



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.127 OF 2012**

**BETWEEN**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST PETITIONER**

**RELEASE POLITICAL PRISONERS TRUST.....2ND PETITIONER**

*(suing through its Executive Co-Ordinator)*

**AND**

**THE HON. ATTORNEY GENERAL.....1ST RESPONDENT**

**THE COMMISSIONER OF POLICE.....2ND RESPONDENT**

**MUSILI DEWROCK KITHOME.....3RD RESPONDENT**

**SIMON KIKWAI.....4TH RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners herein, the Kenya National Commission on Human Rights (KNCHR) and the Release Political Prisoners Trust (RPPT), by their Petition dated 4th April 2012, have sued the Respondents seeking certain orders under **Articles 2(1), 5(6), 10, 20, 21(1) and (4), 23(1)(3)(a)(e), 25(a), 26(1), 28, 29(i) and (f), 49, 53, 238 and 244** of the **Constitution, 2010**.

2. The Petition arises from the events of the night of 23rd November 2011 when one, Ibrahim Ongego (deceased) and his 14 year old son, Joseph Ondego were killed at Kawangware area of Nairobi allegedly after being shot by the 3rd and 4th Respondents, Musili Dewrock Kithome and Simon Kikwai, police officers then attached to Muthangari Police Station in Nairobi.

3. The 1st Petitioner, KNCHR is an Independent Commission established under **Section 3** of the **Kenya National Commission on Human Rights Act, 2011** pursuant to **Article 59(4)** of the **Constitution** and has a mandate that includes promotion of human rights and development of a culture of human rights in Kenya. The 2nd Petitioner better known by its acronym, RPPT, is said to be a non-partisan, non-profit

making registered Trust registered under the **Trustees Perpetual Succession Act, Cap.164 Laws of Kenya.**

### **Petitioners' Case**

4. In the Petition aforesaid and in the oral evidence of PW1, Joyce Nyanchama Mokaya, PW2, Ambrose Nyabaro Mutoke, PW3, Isaac Omolo Okech, PW4 Dr. Oduor Johanssen and in Submissions by Ms. Kabaya who appeared for the Petitioners, the facts as set out by the Petitioners are as follows;

5. On 23rd November 2011 at around 3.00 a.m., PW3 woke up and gave Kshs.350/- to his brother, Joseph Ondego, to go and buy vegetables at a market in Nairobi. His father, Ibrahim Ondego, walked ahead of Joseph and after a few minutes, according to PW3, he heard a gunshot and he rushed to the gate. While there he heard his brother, Joseph, shouting and saying;

*“That is my father who was going to the market”*

6. After a few minutes, he heard another gunshot and then there was silence. He decided not to go out of the homestead but called his neighbour, one Reagan and also tried to call his father on his cellphone which was answered but on the second attempt, it was switched off.

7. Together with Reagan and in great panic, they proceeded to the scene of shooting where he found that both his father and brother had died and police officers were guarding their bodies. Later, the bodies were photographed and taken away.

8. In Cross-examination, PW3 stated that he recorded a statement with the police on the day of the shooting and that he did not know the names of the police officers who shot the deceased persons.

9. PW2, on his part stated that at the material time, he heard gunshots, went to the scene and found the 3rd and 2nd Respondents there. The two later left and came back with the Deputy OCS, Muthangari Police Station and then the bodies of the deceased persons were take away.

10. PW4 conducted postmortem examinations on the deceased persons and concluded that Ibrahim Ombasa Ondego, a 46 year old man had 6 gunshot wounds and that the multiple injuries that they caused at close range, caused his death. Joseph Nyaberi Ombasa, he concluded died of multiple injuries as a result of a single gunshot at close range.

11. PW1 was Ibrahim Ondego's wife who was upcountry at the time of the shootings and told of the suffering she has since undergone as a sole breadwinner for the family.

12. Based on the above evidence, it is the Petitioners' case that they conducted their own investigations and confirmed that the shooting was done by the 3rd and 4th Respondents and that their actions constituted a violation of the deceased persons' human rights and a contravention of the Bill of Rights in the Constitution, 2010 and specifically **Article 26** on the right to life (as read with **Article 4** of the **African Charter on Human and People's Rights**) and **Article 6** of the **International Covenant on Civil and Political Rights**); **Article 50** on the right to a fair trial; **Article 53(1)** on the rights of a child (Joseph was 14 years old at the time of his death) as also provided for by **Articles 6, 16** and **37** of the **United Nations Convention on the Rights of the Child** and **Article 5(1)** of the **African Charter on the Rights and Welfare of the Child**; **Article 238(2)** on the principle that the Police and other security organs shall act in compliance with the law and respect for the rule of law, democracy, human rights and fundamental freedoms and **Articles 243** and **244** on the same point.

13. In addition, it is submitted that the conduct of the 2nd and 4th Respondents and vicariously, the 1st and 2nd Respondents was in breach of **Sections 2, 3, 10 and 49** of the **National Police Service Act** with regard to use of firearms and the duty by police officers to uphold the national values and principles embodied in **Article 10** of the **Constitution** and upholding of the principles of human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalised.

14. Further, that the National Police Service Code of Conduct also contemplates a high standard of professional behaviour for all police officers and in the instant case, the 3rd and 4th Respondents have failed to meet that test.

15. Lastly, that although the 3rd and 4th Petitioners are facing charges of murder in the High Court at Nairobi (**Criminal Case No.91 of 2011**), that fact alone cannot stop this Court from making a decision and grant the following orders;

***“(i) A declaration that this is a public interest case.***

***(ii) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents was in violation of their right to life as stipulated in Article 26(1) and (3) of the Constitution.***

***(iii) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents when they posed no threat amounts to cruel, inhuman and degrading treatment and the same offends Article 29 of the Constitution as read alongside Article 16(1) of the Convention against Torture.***

***(iv) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents was a violation and denial of their freedom and security of the person provided under Articles 27(1) and 29(c) and (f) of the Constitution.***

***(v) A declaration that the force used by the 3rd and 4th Respondents against Ibrahim Ondego and Joseph Nyaberi was excessive and unreasonable in the circumstances***

***(vi) A declaration that the manner in which the 3rd and 4th Respondents killed Ibrahim Ondego and Joseph Nyaberi and placed weapons beside them was a violation of their right to have their human dignity respected and protected as provided under Article 28 of the Constitution.***

***(vii) A declaration that Ibrahim Ondego and his son Joseph Nyaberi were denied their right to a fair trial as provided for under Articles 25(c) and 50 of the Constitution***

***(viii) A declaration that the killing of Mr. Ondego and Joseph Nyaberi was a violation of Articles 53(1)(d), 53(2), 238(2)(b) and 244 of the Constitution.***

***(ix) An order compelling the Respondents to compensate the family of Ibrahim Ondego (deceased) and his son Joseph Nyaberi (deceased)***

***(x) An order compelling the 1st and 2nd Respondents to conduct a formal inquiry into the role of police officers implicated with regard to the regime of apparent extra judicial killings and summary executions.***

***(xi) An order compelling the 1st and 2nd Respondents to re-train all serving and future police officers every 2 years on the Bill of Rights in policing and to require these officers to demonstrate their application of these trainings on an annual basis.***

***(xii) An order compelling the 1st and 2nd Respondents to provide mechanisms for compensation of victims of unlawful use of force by the police.***

***(xiii) A declaration that the State through its agents the 1st, 2nd, 3rd and 4th Respondents failed to fulfill its obligations under Article 6(1) of International Covenant on Civil and Political Rights, Articles 3, 5, 10 and 13 of the universal Declaration of Human Rights, Article 5(1) and (2) of the African Charter on the rights and Welfare of the Child, Article 6 and 16 of the Convention on the Rights of the Child and Article 16 of the Convention Against torture and***

***Other Cruel, Inhuman and Degrading Treatment or Punishment.”***

**Respondents' Case**

16. The Respondents filed no Replying Affidavit in response to the Petition but filed Grounds of Opposition on 27th July 2012 and raised the following relevant issues;

***(i) that the Affidavits in support of the Petition should be struck off as they consist of contradictory, conflicting, and inadmissible evidence and facts based on hearsay.***

***(ii) that there is no evidence that the Petitioners carried out any investigations to warrant a finding that the 3rd and 4th Respondents shot and killed the persons, subject of the Petition and therefore the Petition is premature and based on biased findings and the Petition is therefore an abuse of Court process.***

17. In his Submissions, Mr. Wamotsa, learned Litigation Counsel representing the Respondents stated as follows regarding failure to file any response to the allegations made in the Petition;

***“The 1st Respondent did not file any response to the allegations contained in the Petitioners' Petition despite its unsuccessful efforts to ensure that the police do at least provide instructions for that purpose. In such cases, the general rule would be that, as a matter of law, a party's allegations are admitted and judgment entered against a party who has failed to respond to the allegations”***

18. Having stated as above, learned Litigation Counsel then went on to submit that even without any evidence placed before the Court to contradict or discredit the evidence tendered by the Petitioners and their witnesses, there is no reason to find that the facts as pleaded pointed to any culpability or liability on the part of any of the Respondents for reasons detailed below.

19. Firstly, that none of the witnesses witnessed the shooting or killing of Ibrahim Ondego and Joseph Nyaberi and therefore there is no direct evidence linking the 3rd and 4th Respondents to the shooting incident.

20. Secondly, PW4 stated that the injuries on the bodies of the deceased were caused by a high velocity gun, probably a G3 or AK 47 rifle and that since there is no forensic evidence to tie the 3rd and 4th Respondents to any such gun, then they cannot be said to have been the ones who shot the deceased persons.

21. Thirdly, there is therefore no evidence to point to the vicarious liability of the 1st and 2nd Respondents and further, since the 3rd and 4th Respondents have been charged with the criminal offence of murder, then it has not been established how the 1st and 2nd Respondents can properly be held liable for the criminal actions of the two police officers.

22. Lastly, that the present proceedings should be stayed until the Criminal trial is finalised for reasons that the two Courts dealing with the two aspects of the incident in question may reach different decisions on matters of fact and justice would not be served if contradictory findings are made.

23. Mr. Wamotsa while seeking for a stay as above, also submitted that prayers (x), (xi) and (xii) of the Petition should be struck out for raising extraneous and irrelevant issues which have nothing to do with the present Petition. For avoidance of doubt those prayers relate to extra-judicial killings in general; the alleged need to train all serving and future police officers every two years on the Bill of Rights and an order directed at the 1st and 2nd Respondents to provide mechanisms for compensation for victims of unlawful use of force by the Police.

**Determination**

24. In view of what Mr. Wamotsa said in submissions and which I have reproduced above, it is imperative that I should begin by deciding whether these proceedings should be stayed or not.

25. In that regard, it is agreed by all parties that the 3rd and 4th Respondents are facing murder charges in H.C. Criminal Case No.91 of 2011 (Nairobi) and the case is yet to be finalised. It is also unclear at what stage those proceedings are. Is that a sufficient reason to stay the proceedings?

26. While the Petitioners did not address the matter at all, and which was first raised in Submissions at the close of the hearing, Mr. Wamotsa did not also indicate what law gives this Court the jurisdiction to stay proceedings at the time when a judgment is due for delivery. I have in any event considered the matter and in the criminal trial, one of the issues to be addressed by the Court is whether or not the 3rd and 4th Respondent with malice aforethought caused the deaths of Ibrahim Ondego and Joseph, his son. The burden of proof in those proceedings is beyond reasonable doubt as is the case in all criminal proceedings. The proceedings before me are proceedings under **Articles 22 and 23** of the **Constitution** for enforcement of fundamental rights and freedoms and the Court's duty is to weigh the evidence presented before it and determine whether there was or there was not a violation of the Constitution.

27. Circumstantial evidence, *indicia* and presumptions in such proceedings may therefore be considered, so long as they lead to conclusions consistent with the facts. Circumstantial or presumptive evidence, in my view, is important where the State has acted to suppress all evidence or where the investigation and protector is in fact the alleged perpetrator of the violation. This is the case before me.

28. I am satisfied that I have before me sufficient facts that can lead me to a determination of the Petition without having to await the outcome of the murder trial.

29. Having so held, the first issue to determine is, who exactly shot Ibrahim and Joseph?

30. Mr. Wamotsa has admitted that his clients, the Kenya Police deliberately refused to give him instructions on this and other questions and so I am left only with the evidence on record. I have perused annexures "MH2" to the Supporting Affidavit sworn by Mohammed Hallo, Secretary of the KNCHR and a statement therein caught my attention; it was made by a street dweller, Denis Njenga. Although he never testified in Court, his Statement has never been challenged. In it, he stated that he was sleeping on the verandah of a local bar on the material night when police officers accosted a man who was at the 'matatu' stage nearby. The man was allegedly with his son and the officers ordered them to sit down even as the man explained that he was heading to the market. Once seated, one police officer shot him severally and as the boy begged him not to kill his father, the police officer turned on the boy and shot him once. That after the shooting, people gathered at the scene and a boy he knew as Isaac then came and identified the deceased persons as his father and brother. That later, the police officers took the bodies away.

31. This evidence is on record and is uncontested. Together with the evidence of PW2, PW3 and PW4, it can only be my conclusion that the deceased persons were shot and killed by police officers who were identified as the 3rd and 4th Respondents. PW2 in fact stated that he offered to identify the police officers at Kilimani Police Station but they declined to take part in any identification parade.

32. If the police officers were not the ones who shot the deceased persons for whatever reasons, why did they not answer the allegations made in this Petition? If they were not the killers, why did they refuse to take part in an identification parade? Even if they are acquitted at the criminal trial, there is no bar in law to any findings to the contrary in the present proceedings where the standard of proof is lower than in criminal proceedings. Just as there is no bar to civil proceedings and criminal proceedings under **Section 193A** of the **Criminal Procedure Code** going on simultaneously on the same facts, I see no bar to proceedings under the Constitution proceeding simultaneously or concurrently with criminal proceedings.

33. With the above findings can it be said that the Respondents thereby violated the Bill of Rights?

### **Right to Life**

34. **Article 26** of the **Constitution** provides as follows;

*“(1) Every person has the right to life.*

*(2) The life of a person begins at conception.*

*(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.*

*(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. ”*

35. Further, **Article 4** of the **African Charter on Human and Peoples Rights** provides as follows;

*“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.”*

36. The above provisions generally flow from both **Article 3** of the **Universal Declaration of Human Rights** and **Article 6(1)** of the **International Covenant on Civil and Political Rights** which provide for the non-arbitrary deprivation of life and the burden on the State to protect life.

37. The right of life has been described together with the right to human dignity as the foundation of all other rights and must generally be interpreted widely and never in a restrictive manner – see **Zeitun Juma Hassan (petitioning on behalf of the Estate of Abdul Rahman Biringe (deceased)) vs The Attorney General Petition No.57 of 2011.**

38. In the present case, two Kenyans who woke up at 3.00 a.m. to go and buy vegetables were gunned down with no explanation being given at all. It has not been said that they were a threat to the two police officers who confronted them. Why would they lose their lives in such a Wild West fashion? The arbitrariness of the actions of the 3rd and 4th Respondents was not just chilling, it was an execution. Clearly the right to life was violated and I so find.

### **Rights of a Child**

39. Joseph was 14 years old and fits the definition of a child under the **Children's Act, 2003. Article 53(1)(d)** of the **Constitution** provides as follows;

*“(1) Every child has the right—*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour”*

40. **Articles, 6, 16** and **37** of the **United Nations Convention** on the Rights of a Child as well as **Article 5(1)** of the **African Charter** on the Rights and Welfare of a child similarly make provision for the rights of a child including upholding the principle that a child should never be subjected to inhuman treatment and punishment.

41. In the instant case, it is difficult to see how the rights were violated. Joseph was shot once and died instantly. There is no evidence that he was treated in any degrading manner by the 3rd and 4th Respondents prior to his death. I am consequently unable to find that any rights under **Article 53** of the **Constitution** or any of the above international instruments were violated in this case.

42. In **Hernandez Rivas vs El Salvador Case No.10.911 Report No.7/94** the Inter-American Commission on Human Rights made certain findings where a girl child was verbally and physically abused and specifically found that her rights to humane treatment, personal liberty, fair trial, rights of a child and judicial protection had been violated against the American Convention on Human Rights. The same cannot be said of the present Petition and so the claim in that regard must fail.

### **Right to a fair trial**

43. **Article 50(1)** of the **Constitution** states that;

***“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

44. All other parts of Article 50 relate to rights during a trial. It does not provide as is the submission before me, for denial of a right to a trial *per se*. That is why the decision in **Julius Kamau Mbugua vs Republic Criminal Appeal No.50 of 2008** is correct; that the right to a fair trial is protected during and not before an actual trial. I do not see how the above right was therefore violated in the circumstances of this case.

### **Violations of the law by the Police**

45. The Petitioners have cited **Articles 238** and **244** to make the point that the 3rd and 4th Respondents acted in breach of the principles that bind the National Police Service including;

- (i) *respects for the rule of law, human rights and fundamental freedoms.*
- (ii) *foster and promote relationship with the broader society.*

46. It is obvious that when police officers shot and kill innocent civilians as happened in this case then none of the above principles can be said to have been upheld. I shall find in favour of the Petitioners in that regard.

### **Remedies**

47. The Petitioners have invoked **Article 23(3)** of the **Constitution** which provides as follows;

***“In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

- (a) *a declaration of rights;*
- (b) *an injunction;*
- (c) *a conservatory order;*
- (d) *a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

(e) *an order for compensation; and*

(f) *an order of judicial review.”*

48. In that regard, I have found certain violations of the Bill of Rights and other parts of the Constitution. Declarations must be issued in those circumstances. However prayers (vi), (vii), (x), (xi) and (xii) in the Petition cannot be granted for reasons that no facts were placed before the Court to warrant their grant and no submissions were also made in that regard.

49. Further, where violations have been proved and where especially loss of life has been occasioned by a callous act on the part of anyone, more so, the protector of those rights, compensation is warranted. As was stated by the Court in *Zeitun (supra)*.

*“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 vs Attorney General Nairobi HC Misc. Appl. No.1184 of 2003 [2010]eKLR and Harun Thungu Wakaba vs Attorney General Nairobi HC Misc. Appl. No.1411 of 2004 [2010]eKLR).*

*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.”*

50. I agree and will grant **Kshs.2 Million** as compensation and as a global award for each of the deceased persons. I will not grant costs of the Petition as the Petitioners have not sought any and in any event they were litigating in the public interest and have no direct interest in the outcome of the Petition.

### **Conclusion**

51. In the event, the final orders to be made are the following;

*“(i) A declaration that this is a public interest case.*

*(ii) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents was in violation of their right to life as stipulated in Article 26(1) and (3) of the Constitution.*

*(iii) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents when they posed no threat amounts to cruel, inhuman and degrading treatment and the same offends Article 29 of the Constitution as read alongside Article 16(1) of the Convention against Torture.*

*(iv) A declaration that the shooting and the killing of Ibrahim Ondego and Joseph Nyaberi by the 3rd and 4th Respondents was a violation and denial of their freedom and security of the person provided under Articles 27(1) and 29(c) and (f) of the Constitution.*

*(v) A declaration that the force used by 3rd and 4th Respondents against Ibrahim Ondego and Joseph Nyaberi was excessive and unreasonable in the circumstances.*

**(viii) A declaration that the killing of Mr. Ondego and Joseph Nyaberi was a violation of Articles 53(1)(d), 53(2), 238(2)(b) and 244 of the Constitution.**

**(ix) An order compelling the Respondents to compensate the family of Ibrahim Ondego (deceased) and his son Joseph Nyaberi (deceased) to the tune of Kshs.2 Million for each one of them and therefore Kshs.4 Million in total.**

**(x) A declaration that the State through its agents the 1st, 2nd, 3rd and 4th Respondents failed to fulfill its obligations under Article 6(1) of International Covenant on Civil and Political Rights, Articles 3, 5, 10 and 13 of the universal Declaration of Human Rights, and Article 16 of the Convention Against torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.**

**(xi) There shall be no order as to costs.”**

52. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Kiprono for Petitioner

Mr. Wamotsa for Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**