his veins and was treated for five months. He developed increased heart beats and the doctor told him that it was as a result of the bullet injury. He stated that he could not sleep on the left side as the heart beat increased tremendously. He ended up becoming a poor man. He reported the incident to the police and was issued with a P3 form which he returned to the police.

He did not produced documentary exhibits but his counsel said that they would rely on the documents in the supporting affidavit and promised to bring x-rayed documents, which he did not bring to court.

Having considered all the evidence of this petitioner, in my view he established on balance of probabilities that he was injured during the Kenya Defence Forces operations in Garissa on the 19th November 2012. As such he has established a case against the respondents.

In the submissions of counsel for the petitioners there is an 8th petitioner by the name of Hassan Sheikh Mohamed. The same person also testified as Pw3. His name not having been included in the list of parties in the petition, he cannot feature as a petitioner from nowhere. He has no cause to be considered by this court.

I now turn to the prayers sought.

The prayers sought by the petitioners are various. They range from declarations to requests for award of damages and costs.

Prayer 1 is for a declaration that the Kenya Defence Forces is bound by the Constitution and under duty to respect, uphold and defend the Constitution. This prayer cannot be over emphasized. Article 2 (1) of the Constitution states as follows –

“This constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of Government”

In additions all persons and institutions in Kenya are bound and expected to respect, uphold and defend the Constitution. Article 3 (1) is clear on this position. This prayer will be granted without more.

The second prayer is for a declaration that the decision to send Kenya Defence Forces was illegal contrary to Article 241(3) so as to prevent any other future violation of these provisions and protect sanctity of the Constitution.

In considering this prayer, the court has to decide on who sent the Kenya Defence Forces officers out and for what purpose. No evidence was tendered by the petitioners as to whom and how and for what purpose the Kenya Defence Forces officers were sent out to Garissa town in contravention of Article 241(3) of the Constitution. The burden was on the petitioners to establish on the balance of probabilities that the Kenya Defence Forces were sent by so and so or such and such organization, in contravention of the Constitution. If the Kenya Defence Forces soldiers at Garissa, on their own in reaction to their colleagues being shot, entered into Garissa town, then one cannot say that they were sent by either the President, the Defence Minister, or the Minister for Internal Security.

Since the petitioners have not established by whom and how and for what reasons the Kenya Defence Forces officers were in town in Garissa those two days, this prayer cannot be granted. I decline to grant this prayer.

The third prayer is for a declaration that the petitioners were treated or punished in a cruel inhuman and degrading manner in contravention of Article 29 of the Constitution.

I note that the case relied upon by counsel for the petitioners on inhuman, cruel and degrading treatment relates to people in custody during the one party era, who were tortured and mistreated, sometimes caused to plead to charges they knew nothing about. The case of ***Herman Marine Nderi Vs. Attorney General [2012] eKRL*** was a case in point. The petitioner therein was arrested at Nakuru on suspicion of taking an oath to overthrow the Government. He was kept in custody for 28 years, only to be charged in court at 6pm after official working hours. He was tortured in custody and forced to plead guilty.

The case of ***Patrick Muriithi Mukuha Vs. Edwin Warui Munene & 5 others [2005] eKLR*** was a case where the petitioner was maliciously arrested, beaten and charged.

In the present case however what was stated in evidence related to mistreatment and injuries inflicted on the public or petitioners, who were not in custody nor were they taken into custody thereafter. In my view the nature of the claims in the present case are generally of civil wrongs and not necessarily a violation of the Constitution Provisions under Article 29. They can be pursued otherwise than by constitutional petition. This prayer is not merited, and I will not grant the same.

The fourth prayer is for a declaration that the petitioners inherent rights to dignity had been infringed contrary to Article 28. In my view again, what transpired herein according to the evidence on record, were civil wrongs committed by military officers against civilians. Remedies for such wrongs can be addressed through civil litigation without the necessity of Constitutional declarations. I will decline to grant this prayer.

The next prayer is a request for general and extemporary damages for violations by State Officers of the Constitutional Rights of the petitioners. In my view the petitioners who have proved having been assaulted and injured by the Kenya Defence Forces officers have proved their civil claim against the Government, which entitles them to damages. They are thus entitled to compensation for the injury, pain

and suffering and the anguish they have suffered. I will deal with each of them hereafter. I observe at the outset, that the case of **Garissa Maize Millers Vs. Attorney General & 2 others Civil Suit No. 12 of 2013** relied upon by counsel for the respondent was decided on the basis that the claimant did not prove the claim on the balance of probabilities. It is not applicable in the present case.

The prayer for loss of earnings was not supported by evidence. Such loss of earnings have to be proved, and they were not.

The 1st petitioner Warage Hussein Jidhaye Pw4. She was hit by a bullet on 20/11/2012 on the right leg and injured. She stated that she was treated at Kenyatta hospital at a cost of Kshs. 755,000/=. She asked for damages for loss of blood, suffering and recovery of medical costs. Special damages were not pleaded. The medical costs cannot thus be awarded. Doing the best I can, I award Kshs. 1 million damages for pain and suffering.

The second petitioner Ahmed Abdi Sheikh suffered an injured leg, which was later amputated. He brought an artificial leg for US dollars 11,000 – which was not contested by the defence. He did not produce the other documents to prove additional cost for medical services. His counsel has not proposed any figure for damages. He merely states that this petitioner is now not able to conduct the business he conducted for his mother of buying and selling cows. On general damages for loss of leg below the knee the case of **Simon Ano Mua Vs. Kiogo Mukwama (t/a Kioga Mulewano Transporters) and 2 others (2013) eKLR** is relevant. The court awarded Kshs. 2 million for pain suffering and loss of amenities. I will go by that figure. I thus award him Kshs. 2 Million as general damages for pain and suffering and loss of amenities.

The cost of the artificial leg would be special damages to be pleaded and proved. There is no indication, even on general terms for a request for an award of special damages. Since special damages have to be pleaded and proved, I cannot award any amount for the cost of the artificial leg.

I now turn to Harun Haji the 5th petitioner. He suffered injuries but a CT scan at Thika showed he did not suffer brain and damage. He was however assaulted all over the body and became unconscious for a considerable time. He said that he suffered permanent disability but did not give supporting evidence. His counsel did not ask for any specific figure of damages for him. Doing the best can in the circumstances of the case, I will award him Kshs. 400,000/= for pain suffering and loss of amenities for the injuries he suffered at the hands of military officer.

I turn to Hassan Galbinur the 7th petitioner. He stated that he was injured due to beatings from the military personnel. He became unconscious and was still feeling unwell. His heartbeat had increased tremendously, and became a poor man. He was injured by a bullet which poisoned his internal organs, as consequence of which he was not able to conduct business now.

His counsel has not asked for any specific figure for damages. The cases relied upon by counsel are not directly relevant to the kind of injuries sustained by Hassan. No doctor came to testify regarding any of the medical complaints.

Doing the best I can, I award him general damages of Kshs. 1,800,000/= for pain and suffering, and loss of amenities.

The exemplary damages and damages for loss of earnings sought are not awardable in the present case. The manner in which the court should approach the determining of loss of earning capacity, and loss of earnings, was addressed in the case of **Simon Ano Mua Vs. Kioga Mukwano & 2 othes [2013] eKLR** wherein Waweru J. applied what was stated by the Court of Appeal in **Butler Vs. Butler [1984] KLR 225**. I fully agree with the reasoning in that case.

I will award the costs of the suit to the successful petitioners against the respondents jointly and severally.

As for the petitioners who lost the case, I will not award costs to the respondents, as the case was brought

as a Constitutional petition, and is of public interest.

The orders of the court are as follows:-

1. I grant prayer 1 of the petition.
2. Waraga Hussein is awarded Kshs. 1 million as general damages for pain and suffering.
3. Ahmed Abdi Sheikh is awarded general damages of Kshs. 2 million.
4. Harun Haji is awarded general damages of Kshs. 400,000/=.
5. Hassan Galbinur is awarded general damages of Kshs. 1,800,000/=.

The general damages awarded will attract interest from the date of their judgment. The respondents will pay the costs of the successful petitioners jointly and severally.

Dated and delivered at Garissa this 6th day of September 2016

GEORGE DULU

JUDGE