



Mohamed & 2 others v Attorney General & another (Constitutional Petition 169 of 2018) [2024] KEHC 5518 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 169 OF 2018**

OA SEWE, J

APRIL 29, 2024

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

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

AND

IN THE MATTER OF UNLAWFUL DEATH OF RASHID SULTAN TIMAM

BETWEEN

MUNIRA MOHAMED 1ST PETITIONER

NASSIR SULTAN MBARAK TIMAMY 2ND PETITIONER

SULTAN ALI SULTAN 3RD PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

JUDGMENT

1. The brief background of the Petition is that Rashid Sultan Timamy, the deceased in this matter, was the husband of the 1st petitioner. He was engaged in the business of house construction under the name and style of Texlive Construction Co. Ltd. At paragraph 12 of the Petition dated 18th June 2018, it was stated that On the 28th June 2016 at about 8.45 p.m. the deceased was at home, working from his home office when a group of armed people invaded his home. The petitioners averred that, in an attempt to defend himself and the members of his household, the deceased rushed to retrieve his duly licensed



- firearm. In the process he was shot dead by the people who his widow, the 1st petitioner, came to learn were police officers. They proceeded to search the house until 11.00 p.m. when the 1st petitioner was taken to the Police Station for further interrogation. The body of the deceased was later released to her for burial.
2. The 2nd petitioner is a brother to the deceased, while the 3rd petitioner is a nephew to the deceased. Thus, the petitioners brought this Petition against the Attorney General, the 1st respondent, and the Inspector General of Police, the 2nd respondent, for the following orders:
 - (a) A declaratory order be issued that Rashid Sultan Timami's right to life as guaranteed under Article 26 of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (b) A declaratory order be issued that Rashid Sultan Timami's right to equality before the law and equal protection of the law as guaranteed under Article 27(1) of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (c) A declaratory order be issued that Rashid Sultan Timami's right to inherent dignity and the right to have that dignity respected and protected as guaranteed under Article 28 of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (d) A declaratory order be issued that Rashid Sultan Timami's right to freedom and security of the person as guaranteed under Article 29 of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (e) A declaratory order be issued that Rashid Sultan Timami's, and his family's right to freedom and security of the person as guaranteed under Article 29 of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (f) A declaratory order be issued that Rashid Sultan Timami's and his family's right to privacy and equal protection and benefit of the law as guaranteed under Articles 27 and 31 of the Constitution has been infringed as a result of the actions by the agents of the 2nd respondent.
 - (g) A declaratory order be issued that Rashid Sultan Timami and his family are entitled to the payment of damages and compensation for the violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution.
 - (h) Costs of the Petition.
 - (i) Interest on [h] above at court rates.
 - (j) Any further relief or orders that the Court may deem just and fit to grant.
 3. The Petition was supported by the affidavit sworn by the 2nd petitioner, Nassir Sultan Mbarak, on 18th June 2018. He deposed that the deceased was a married man, blessed with three children; and that he was a successful businessman who at all material times operated Texlive Construction Co. Ltd. The 2nd petitioner also averred that the deceased was a licensed firearm holder, having applied for and been granted a licence on 29th October 2005 as required under the Laws of Kenya. The 2nd petitioner further stated that on 29th June 2016 at around 12.30 a.m. he was informed of the shooting incident that had occurred at the house of his brother, the deceased. He proceeded to the scene of the incident and got to learn that the deceased had died and that his body was at Malindi District Hospital Mortuary.
 4. The 2nd respondent further averred that the Police, through a press statement, admitted to having killed the deceased; and therefore that the actions of the Police and the state agents amounted to an



infringement of the constitutional rights of the deceased and his family as enshrined in Articles 26, 27(1), 28, 29, 30 and 48 of the *Constitution* of Kenya. Consequently, the 2nd respondent averred that it is in the interest of justice that the Petition be allowed and the orders sought therein granted. He annexed to his affidavit a Certificate of Death in respect of the deceased, a Certificate of Incorporation for Texlive Construction Co. Ltd and a Firearm Certificate in the name of the deceased, among other documents.

5. The Petition was also supported by the affidavits of the 1st petitioner, Munira Hamoud Mohamed, Sultan Ali Sultan, the 3rd respondent, Alex Mbazi Mtume, Salim Hamoud Mohamed, Patrick Mumba, Johnson Kefa Kahindi, Samson Kiti Mwangombe and Riziki Kalume Gohu, the majority of whom were employees of Texlive Construction Company Ltd.
6. In response to the Petition, the respondents relied on the Replying Affidavit sworn by Chief Inspector Stanley Gitiobu of Malindi Sub-County Criminal Investigation Headquarters. He averred that, on the 28th June 2016, Anti-Terrorism Police officers at DCI office Malindi received intelligence that there were terrorist operatives holed up in a house within Malindi Town. They proceeded to assemble a multi-agency team of security personnel for a sting operation at the house in question in Sea Breeze Area.
7. CI Gitiobu further averred that, at about 10.30 p.m. the officers entered into the house of the deceased; and that he resisted the police officers by shooting at them using his shotgun make MOSSBERQ Serial No 1629532. As a result, an exchange of fire ensued in which the deceased was fatally shot. The house was thereafter searched and one Hamud Majid Hamud, who was in the house at the material time, was found in possession of a Taurus revolver Serial No KK99356, which he used to fire at the officers and injured one officer, No 97708 PC Joseph Waititu Wangeci. He concluded his averments by stating that two people were arrested at the scene, namely Hamud Majid Hamud and Abdullaziz Ali; and that later, another suspect was arrested, namely Imran Hassan. Investigations were thereafter conducted, after which the suspects were arraigned before court. In respect of the deceased an inquest file was opened as is the procedure.
8. The respondents filed a Further Affidavit on 24th June 2022, sworn by Chief Inspector Benard Kilonzo, who investigated the subject case alongside Chief Inspector Stanley Gitiobu. He stated that upon conclusion of their investigations he prepared a Covering Report, a copy whereof was exhibited as Annexure BK4 to his affidavit. He explained that the deceased died because he took the first step by firing at police officers; thus necessitating a response from the officers in self-defence. He further averred that their investigations revealed that the deceased and others were involved in terrorist activities, thus putting the whole country in jeopardy. He relied on the Crime and Incident Report, a statement by PC Joseph Waititu who was shot and injured during the incident and an excerpt of the Investigation Diary (Annexures BK1, BK2 and BK3) to demonstrate that had the deceased cooperated with the police officers, the exchange of fire would have been unnecessary.
9. The Petition was canvassed by way of written submissions. Accordingly, Mr. Kazungu for the petitioners filed his written submission on 21st April 2022 and thereby proposed the following issues for determination:
 - (a) Whether the petitioners have demonstrated that their rights and fundamental freedoms under the Bill of Rights have been violated as pleaded;
 - (b) Whether the orders sought by the petitioners should issue.
10. Counsel made reference to the affidavits of the 1st petitioner, Munira Hamoud Mohamed, and Alex Mbazi Mtume sworn on 28th July 2016, as to what exactly transpired on the night of 28th June 2016.



- He urged the Court to find that the respondents have not only admitted the petitioners' account of the events, but have also failed to provide any proof whatsoever of the nature and kind of intelligence that prompted their action. He consequently urged the Court to find that the acts of the respondents' agents were unreasonable and unjustified in the circumstances.
11. Mr. Kazungu relied on *Anarita Karimi Njeru v Republic* [1976-80] 1 KLR 1272 and *Trusted Society of Human Rights Alliance v Attorney General and others*, Petition No 229 of 2012 in support of his submission that the petitioners have demonstrated to the Court in the clearest way possible how and in what manner their rights and those of the deceased, Rashid Sultan Timami, have been violated, as well as the applicable provisions of the *Constitution*. In conclusion, counsel relied on *Kenya Human Rights Commission & another v Non-governmental Organizations Co-ordination Board & another* [2018] eKLR to buttress his submission that public officers have an obligation to obey the constitutional command and the law and that in the event of violation, their actions must be declared unconstitutional and illegal for purposes of Article 23 of the Constitution. He therefore urged the Court to grant the petitioners the prayers sought in their Petition.
 12. On his part, Mr. Waga, learned counsel for the respondents, relied on his written submissions dated 23rd June 2022. He proposed the following issues for determination:
 - (a) Whether the death of Mr. Rashid Sultan Timami was justifiable;
 - (b) Whether the petitioners are entitled to the prayers sought in the Petition.
 13. Mr. Waga submitted on the mandate of the 2nd respondent, reiterated the circumstances under which the deceased was shot dead and urged the Court to find that the death of the deceased was justifiable as it occurred while the officers were protecting their lives in the line of duty. He cited *Rice v Connolly* [1996] 2 QB 414, p 419 and Petition No E063 of 2021: *Abdulrahman Said and another v The Attorney General and others* for the proposition that it is the duty of a police officer to take all steps which appear necessary in the circumstances for keeping peace, preventing crime or protecting property from criminal injury. Accordingly, Mr. Waga prayed for the dismissal of the Petition with costs to the respondents.
 14. A careful consideration of the Petition shows that it was brought in accordance with the principles laid in *Anarita Karimi Njeru v Republic* (supra) in which the Court of Appeal held:

...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.”
 15. The principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as hereunder:
 - (42) ...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.”

16. I have accordingly perused the Petition and the documents filed therewith and note that the petitioners set out how and in what manner their rights and the rights of the deceased, Rashid Sultan Timami, were infringed. They likewise stated with specificity the provisions of the Constitution relevant to their Petition bearing in mind the position taken in the *Trusted Society* case 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.”

17. That said, it is instructive to mention at the outset that, in exercising its interpretive function, the Court must bear in mind the precepts set out at Article 259 of the Constitution. The provision states:

- (1) This Constitution shall be interpreted in a manner that—
 - (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
- (2) ...
- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—
 - (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;



- (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
- (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
- (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

18. Hence, in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR thus:

- 91. The *Constitution* has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
- 92. We are also guided by the provisions of Article 159(2) (e) of the *Constitution* which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the *Constitution*.
- 93. Thirdly, in interpreting the *Constitution*, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of *S. v Acheson*, 1991 (2) S.A. 805 (at p.813) where he stated that:

“The *Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals andaspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the *Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

- 94. Further, the Court is required, in interpreting the *Constitution*, to be guided by the principle that the provisions of the *Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see *Tinyefuza v Attorney General of Uganda* Constitutional Petition No 1 of 1997 (1997 UGCC 3).

19. Similarly, in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, it was held:

...In interpreting the *Constitution*, this court is bound by the provisions of Section 259 which requires that the *Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental



freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...

...In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read together in order to get a proper interpretation. In the Ugandan case of Tinyefuza vs. Attorney General, Constitutional Appeal No 1 of 1997, the court held as follows:

“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”

20. Accordingly, I have given careful consideration to the Petition, its Supporting Affidavits and the written submissions filed by learned counsel, there is no dispute that the 2nd respondent, while working on terrorism related intelligence assembled a multi-agency security team to respond to the perceived threat. Accordingly, the multi-agency team proceeded to the home of the deceased, Rashid Sultan Timami, at Breeze Point Area in Malindi Sub-County on the night of 28th June 2016 at around 10.30 p.m. There ensued exchange of gunfire, in the course of which the deceased was fatally shot while one of the police officers, PC Joseph Waititu was injured. In the averments of CI Stanley Gitioibu and CI Benard Kilonzo two guns were recovered during the operation, a shotgun make MOSSBERQ Serial No 1629531 and a Taurus revolver Serial No kk99356 together with ammunition. They further averred that three suspected terrorists were arrested and later charged with terrorism-related offences; which assertions were not disputed by the petitioners.
21. In the premises, the issues for determination are as follows:
 - (a) Whether the petitioners have demonstrated that the rights of the deceased, Rashid Sultan Timami and their fundamental freedoms under the Bill of Rights have been violated as pleaded;
 - (b) Whether the orders sought by the petitioners should issue.

A. On violation of the deceased’s and petitioners’ rights and fundamental freedoms under the Bill of Rights:

22. As has been pointed out herein above, the 1st petitioner is the widow of the deceased herein, Rashid Sultan Timami. At paragraph 1 of the Petition, it was averred that the petitioners brought this Petition as a matter of public interest, the pursuit of the rule of law and in defence and protection of the provisions of the Constitution of Kenya and on behalf of the estate of Rashid Sultan Timami. The 2nd petitioner was described as a brother of the deceased while the 3rd petitioner is a nephew to the deceased. Other than a prayer for a declaratory order on behalf of the deceased, his widow and their three children, as per paragraph [e] and [f] of the prayers in the Petition, all the other prayers are exclusively in connection with the deceased. It is also noteworthy therefore that there is no specific prayer in respect of the 2nd and 3rd petitioners, save the general assertion at paragraph [g] that “Rashid Sultan Timami and his family” are entitled to payment of damages and compensation for the violations and contraventions of their fundamental rights and freedoms under the Constitution.
23. In the premises, the petitioners’ prayers are all predicated on the death of Rashid Sultan Timami, to which end, the petitioners relied on Articles 26, 27(1), 28, 29, 31 and 48 of the Constitution. Article 26 of the Constitution provides for the right to life 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 authorized 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.
24. There is no gainsaying therefore that the right to life is sacrosanct and therefore ought to be treated as such. It is for this reason that the Kenyan law criminalizes both intentional and non-intentional killing of another. It should be plain then that, granted the provisions of Article 244 of the Constitution, individual officers employed in the Police Service ought to exercise restraint in effecting arrest of offending citizens; and therefore that the mere fact that police officers were in the course of effecting arrest of the victim is no justification for the taking away of another person's life. I therefore could not agree more with the expressions of Hon. Onguto, J. in *Ann Wairimu Njabira v Nairobi City County Government & 4 others* [2017] eKLR that:
21. Like in most international convention 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 the 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 a prohibition against killing whilst making an arrest. The arresting entity it 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 fulfill" the rights in the Bill of Rights : see Article 21 of the *Constitution*.
25. The petitioners have consequently demonstrated that on the 28th June 2016 at around 8.45 p.m. police officers invaded the deceased's home and shot him dead in the presence of his wife, the 1st petitioner. The Certificate of Death was exhibited herein as Annexure ASM-1 to the Supporting Affidavit, and it confirms that the deceased, Rashid Sultan Timami, died on 28th June 2016 at the age of 41 years. The Certificate of Death further confirms that the cause of death of the deceased was cardio pulmonary arrest due to pulmonary haemorrhage due to penetrating thoracic injury. Indeed, the fact of death of the deceased was expressly admitted by the respondents vide paragraph 6 of the Replying Affidavit of Chief Inspector Gitobu.
26. Granted the circumstances under which the deceased died, the question to pose is whether the shooting incident was intentional or whether it is excusable in law. The question is pertinent because, as pointed



out herein above, Article 26(3) of the Constitution recognizes that a person may be deprived of life in situations where such deprivation is authorized by the Constitution or other written law. Indeed, Article 24 of the Constitution is explicit that:

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
 - (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
- (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

27. Accordingly, the petitioners having demonstrated that the deceased was shot dead by the the Police, the burden of proof shifted to the respondents to demonstrate that the shooting was justified. This is explicit from Sub-Article (3) above. Thus, in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated))* [2013] KESC 6 (KLR) (16 April 2013) (Judgment), the Supreme Court held:

"...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden..."

28. Similarly, in *Mburu Njuguna (suing on behalf of the Estate of John Macharia Mburu (deceased)) v Chief Korogocho Location & 3 others* [2014] eKLR it was held:

Once the petitioner has established, on the balance of probabilities, that the death of the deceased was as a result of police action, the burden of proof that the death was as a result of one or more of the exceptions provided in the Constitution is on the State. In *Stephen Iregi Njuguna v Attorney General*, Civil Appeal No 55 of 1997 (1995-1998) 1 EA 252, the Court of Appeal stated the position thus, "The police do not have any unqualified licence to resort to shooting. They are authorised 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...”

29. The explanation proffered by the respondents was that when they visited the home of the deceased for a sting operation, he resisted the police officers by shooting at them using his shotgun make MOSSBERQ Serial No 1629532. As a result, an exchange of fire ensued in which the deceased was fatally shot. CI Gitibu further explained that upon searching the house, they found one Hamud Majid Hamud, who was in possession of a Taurus revolver Serial No KK99356, who also fired at the officers and injured one officer, No 97708 PC Joseph Waititu Wangenci.
30. As has been pointed out herein above, there is no dispute that two suspects were arrested at the scene, namely Hamud Majid Hamud and Abdullaziz Ali and that later, another suspect was arrested, namely Imran Hassan who were duly charged and arraigned before court. In the Covering Report exhibited as Annexure BK4, the investigating officer explained that the deceased died because he fired at police officers; thus necessitating a response from the officers in self-defence. He further averred that their investigations revealed that the deceased and others were involved in terrorist activities, thus putting the whole country in jeopardy. He relied on the Crime and Incident Report, a statement by PC Joseph Waititu who was shot and injured during the incident and an excerpt of the Investigation Diary (Annexures BK1, BK2 and BK3) to demonstrate that had the deceased cooperated with the police officers, the exchange of fire would have been unnecessary.
31. That two guns were recovered from the shooting scene is not in doubt. In addition, the 1st petitioner conceded at paragraph 7 of her Supporting Affidavit that the deceased and his nephew confronted the police officers with guns. She stated thus with reference to her deceased husband:
- "I was hearing gunshots, he went to his room to pick up his gun together with the nephew as had two types of guns; namely a pistol revolver and a short gun..."
32. In addition to the foregoing, the respondents availed evidence to prove that, in the course of the exchange of fire, one of the police officers, PC Wangeci, was shot and injured. His statement was introduced in evidence as an annexure to the Further Affidavit sworn by CI Kilionzo; which evidence was uncontroverted. That evidence shows that the situation was a delicate one and that the use of force was justified from the standpoint of Section 49 of the *National Police Service Act* as read with Part B of the Sixth Schedule. In particular, Paragraph 2 of Part B, Sixth Schedule states:
- Firearms may only be used when less extreme means are inadequate and for the following purposes— (a) saving or protecting the life of the officer or other person; and (b) in self-defence or in defence of other person against imminent threat of life or serious injury.
33. In the premises, the respondents have satisfactorily proved that the circumstances warranted the use of firearms in self defence. It is instructive that Section 35 of the *Prevention of Terrorism Act*, No 30 of 2012 provides:
- (1) Subject to Article 24 of the *Constitution*, the rights and fundamental freedoms of a person or entity to whom this Act applies may be limited for the purposes, in the manner and to the extent set out in this section.
 - (2) A limitation of a right or fundamental freedom under subsection (1) shall apply only for the purposes of ensuring—
 - (a) the investigations of a terrorist act;



- (b) the detection and prevention of a terrorist act; or
 - (c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others.
- (3) The limitation of a fundamental right and freedom under this section shall relate to—
- (a) the right to privacy to the extent of allowing—
 - (i) a person, home or property to be searched;
 - (ii) possessions to be seized;
 - (iii) the privacy of a person’s communication to be investigated, intercepted or otherwise interfered with.
 - (b) the rights of an arrested person specified under Article 49(1)(f) of the Constitution may be limited only for purposes of ensuring—
 - (i) the protection of the suspect or any witness;
 - (ii) the suspect avails himself for examination or trial or does not interfere with the investigations; or
 - (iii) the prevention of the commission of an offence under this Act and the preservation of national security, in accordance with section.
 - (c) the freedom of expression, the media and of conscience, religion, belief and opinion to the extent of preventing the commission of an offence under this Act; (d) the freedom of security of a person to the extent of allowing investigations under this Act;
 - (e) the right to property to the extent of detaining or confiscating any property used in the commission of an offence under this Act.

34. In Rice v Connolly [1996] 2 QB 414, p 419 it was held, (per Lord Parker):

‘It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury.’

35. In the light of the foregoing, it is manifest that allegations of violation of Articles 26 are untenable. In the same vein and for the same reasons, the allegations of violations of Articles 27(1), 28, 29, 31 and 48 of the Constitution, cannot stand. The Petition is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF APRIL 2024

OLGA SEWE

JUDGE

