Muslim for Human Rights (MUHURI) & another v Inspector General of the National Police Service & 2 others (Petition E070 of 2021) [2024] KEHC 3233 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3233 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E070 OF 2021

OA SEWE, J

MARCH 19, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2, 26,27(1), 28, 29, 31, 35, 48, 50 AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF THE UNLAWFUL KILLING OF OMAR FARAJ

AND

IN THE MATTER OF SECTION 388 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

MUSLIM FOR HUMAN RIGHTS (MUHURI).....1ST PETITIONER

KHELEF KHALIFA.....2ND PETITIONER

VERSUS

THE INSPECTOR GENERAL OF

THE NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE DIRECTORATE OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

BETWEEN

MUSLIM FOR HUMAN RIGHTS (MUHURI) ..... 1ST PETITIONER

KHELEF KHALIFA ..... 2ND PETITIONER

AND

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE ..... 1ST RESPONDENT

THE DIRECTORATE OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

[1] This Petition was brought by Muslims for Human Rights (muhuri), a non-governmental organization based in Mombasa, and its Chairman, Khelef Khalifa (the 2nd petitioner), against the Inspector General of Police (the 1st respondent), the Director of Public Prosecutions (the 2nd respondent) and the Attorney General (the 3rd respondent). They averred at paragraph 4 of the Petition that MUHURI (the 1st petitioner) was founded in September 1997 with the objective and mandate of contributing to promotion, protection and enjoyment of human rights by all. Thus they averred that they brought this Petition as a matter of public interest, in the pursuit of the rule of law and in defence and protection of *the Constitution* on behalf of the estate of Omar Faraj, now deceased.

[2] The brief background of the Petition is that, the deceased, a local butcher and resident of Mwembe Tanganyika in Mombasa County, was shot dead on the morning of 28th October 2012 by persons believed to be police officers. The police officers were believed to be from the special counter-terrorism unit of the General Service Unit Recce Company known as the Rapid Response Team (RRT). The petitioners obtained information from the family and neighbours of the deceased and gathered that the deceased was shot when the RRT squad opened fire on the family after the deceased hesitated in opening the door. He sustained injuries on his head and other parts of the body from which he succumbed at the scene.

[3] The petitioners further averred that it later emerged that the RRT, the NIS and the ATPU officers who conducted the joint operation, were in fact hunting for one Fuad Abubakar Manswab, the alleged mastermind of a failed terrorist attack in Mombasa, who was believed to be hiding in the neighbourhood. They described the late Omar as a polite and pious Muslim who abhorred all kinds and manners of confrontation; and that he was generally a happy and jovial person. He was also said to be a family man, who strove for peace and harmony in the community in which he lived.

[4] Thus, at paragraphs 28 to 38, the petitioners set out the provisions of *the Constitution* as well as the *National Police Service Act*, No. of 2011, which, in their view, were violated by the respondents. They likewise endeavoured to show the manner of violation. On the basis of those assertions, the petitioner prayed for the following reliefs:

(a) That a declaratory order be issued that the right to life of Omar Faraj (deceased) as guaranteed by Article 26 of *the Constitution* was violated as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(b) A declaratory order be issued that the right of Omar Faraj (deceased) to equality before the law and equal protection of the law as guaranteed by Article 27(1) of *the Constitution* was infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by the agents of the 1st respondent and by failure to investigate the unlawful killing and bring the culprits to justice.

(c) A declaratory order be issued that the right of Omar Faraj (deceased) to inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28 of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(d) A declaratory order be issued that the rights of Omar Faraj (deceased) to freedom and security of the person as guaranteed by Article 29 of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(e) A declaratory order be issued that the right of Omar Faraj (deceased) and his wife to privacy as guaranteed by Article 31 of *the Constitution* was infringed as a result of the unjustifiable and unlawful invasion of their home by agents of the 1st and 3rd respondents without warrants of search and without any reasonable or probable cause for suspicion of any offence committed by Omar Faraj (deceased) and his wife.

(f) A declaratory order be issued that the right of the petitioners, the widow and family of Omar Faraj (deceased) and the public at large to access information regarding investigations, if any, conducted over the unlawful killing of Omar Faraj (deceased) and/or whether any person has been held accountable for his killing, or if any judicial inquest has been initiated regarding his unlawful killing guaranteed by Article 35 of *the Constitution*, was infringed as a result of failure by the agents of the respondents jointly to provide, publicize and/or disclose the information.

(g) A declaratory order be issued that the 1st and 2nd respondents are obliged, in the minimum, to initiate a judicial inquest into the killing of Omar Faraj (deceased) by dint of Article 48 of *the Constitution* and Section 388 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

(h) An order for general, exemplary and/or punitive damages be made pursuant to the declaratory orders in prayers (a) to (f) above as shall be assessed by the Court.

(i) An order be issued directing the 1st and 2nd respondents jointly and severally to furnish the 2nd petitioner, herein, Khelef Khalifa, and the widow of Omar Faraj (deceased) one Rahma Ali, with information and/or comprehensive report of investigations conducted over the unlawful killing of Omar Faraj (deceased) including information whether any person has been held accountable for his killing, or if any judicial inquest has been initiated regarding his unlawful killing.

(j) Costs of the Petition.

(k) Interest on the monetary awards and on costs of the Petition.

(l) Any further relief that the Court may deem just and fit to grant.

[5] The Petition was supported by the affidavit of the 2nd petitioner, sworn on 22nd December 2021 together with the documents annexed thereto. In addition, the petitioners relied on the affidavit sworn on 14th December 2021 by Namir Shabibi, a British citizen residing in the United Kingdom. Mr. Shabibi, a journalist by profession, also annexed several journalistic publications to his affidavit, which I will revert to in due course.

[6] Based on information obtained from the widow and other family members of the deceased, Omar Faraj, the 2nd petitioner averred that the deceased was born on 18th December 1973; and that he was a married man, working as a butcher and cashier at Shopright Butchery, next to Nawal Centre in Mombasa Town. He further deposed, as has been pointed out herein above, that the deceased was a polite, honest and pious person who avoided all kinds of confrontation. He added that the deceased was a staunch believer in the Islamic school of thought that one should never hurt anyone or anything in this world, and always encouraged his family to live by those values.

[7] The 2nd petitioner further deposed, again based on information obtained from the widow of the deceased, Rahma Ali, that the deceased and his wife were asleep when their house at Mwembe Tanganyika in Mombasa was invaded by a group of heavily armed police officers. The police officers proceeded to shoot at them thereby injuring the deceased on the temple as he scampered for safety with his wife from the invading police officers. He further deposed that although the deceased and his wife managed to slip out of the house with a view of seeking help from their neighbours, he collapsed and died soon thereafter from the gunshot wounds.

[8] At paragraph 13 of his affidavit, the 2nd petitioner deposed that a postmortem conducted by the government pathologist on 28th October 2012 revealed that the cause of death of Omar Faraj (deceased) was traumatic brain damage following a gunshot to the head. He annexed the Postmortem Report as Annexure K1 to his affidavit. He added that through various investigative publications, the family members of the deceased came to learn that his killing was a case of reckless mistaken identity. The 2nd petitioner pointed out that the publications were exhibited through the second affidavit, sworn by Namir Shabibi.

[9] The 2nd petitioner also mentioned that he had been seeking information from the 1st respondent on the investigations conducted on the killing of Omar Faraj and the result of the said investigations, but that as of the time of filing the Petition, no response had been received by him from the 1st respondent. To buttress his averment, the 2nd petitioner annexed a copy of his request for information as Annexure KK2 to his affidavit. In respect of the 2nd respondent, the 2nd petitioner made reference to Section 388 of the Criminal Procedure Code and deposed that the 2nd respondent was under obligation to initiate a judicial inquest into the death of the deceased, granted that nobody had been charged in connection with it.

[10] Consequently, the 2nd petitioner asserted, at paragraph 23 of his Supporting Affidavit, that the failure by the respondents to take action to ensure justice was served in the matter of the death of Omar Faraj is an affront, not only to the rule of law and the fundamental tenets of democracy but also to the rights of the deceased and his family as guaranteed under international human rights law and the Bill of Rights as recognized under the Constitution of Kenya. The 2nd petitioner concluded his affidavit by stating that, at all material times, the family members of the deceased and the petitioners had the consolation and the legitimate expectation that the State would uphold, defend and protect the rights and fundamental freedoms of all its citizens, including the deceased; but that it had failed to take any action by the time of filing the Petition.

[11] Responses to the Petition were filed by learned counsel for the respondents, Mr. Makuto (for the 1st and 3rd respondents) and Ms. Anyumba (for the 2nd respondent). In his Grounds of Opposition filed on the 23rd September 2022, the 1st respondent contended that:

(a) The Petition is misconceived, vexatious and an abuse of the process of the Court;

(b) The 1st respondent denies the contents of Paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of the Petition and invites the petitioners to strict proof;

(c) The Petition is based on hearsay and inadmissible evidence;

(d) The 1st respondent denies that Omar Faraj was intentionally deprived of his life or that his right to life was violated, and the petitioner is invited to strict proof;

(e) The 1st respondent denies that Omar Faraj's right to equal protection of the law was violated;

(f) The 1st respondent denies that his officers acted in any way that violated the right to dignity of Omar Faraj;

(g) The 1st respondent denies the contents of paragraph 31 of the Petition or that the 1st respondent's officers acted in any way that occasioned physical/mental or psychological torture on Omar Faraj;

(h) Paragraphs 31, 32, 33, 36, 37 and 38 of the Petition are not precise enough to enable the 1st respondent reply to the allegations therein;

(i) The Petition as drawn fails the test of Anarita Karimi Case and ought to be dismissed with costs;

(j) No evidence has been availed to support the allegation that Omar Faraj and Titus Nabiswa were killed by officers/agents of the 1st respondent;

(k) The petitioners have failed to discharge the burden of proof and are therefore not entitled to the grant of prayers sought in the Petition.

[12] I note that the response was purportedly filed on behalf of, not only the 1st and 2nd respondents, but also the 4th respondents. I have deliberately refrained from making any reference to the 4th respondent for the reason that there are only 3 respondents in the Petition. Instead, I have treated the response as including the position taken by the Attorney General as the 3rd respondent.

[13] On behalf of the 2nd respondent, the following Grounds were put forward in the Response filed on 2nd June 2022:

(a) The evidentiary burden under Section 107, 109 and 110 of the *Evidence Act*, has not been discharged;

(b) There is no disclosure that the 2nd respondent had prior knowledge of any report relating to the death of Omar Faraj or any ongoing investigations;

(c) There is no evidence tendered to show the nature and manner in which the 2nd respondent violated the provisions of *the Constitution* or any law as alleged by the petitioner in this matter; hence the Petition does not meet the test of a constitutional petition as laid down in the case of Anarita Karimi Njeru v Republic [1979] KLR 154;

(d) The 2nd respondent is mandated under Article 157 of *the Constitution* and Section 6 of the *Office of the Director of Public Prosecutions Act* to institute and undertake criminal proceedings against any person before any court of law and by dint of Article 157(10) of *the Constitution*, the 2nd respondent shall not require the consent of any person or authority for commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person;

(e) The Petition fails to establish any commission of illegality, irrationality, impropriety or unreasonable acts against the 2nd respondent in carrying out its mandate as to trigger the High Court's intervention;

(f) The Petition discloses no reasonable cause of action against the 2nd respondent and is therefore devoid of merit.

[14] The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 26th January 2023. In the petitioners' written submissions dated 19th June 2023, their counsel, Mr.

Mbugua Mureithi, reiterated the factual basis of the Petition and the evidence in support thereof as contained in the two Supporting Affidavits filed with the Petition. On the basis thereof, he proposed the following issues for determination:

(a) Whether the Petition is opposed;

(b) Whether the Petition is properly before the Court;

(c) On whom does the burden of proof lie in this Petition; and has it been discharged?

(d) Whether the petitioners are entitled to the prayers sought;

(e) Who should bear the costs of the Petition?

[15] Thus, the petitioners submitted that, because the respondents relied on Grounds of Opposition, no rebuttal evidence was presented to counter the averments made herein by the petitioners in their Supporting Affidavits. They relied on Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR and Gulleid v Registrar of Persons & another (Petition E007 of 2021) [2021] KEHC 110 (KLR) at para 10 to 12 to buttress the submission that, without a replying affidavit, the averments in the affidavits of the 2nd petitioner and Namir Shabibi are uncontroverted and deemed admitted. They further posited that, without a replying affidavit, no suspicion of crime can be imputed on the deceased subject, Omar Faraj and no justification can be inferred or advanced for his brutal killing.

[16] On whether the Petition is properly before the Court, granted the assertions of the respondents to the effect that the Petition is devoid of merit and was simply filed in abuse of the process of court, counsel submitted that the Petition raises serious, credible and grave complaints of violation of the right to life of the deceased, Omar Faraj, followed by failure by the respondents to investigate or facilitate access to justice for the violation. He further submitted that the Petition is about impunity and therefore discloses valid constitutional issues around the Bill of Rights that ought to be decided on their merits. In this regard, reference was made to the case of Jonathan Munene v Attorney General & 2 Others; Kenya Judges Welfare Association (Interested Party) [2021] eKLR, paragraphs 25 to 28 for a discussion of pleadings that do not disclose a reasonable cause of action, or are vexatious, scandalous and an abuse of the process of the court.

[17] At paragraphs 40 to 47 of their written submissions, the petitioners responded to the submissions by the respondents to the effect that the Petition fell short in terms of specificity. Their contention was that the Petition as drawn is precise enough and was filed in full compliance with Rule 10(1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the principle of Anarita Karimi Njeru and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR. They added that, in any event, the cases decided after Mumo Matemu show that the requirement for precise pleadings, being an issue of fact, is not cast in stone, but is an assessment made on case by case basis. Counsel for petitioners relied on A N M & another (suing in their own behalf and on behalf of A M M (minor) as parents and next friend v F P A & another [2019] eKLR and Samuel Tunoi v Speaker Nakuru County Assembly & 2 others [2019] eKLR to buttress his arguments.

[18] In respect of the burden of proof, the petitioners were of the posturing that they have deposed to extrajudicial killing of the subject, Omar Faraj, on the morning of 28th October 2012 at his home by police officers; and therefore the killing of the subject is undisputed. They added that in the circumstances, the petitioners only needed to establish a prima facie case that the subject was killed by the police; and therefore that the substantive burden was on the State to show that the death was as a result of one or more of the exceptions provided for in *the Constitution*. In this regard, they made

reference to Mburu Njuguna (suing on behalf of the Estate of John Macharia Mburu (Deceased) v Chief Korogocho Location & 3 Others [2014] eKLR and Ann Wairimu Njahira v Nairobi City County Government & 4 Others [2017] eKLR para 21 to 22, among other decisions. Thus, the petitioners were of the view that, having discharged their burden of proof, the Court ought to grant them all the prayers set out in the Petition. They made detailed submissions in respect of each prayer at paragraphs 75 to 108 of their written submissions.

[19] On behalf of the 2nd respondent, written submissions were filed herein dated 24th July 2023. The issues for determination were thereby proposed to be:

(a) Whether the Petition meets the specificity test as against the 2nd respondent; and,

(b) Whether the 2nd respondent violated the petitioners' rights.

[20] In line with the foregoing, counsel for the 2nd respondent submitted that the burden of proof was on the petitioners, by dint of Sections 107(1), (2) and 109 of the *Evidence Act* to lay a factual basis for each infringement alleged. She relied on Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR; Wamwere & 5 others v Attorney General (Petition 26, 34 and 35 of 2019 (Consolidated) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27th January 2023) to underscore the submission that whether or not the respondents adduced evidence did not relieve the petitioners of their burden of proof.

[21] With regard to the probative value of the journalistic publications relied on by the petitioners, the 2nd respondent submitted that the same are not admissible, given that the deponent, Mr. Namir Shabibi, relied on information from undisclosed sources. On the authority of Andrew Omtata Okoiti & 5 Others v Attorney General & 2 Others [2010] eKLR, the 2nd respondent urged the Court to disregard Mr. Shabibi's affidavit and the documents annexed thereto.

[22] On whether there is a valid cause of action against the 2nd respondent, counsel adverted to the provisions of Article 157 of *the Constitution*, and Section 4 of the *Office of the Director of Public Prosecutions Act*, No. 2 of 2013 which set out the mandate and functions of the 2nd respondent. Accordingly, the 2nd respondent emphasized the assertion that the duty of investigations lies with the National Police Service as established under Article 243 of the Constitution. Counsel added that, up until the filing and service of this Petition, the 2nd respondent was unaware of the death of the deceased, since no complaint or report was forwarded to the ODPP in that regard; and therefore the petitioners cannot now claim that the 2nd respondent failed in the discharge of his functions for a decade. She relied on Julius Kamau Mbugua v Republic [2010] eKLR in which the Court of Appeal cited with approval the following excerpt from the decision of the Supreme Court of Canada in R v Morin [1992] 1 SCR 771:

The general approach in a determination as to whether the right has been denied is not by the application of mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay."

[23] Hence, counsel for the 2nd respondent was of the posturing that, since the petitioners only sought information about the case prior to the institution of the Petition, no liability can attach against the 2nd respondent. On the distinction between the functions of the 1st and 2nd respondents, reliance was placed on Kinoti & 7 Others v Chief Magistrates Court Milimani Law Courts & 4 Others; Sanga & 2 Others (Interested Parties) (Constitutional Petition E495 of 2021) [2022] KEHC 11622 (KLR) for the proposition that there is a deliberate constitutional and legislative design to separate investigations from prosecution with a view of instilling fairness and confidence in the criminal justice system. In the premises, counsel submitted that the 2nd respondent cannot be held accountable for the loss of life

or any extra judicial killings as alleged, as the powers of arrest and investigation lies with the National Police Service.

[24] From the foregoing summary, there is no dispute that the house of the deceased, Omar Faraj, was raided by police officers in plain clothes in the early hours of 28th October 2012. The deceased was then sleeping in his house in Mwembe Tanganyika area. It is common ground that the deceased was in the house with his wife; and that the police first threw teargas canisters into the house. When the deceased attempted to get out of the house, he was shot at the temple of his head as he climbed out of his bedroom window.

[25] It is also not in dispute that a postmortem examination was conducted on the body of the deceased by the government pathologist at Coast General Hospital in the morning hours of 28th October 2012 and the postmortem report was produced herein as Annexure KKA at pages 18 to 21 of the Petition. Based on his observations and findings, the Pathologist formed the opinion that the deceased died due to traumatic brain damage following a gunshot to the head. There is no dispute therefore that the deceased died on 28th October 2012 as a result of gunshot wounds. The respondents having denied liability for the death, the issues for determination are:

(a) Whether the deceased died at the hands of the Police; and if so,

(b) Whether in the circumstances, the constitutional violations alleged herein were proved to the requisite standard.

(c) What reliefs, if any, ought to be granted by the Court?

[26] Before engaging in a merit consideration of the issues, it is pertinent to determine the preliminary issue raised herein by the respondent as to the competence of the Petition. The respondents were of the firm conviction that the Petition falls short of the threshold laid down in the case of Anarita Karimi in terms of specificity. They accordingly urged the Court to strike it out without further ado. The 2nd respondent relied on Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR for the holding that:

> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

[27] In this regard, it was held in Anarita Karimi Njeru v Republic [1979] eKLR, that:

> ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

[28] The same position was reiterated by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (supra) thus:

(42) It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

[29] Similarly, in the case of Robert Amos Oketch v Andrew Hamilton & 8 others (Sued in their Personal Capacities and as Trustees of the National Bank of the Kenya Staff Retirement Benefit Scheme) & 4 others [2017] eKLR, the court held: -

> 63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anarita Karimi Njeru v Republic (supra). In that case, the court stated that where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it..."

[30] Accordingly, I have considered the Petition and responses by the respondent in the light of the written submissions filed herein by learned counsel in that regard. I note that the petitioners filed a 9-page Petition in which they made averments as to the jurisdiction of the Court, the description of the parties and the facts on which the Petition was premised. They also took care to supply particulars as to the constitutional foundation of their Petition and the alleged contraventions at Sections D and F thereof. The reliefs have also been outlined at Section H of the Petition. In the premises, it cannot be argued that the Petition falls short in terms of specificity.

[31] Indeed, in Mumo Matemu, the Court of Appeal hastened to add that:

> ...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

[32] In effect, the Court of Appeal approved the position taken by a 3-judge bench of the High Court in Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR that:

> We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case..."

[33] Accordingly, I find no merit at all in the respondents' contention that the Petition does not meet the threshold of specificity. Indeed, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

[34] Accordingly, I fully endorse the expressions of Hon. Odunga, J. in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR (at para 63 that:

> On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation..."

[35] The same sentiments were expressed in A N M & Another (suing in their own behalf and on behalf of A M M (minor) as parents and next friend v F P A & Another [2019] eKLR and Martin Wanyonyi (CEO Centre for Human Rights Organization) & Another v County Government of Bungoma & 2 Others [2019] eKLR, among others. Looked at from that angle, there can be no doubt that the Petition is compliant and competent for consideration on its merits.

[36] It is also pertinent to determine at this stage the issues raised herein by learned counsel in connection with the burden of proof. While counsel for the petitioners took the position that the petition is unopposed, granted that no replying affidavit was filed by either of the respondents, the respondents took the posturing that the burden of proof in such cases rests squarely on the petitioners, regardless of whether or not rebuttal evidence is adduced. It is indeed the case that the respondents opted to rely on Grounds of Opposition to the Petition as backed up by their written submissions; and therefore no factual response to the petitioners' Supporting Affidavits was filed.

[37] In particular, the 2nd respondent made reference to Wamwere & 5 Others v Attorney General (Petition 26, 34 & 35 of 2019) Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) in which the Supreme Court held:

> A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or lived in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof."

[38] Hence, in connection with the burden of proof, Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya is explicit that:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

[39] Likewise, Section 108 of the *Evidence Act* provides that:

> The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[40] Thus, the Court of Appeal in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, held: -

> ...As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act..."

[41] Accordingly, in Wamwere & Others v Attorney General (supra), the Supeme Court held, at paragraph 21 that:

> ...Even in situations where a respondent did not file or tender evidence to counter the petitioner's case, the petitioner bore the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard was met would depend on whether a court based on the evidence was satisfied that it was more probable that the allegation(s) in issue occurred. The 1st appellant's evidence or lack of it, for that matter, could not be the

basis of a finding that it was more probable than not that her right not to be deprived of property was infringed."

[42] Needless to say that the aforementioned decision supersedes the cases of Daniel Kibet Mutai & 9 Others v Attorney General [2019] eKLR (para 39) and Gulleid v Registrar of Persons & Another (Petition E007 of 2021) [2021] KEHC 110 (KLR) (para 10 to 12) on which the petitioners relied. It is therefore with the foregoing in mind that I proceed to consider the issues identified at paragraph 26 herein above.

A. On whether the deceased died at the hands of the Police:

[43] Neither the 2nd respondent nor Mr. Namir Shabibi were at the scene of the subject homicide. Accordingly, the respondents impugned their respective affidavits on the ground that they were premised on hearsay and unverified journalistic publications. Counsel for the 2nd respondent further submitted that, even after gathering the said information, Mr. Shabibi never interrogated the state agencies that were adversely mentioned in the documents he relied on. She further urged the Court to note that Mr. Shabibi never sought to question any of the eye witnesses, including the widow of the deceased. Accordingly, counsel discounted the probative value of Mr. Shabibi's averments.

[44] It is significant however that the respondents conceded to the veracity of the postmortem form produced herein by the petitioners. The document shows, on the face of it that it originated from Makupa Police Station; and that the deceased body was under the charge of IP Pius Kilonzo. As has been pointed out, the document further confirms that the body was found at Majengo on 28th October 2012 at about 6.00 am. The document further states, in terms of circumstances of death:

> The victim was shot dead during a shoot out between police and terror suspect when one suspect had gone to show police their hide out within majengo area."

[45] That piece of evidence goes to support the assertion by the petitioners that the deceased was shot dead by the police. Indeed, at paragraphs 4, 6 and 7, the 1st and 3rd respondent merely disputed the wilfulness of the shooting or that the officers concerned acted in any way that violated the right to dignity of the deceased. I am therefore satisfied that the petitioners have adduced sufficient evidence to demonstrate that the deceased was shot by the police.

B. Whether in the circumstances, the constitutional violations alleged herein were proved to the requisite standard:

[46] Article 26 of *the Constitution* provides thus in its Sub-Articles (1) and (3):

> (1) Every person has the right to life.
>
> ...
>
> (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

[47] Accordingly, having found that the deceased was shot dead by the police, the evidential burden shifted to the police to demonstrate that the shooting was warranted. The rationale for this posturing was well explicated by the Court of Appeal in Stephen Iregi Njuguna v Attorney General [1995-1998] 1 EA 252:

> The police do not have any unqualified licence to resort to shooting. They are authorized to shoot only when it is necessary to do so and it is up to them to demonstrate that the shooting was necessary...From the circumstances it is obvious that the deceased died as a result of the

police firing. So the onus has shifted onto the respondent to prove that in the circumstances of the case they were excused by law for having caused the death of the deceased..."

[48] In the same vein, Section 61 of the *National Police Service Act* provides that:

(1) Subject to subsection (2), a police officer shall perform the functions and exercise the powers conferred by *the Constitution* and this Act by use of non-violent means.

(2) Despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule.

[49] Rule 1 of the Sixth Schedule on the other hand provides that:

A police officer shall always attempt to use non-violent means first and force may only be employed when non-violent means are ineffective or without any promise of achieving the intended results."

[50] Not a whiff, by way of explanation for the shooting, was forthcoming from the 1st and 3rd respondents, save for the bare assertion in the postmortem report that the deceased died in the course of a shootout between the police and a terror suspect. There was no evidence by way of OB entry or any other such document to show that the deceased was suspected of terrorism or that he exchanged fire with the police officers. This is notwithstanding that under the Sixth Schedule, the concerned police officers were expected to secure the scene, collect evidence, investigate and report to the Independent Police Oversight Authority (IPOA) in respect of an incident such as this where the use of firearm occasioned death.

[51] In particular, Rule 2(3) of Part C of the Sixth Schedule of the *National Police Service Act* states:

The station commander, or any other relevant direct superior, shall, immediately after the death or serious injury of a person who at the time of his death or injury, was in police custody or under the control of the police or in any way the death or serious injury was the result of police action or inaction which includes anyone who may have been injured or killed being a bystander during a police operation-

a. Take steps to secure evidence which may be relevant to that death;

b. Immediately report the case to the Independent Police Oversight Authority, using means of communication that guarantee there will be least delay, and confirm this in writing no later than within 24 hours after the incident;

c. Supply the independent Police Oversight Authority with evidence of and all other facts relevant to the matter, including, if available, the names and contact details of all persons who may be able to assist the Independent Police Oversight Authority should it decide to conduct an investigation; and

d. Non-compliance with the above shall be an offence."

[52] In the premises, I am convinced that the shooting of the deceased, Omar Faraj, was totally unwarranted. In reaching this conclusion I am persuaded by the position taken by Hon. Onguto, J. in Ann Wairimu Njahira v Nairobi City County Government & 4 others [2017] eKLR that:

21. Like in most international conventions to which Kenya has ascribed and is party to, *the Constitution* under Article 26 guarantees every person the right to life. It is an innate right. It is an unqualified right and commences at conception until death. Only *the Constitution* or statute law may limit it. In effect the right to life exists in every person regardless of their action.

Even criminals until and unless convicted of offences which fetch mandatory death sentence have the right to life vested in them.

22. The right to life, in my judgment, essentially means that a person is entitled not to be killed. The right to life is a moral principle based on the belief that a human being has the right to live and, in particular, should not be killed by another human being, and this includes prohibition against killing whilst making an arrest. The arresting entity is to be remembered has only to use the necessary force commensurate with any resistance to help achieve the objective of an arrest which is to bring the arrested person to justice. Death is not and cannot be justice unless meted upon conviction. Additionally, the State and all State organs are enjoined to protect this right for the basic reason that the State and State organs have an obligation to "observe, respect, protect, promote and fulfil" the rights in the Bill of Rights..."

[53] Having reached the conclusion aforesaid, it follows that there was a violation of the deceased's right to life as provided for under Article 26 of the Constitution. I am further satisfied that the deceased's right to the security of his person was likewise violated; being convinced as I am that the right to life is inseparable from the right to security of the person as enshrined in Article 29 of *the Constitution*. The provision states:

> Every person has the right to freedom and security of the person which includes the right not to be subjected to any form of violence from either public or private sources."

[54] It is for the same reasons that I am satisfied that the deceased's right to equal protection of the law under Article 27, right to human dignity under Article 28 and right to privacy under Article 31 of the Constitution were likewise ingrained. As to the right of Access to information, Article 35 of *the Constitution* states:

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

[55] Under Section 4 of the *Access to Information Act*, every person has the right to access information unless such a right has been limited under Section 6 of the Act. Section 4 provides:

(1) Subject to this Act and any other written law, every citizen has the right of access to information held by—

(a) the State; and

(b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

(2) Subject to this Act, every citizen's right to access information is not affected by—

(a) any reason the person gives for seeking access; or

(b) the public entity's belief as to what are the person's reasons for seeking access.

(3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.

(4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.

(5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.

[56] It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. The Act under Section 5 requires that a public entity should facilitate access to information held by it provided that the information is sought in accordance with the procedures set out in Section 8, which requires that the request for information be in writing with sufficient details and particulars to enable the public officer to ascertain what information is being sought. The information should also be provided without any delay.

[57] Accordingly, in Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR, it was held: -

270. Article 35(1)(a) of *the Constitution* does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in The Public's Right to Know: Principles on Freedom of Information Legislation – Article 19 at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information. Where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings. I also endorse the definition of public bodies to include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quasi-non-governmental organisations, judicial bodies, and private bodies which carry out public functions..."

[58] Likewise, in Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR, it was held:

34. The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of *the Constitution* of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.

35. A third consideration is the nature and form of information that should be availed by the State, and the extent to which information should be disclosed...However, there are certain international standards which offer a guide on the nature of the information to be provided, and the extent to which disclosure should go..."

[59] In the same vein, in Kenya Railways Corporation & 2 others v Okoiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (Civ) (16 June 2023) (Judgment), the Supreme Court stated:

> ...whereas information held by the State ought to be freely shared except in exceptional circumstances, such information should flow from the custodian of such information to the recipients in a manner recognised under the law..."

[60] In the present case, the petitioners have not presented any evidence to show that they requested for any information in writing from any of the respondents or that access was declined. Indeed, Section 48 of the *National Police Service Act* provides as follows with regard to access to information:

Subject to Article 244 of *the Constitution* and any other law enacted pursuant to Article 35 of *the Constitution*, a limitation of a right shall be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and shall be limited only for purposes of ensuring-

(a) the protection of classified information;

(b) the maintenance and preservation of national security;

(b) the security and safety of officers in the Service;

(c) the independence and integrity of the Service; and

(e) the enjoyment of the rights and fundamental freedoms by any individual, does not prejudice the rights and fundamental freedoms of others.

[61] In the premises, I am not convinced that the Petitioner has proved any violation of its right of access to information by any of the respondents in the manner envisaged by Article 35 of the Constitution, and I so find

C. On whether the petitioner is entitled to the reliefs sought:

[62] Article 23(1) of *the Constitution* gives the Court the jurisdiction, in accordance with Article 165, to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, Sub-Article (3) is explicit that:

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.

[63] It is now settled that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR Hon. Chacha, J. held that an appropriate relief should be an effective remedy for purposes of enforcing *the Constitution*, human rights and the rule of law. He

relied on Fose vs. Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 wherein it was held that:

(19) Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

[64] Similarly, in Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17, it was held that:

(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source".

[65] As pointed out herein above, the petitioner prayed for the following orders against the respondent:

(a) That a declaratory order be issued that the right to life of Omar Faraj (deceased) as guaranteed by Article 26 of *the Constitution* was violated as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(b) A declaratory order be issued that the right of Omar Faraj (deceased) to equality before the law and equal protection of the law as guaranteed by Article 27(1) of *the Constitution* was infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by the agents of the 1st respondent and by failure to investigate the unlawful killing and bring the culprits to justice.

(c) A declaratory order be issued that the right of Omar Faraj (deceased) to inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28 of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(d) A declaratory order be issued that the rights of Omar Faraj (deceased) to freedom and security of the person as guaranteed by Article 29 of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(e) A declaratory order be issued that the right of Omar Faraj (deceased) and his wife to privacy guaranteed by Article 31 of *the Constitution* was infringed as a result of the unjustifiable and unlawful invasion of their home by agents of the 1st and 3rd respondents without warrants of search and without any reasonable or probable cause for suspicion of any offence committed by Omar Faraj (deceased) and his wife.

(f) A declaratory order be issued that the right of the petitioners, the widow and family of Omar Faraj (deceased) and the public at large to access information regarding investigations, if any, conducted over the unlawful killing of Omar Faraj (deceased) and/or whether any person has been held accountable for his killing, or if any judicial inquest has been initiated regarding his unlawful killing guaranteed by Article 35 of *the Constitution*, was infringed as a result of failure by the agents of the respondents jointly to provide, publicize and/or disclose the information.

(g) A declaratory order be issued that the 1st and 2nd respondents are obliged, in the minimum, to initiate a judicial inquest into the killing of Omar Faraj (deceased) by dint of Article 48 of *the Constitution* and Section 388 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya.

(h) An order for general, exemplary and/or punitive damages be made pursuant to the declaratory orders in prayers (a) to (f) above as shall be assessed by the Court.

(i) An order be issued directing the 1st and 2nd respondents jointly and severally to furnish the 2nd petitioner, herein, Khelef Khalifa, and the widow of Omar Faraj (deceased) one Rahma Ali, with information and/or comprehensive report of investigations conducted over the unlawful killing of Omar Faraj (deceased) including information whether any person has been held accountable for his killing, or if any judicial inquest has been initiated regarding his unlawful killing.

(j) Costs of the Petition.

(k) Interest on the monetary awards and on costs of the Petition.

(l) Any further relief that the Court may deem just and fit to grant

[66] Having found that the constitutional rights of the deceased were violated, I am satisfied that the declaratory orders in respect of violations of Articles 26, 27, 28, 29 and 31 are warranted. Those in respect of Articles 35, 48 are premature and unjustified and are accordingly dismissed.

[67] The petitioners also prayed for damages to be assessed by the Court for violation and contravention of the fundamental rights of the deceased. In this respect, it is to be appreciated that from a constitutional standpoint, an award of damages is not intended to serve a punitive end; but for vindication of a right. Thus, in Dendy v University of Witwatersrand, Johannesburg & Others [2006] 1 LRC 291, the Constitutional Court of South Africa held that:

> ...an award of damages was a secondary remedy to be made in only the most appropriate cases...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy." (see also Gitobu Imanyara & 2 others v Attorney General, supra)

[68] While discussing the propriety of an award of damages in constitutional petitions, the Court of Appeal, in the case of Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment), stated: -

> 16. ...that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.

[69] Similarly, in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> ...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and

circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. (Emphasis supplied) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."

[70] Accordingly, counsel for the petitioners proposed an award of Kshs. 5,000,000/= as general damages and Kshs. 1,500,000/= as exemplary damages, taking into account the manner in which the deceased was executed. He urged the Court to take into account that the deceased's life was cut short at the prime age of 39 years. Taking into account the authorities relied on by the Petitioners at paragraph 104 of their written submissions, I am in agreement that an award of Kshs. 5,000,000/= general damages and Kshs 1,500,000/= exemplary damages would suffice.

[71] As to costs, there can be no doubt that the petitioners are entitled to costs, granted the aforementioned findings. Even if the Petition were to be dismissed, it would still be in the discretion of the Court to make an orders as to costs as appropriate. Indeed, in Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR it was held that:

> 3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of *the Constitution* for the enforcement, respectively, of the Bill of Rights and the other parts of *the Constitution* are in the same terms."

[72] In the result, the Petition succeeds in part and orders are hereby granted as follows:

(a) That a declaratory order be and is hereby issued that the right to life of Omar Faraj (deceased) as guaranteed by Article 26 of *the Constitution* was violated as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(b) A declaratory order be and is hereby issued that the right of Omar Faraj (deceased) to equality before the law and equal protection of the law as guaranteed by Article 27(1) of *the Constitution* was infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by the agents of the 1st respondent and by failure to investigate the unlawful killing and bring the culprits to justice.

(c) A declaratory order be and is hereby issued that the right of Omar Faraj (deceased) to inherent dignity and the right to have that dignity respected and protected as guaranteed by Article 28

of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(d) A declaratory order be and is hereby issued that the rights of Omar Faraj (deceased) to freedom and security of the person as guaranteed by Article 29 of *the Constitution* has been infringed as a result of his unlawful killing through unjustifiable and unlawful shooting by agents of the 1st respondent.

(e) A declaratory order be and is hereby issued that the right of Omar Faraj (deceased) and his wife to privacy guaranteed by Article 31 of *the Constitution* was infringed as a result of the unjustifiable and unlawful invasion of their home by agents of the 1st and 3rd respondents without warrants of search and without any reasonable or probable cause for suspicion of any offence committed by Omar Faraj (deceased) and his wife.

(h) An order for general damages in the sum of Kshs. 5,000,000/= and exemplary and/or punitive damages in the sum of Kshs. 1,500,000/= be made pursuant to the declaratory orders in prayers (a) to (e) above together with interest thereon at court rates from the date of this judgment until full payment.

(j) Costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MARCH 2024

OLGA SEWE

JUDGE