



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURT

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 57 OF 2011

BETWEEN

ZEITUN JUMA HASSAN petitioning on behalf of

the Estate of ABDUL RAMADHAN

BIRINGE (deceased) PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

SUPERINTENDANT ABDI SALAT 2ND RESPONDENT

INSPECTOR WALTER KIPTALA 3RD RESPONDENT

POLICE CONSTABLE MWERA 4TH RESPONDENT

POLICE CONSTABLE OBIERO 5TH RESPONDENT

JUDGMENT

Introduction and Background

1. This court was bestirred by Zeitun Juma Hassan, whose husband Abdul Ramadhan Biringe (“the deceased”), died in police custody at Migori Police Station. The petitioner is the wife and duly appointed administrator of his estate. They were married in 1982 and lived together until his death. They had five children.
2. In her petition dated 1st April 2011, the petitioner seeks redress for the violation of her husband’s right to life, protection from torture, inhuman and degrading treatment and protection of the law protected by **sections 71, 72 and 74** of the former Constitution. The issue for consideration is whether the State and the 2nd, 3rd, 4th and 5th respondents, who are police officers, should be held responsible for the death of the deceased while he was in custody at Migori Police Station.
3. In order to support their respective cases the parties filed affidavits. The petitioner filed an affidavit in support of the petition sworn on 1st April 2011, a supplementary affidavit sworn on 6th

March 2012, and a corrective affidavit sworn on 20th December 2012. The respondents relied on the replying affidavit of Salat Abdi Ali sworn on 22nd November 2011.

4. The petitioner testified and called two witnesses, Dr Idagiza, the doctor who carried out the post-mortem and Ahmed Ramadhan Biringe, a brother of the deceased. The respondents' case was supported by the testimony Joseph Mberia, who was at the material time the Officer Commanding Migori Police Division ("OCPD"), Superintendent Abdi Salat, the 2nd respondent, Constable Walter Kiptala, the 3rd respondent, and Constable Obiero, the 5th respondent. At the conclusion of the case the parties filed written submissions.
5. On the evening of 18th August 2003, the deceased was apprehended by the police in connection with the alleged theft in transit of Kshs. 300,000. The following morning, the petitioner received a telephone call informing her that her husband had died while in custody at Migori Police Station. The petitioner avers that when she last saw her husband on 16th August 2003, he did not have any visible injuries on his body and was in perfect health.
6. The facts giving rise to the petitioner's case have been the subject of previous court proceedings. An inquest, **Migori Principal Magistrates Court Inquest Case No. 1 of 2005**, was instituted to inquire into the death of the deceased. After hearing 14 witnesses, the Inquiry Magistrate, in a ruling dated 11th July 2006, directed that the 2nd, 3rd, 4th and 5th respondents be brought to court to answer charges of manslaughter contrary to **section 202(1) and 205 of the Penal Code (Chapter 63 of the Laws of Kenya)**.
7. In order to forestall the impending charge of manslaughter, the 3rd, 4th and 5th respondents challenged the decision of the Attorney General and Director of Public Prosecutions to prosecute them on the basis on the findings of the inquest magistrate. They filed an application for judicial review; **Kisumu HC Misc. Application No. 128 of 2010, Inspector Walter Kiptala, Geoffrey Mwera and Jacob Ochieng' Obiero v Attorney General and Deputy Public Prosecutor**. Although they did not succeed in quashing the Attorney General's decision to prefer charges against them, the learned judge held that the inquest magistrate contravened the Constitution by purporting to direct the Attorney General to prefer charges against the respondents on the basis of his conclusions.
8. The High Court decision did not derail the Attorney General's decision to charge the 3rd, 4th and 5th respondents. They were charged with manslaughter in **Kisumu Chief Magistrates Court Criminal Case No. 398 of 2010, Republic v Walter Kiptala, Jacob Ochieng Obiero and Geoffrey Mwera Muganda**. After the trial, the accused were acquitted under **section 210 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** on the basis that the prosecution had not presented a case for them to answer.
9. It is not in dispute that the deceased died in police custody. The petitioner's case, based on the inquest and manslaughter trial proceedings, is that the rights and fundamental freedoms of the deceased protected by repealed Constitution were violated by the respondents. The petitioner states that the 2nd, 3rd, 4th and 5th respondents were acting under the authority of the State and that the State represented by the 1st respondent is vicariously liable for the wrongful death and torture inflicted on the deceased.

Witness Testimony

10. The testimony presented during the hearing focused on the deceased's circumstances in custody and his consequent death. Dr Aggrey Idagiza Akidiva, a qualified medical doctor, practising in Migori, testified that he was present when the post-mortem examination was carried out on 19th August 2003 at Migori Terminus Hospital. The deceased's body was identified by his relatives, Ahmed and Shafi Ramadhan. Police Inspector Oballa and Dr Obong'o, the Medical Officer of

Health were present. The deceased's relatives paid for Dr Idagiza's services.

11. Dr Idagiza stated that the post mortem commenced at 2.30 pm and was finalised at 3.30 pm. The estimated time of death was above 12 hours to the post mortem. The body was still fresh and rigor mortis was setting in. Dr Idagiza testified that the form was filled by Dr Obongo. The findings recorded in the Post Mortem Form (Ref: No. 19/03) were as follows;

External appearance was described as follows;

- *Externally – lower limbs – multiple bruises both hands*
- *Upper arm limbs – bruises on each side hands*
- *Thorax – Bruises, Posteriorly both sides with visible whip marks*
- *General lymphneodopathy more to the cranial region*

Head

- *Haematoma of moderate size under skull of the vertex region.*

As a result of my examination, I formed the opinion that the cause of death was “Cardiorespiratory arrest due to trauma or pre-existing dilapidated health.”

12. Dr Idagiza testified that it is uncommon for two doctors to perform a post mortem but Dr Obongo prepared a report and filled the post mortem form in which he concluded that the death was due to trauma or a pre-existing condition. Dr Idagiza prepared his own report which noted the same injuries and concluded that, *“the inflicted of pain and the resulting shock led to the cardiopulmonary arrest.”* He noted that there was no difference in the observations made by both Doctors but there was a slight difference in their conclusions. Under cross-examination, Dr Idagiza, answered that the injury at the back of the head could not have led to death.

13. The testimony presented on behalf of the respondents revolved around the circumstances under which the deceased was held in custody. It is not in dispute that the deceased was apprehended for the alleged theft of Kshs. 300,000 cash in transit and booked at Migori Police Station.

14. Joseph Mberia testified that at the material time he was the Officer Commanding Migori Police Division (“OCPD”) and on 18th August 2003 he spent the day in Kisumu with SP Salat, the Division Investigating Officer (“DCIO”). As they were on the way to back to Migori, Salat informed him about a theft case he had given his deputy to investigate. On arrival at Migori, he later received a report from the Officer Commanding Migori Police Station (“the OCS”), Samuel Musopo, that a suspect had died in custody. He called SP Salat and they proceeded to the Police Station and where they went directly to the cell. He testified that he found the deceased lying, fully clothed, on his back. He also looked the face and checked the trouser. He did not see any visible injuries. He contacted scene of crime personnel at Homabay but they had gone to another crime scene at Mbita. After waiting for two hours, he instructed the OCS to take charge and remove the body as it was rapidly deteriorating. He stated that the investigation was taken over by a team from the provincial headquarters.

15. SP Salat Abdi Ali, the 2nd respondent, confirmed that on 18th August 2003, he was the DCIO Migori and while at Kisumu he received the theft of Kshs. 300,000.00 by a driver. As he was away, he directed his deputy to look into the matter. He arrived in Migori at 10 pm and went to his house. After about 30 minutes, PC Mwera came to inform him that they were looking for the turn boy who had disappeared and the suspect was in the cells. He testified that he proceeded to the office to see the suspect. PC Mwera brought the suspect whom he interviewed him briefly. He asked PC Mwera to call PC Kiptala for the keys to the general CID office while he remained with the suspect in his office. He testified that it was his duty as the senior officer to interview the suspects to establish if they had any complaints against the other officers while in police custody. He stated that the suspect had no complaint. He explained that the suspect informed him that it

was the turnboy who had stolen the money which he had kept in the dashboard. SP Salat described the suspect as looking sickly, frail and emaciated. After interviewing the suspect for about 20 to 30 minutes he called the officers to take the suspect and record the statement and thereafter place him in cells. He thereafter left for his house.

16. The following day at about 8.30 am when he reported to the office, Mberia informed him that the suspect arrested the previous day had died in the cells. He accompanied, Mberia and the OCS to the cells to see the deceased. He found the deceased lying on his back with clothes on and legs bent at the knees. He observed that the deceased had no visible injuries on the body. He did not notice any stains of blood, vomit or any found in the surrounding. SP Salat further testified that he ensured that other suspects were removed and placed in the Women cells and the body left for the scene of crime personnel to come from Homa Bay. As the scene of crimes officers did not arrive, he discussed the matter with Mberia and they agreed upon request by the family to remove the body to Terminus Private Hospital. He said that the family requested that the body be sent to a private facility so as to prepare for a quick Islamic burial. He states that the last time he saw the body was when it was loaded to be taken to the mortuary.
17. PC Walter Kiptala Chebore, the 3rd respondent, recalled that on 18th August 2003 he was stationed at Migori Police Station. At about 11 pm, PC Geoffrey Mwera, came to his house and informed him that the DCIO wanted them to record a statement. Since he did not have the keys to the General Office, he went to collect the keys from a colleague, PC Jacob Ochieng'. They proceeded to the DCIO's office where they met SP Salat and the suspect. SP Salat briefly explained the case and left them to take the statement from the suspect. He stated that the suspect appeared shaken like any other suspect. He described the suspect as thin with sunken eyes. The policemen escorted him to the general CID office and after taking his statement for about 15 to 25 minutes they escorted him to the cells. PC Kiptala testified that the suspect told them that prior to the incident he had a running stomach and that is why he had stopped the vehicle to relieve himself whereupon the conductor disappeared with the cash which was in the glove compartment. When he was cross-examined he stated the suspect was cautioned and that PC Ochieng' recorded and signed the suspect's statement. He also confirmed that he suspect signed his statement. After the interrogation, PC Kiptala testified that he went to sleep but was woken up at about 3 am to attend to an incident in Rongo. He was informed of the death of the suspect when he came back later in the afternoon.
18. PC Jacob Obiero, the 5th respondent, who was attached to the CID Office Migori testified that on 18th August 2003 at about 11 pm he was awakened by PC Kiptala to join them to interrogate a suspect. He stated that the interview took about 25 to 30 minutes. He observed that the suspect was weak and tired but he did not complain that he was feeling sick. In cross-examination he stated that the suspect did not complain of any injury or have any visible injury. After the interview, the suspect was taken back to the cells. PC Obiero further testified that he received the news of the suspect's death while he was in Rongo. PC Obiero confirmed that he was the one recording the information during the interrogation but he did not take the suspects statement.

Right to Life and Freedom from Torture

19. On the basis of the testimony, the petitioner submitted that the deceased was deprived of his life by the State. The petitioner asserts that the State has the responsibility to protect life and the responsibility is elevated when a suspect is arrested and placed in police custody. At the time of the deceased's arrest and death the former Constitution was applicable. **Section 71** provides as follows;

71. (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to

the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case-

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence,

or if he dies as result of a lawful act of war.

20. What is the nature and extent of the right to life protected under the Constitution? The right to life is one of the central rights recognised in international human rights instruments. **Article 4** of the **African Charter** provides that, “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of the person. No one may be arbitrarily deprived of this right.*” This provision echoes **Article 3** of the **Universal Declaration of Human Rights** and **Article 6(1)** of the **International Covenant on Civil and Political Rights** which states that, “*Every human being has the right to life, [which] shall be protected by law, and [that] no one shall be arbitrarily deprived of his life.*”
21. International treaty and case law from international human rights bodies and tribunals has provided an exposition of the content of the right to life. International courts and tribunals have generally recognised the foundational nature of the right to life and have interpreted it broadly. The Human Rights Committee in **General Comment No 6: The Right to Life**, notes that the right to life, ‘*is a right which should not be interpreted narrowly*’ and ‘*cannot properly be understood in a restrictive manner.*’ The Africa Commission in **Forum of Conscience v Sierra Leone Communication 223/98** held that, “*The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.*”
22. The right to life is absolute and can only be deprived through due process of law. In **Nalibati Behera alias Lalit Behera v State of Orissa [1993] AIR 1960 , 1993 SCR (2) 581**, Dr Anand J., of the Supreme Court of India, expressed the obligation of the State to protect the right to life particularly for those in police custody as follows; “*It is axiomatic that convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State, to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.*”
23. Apart from ensuring that the every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws (See **Osman v United Kingdom [2000] 29 EHRR 245**). There is also a procedural obligation to conduct an effective official investigation into any death resulting from the use of force and any death resulting from the State’s failure to protect the right

to life. The purpose of such investigations is to ensure that domestic laws protecting the right to life are applied, and also to hold state officials accountable, to bring all the facts to public notice, to rectify any dangerous practices and to give relatives of the deceased and the public the reassurance that any lessons learned from the death might save the lives of others.

24. As the suspect died in police custody, it is the burden of the State to demonstrate that the death was not a result of its action or was merely fortuitous. The authorities must provide a satisfactory and convincing explanation for the events leading to a prisoner's death. In **Salman v Turkey [2002] 34 EHRR 17** the European Court of Human Rights described the obligation as follows, "*Persons in custody are in a vulnerable position and the authorities are under duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused...the obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Where the events in issue are wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*" The same point was emphasised in **Jordan and others v United Kingdom (2003) 37 EHRR 2** where it was held that, "*Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*"
25. I agree with the general principles that I have attempted to distil above as they are based on the fact that the right to life is a foundational right, is sacrosanct and admits no exceptions other than those provided in the Constitution. In circumstances where a person dies in police custody the burden is on the State to provide a satisfactory and convincing explanation that it is not liable. Such a requirement is consistent with the core duty of the State to protect the lives of people especially those who are in positions of vulnerability.
26. The petitioner also alleges that the deceased was tortured or subjected to cruel and inhuman treatment. **Section 74(1)** of the former Constitution provides that, "*No person shall be subject to torture or to inhuman or degrading punishment or other treatment.*" The **United Nations Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment** defines torture as; "*any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*" This definition of torture has been adopted by our courts in **Republic v Minister For Home Affairs and Others ex parte Sitamze [2008] 2 EA 323** and **Frankline Kithinji Muriithi v Loyford Riungu Muriithi and Others Nyeri CA Civil Appeal No. 43 of 2013 [2014] eKLR)**
27. International human rights standards provide that there is a negative obligation to refrain from subjecting people to torture or to inhuman or degrading treatment or punishment. There is a positive obligation on public authorities to intervene to stop torture, inhuman or degrading treatment or punishment as soon as they become aware of it. There is also an obligation not to expose a person to torture or inhuman or degrading treatment or punishment and a positive obligation on States to investigate any allegations of torture or of inhuman or degrading treatment or punishment.
28. The proceedings before the court are for the enforcement of rights and fundamental freedoms

under **section 84** of the former Constitution. I am therefore called upon to scrutinise the testimony witnesses who were present at Migori Police Station, the evidence of recorded at the inquest proceedings and trial for manslaughter and the depositions filed herein and come to an independent conclusion as to whether the State is liable as contended by the petitioner. I therefore agree with the submission by Ms Kilonzo, counsel for the petitioner, that this case is not an appeal from the inquest ruling or the decision acquitting the respondents at the criminal trial.

29. **Sections 44** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* provides that a judgment is only conclusive of the matters that are determined therein while **section 47A** of the *Evidence Act* provides that a judgment that declares a person guilty of an offence is only conclusive of the guilt in respect of the offence. It is a well-established principle that an acquittal in criminal case does not extinguish civil liability (See *Chemwolo and Another v Kubende [1986] KLR 492, Abdi Ali Dere v Firoz Hussein Tinidal CA Civil Appeal No. 310 of 2005 (Unreported)*). An acquittal is not proof of innocence nor does it operate as a discharge from liability in civil proceedings. All the court proceedings preceding this suit were instituted to achieve a specific purpose. The inquest was for the purpose of inquiring in to the circumstances of the death of the deceased under **Part XII (sections 385 to 388)** of the *Criminal Procedure Code*. The criminal trial was conducted to establish the accused's culpability for the offence for which they were charged while the judicial review proceedings were concerned with the legality of the decision of the Attorney General. None of the proceedings determined the liability of the State or respondents for violation of rights and fundamental freedoms under the Constitution. What is important in this case is for the Court to evaluate the evidence and draw the necessary inferences and conclusions in order to make its determination.

Determination

30. In light of the brief principles I have outlined above, did the State violate the deceased's rights? The obligation on the State to provide a satisfactory explanation of the death of the deceased in custody is further buttressed by **section 112** of the *Evidence Act* states that, "*In any civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.*" The burden of proof that the deceased's death was lawful and not the result of unlawful action lies squarely on the State.

31. Ms Kilonzo advanced the position that the deceased was tortured or subjected to harsh treatment which resulted in death. The respondents, on the other hand, propounded the case that the deceased was sick and that he died of a pre-existing condition. Mr Wamotsa, counsel for the respondents, submitted that deceased did not have any injuries and the only people who saw the injuries are the relatives of the deceased who were determined to blame the respondents for his death.

32. I will first deal with the evidence of the people who saw the deceased at the time when he was in custody. SP Salat, PC Kiptala and PC Obiero all testified that when they interrogated the deceased he was emaciated, weak and had sunken eyes which tended to suggest that he was ill but he did not have any visible injuries. SP Salat confirmed that the deceased did not make any complaint about his condition. PC Kiptala and Obiero denied that the interrogation was physical or harsh as insinuated by the petitioner. SP Salat did not see the deceased after he released him for interrogation to his officers.

33. Although the police officers on sentry duty at the Police Station were not called to testify, their evidence was critical to determine the condition of the deceased. PC Timothy Tali, one of the officers on sentry duty, testified at the inquest as follows, "*[A]t 10.45 pm Abdul Ramadhan removed by S. P. Salat and P. C. Mwera ... He was returned at ... 12.02am by PC Mwera, PC Kiptala and PC Ochieng Obiero all of DCIO's office Migori. I was on duty, the prisoner was weak and unstable, he was staggering. I made an entry in the cell register I indicated the date or OB No. physical condition (appears not stable/weak). Removal column shows that he was taken out while fit and it is signed. I also signed my column. He was escorted to the cells, we*

visited the cells at 6.17 hrs with PC Muendo, we found the same prisoner dead, there 39 prisoners sharing the room with other prisoners” When cross-examined, he stated, “He was booked at 9.52 pm by PC Namiti of DCIO’s office. He reminisced that he appears normal, the removal was just for about 2 hours. The removal was by order of DCIO-Migori S.P Salat. The DCIO and Police constable Kiptala, OChieng’ Obiero and Mwera took the prisoner away. I noticed that he was weak, unstable when he returned and I made the remarks in the cells register. He was fit when he was removed. Police Constable Gekone recorded and signed that. I visited them in the cells at 10.45 and after 6 am. The condition prompted to ask what happened to the prisoner but we never thought it was that serious, otherwise we could not have allowed them to book in the prisoner.” [Emphasis mine]

34. PC Muendo, who was on duty with PC Tali, on the material day testified at the inquest as follows, “The removal [of the prisoner] was indicated in the cell register. He was removed at 22.45 hours, the time of removal, the physical status was indicated. He was fit during removal, it was countersigned. The prisoner was returned 2 minutes past mid-night. I was on duty when he was returned by PC Kiptala and PC Mwera, but they wrote it is DCIO SP Salat who returned the prisoner We made our remarks in the register, the prisoner appeared weak supporting himself on the wall. We returned him to the cell ...” [Emphasis mine]
35. During the trial, PC Tali confirmed that when he reported on duty the all the prisoners were in good condition. He noted that when the deceased was returned at mid-night he had no injuries, he was quiet, he sat down, struggled and collapsed. He recorded in the OB that the prisoner was not stable and was weak.
36. The evidence of the two sentry officers is clear that the deceased left the police cell when he was fit but returned after two hours when he was weak. The interrogating officers’ testimony is at variance with that recorded in the cell register. The respondents had the opportunity to produce the cell register which would have shed more light on the deceased’s condition but they did not. The inference to be drawn is that something must have happened to the deceased while he was being interrogated such as to affect his health condition.
37. My view is fortified by the fact that three officers interrogated the suspect yet there is no written record of what was said by the suspect. The evidence shows that the reason why PC Kiptala, Obiero and Mwera were called late in the night by SP Salat was to interrogate and take a statement from the deceased. PC Kiptala testified that a statement was indeed taken from the deceased. PC Obiero testified that he recorded the information on a piece of paper but a statement was not taken from the deceased. This is a wholly unsatisfactory state of affairs for a suspect to be questioned late at night by four police officers without a caution being administered and without a written record of the interrogation. If the officers did not intend to record a statement why did they interrogate him in the middle of the night? Did they want to extract a confession from him?
38. The other evidence of the deceased state of health and body condition is to be found in the evidence of the post-mortem. IP Mberia and SP Salat, who observed the body of the deceased while it was still in the cell, confirm that apart from the deceased looking weak and emaciated, there were no visible injuries on the deceased. The respondents relied on statements recorded during the investigation which are part of the annexures to the deposition of SP Salat. In his statement, Samuel Musopo, the OCS Migori Police Station recorded that he visited the cell at about 8.30 am and he examined the body in detail and found no blood stains on the ground or on his clothing. He ensured that the body was taken to Terminus Hospital. At Terminus Hospital the body was received by James Okoth Kasuku who also recorded a statement to the effect that on 19th August 2003 at about 9.30 am police officers brought the body of male person. He described the body as, “*fresh, without any blood oozing from any opening or closed by. It was brought while wrapped in black polythene paper. It was only the right knee which has some bruises. No other part has any bruises.*” Although the two persons recorded statements neither of them were called to testify at the inquest although their evidence was critical in establishing the condition of the body and the cause of death.

39. Mr Wamotsa, counsel for the respondents, urged the court to accept the statements of Samuel Musopo and James Okoth Kasuku as opposed to the testimony of Dr Idagiza and the post-mortem report. He submitted that the evidence of the cause of death from the post-mortem reports cannot be relied upon for several reasons. That the cause of death recorded was at best ambiguous, that is, the deceased died of trauma or a pre-existing condition. Counsel attacked the detailed typewritten report of Dr Idagiza setting out the injuries as an afterthought and inherently unreliable as the report does not set out specific details of the bruises and the injuries, their relative position and dimensions. He also questioned the qualifications of the doctors and whether they were qualified to make the findings as they were not qualified pathologists. Counsel emphasised what SP Salat stated in his deposition that that, “[13] *the post mortem was conducted at the request of the family of the deceased and undertaken by the said family’s doctor, Dr Igadiza A. Akidiva, and with respect it is highly impossible that there was independence in preparation of the post mortem report.*”
40. I am unable to accept the respondents’ submissions. The post-mortem was carried out in the presence of two government functionaries; Inspector Oballa and Dr Obong’o, the Medical Officer of Health for Migori. If there were any grounds to object to the manner in which the post-mortem was being carried out, either of the two officers would have objected. Furthermore, if any observation recorded was not consistent with the facts either of them would have objected. I do not find any fault with the credentials of Dr Idagiza as a medical practitioner. Whereas he is not an expert pathologist, he is the medical practitioner whose findings were relied upon to launch the inquest. The State had no problem calling him as witness during the inquest where he testified on its behalf. It also had no objection to submitting the post-mortem form as part of its evidence at the manslaughter trial. Dr Idagiza testified in these proceedings and was cross-examined by counsel for the respondents. I find his evidence credible. His report confirmed the injuries he observed during the post-mortem. On the other hand, Dr Obong’o and IP Oballa did not record any statements or testify at the inquest or trial. Samuel Musopo and James Okoth Kasuku were not called at the inquest or at the trial. Thus their statements were not tested by cross-examination. When I consider the probative value of the statements alongside the other evidence and the testimony of Dr Idagiza, I accept that the deceased suffered the soft tissue injuries which resulted in the trauma that caused his death. I also hold that it is not inconsistent for the deceased to have a pre-existing condition and die as a result of trauma caused by infliction of pain which is evidenced by the soft tissue injuries.
41. Even if I accept that the deceased has a pre-existing condition which resulted in his death, I cannot accept that the multiple bruises and the whip marks were a pre-existing condition. The respondents have not accounted for the injuries that were observed by Dr Idagiza and recorded contemporaneously in the post-mortem form. At the end of the day, any deficiency in the manner in which the death was investigated, the post-mortem done and the findings recorded cannot be placed at the feet of the petitioner. In line with the principle enunciated in ***Salman v Turkey (Supra)***, the responsibility to conduct a proper investigation including ensuring that a post-mortem is done by a qualified pathologist belongs to the State.
42. The respondents advanced the theory that the deceased could have accidentally fallen and died as a result of the head injury. Dr Idagiza was clear that the injury at the back of the head could not have caused death. A fall cannot explain the other soft tissue injuries sustained by the deceased on his body. Furthermore, if, as I accept, that the deceased left the cell for interrogation when he was fit and returned in a state of weakness, the fall could only be attributed to the treatment he suffered during interrogation. The State did not offer any evidence, medical or otherwise, to explain the cause of the soft tissue injuries sustained by the deceased. The State did not establish that in fact the pre-existing condition is what resulted in the bruises and other soft tissue injuries.
43. In order to support her case, the petitioner produced photographs of the deceased taken at the Terminus Hospital Mortuary. These were annexed to the petitioner’s supporting affidavit as exhibit C. Without the photographer being called to testify and describe the condition of the body, I find the photographs unhelpful in assisting the court make a determination one way or another.

44. As I outlined earlier in the judgment, the burden of proof is on the State to provide clear and convincing explanation of the death that would discharge its liability. The State cannot discharge this obligation by attacking the doctors who conducted post-mortem when it did not itself conduct an independent post-mortem. The State has a positive obligation to conduct an independent investigation by ensuring a qualified practitioner is available to carry out the post-mortem.

45. The inquiry Magistrate, in his ruling, noted as follows, “*Evidence shows that physical condition of the deceased deteriorated when he was removed for interrogation and that went on for over one hour. The Doctor who conducted post mortem found fresh injuries, multiple bruises in lower and upper limbs. He also noted whip marks that is an indication that the interrogation was not verbal but physical. The deceased was not involved in an accident prior to his arrest. Why would the deceased suffer from multiple bruises in the hands and legs? The deceased had not complained of having been assaulted by any person prior to his arrest, when then would he suffer from haematoma of the skull and whip marks, was he tortured during interrogation? Those who participated in the removal of the deceased from the cells and subsequent interrogation are known. They returned him to the cells at around mid-night and the deceased died soon thereafter. He was found dead when the cell was opened at 6.00 am. I am of the view that the interrogation was cruel and strenuous and that led to the death of the deceased*”

46. At the trial of the 3rd, 4th and 5th respondents, learned magistrate observed that, “*From the evidence that I have given out in this ruling I see no reason at all to put the accused persons to their defence. I make the above finding because of the following reasons:*

- i. *Of all the witnesses who testified before this court none gave evidence directly implicating the accused persons;*
- ii. *There were more than 30 suspects who were in the Migori police cells with the deceased. None was called to assist the court to determine the condition of the deceased when he left and entered the cells. No reasons were given as to why these crucial witnesses were never called.*
- iii. *The post mortem report indicates that the deceased died due to an existing dilapidated health. The doctor was never called to explain what could have been the cause of the trauma. Further no evidence suggested that the accused persons herein could have been directly involved in causing the trauma. It is also important that the first witnesses to see the body of the deceased did not mention seeing any injuries in fact, the first time we see the injuries being mentioned is after the post mortem report and the photographs. It now leaves the court with no evidence as to when the injuries on the body of the deceased were inflicted.*

The evidence on record is contradicting and putting the accused persons to their defence is like calling them to fill the gaps that have been left open by the prosecution witnesses.”

47. When a person dies in custody, it is only the State that has the all the information necessary to expose the cause of death. What is clear from the evidence available is that there are lingering questions about the manner in which the deceased met his death. Mr Wamotsa submitted that from the evidence presented before the court the cause of death of the deceased is unknown. Can the State evade its responsibility to protect life under **section 71** and **74** of the former Constitution by alleging that the cause of death is unknown? Part of the duty of the state to protect the right to life is to, “*leave no stones unturned.*” The both the inquest and trial magistrate, as I have quoted from their findings, point to large boulders along the way of establishing the cause of the deceased’s death. On my part and for the reasons I have outlined, I find and hold that it is more likely that the deceased was subjected to cruel, inhuman and degrading treatment during the interrogation which resulted in his death.

48. In the case of **Veronica Wambui Karanja v Attorney General Nairobi HCCC No. 582 of 1988 [2008]eKLR**, the court found the State liable for torture, cruel and inhuman treatment based on circumstantial evidence that showed that the deceased in the case was well and healthy being but was retained in a wheel chair after 20 days and after being in no other company except the law enforcement personnel of the Kenya Police. In this case the deceased was only in the company of

the police. While he may have been weak or emaciated, the evidence of Dr Idagiza, the post-mortem report show injuries which are consistent with torture, cruel and inhuman treatment.

49. Having considered the evidence in its entirety, I find and hold that the State has not discharged its burden of explaining to death of the deceased and in the absence of a sufficient explanation; the respondents are liable for death of Abdul Ramadhan Biringi.

Relief

50. As a result of the violations, the petitioner seeks declarations that the deceased's rights and fundamental freedoms were violated, general damages for pain and suffering, loss of earning, loss of life and loss of dependency. The petitioner also seeks exemplary and punitive damages, costs and interest.

51. The violation of a right and fundamental freedom under the Bill of Rights must find a remedy. **Section 84** of the former Constitution empowers the High Court to, "*make any orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).*" In ***Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385***, the Privy Council held, inter alia, that section 6 of the Constitution of Trinidad and Tobago was intended to create a new remedy for the contravention of constitutional rights without reference to existing remedies and that the word 'redress' in its context bore its ordinary meaning of reparation or compensation, including monetary compensation. The relevant provision of the Constitution of Trinidad and Tobago is similar to **section 84** of the former Constitution. The Court emphasized that the notion of constitutional damages lies within the realm of public law and goes beyond what is available in the common or private law sphere.

52. Although former Constitution does not use the word "redress", the power of the Court to grant a remedy unmoored from the shackles of common law or statute is undoubted (see ***Dominic Arony Amolo v Attorney General Nairobi HC Misc. 494 of 2003 [2003]eKLR***). Shields J., in ***Marete v Attorney General [1987] KLR 690*** appreciated the jurisdiction of the Court to provide relief for the violation of constitutional rights in the following words, "*The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84. Both section 74 and section 84 are similar to the provisions of other Commonwealth Constitutions. It might be thought that the newly independent states who in their constitution enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.*"

53. The petitioner's plea to the court is to award damages that would compensate the deceased's estate and dependants as a result of the respondents' unconstitutional actions. It is beyond doubt that compensatory damages are one of the reliefs the Court is empowered to grant under **section 84** of the former Constitution (See ***Wachira Weheire v Attorney General Nairobi HC Misc. Appl. No. 1184 of 2003 [2010]eKLR*** and ***Harun Thungu Wakaba v Attorney General Nairobi HC Misc. Appl. No. 1411 of 2004 [2010]eKLR***).

54. The petitioner's case is that the death of the deceased has robbed her and her family of their breadwinner. At the material time the deceased was a lorry driver who supported his family wholly. While the principles applicable to the ordinary civil law may be relevant in guiding the court in awarding damages, under **section 84** of the former Constitution, the Court has wide discretion in awarding relief subject to the overall duty of the court to ensure that the deceased's rights are vindicated. It is therefore not necessary to prove actual loss of dependency under the ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)*** or actual loss to the estate under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** although the principles therein may provide some guidance as to the amount of damages.

55. This is a case where the deceased was subjected to torture, cruel and inhuman treatment and as a

result thereof died. An award based on civil law principles may not reflect the gravity of the violation. I consider that a global award would be most appropriate in the circumstances. While the sum awarded may never fill the gap the deceased left, it can only serve to vindicate the right and send a clear message that impunity will not be tolerated. I consider an award of **Kshs 3,000,000.00** as general damages appropriate in the circumstances.

Disposition

56. Following the findings I have made above, I allow the petition on the following terms;

- a. **I declare that the rights and fundamental freedoms of Abdul Ramadhan Biringe (deceased) under section 71(1) and 74 of the former Constitution were violated by the respondents as a result of being subjected to torture, cruel and inhuman treatment and consequent death in police custody on 18th and 19th August 2003.**
- b. **The 1st respondent shall pay the petitioner Kshs. 3,000,000.00 as general damages.**
- c. **The 1st respondent shall pay the costs of the petition.**
- d. **Interest shall accrue on (b) above at court rates from the date of this judgment.**

57. I thank counsel who appeared in this matter for their industry and well-articulated submissions.

DATED and DELIVERED at NAIROBI this 12th May 2014.

D.S. MAJANJA

JUDGE

Ms Kilonzo instructed by Kilonzo and Company Advocates for the petitioner

Mr Wamotsa, Mr Kuria and Ms Wandia instructed by the State Law Officer for the respondents.