**Legal Advice Centre t/a Kituo Cha Sheria & 84 others v Cabinet Secretary, Ministry of Education & 7 others (Petition 104 of 2019 & 353 of 2022 & 209, 210, 211, 212, 213, 214 & 215 of 2021 (Consolidated)) [2024] KEHC 17253 (KLR) (Constitutional and Human Rights) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17253 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 104 OF 2019 & 353 OF 2022 & 209, 210, 211, 212, 213, 214 & 215 OF 2021 (CONSOLIDATED)**

**AK NDUNG'U, M THANDE & DK KEMEI, JJ**

**JULY 31, 2024**

**BETWEEN**

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... 1ST PETITIONER**

**AGNES WAHITHE MWANGI ..... 2ND PETITIONER**

**JANNAI S. NJEKA ..... 3RD PETITIONER**

**PAUL KINYALA ..... 4TH PETITIONER**

**JOHN MAINGI MWANGI ..... 5TH PETITIONER**

**JOSEPH WANYIRI NGATIA ..... 6TH PETITIONER**

**JOHN GITAU MUCHERU ..... 7TH PETITIONER**

**PETER KINUTHIA WAINAINA ..... 8TH PETITIONER**

**SUSAN GAKENIA KAMAU ..... 9TH PETITIONER**

**KENNETH GATITHU NG'ANG'A ..... 10TH PETITIONER**

**AGNES MBITHE MUINDU ..... 11TH PETITIONER**

**SIMON KURIA KANYARI ..... 12TH PETITIONER**

**JAMES NG'ANG'A ..... 13TH PETITIONER**

**KESIAH WANJIRU NJENGA ..... 14TH PETITIONER**

**JOYCE KEMTO NYAKUNDI ..... 15TH PETITIONER**

**EVERLYNE NAOMI MAKUBA ..... 16TH PETITIONER**

**CHARLES NDERITU KINGORI ..... 17TH PETITIONER**

**STANELY MAINA WAIHARO ..... 18TH PETITIONER**

**PETER NGANE KAMAU ..... 19TH PETITIONER**

**FREDRICK ECHESA WABURAKA ..... 20TH PETITIONER**

**JACKSON M. NGULI ..... 21ST PETITIONER**

**FLORENCE KATUNI FELIX ..... 22ND PETITIONER**

**BENSON THINWA WANJAU ..... 23RD PETITIONER**

**DAVID OLIMBA ONYANGO ..... 24TH PETITIONER**

**STEPHEN KILONZO MUSAU ..... 25TH PETITIONER**

**PETER OSUMO OMWAMBA ..... 26TH PETITIONER**

**KALEKYE MWANDIKA MUSYIMI ..... 27TH PETITIONER**

**PETER MUNYOKI ISOMBO ..... 28TH PETITIONER**

**JAMES KIHIA MWANGI ..... 29TH PETITIONER**

**AMOS E. OMONDI ..... 30TH PETITIONER**

**DAVID WANYONYI MUSAMBAI ..... 31ST PETITIONER**

**MUMBE MULEI ..... 32ND PETITIONER**

**PAUL NYANGAU MOSIRIA ..... 33RD PETITIONER**

**RISPER KERUBO MOSE ..... 34TH PETITIONER**

**SAMUEL GEORGE OJORO ..... 35TH PETITIONER**

**BENSON MUTUKU NDAMBUKI ..... 36TH PETITIONER**

**CAROLINE ATIENO ..... 37TH PETITIONER**

**DANIEL WILLIAM NYABOGA ..... 38TH PETITIONER**

**EUNICE WANGARI MWANGI ..... 39TH PETITIONER**

**BENSON MULUNDA MUTOTE ..... 40TH PETITIONER**

**AGNES SYONMBUA MUSYIMI ..... 41ST PETITIONER**

**THOMAS AKELO WAYODI ..... 42ND PETITIONER**

**KARANI KADHENGI MENZA ..... 43RD PETITIONER**

**ANJELINE ADIPO NYADENGE ..... 44TH PETITIONER**

**PETER KIPKORIR KOMEN ..... 45TH PETITIONER**

**JOSEPH OMARI ..... 46TH PETITIONER**

**AFUSA CHITERI MUKOYA ..... 47TH PETITIONER**

**SIPRINE ANYANGO ODONGO ..... 48TH PETITIONER**

**PURITY WANJIRU NDUMIA ..... 49TH PETITIONER**

**ISAAC OCKEREMI ESIROMO ..... 50TH PETITIONER**

**HENRY MULI MULUI ..... 51ST PETITIONER**

**ZIPHORAH KARIMI NKANATHA ..... 52ND PETITIONER**

**FELIX WANJALA BARASA MUSABI ..... 53RD PETITIONER**

**JOSPEH KIKUVI MWANIA ..... 54TH PETITIONER**

**JULIUS MULU MWIKYA ..... 55TH PETITIONER**

**PHINEAS GICHOVI ..... 56TH PETITIONER**

**CHRISTOPHER BUSHEN LEGEN ..... 57TH PETITIONER**

**JOSPEH MUSAU MUKEWA ..... 58TH PETITIONER**

**JAPHETH MUTHAMA KIVUA ..... 59TH PETITIONER**

**HANNAH WAMAITHA NJENGA ..... 60TH PETITIONER**

**THOMAS MWANGI KARANJA ..... 61ST PETITIONER**

**ELIZABETH MUTHONI KARIUKI ..... 62ND PETITIONER**

**JAMES MINJIRE MACHARIA ..... 63RD PETITIONER**

**MUTHURI PATRICK MWENDWA (SUING ON BEHALF OF THE ESTATES OF THEIR DECEASED CHILDREN, THEIR OWN BEHALF AS PARENTS OF GARISSA UNIVERSITY COLLEGE TERRORISM ATTACK VICTIMS) ..... 64TH PETITIONER**

**REACHEL MUNJIRU GIKONYO ..... 65TH PETITIONER**

**BEN MWITI KABERIA ..... 66TH PETITIONER**

**JAMES MULI MUTHENGI ..... 67TH PETITIONER**

**DANCAN OBWAMU OMBUNGA ..... 68TH PETITIONER**

**ANDERSON OWALLA OGOLA ..... 69TH PETITIONER**

**ALFRED KITHU MUTUA ..... 70TH PETITIONER**

**RISPER NYAKARI NYANG'AU ..... 71ST PETITIONER**

**MERCY CHEPKORIR ..... 72ND PETITIONER**

**NARIUS KIPNG'ENO ..... 73RD PETITIONER**

**STANLEY MWANGANGI MULI ..... 74TH PETITIONER**

**KASYOKA MWAMBEKO ..... 75TH PETITIONER**

**EVALINE CHEPKEMOI ..... 76TH PETITIONER**

**RONALD MAGEMBE MORANGA ..... 77TH PETITIONER**

**ANNASTACIAH NTHENYA MIKWA ..... 78TH PETITIONER**

**FRANKLINE WEKESA SIMIYU ..... 79TH PETITIONER**

**JOSEPHAT WAFULA MUMILO ..... 80TH PETITIONER**

**NYONGESA WAFULA ISAAC ..... 81ST PETITIONER**

**HENRY WABOMBA WAFULA ..... 82ND PETITIONER**

**COSMAS WEKESA MUSEMBE ..... 83RD PETITIONER**

**JOSEPHAT NYONGESA KISIKA ..... 84TH PETITIONER**

**GODFREY WANGWELO KIKAI ..... 85TH PETITIONER**

**AND**

**THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR SECURITY AND COORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT**

**THE INSPECTOR-GENERAL, THE NATIONAL POLICE SERVICE .... 3RD RESPONDENT**

**GARISSA UNIVERSITY ..... 4TH RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF DEFENCE ..... 5TH RESPONDENT**

**THE HON. ATTORNEY-GENERAL ..... 6TH RESPONDENT**

**INDEPENDENT POLICING AND OVERSIGHT AUTHORITY .... 7TH RESPONDENT**

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... 8TH RESPONDENT**

## JUDGMENT

### Introduction

1. On 2nd April 2015, a tragic and devastating terrorist attack occurred at Garissa University [College] [the University] in Kenya, resulting in the deaths of 148 people and 79 injured. Following the attack, a number of Petitions claiming violation of constitutional rights by the University and Government agencies were filed, namely Petition 104 of 2019, Petitions Nos. 209-215 of 2021 and Petition 353 of 2022. The Petitions were subsequently consolidated by an order of the Court dated 19th September 2023 with Petition No. 104 of 2019 being the lead file.

### Petition 104 of 2019

2. Petition No. 104 of 2019 dated 15th March 2019 and amended on 14th November 2019, seeks the following orders:

    a. A declaration that the state and the Respondents have the responsibility to prevent and combat terrorism and to protect citizens from terrorist attacks and that the state abdicated on this responsibility during the Garissa University College attack.

b. A declaration that the Respondents failed/neglected to take adequate measures to prevent the attack, mitigate the effect of the attack and/or ease the escape and rescue operations as a result of their reckless and negligent acts the petitioners' children lost their lives and their constitutional rights were violated.

c. A declaration that the Petitioner's right to legitimate expectation of police action that was preventive, responsive, expeditious and efficient before and after the attack as espoused in Article 244 of *the Constitution* of Kenya and Section 24 of the *National Police Service Act* was gravely violated.

d. A declaration that with the general information and sufficient intelligence on a possible attack the Respondents were incomplete [sic] dereliction of the duties and obligations.

e. A declaration that the Respondents compromised or violated the rights to life, security of Person of the Petitioners' children and the legitimate expectation of the Petitioner's under Article 26 of *the Constitution*, Article 29 of *the Constitution* of Kenya, Article 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.

f. The state contravened the provisions of Article 241[3] of *the Constitution* of Kenya in deploying military officers in the attack as a result of which the petitioners' children lost their lives and their constitutional rights were violated.

g. A declaratory order directed at the Attorney General to advise the President to set up a commission of inquiry to inquire on the:

    i. The steps the state has taken to prevent terrorism and avoid a repetition of an attack in an education facility.

    ii. The state and the relevant bodies have taken following the recommendations of the reports of the 7th and 8th Respondents.

    iii. Culpability of state officers in the attack and recommendations for their prosecutions.

    iv Life sentence with no possibility of parole for terrorist attackers and the recommendations be forwarded to the necessary bodies for formulation and enactment of statute law.

h. A declaratory order directed at the Attorney General to advise the President to set up a Ministry of State in charge of Anti- terrorism.

i. An order directed at the state and the Respondents to build a concrete perimeter wall around Garissa University with a fully equipped police station within the school compound and manned by paramilitary personnel and students nominated by the student's union.

j. Spent.

k. A declaration that as a result of the breach of rights enumerated above, the Petitioner suffered damages, pain and suffering.

l. A declaration that each of the Petitioners is therefore entitled to special, general and exemplary damages against the Respondents herein jointly and/or severally.

m. An order for compensation as enshrined and provided for under Article 23[e] of *the Constitution* made up of special damages for the expenses incurred and the damages for loss

of lives, General damages and exemplary damages pursuant to the declaration prayed in prayer [k] above for each of the petitioners.

n. This being a matter of public interest there be no orders as to costs.

3. The events that constitute the background to this Petition are as indicated in the Petition and are in effect complaints against what the Petitioners deem to be the actions and or omissions of the various State Officers and offices as well as the 4th Respondent [the University]; that the said acts and omissions led to the untimely demise of the Petitioners' children, loss, pain and suffering to the estates of the deceased children. The Petitioners also claimed that they incurred expenses, suffered immense psychological and emotional pain.

4. The Petitioners averred that their children received death threats in December 2014, which created tension in the University. Further, that the University's principal wrote to the County Commissioner in March 2015 seeking that security within the school be increased. However, the request was not sufficiently considered. It was stated that alerts were duly issued to universities, warning them of imminent terrorist attacks and immediately thereafter the Garissa Teacher Training College that is adjacent to the University was closed. It was further averred that on 1st April 2015 some students received SMS messages of an impending terror attack which the University dismissed as an April fool's day prank.

5. The Petitioners gave a narration of how the attack unfolded on the material date at around 5 am at the University gate where two civilian guards were fatally shot. The attackers then moved to a classroom where some 30 students holding their morning devotion were equally shot dead. Thereafter, the assailants advanced to the hostels where they killed more students and injured others.

6. The Petitioners' grievance is that the response to the attack was unreasonably delayed and uncoordinated. Kenya Defence Forces [KDF] responded at around 11 am while RECCE Squad responded at 5pm, which was several hours after the commencement of the attack. It is the Petitioners' case that the delay in deploying the elite squad was occasioned by misuse of their pilot and their CESSNA plane for personal use hence leaving them with no means of transport.

7. In addition, the State failed to provide security officers with equipment like night vision and deployed aged officers as well as those with limited training to the operation, and in totality failed to prioritize deployment of officers to the University on the day of the attack. It was further stated that the Respondents did not conduct security surveys on targeted institutions including the University and failed to implement security intelligence recommendations so as to avert the attack. Similarly, that the Respondents failed to heed travel advisories issued by foreign states to their nationals on the possibility of terrorist attacks in the country.

8. The situation was exacerbated by the construction design of the hostels that did not provide adequate emergency escape exits rendering them a death trap for the students. Additionally, the University did not have the necessary technology like electric fences, CCTV to identify potential attackers and suspicious activities. The Petitioners blamed the University for failing to provide information on emergencies so as to prevent and mitigate the effects of the attack.

9. Further, it is pleaded that no appropriate measures were taken to enhance the security of the Petitioners and the University in general despite there being recommendations in reports on previous terrorist attacks which the State has failed to implement, enforce and effect.

10. Additionally, it is pleaded that the leader of majority in national assembly flanked by leaders from North Eastern Kenya had in a press conference stated that he would produce the names of the

financiers of the Garissa University terrorist attack. Hence the petitioners contend that the State with its machinery had all information on the financiers, collaborators and sympathizers of the attack.

11. In view of the foregoing, the Petitioners contend that the actions and omissions of the Respondents offended the provisions of Articles 26[1], 29 and 43[f] of *the Constitution*. The 3rd Respondent, the Inspector General of the National Police Service [the IG] was alleged to have been in breach of his mandate under Article 244 of *the Constitution* as well as Section 24 of the *National Police Service Act*. It was further alleged that the State contravened Article 241[3] of *the Constitution*.

12. The facts upon which the Petition is grounded were reiterated in the affidavit of Dr. Annette Mbogo, the Executive Director of the 1st Petitioner sworn on 14th November 2019. According to her, the office of the Ombudsman carried out investigations on the Garissa University attack pursuant to its mandate under *the Constitution* and the *Commission on Administrative Justice Act* and whose finding were that incapacity was to blame for the magnitude of the attack. She averred that the Parliamentary Committee on the terror attack on Westgate Mall made recommendation on establishment of a national inter-agency coordination center. She accuses the State of failure to implement the findings of the said committee which led to poor coordination of response to the Garissa University attack resulting in a long siege and loss of lives. She cited the report of the parliamentary committee which found that the Garissa University attack would have been prevented or at least limited to very few casualties, had necessary steps been taken.

13. She averred that pursuant to its constitutional mandate, the Ombudsman carried out investigations into the Garissa University attack and made a report. She referred to a press release containing part of the Ombudsman report which found a number of weaknesses in policing, welfare and support to Police Officers involved in operations. The Ombudsman further found that the Commandant erred for directing the pilot of Cessna 208 to fly his daughter-in-law and her children from Mombasa to Nairobi at a time when there was the pressing need to promptly deploy the elite RECCE squad and security personnel to the University.

14. She averred that in the report S/ 2015/ 801 released by the United Nations Monitoring Group on Somalia and Eritrea, Kenya security forces were faulted for their slow response to the assault. Further that a committee of the United Nations Security Council faulted the State for failing to act on credible security intelligence about the imminent attack on the University and that according to the report, multiple intelligence sources told members of the monitoring group that the assailants were known to be in Garissa 10 to 14 days prior to the attack. Additionally, that the report indicated that Dr. Ahmed Warfa, the Principal of the University, received an SMS from the police advising him of a possible attack against 4 targets including the University. Being aware that the security arrangements were inadequate, he wrote to the Deputy County Commissioner, County Commissioner, High ranking state officials, Ministry of Education and the Vice-Chancellor of Moi University, seeking security reinforcements but received no response.

15. The report further confirmed the Petitioner's claim for inordinate delay in that it indicated that the security officers arrived at the campus two hours after the attack. However, no action was taken against the attackers until the elite RECCE squad of the General Service Unit arrived late in the evening leading to many casualties. The report further confirmed that in March 2015, intelligence warnings of an imminent attack on education institutions in Kenya had widely been disseminated and most universities had gone on high alert.

16. Annette Mbogo stated that the police failed to discharge their duties diligently and professionally before, during and after the attack in accordance with their mandate under Article 244 of *the Constitution* of Kenya and Section 24 of the *National Police Service Act*. Additionally, that the

deployment of army officers in the circumstances was in contravention of Article 241 of *the Constitution* which requires that such deployment is to assist and cooperate with other authorities followed by a report to the National Assembly, which was not done.

17. She contended that the Respondents violated Articles 26, 29, 241 and 244 of *the Constitution* and Section 24 of the *National Police Service Act*. She urged that the Respondents are hence liable for the material loss and damage suffered by the Petitioners and the estates of their children.

18. The Petition is also supported by the affidavit of Stephen Mwangi sworn on 14th November 2019. He averred that he was then the Secretary General of the University College and that he lost his sister Joyce Wakiuru in the Garissa terrorist attack. He stated that at the time of the attack, he was a second-year student pursuing a bachelor's degree in information sciences and was waiting to sit his exams. He averred that in December 2014 or thereabout, they received threats vide letters dropped along Garissa Road adjacent to the University, warning all non-Muslim students to vacate the University or risk facing a similar fate as that of the bus and quarry terrorist attacks in Mandera in the year 2014.

19. He averred that in March 2015, security personnel drawn from Garissa Police Station held a meeting with student leaders and the students were assured of their security. Thereafter alert notices warning of imminent terrorist attack to a university or institution of higher learning in Kenya were dispatched to all universities and prominently displayed in their notice boards.

20. On the material day, he was able to escape the attack by hiding in a wardrobe. The escape of other students was however hampered by the manner in which the student hostels were constructed. He blamed the Respondents for being complacent.

21. In further support to the Petition, the 2nd Petitioner Agnes Wahithe Mwangi duly authorized by her co-Petitioners swore an affidavit on 14th November 2019 and stated that she brought the Petition on her own behalf and on behalf of parents of the students of the University and the estates of the deceased students. She annexed copies of death certificates, letters of administration for the estates represented, university identification documents, birth certificates and a letter from State House dated 7th April 2015.

22. According to the deponent, she received a text from her son, Stephen Mwangi informing her of the attack; that she learnt that her daughter Joyce Wakiuru was killed in the attack and that she incurred burial expenses.

23. She further averred that there had been security concerns and security intelligence concerning the attack but the Respondents did not take measures to avert the attack. She referred to news articles and videos marked as AW4, AW 5[b], [c], [d], AW6 [a], [b], AW 7[a], [b], [c] and [d]. It was the deponent's concern that there was late deployment of the elite squad that ended the attack and had the deployment been timely, her daughter would not have died. The deponent was aware of a preliminary inquiry investigating the attack and she attached a video by the then Minister of Interior and Security that was certified by Tobias Mwadime. According to the deponent, the Government is to blame for failing to prevent the attack by not deploying sufficient security personnel. In this regard, she attached newspaper reports and copies of Hansard Proceedings. She averred that she had a justiciable claim for damages and compensation that she and her co-Petitioners were entitled to.

24. The 1st Respondent [Cabinet Secretary, Ministry for Education] opposed the Petition vide a replying affidavit sworn on 12th October 2020 by Amb. Simon Nabukwesi, its Principal Secretary State Department for University Education & Research. He deponed that as duly stated by the Petitioners, terrorism is a global challenge and that the Government of Kenya recognizes terror as a world menace hence the accession and ratification of peace and security treaties. He cited the International

Convention for Suppression of terrorists Bombings on 16th November 2001 the objective of which is to enhance international cooperation among state parties in devising and adopting effective and practical measures for prevention of acts of terrorism and for prosecution and punishment of perpetrators. To implement that convention, Kenya enacted the *Prevention of Terrorism Act* No. 30 of 2012 and established the Anti-Terrorism Police Unit.

25. He further stated that Kenya signed the International Convention for the Suppression of Acts of Nuclear Terrorism on 15th September 20015 and ratified the same on 13th April 2006.

26. He concluded that contrary to the Petitioners' allegation, the Respondents did not provide an unsafe education environment to the students of the University, which lead to their death.

27. In reply to the Petition, Njenga Miiri, then County Commissioner Garissa swore an affidavit on 18th November 2020 on behalf of the 2nd Respondent, the Cabinet Secretary, Ministry of Interior, Security and Coordination of National Government [Cabinet Secretary Interior]. He averred that he was involved in the coordination, response and rescue operation on 2nd April 2015 at the University when the Al-Shabaab terrorist group invaded the institution. He averred that as the then chair of the Security Committee in the County it was within his purview to ensure co-ordination on security matters between all the relevant security agencies in the County.

28. He further stated that he received various intelligence reports of the heightened terrorist activities in the County and not in relation to a pending attack against the University in particular. He contended that the Petitioners' allegations of availability of intelligence against an impending attack against the University on 2nd April 2015 is untrue and not backed by any tangible evidence. He added that reinforcements were dispatched based on the available intelligence of the impending terrorist attacks and according to resources available at that time.

29. Further, he stated that security personnel were dispatched to all potential areas of attack including the University and that on the first alert of the attack on the University, the State dispatched all specialized troops from all the security agencies. He averred that the Recee Squad is not the only qualified group to defend the scene at the University as other officers were available, including the KDF, NPS and special forces.

30. His case is that the Petitioners failed to avail evidence to prove the allegation that the Police aircraft was being used by an officer to fly his daughter in law and her children from Mombasa to Nairobi as alleged.

31. In addition, he stated that terrorism is a global phenomenon and an emerging security issue that nations all over the world are struggling to combat and control. Further, that there is no quick fix to terrorism and even the world's most powerful nations do not have control over the same. On mechanisms put in place by Kenya to combat terrorism, he stated that all 47 counties had by June 2019 been supported by the national Counter Terrorism Center to develop county action plans for countering violent extremism.

32. On alleged culpability of security officers, he stated that a few officers who had been interdicted were reinstated following independent investigations by the IG and the Cabinet Secretary Interior which absolved them of abdication of their duties.

33. On the averments in the Petition regarding Aden Duale, the majority leader in the National Assembly, he averred that the said leader enjoys the constitutional right to freedom of expression and the Respondents have no control of what he says. Further, that the said leader has never supplied the information to any State security agency and his statements cannot be an illustration that the agencies had all information but failed to take steps to stop the attacks.

34. It was further averred that the Petitioners have not met the threshold for the orders sought as they have not tendered any evidence demonstrating the alleged negligence on the part of the Respondents and how the State agencies failed to discharge their mandate to prevent and control the terror attack at the University. Further that the Petitioners cannot shift the burden of proof to the Respondents in any way.

35. He urged that the Petition be dismissed with costs to the Respondents.

36. The 3rd Respondent opposed the Petition vide a replying affidavit sworn on 12th July 2019 by Musa Yego, currently the Officer in Charge of Flying Squad Kenya at the Directorate of Criminal Investigation. He averred that he was involved in the coordination, response and rescue operation on 2nd April 2015 at the University when the terror group, Al-Shabaab, attacked the institution at around 6.00 am in the morning. He stated that they responded in due time by sending more specialized forces from, KDF, the Administration Police, DCIO, Kenya Police and the GSU RECEE Squad. He averred that in synergy with the relevant medical emergency services they were able to save most of the students who had been held captive within the institution.

37. He added that they were in receipt of security intelligence on impeding terror attacks in the country and the allegations as contained in the Petition is false as there was no specific intelligence of a possible attack at the University. He contended that acting on the security intelligence they were able to avail reinforcements in the 200 mapped potential areas and that they were in receipt of the University's request for additional security reinforcements. Further, that the University was supplied with additional security personnel and police officers intensified patrols and surveillance at the University and other potential areas. Further that contrary to the Petitioners' allegations, the IG did deploy the GSU RECEE Squad and enough troops and personnel on the ground in response to the terror attack.

38. Musa Yego further stated that the GSU RECEE Squad arrived at the scene at 2 pm and not 6 pm as alleged. He averred that the Police airplane was in Mombasa on official duty and that the allegation that the same was in use by the family of a senior police officer and not availed in good time to airlift the RECCE Squad, is mere hearsay.

39. He further deponed that the police and military world over have a systematic way of dealing with incidents such as the terrorist attack and that the same is not open for civilian scrutiny. He added that the Petitioners are not experts in the field and cannot therefore give an opinion on whether the operation was well coordinated or not.

40. On travel advisories, he stated that the same give general information and cannot be used as intelligence as they have no background information and are not specific. In any event the Respondents have no control over travel advisories issued by foreign states.

41. Responding to the Petitioners' allegations regarding Aden Duale, the then majority leader in the National Assembly, he stated that the leader of Majority in Parliament enjoys his constitutional rights of freedom of expression. Further that the sentiments and opinions expressed by members of the legislative arm of government as seen in the Hansard report were mere opinions on the floor of the House.

42. He further averred that newspaper cuttings cannot be tendered as evidence in a court of law.

43. On the prayer that the President be ordered to form a judicial commission of inquiry, he stated that there is no provision under an Act of Parliament that stipulates that the President of the Republic of Kenya can be compelled or supervised to discharge his mandate as provided under Section 3 of the

Commission of Inquiry Act. Similarly, that the Court has no jurisdiction to direct the Executive to set up a ministry in charge of terrorism.

44. Prof. Ahmed Osman Warfa, then Principal of the University swore a replying affidavit on 16th June 2021. He disputed the allegations by the Petitioners that prior to the attack students of the University received warnings in form of letters thrown on the side of the road adjacent to the University alerting them of an attack against the University. He maintained that the University was not made aware of such warnings.

45. According to him, the architectural design of the University did consider safe and rapid exits of students in cases of any emergency and that the demarcation between the male and female hostels was for security purposes.

46. With regard to response to the attack, he stated that KDF, NPS and local administration police first responded before the arrival of the Recce Squad and all worked as a team as a result of which many lives were saved.

47. He further stated that the students of the University had been taken through mock exercises and sensitized on how to respond in cases of a terror attack. It is therefore not true that the Respondents failed to initiate security awareness and sensitization of the students.

48. The 5th Respondent [Cabinet Secretary, Defence] opposed the Petition vide a replying affidavit sworn on 17th July 2019 by J. R. Kamary, then Commander Forward Maintenance Area, Garissa Military Camp. It is his case that the Petition is fatally defective and should be struck out, in that the affidavits in support thereof offend the provisions of Section 4[1] of the *Oaths and Statutory Declarations Act*, having been commissioned by Rhoda N. Maina, who works for the 1st Petitioner. Further that the limited grant of letters of administration in Petitions 50 and 51 of 2017 are in respect of the same person and are designed to sway the cause of justice. Additionally, that the limited grants relied on by the 2nd -10th Petitioners are defective.

49. According to the deponent, the Petition is a fishing expedition and does not meet the threshold of public interest litigation as the remedies sought are private and personal in nature. It is contended that the Petitioners have relied on newspaper cuttings which are inadmissible in evidence.

50. The deponent stated that when he arrived at the scene of the incident he found that the NPS personnel had arrived and were in control of the operation. He added that the KDF is adequately trained to tackle all manner of security situations including fighting in built up areas and close quarters combat. He stated that the contingent assisted in the rescue of 600 students, suppressed and neutralized the terrorists. He asserted that KDF was solely deployed to the scene in support of the NPS in line with its constitutional mandate and upon request of Garissa County National Police Service Command. He stated that KDF's involvement in the operation was therefore in support of civilian authorities in the context of disaster or emergencies as provided under Article 241[3] of *the Constitution* and at no time did the KDF take over command and control of the operation.

51. Kamary further stated that he was not aware of any specific and actionable intelligence on the occurrence of the attack at the University but was aware that the NPS Command at Garissa had increased deployment of personnel due to activities of Al-Shabaab in the region.

52. The 7th and 8th Respondents were by an order of this Court of 28th April 2022 discharged from the Petition.

**Petition 353 Of 2022**

53. This Petition is dated 6th July 2022 and arises from the terrorist attack on the University on 2nd April 2015. Whereas the factual basis of the Petition is the same as in Petition 104 of 2019, the Petitioners herein claim damages for injuries sustained in the attack. The Petitioners claim that as a result of the Respondents actions they have suffered various injuries.

54. The Petitioners listed the claim for special damages which include Kshs. 5,000.00 being the cost of obtaining medical legal report. The 2nd Petitioner claims Kshs. 4,571,033.72 being hospital costs and Kshs. 2,920,000.00 being future medical expenses. The 6th Petitioner claims Kshs. 100,000.00 for future medical expenses, while the 8th Petitioner claims Kshs. 152, 750.00 being hospital costs. The 9th Petitioner's claim is for Kshs. 200,000.00 for future medical expenses. The 13th Petitioner claims for Kshs. 2,000.00 being hospital costs, while the 15th Petitioner claims Kshs. 200,000.00 for future Medical expenses.

55. The Petitioners also seek general and exemplary damages and compensation as a result of the actions and omissions of the Respondents.

56. They also seek the following orders:

    a. A declaration that the state and the Respondents have the responsibility to prevent and combat terrorism and to protect citizens from terrorist attacks and the state abdicated on this responsibility during the Garissa University College attack.

    b. A declaration that the Respondents failed/neglected to take adequate measures to prevent the attack, mitigate the effect of the attack and/or ease the escape and rescue operations as a result of their reckless and negligent acts the petitioners were injured and their constitutional rights were violated.

    c. A declaration that the Petitioner's right to legitimate expectation of police action that was preventive, responsive, expeditious and efficient before and after the attack as espoused in Article 244 of *the Constitution* of Kenya and Section 24 of the *National Police Service Act* was gravely violated.

    d. A declaration that with the general information and sufficient intelligence on a possible attack the Respondents were incomplete [sic] dereliction of the duties and obligations.

    e. A declaration that the Respondents compromised or violated the rights to life, security of Person of the Petitioners and the legitimate expectation of the Petitioners under Article 26 of *the Constitution*, Article 29 of *the Constitution* of Kenya, Article 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.

    f. A declaration that as a result of the breach of rights enumerated above, the Petitioners suffered damages, pain and suffering.

    g. A declaration that each of the Petitioners is therefore entitled to special damages, as particularized in paragraph 33, general damages and exemplary damages against the Respondents herein jointly and/or severally.

h. An order for compensation as enshrined and provided for under Article 23[e] of *the Constitution* made up of special damages for the expenses incurred, General damages and exemplary damages pursuant to the declaration prayed in prayer [k] [sic] above for each of the petitioners.

i. This being a matter of public interest there be no orders as to costs.

57. In support of the Petition, Reachel Munjiru Gikonyo, then a first-year student at the University, swore an affidavit on 6th July 2022. She stated that she brought the suit on her own behalf and on behalf of other students of the University who were injured in the attack.

58. She stated Christian union members were holding morning devotions when two hooded men stormed the classroom at 5.30 am and began shooting at the students who piled onto each other. She stated that she was in the back as she lay on her side. In a second round of shooting, she was shot several times on her back with one bullet penetrating the frontal rib cage. In the end out of the 30 students in the devotions, 23 were killed and 7 including herself were injured.

59. She stated that she sustained severe spinal injury for which she was admitted at the Kenyatta National Hospital for 3 months. She later went to Appollos International Hospital in India for surgery for removal of a bullet that was lodged in her spine. She is now paralyzed in her lower limbs and is confined to a wheelchair and has lost bladder control. As a result of her injuries, her mother became depressed and eventually died. She blamed the State for the late and poor coordination of the response to the attack.

60. In further support of the Petition, Ben Mwiti Kaberia swore an affidavit on 6th July 2022. His reiterated the averments of Reachel Munjiru Gikonyo. He stated that he too was at the Christian Union devotions and was shot by the attackers and sustained injuries on both thighs and spinal cord. When the attackers moved to the next classroom, he called the Garissa County Commissioner who told him that rescue was on the way. It was not until 12 noon when the Kenya Red Cross and Amref together with police officers came and took him to Garissa General Hospital and he was later transferred to Kenyatta National Hospital. He averred that the injuries left him disabled and he walks with crutches and is in pain most of the time.

61. James Muli Muthengi another student of the University stated in his affidavit sworn on even date that he was at the hostel asleep, when he was woken up by loud bang of explosives and gunshots. In his attempt to escape, he was shot at the lower part of his right leg and also saw other students being shot. He limped to a bush near a sewage where he lay until 6pm when he was rescued and taken to Garissa General Hospital and later airlifted to Kenyatta National Hospital. He averred that the injuries sustained have completely affected and changed his life. He blamed the State for inordinate delay in the response to the attack.

62. Annette Mbogoh, the Executive Director of the 1st Petitioner also swore an affidavit on even date which is a replica of the affidavit she swore on 14th November 2019 in support of Petition 104 of 2019. We do not see the need to regurgitate her averments.

63. In opposition to the Petition, the Cabinet Secretary, Defence vide an affidavit sworn by Lieutenant Colonel P. K. Muindi [19767] on 30th November 2022, denied all the allegations as contained in the Petition. He deponed that the remedies as sought by the Petitioners are private and personal. It is contended that the Petition is largely built on hearsay evidence, innuendo and speculation. He reiterated the averments contained in the replying affidavit of Col. J. R. Kamary in opposition to Petition No. 104 of 2019.

64. There were no other specific responses to this Petition.

Pet E209 of 2021

65. Petition No. 209 of 2021 is dated 9th June 2021 and filed by Frankline Wekesa Simiyu suing as administrator of the estate of his son Tobias Sifuna Simiyu [deceased] who perished in the terrorist attack at the age of 21 years. The Petition is supported by the Petitioner's affidavit of even date. The Petitioners' case is that the deceased was a student at the University when on 2nd April 2015, a group of attackers stormed the University and killed and injured students. The Petitioner avers that there had been earlier warnings that Al Shabaab Terror group was planning retaliatory attacks on a vital installation in Nairobi and a major university in the country.

66. It is contended that the omission to provide a GSU or military squad to offer 24/7 security to the University premises led to the death of the deceased thereby violating the deceased's right to freedom and security of the person under Article 29[a], [c], [d], [e] and [f] and the right to life under Article 26[1] of *the Constitution*.

67. The Petitioner further stated that the security officers took an unreasonably long time to respond to the attack which afforded the terrorists time to carry out their heinous, cowardly and cold-blooded massacre on the students.

68. The Petitioner contended that under the Bill of Rights, the Kenya Government has an obligation to protect its citizens from such violence and violent death. It was the Petitioner's view that the President, in his message of condolences, admitted liability and pledged to do justice by compensating the family of the deceased.

69. The Petitioner thus sought the following prayers:

    1. A declaration that the Petitioner's deceased son Tobius Sifuna Simiyu's fundamental rights to freedom and security of the person and the right to life were denied, contravened and grossly violated by the respondent's security officers on 2/4/2015.

    2. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contraventions of his deceased son's rights to freedom and security of the person and the right to life under the aforementioned Article 26 [1] and Article 29 [a], [c], [d], [e] and [f] of *the Constitution* of Kenya, 2010.

    3. General damages as provided under Article 23 [3] [e] of *the Constitution* of Kenya, 2010 for the denial of the fundamental right to freedom and security of the person and the right to life by the Kenyan Government Security officers be awarded.

    4. Any further orders, writs, directions, as this honourable court may consider appropriate.

    5. Costs of the suit and interest.

**Petition E210 of 2021**

70. This Petition is dated 9th June 2021 and filed by Joseph Wafula Mumilo suing as administrator of the estate of his son Edward Wafula [deceased] who perished in the terrorist attack at the age of 23 years. The Petition is supported by the Petitioner's affidavit of even date.

**Petition E211 of 2021**

71. This Petition is dated 9th June 2021 and filed by Nyongesa Wafula Isaac suing as administrator of the estate of his daughter Dorothy Nanjala Nyongesa alias Dorothy Nyongesa [deceased] who perished in the terrorist attack at the age of 20 years. The Petition is supported by the Petitioner's affidavit of even date.

**Petition E212 of 2021**

72. This Petition is dated 9th June 2021 and filed by Henry Wabomba Wafula suing as administrator of the estate of his daughter Leah Nanjala Wafula [deceased] who perished in the terrorist attack at the age of 21 years. The Petition is supported by the Petitioner's affidavit of even date.

**Petition E213 of 2021**

73. This Petition is dated 9th June 2021 and filed by Cosmas Wekesa Musembe suing as administrator of the estate of his daughter Emily Namaemba Musebe alias Emily Namaemba Museve [deceased] who perished in the terrorist attack at the age of 21 years. The Petition is supported by the Petitioner's affidavit of even date.

**Petition E214 of 2021**

74. This Petition is dated 9th June 2021 and filed by Josephat Nyongesa Kisika suing as administrator of the estate of his daughter Stellah Namalwa Nyongesa [deceased] who perished in the terrorist attack at the age of 21 years. The Petition is supported by the Petitioner's affidavit of even date.

**Petition E215 of 2021**

75. This Petition is dated 9th June 2021 and filed by Godfrey Wangwelo Kikai suing as administrator of the estate of his son Abel Mukhwana alias Abel Mukhwana Watola [deceased] who perished in the terrorist attack at the age of 19 years. The Petition is supported by the Petitioner's affidavit of even date.

76. Petitions Numbers E210-E215 of 2021 arise from the same factual background as Petition No. E209 of 2021. Each Petitioner claims violation of their respective deceased children's rights to freedom and security of the person under Article 29[a], [c], [d], [e] and [f] and the right to life under Article 26[1] of *the Constitution*. They also seek similar prayers as set out in Petition No. E209 of 2021.

77. The Attorney General, the 6th Respondent, responded to all these Petitions through the replying affidavit of Njenga Miiri, then Garissa County Commissioner sworn on 2nd November 2021. He reiterated his averments in his replying affidavit sworn on 18th November 2020 in opposition to Petition Number 104 of 2019. We need not regurgitate the averments.

78. The consolidated Petitions were canvassed by way of written submissions which were highlighted before us by the parties' respective counsel.

79. We have duly considered the Petitions, the affidavit evidence, submissions by learned counsel, the applicable law as well as the case law cited. The issues for determination crystalize into the following:

    1. Whether the Petitions meet the threshold of a constitutional petition.

    2. Whether the Petitions are time barred or filed after inordinate delay.

    3. Burden of proof.

4. What is terrorism

5. Whether the state and its agencies have the responsibility to protect its citizens and whether it failed to do so in the Garissa terrorist attack

6. Whether the acts or omissions by the Respondents violated the rights of the Petitioners

7. Whether the state contravened the provisions of Article 241 [3] of *the Constitution* in deploying military officers/KDF in response to the attack.

8. Whether an order for the setting up of a ministry of state in charge of anti-terrorism/establish judicial commission of inquiry should be granted.

9. Whether the Petitioners have proved claim for and quantum of damages.

80. The Petitions before us call for the interpretation and application of the provisions of *the Constitution*. The principles of constitutional interpretation are well laid out in Article 259[1] which provides that *the Constitution* shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. It is therefore the duty of the Court under Article 259[1] to take a purposive approach in interpreting *the Constitution*. In this regard, the Supreme Court in Speaker of Senate v Attorney General and 4 Others SCK Advisory Opinion No. 2 of 2013 [2013] eKLR stated:

> " Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –
>
> "recognisingthe aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."

81. Similarly, in Government of Republic of Namibia v Cultura 2000, 1994[1] SA 407, Chief Justice Mahomed stated:

> " A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation.
>
> [see also Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 and State v Acheson 1991[20 SA 805,813B].

82. Further, the Court is required to comply with the edict that *the Constitution* must be interpreted as a whole. This principle was well illuminated in the case of Centre for Rights Education and Awareness

[CREAW] and Others v The Attorney General Nairobi Petition No 16 of 2011 [2011] eKLR where the Court, citing other decisions, stated:

> 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 to get a proper interpretation.

83. The Supreme Court of Uganda expressed similar sentiments in the case of Olum v Attorney General of Uganda [2002] 2 EA 508] as follows:

> [T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.
>
> [see also Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997 [Unreported]].

84. The jurisdiction of this Court to enforce *the Constitution* is enshrined in Article 165[3] thereof. Specifically, Article 23[1] confers jurisdiction upon this Court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It is this jurisdiction that we have been invited to exercise and which we endeavor to do within the ethos of constitutional interpretation explained hereinabove.

**Whether the Petitions meet the threshold of a constitutional petition**

85. The 1st, 2nd, 3rd, 4th and 6th Respondents submitted that the Petitions do not set out with reasonable precision the rights that were violated and the manner of violation.

86. The threshold for a constitutional Petition was discussed in the case of Anarita Karimi Njeru v Republic [1979] KLR where the court set out the parameters in the following terms:

> " We would, however, again stress 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."

87. The Court of Appeal in the more recent case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR stated:

> [42] 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."

[43] The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

[44] We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru [supra]. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent.

88. We have perused the Petitions before us and note that the claims by the Petitioners have specifically and clearly pleaded the rights that they allege to have been violated. These are their rights to life under Article 26 and right to security of person under Article 29. They have also described the manner in which these rights were allegedly violated by setting out specific acts and omissions of the Respondents in relation to the attack at the University. It is worthy of note that in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [supra] the Court of Appeal observed that the precision requirement in the Anarita Karimi case [supra] is not to be mistaken for exactitude. Rather, the doctrine in that case is applied to ensure that upon proper definition of the issues in a constitutional petition, the Court can apply its mind to the real issues at hand, thereby saving judicial resources.

89. We are therefore satisfied that the Petitions as set out meet the threshold for a constitutional petition.

**Whether the Petitions are time barred or filed after inordinate delay**

90. As a preliminary issue, the filing of the Petitions has been challenged on the basis that the same were filed out of time and after inordinate delay and that the same are time barred. We note that before us are constitutional Petitions. Unlike other claims which are subject to the *Limitation of Actions Act*, Cap 22 Laws of Kenya, there are no set time limits for the filing of a constitutional petition for redress for violation of the Bill of Rights. We acknowledge, however, that the Court must guard against stale claims, including constitutional petitions, that would prejudice a respondent, be it the state or an individual.

91. There is a plethora of case law on this issue of limitation of time. In Monica Wangu Wamwere & 5 Others v the Attorney General, SC Petition no. 26 of 2019 the Supreme Court while addressing the question stated as follows:

> " Perhaps, the starting point under this issue should be a consideration of whether the two superior courts below in their impugned decisions imposed limitation of time as alleged by the appellants. Having perused the decisions in question, we are satisfied that the two courts did not impose the limitation alluded to. In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under *the Constitution* which are evaluated and decided on a case by case basis.
>
> Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights. See the persuasive decision of the Court of Appeal Safepak Limited v Henry Wambega & 11 Others, Civil Appeal No. 8 of 2019; [2019] eKLR. It is on that basis that the two superior courts held that claims of violation of human rights must be filed in court within reasonable time. Where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. This takes us to the consideration of the next issue."

92. In Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR, the Court of Appeal stated:

> " Therefore, as to whether the instant petition is time barred, the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of *Joan Akinyi Kaba Sellah and 2 others v Attorney General, Petition No. 41 of 2014*, the learned judge observed interalia that in a line of cases such as Dominic Arony Amollo v Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 [OS] 2010 eKLR, Otieno Mak' Onyango v Attorney General and another, Nairobi HCCC No. 845 of 2003, [unreported], courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
>
> Further in James Kanyiita supra, contrary to the submissions by the petitioners, the court held that although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of *the constitution* is entitled to consider whether there has been inordinate delay in lodging the claim. The court further stated that the court is obliged to consider whether justice will be served by permitting a respondent whether an individual or the state, in any of its manifestations, should be vexed by an otherwise stale claim."

93. We have considered the period of delay in the filing of these petitions which translates to about 6 years. We find the reasons advanced for the delay in the filing cogent and excusable. The period of delay is also not inordinate and no prejudice is discernably visited on the Respondents.

**Burden of proof**

94. In a petition such as the one before us, a petitioner is under obligation to satisfy the evidential burden that a specific right exists and which right has been violated or restricted and the manner of violation besides pleading the same with reasonable particularity and precision.

95. Additionally, a petitioner in a constitutional petition, just like in any other case is required to discharge the burden of proof as stipulated in Sections 107, 108 and 109 of the *Evidence Act* which provide as follows:

> 107. Burden of Proof
>
> 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.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact.
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

96. In Od*inga & 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 addressed its mind to the burden of proof and stated:

> 193. Such a line of judicial thinking is also found in the Nigerian case, Buhari v Obasanjo [2005] CLR 7K, in which the Supreme Court stated:
>
> He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party.

97. In essence therefore

98. a petitioner needs to adduce evidence to demonstrate the existence of the right, the violation or restriction thereof and the manner of such violation or restriction. This demonstration must be within the degree of proof established in law.

99. In the case of Leonard Otieno v Airtel Kenya Limited [2018] eKLR, the petitioner filed a petition against the respondent inviting the court to find and hold that his rights under Articles 46 and 31 of *the Constitution* were violated and sought an award of general damages for the alleged infringement. The petitioner averred that during the month of March 2017, he experienced repeated network disruptions, effectively barring him from communicating and accessing the respondent's mobile money services. In his judgment dismissing the petition, Mativo, J. [as he then was] stated:

64. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd v Smith & Associates Far East Ltd[52] :

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

65. It is a fundamental principle of law that a litigant bears the burden [or onus] of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill- considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

100. The duty in this matter, therefore, is on the Petitioners to achieve the standard of proof set out in the cited decisions.

**What is Terrorism**

101. As indicated herein, the Petitioners' cause of action arose from a terrorist attack. As we consider the matter before us, we find it necessary to have a peek at what terrorism is. We take judicial notice that terrorism is a global phenomenon which the entire world has been grappling with over time. Massive losses of lives and property have been witnessed in various parts of the world. Kenya has had its fair share of devastating attacks such as the 1998 bombing of the United States embassy in Nairobi, the Paradise Hotel, Kikambala bombing on 28th November, 2002, Westgate Shopping Mall terrorist attack on 21st September, 2013, the Dusit D2 Hotel attack on 15th January, 2019 and the Garissa University Terrorist Attack on 2nd April 2015, the subject of these Petitions.

102. Black's Law Dictionary Tenth Edition defines terrorism as the use or threat of violence to intimidate or cause panic especially as a means of achieving a political end. An intentional use of terror induced fear by an individual or group to amplify the effects of a strategic act of violence.

103. The Commonwealth Treaty on Cooperation of the Commonwealth of Independent States in Combating Terrorism at Article 1 defines terrorism as:

> " Terrorism" - an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population, and taking the form of:
>
> Violence or the threat of violence against natural or juridical persons;
>
> Destroying [damaging] or threatening to destroy [damage] property and other material objects so as to endanger people's lives;
>
> Causing substantial harm to property or the occurrence of other consequences dangerous to society;
>
> Threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity;
>
> Attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons;

Other acts classified as terrorist under the national legislation of the Parties or under universally recognized international legal instruments aimed at combating terrorism;"

104. Article 1[3] of the OAU Convention on the Prevention and Combating of Terrorism defines a terrorist act as follows:

> " 3. Terrorist act means
>
> a. any act which is in violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of or cause serious injury or death to any person, any number or group of persons or causes or may likely to cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
>
> i. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular stand point, or to act according to certain principles; or
>
> ii. disrupt any public service, the delivery of essential service to the public or to create a public emergency; or
>
> iii. create general insurrection in a state.
>
> any promotion, sponsoring, contribution to command aid, incitement, encouragement, attempt, threat, conspiracy, organizing or procurement of any person with the intent to commit any act referred to in paragraph [a] [i] to [iii]."

105. In our jurisdiction, the *Prevention of Terrorism Act*, CAP 59B Laws of Kenya at section 2 defines terrorist act as:

> " terrorist act" means an act or threat of action—
>
> [a] which—
>
> [i] involves the use of violence against a person;
>
> [ii] endangers the life of a person, other than the person committing the action;
>
> [iii] creates a serious risk to the health or safety of the public or a section of the public;
>
> [iv] results in serious damage to property;
>
> [v] involves the use of firearms or explosives;

[vi] involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxin into the environment;

[vii] interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport or other essential services;

[viii] interferes or disrupts the provision of essential or emergency services;

[ix] prejudices national security or public safety; and

[b] which is carried out with the aim of—

[i] intimidating or causing fear amongst members of the public or a section of the public; or

[ii] intimidating or compelling the Government or international organization to do, or refrain from any act; or

[iii] destabilizing the religious, political, Constitutional, economic or social institutions of a country, or an international organization:

Provided that an act which disrupts any services and is committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act within the meaning of this definition so long as the act is not intended to result in any harm referred to in paragraph [a][i] to [iv].

106. The natural question then, is what is the responsibility of states and in particular Kenya, in the prevention and combating terrorism. This leads us to the next issue for determination.

**Whether the state and its agencies have the responsibility to protect its citizens and whether it failed to do so in the Garissa University terrorist attack**

107. In their submissions on behalf of the Petitioners, Dr. Khaminwa, Mr. Mwariri and Ms. Njuguna contended that the Government's core duty is the protection of its citizens. That duty in our context is placed on the State under Article 1 of *the Constitution* whereby sovereign power is vested in the people and delegated to the three State organs. The Petitioners and their parents had delegated their sovereign power including the power to protect their lives and property, to the State.

108. It was argued that Section 24 of the *National Police Service Act* imposed a negative obligation on the part of Government in general and police in particular not to violate the rights and fundamental freedoms of the People of Kenya, but also imposes a positive obligation on the part of the said agencies to protect the people from the threat of violation of their fundamental rights and freedoms. It was further submitted that the principle of positive obligation is also recognized by the European Court of Human Rights in Mahmut Kaya v Turkey Application No. 22535/93.

109. On the issue of the Petitioners' legitimate expectation, counsel referred the court to the University's letters to the police, the UN Monitoring Group letters, the embassies travel advisories and the aforestated Parliamentary Departmental Committee report, which he argued revealed that the security agencies failed to take adequate preventive measures as part of their obligations.

110. It is urged that the State was responsible in failing to take measures to prevent the 2015 Garissa University attack and it also failed to take up sufficient measures to mitigate the effects through its response thus failing terribly to protect the students who died in the attack. Counsel argued that, all this occurred despite the State having sufficient intelligence and information of a potential attack. They submitted that the State had prior information and or intelligence over the Garissa University attack and relied on the decision of Charles Murigu Muriithi & 2 others v Attorney General [2019] eKLR.

111. It was further argued that the Parliamentary Departmental Committee on Administration and National Security, established from its meeting with the management of the University, that the University had received intelligence on a possible attack by Al-Shabaab four days prior to the attack and that the management of the University convened a student gathering to sensitize the students on their vigilance. It also established that the students received SMS messages indicating an impending attack and that the same were dismissed as rumours and April Fools' Day prank. Counsel further argued that on 13th March 2015 and 27th March 2015 the U. S. embassy and U.K Government respectively warned its citizens throughout Kenya of a potential terror attack.

112. Counsel submitted that, the Commission on Administrative Justice in its report "Incapacity to blame for the magnitude of the Garissa Attack", established that prior intelligence reports were provided to the police and other relevant security agencies targeted several places including Garissa University College. Further, The United Nations in its report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2182, established that the monitoring group obtained letters sent by the University Principal warning of a potential attack and requesting security upgrades.

113. It was further submitted that in his affidavit, Musa Yego concurred that there was a request from the University for additional police officers and that the same was considered and that subsequent mock drills were conducted with the public thus a clear indication that the State was very aware of the potential attack and took no actions to prevent the same and eliminate the risk posed on the Petitioner's children. Further, that as per the conclusion of the United Nations in its report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council Resolution 2182, the success of the Al-Shabaab's attack on the University was due to failure of communication than lack of actionable intelligence thus there was clearly sufficient intelligence on the imminent Garissa University attack.

114. The Petitioners submitted that the relevant authorities failed to act and appreciate clear threats of terror attacks on the University despite presence of ample communication from the Principal now Vice Chancellor Prof. Warfa by way of five letters to them requesting a robust upgrade of security at the University.

115. Mr. Mwara submitted for the Petitioners that the attack on the University and the killing of the Petitioners children happened one week after fliers went around on 25th March 2015, warning that the Al-Shabaab terror group was planning retaliatory attack on a vital installation in Nairobi and a major university in the country. He further submitted that the Respondents in their affidavit admitted knowledge of such intelligence reports. Additionally, Counsel submitted that the issue of the duty of the police officers to the citizens against attacks was discussed at length in the case of Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR.

116. Additionally, Counsel submitted that the Respondents by their own witness admitted that they owed a duty of care to the students of the University and further that a request to avail police officers to the University was made and granted. Further, that the deceased children's right to life and security of the person were violated, threatened, infringed upon or denied by virtue of the Al Shabab terror attack committed against them and the State's failures.

117. Counsel submitted that the Petitioners deceased children were entitled to protection of their constitutional right to freedom and security of the person as provided under Article 29 of *the Constitution* and the right to life as proved under Article 26 of *the constitution* of Kenya by the Respondent's security officers/agencies.

118. Mr. Weche, learned Counsel for the 1st, 2nd, 3rd, 4th and 6th Respondents submitted that the allegation that security agencies were aware of the specificity of the attack has not been proven. Counsel urged that as stated in the affidavit of Njenga Miiri, the intelligence the government security apparatus had received was of such a general nature and did not point to the possibility of the attack in issue or at all.

119. Mr. Yator for the 5th Respondent submitted that it is true that the State has a responsibility to protect its citizens against harm. He however contended that the said responsibility is not absolute and that just as acknowledged by the Petitioners, there will always be those determined to get around whatever security measured put in place. It was submitted that the State can only provide security within its means and that the State did not fail in any manner to provide security to the University. KDF's case is that by the time they were deployed to the scene, the NPS had already deployed and were conducting rescue operations and their role was to assist.

120. Counsel further submitted that in as much as sovereign power is delegated to State Organs under Article 1, that power can also be exercised directly by the people under Article 1[2] of *the Constitution*. He placed reliance on the case of Palmer versus Reginam [1971] ALL E.R 1077 where the court held that:

> " If an attack is so serious that it puts someone in immediate peril, then immediate defensive action may be necessary."

121. Additionally, he submitted that for a special duty of care by the Police to arise, it must be established that the authorities "knew at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from criminal acts of a third party." He relied on Mahmut Kaya case [supra] and Charles Murigu Muriithi case [supra]. He argues that in this case no such duty of care was created to hold KDF culpable since there was no actionable intelligence. KDF adopted the position taken by Judge Golcukly in the Mahmut Kaya case [supra] that "no government is able to make security agents available to accompany persons who feel threatened or provide personal protection in a high risk area where hundreds or even thousands of people are in like situation."

122. Counsel further urged that terrorism is not unique to Kenya and that this notwithstanding KDF and NPS responded to the situation and were able to rescue more than 600 students.

123. We have taken into account the evidence and rival submissions in relation to this issue. It is common ground that the State has the responsibility to protect its citizens. The divergence in the position of the parties herein on this matter is in regard to the extent of that responsibility.

124. The State has a constitutional and statutory obligation to protect the lives and property of its citizens. Article 1 of *the Constitution* provides that all sovereign power belongs to the people. By dint of Clause [2] the people may exercise that sovereign power either directly or through their democratically elected representatives. To this end, the citizens have delegated their sovereign power, which includes the power to protect their properties and lives to the State. This stems from the social contract theory espoused by Thomas Hobbes wherein the citizens delegate certain functions to the State to exercise on their behalf. One of those functions is the provision of security and protection. No doubt such provision of security and protection applies to incidents of terrorist attacks, like to any other crime.

125. The State protects its citizens through the police service which is the organ responsible for maintaining law and order, preservation of peace, protection of life, and property as well as prevention and detection of crime including the apprehension of offenders. Section 24 of the National Police Act stipulates that the functions of the NPS are inter alia provision of assistance to the public when in need, maintenance of law and order, preservation of peace and protection of life and property.

126. We recognize that terrorism is a complex type of global crime. Due to its fluidity and amorphous nature, it has posed serious challenges not only to Kenya but also to developed nations. We are therefore alive to the fact that whereas the responsibility of the State in prevention and combating terrorism is a duty owed to citizens, the culpability in terms of actions and omissions leading to loss from terrorist acts varies from one circumstance to another.

127. The evidence on record shows that due to a number of terrorist attacks and threats of attacks and the existing intelligence reports on impending attacks in the region, though not specific to the University, the security situation was fragile. As such, it is correct to infer that, for the Respondents and specifically the IG and Cabinet Secretary Interior to be held culpable, it must be established that they knew or ought to have known at the time that the possibility of an attack was real.

128. It is the Petitioners' contention that the Respondents compromised or violated their right to life and security of the person leading to death and injuries among the students at the University and thereby breaching their legitimate expectation under Articles 26 and 29 of *the Constitution*, Articles 4 and 6 of the African Charter on Human and Peoples' Rights and Article 3 of the Universal Declaration on Human Rights. Further, that the Respondents contravene Article 241[3] of *the Constitution* by deploying military officers in the attack as a result of which some students of the University lost their lives while others were injured.

129. The Petitioners contend that the Respondents failed to or neglected to take adequate measures to prevent the attack. In particular, the IG failed in his mandate under Article 244 of *the Constitution* and Section 24 of the National Police Act by failing to prevent the attacks and preserve or protect the lives of the Petitioner's children.

130. It is their case that the State had prior information and intelligence regarding the Garissa University attack which, had they acted upon, the attack could have been averted. They relied on report S/2015/801 of United Nations Monitoring Group on Somalia and Eritrea. They further relied on travel advisories issued by the United States and United Kingdom Governments to their nationals warning them of possible terrorist attacks in various parts of Kenya. The United Kingdom travel advisory referred to among other places, Garissa county. The aforesaid report and travel advisories are exhibited in the supporting affidavit of Annette Mbogoh.

131. The Petitioners also relied on the averments of Stephen Mwangi, Reachel Munjiru Gikonyo and Ben Mwiti Kaberia that in December 2014 the students received threats through letters that were dropped along Garissa Road adjacent to the University warning non-Muslim students to leave the premises failing which they would face attacks like the Mandera bus and quarry terrorist attacks in 2014. In response to this claim the Principal of the college denied the claim by the Petitioners that there were letters threatening non-Muslim students to leave the premises or face an attack.

132. Stephen Mwangi further stated that following a letter by the Principal to the County Commissioner seeking an increase of security, additional two policemen were assigned to the University bringing the total number of officers deployed at the university to 4. This is corroborated by the Principal in his replying affidavit who stated that his request for additional security was not adequately considered as the number of policemen were only increased by two.

133. The Respondents denied that they received any intelligence of a specific terrorist attack of the University, save for Njenga Miiri and Musa Yego who acknowledged receipt of intelligence reports on suspected terrorist activities in various parts of the country.

134. It was submitted for the Petitioners that for the state to be held accountable it must be shown that there was prior information made available to the state but failed to act upon it as was discussed in the case of Charles Murigu Muriithi case [supra]. Counsel's argument was that the State was made aware of the imminent attack and had ample intelligence of the same. He referred the Court to the Parliamentary Departmental Committee on Administration and National Security, Report on Investigations into the Garissa University College Terrorist Attack where he stated it was observed that the attack would have been prevented had necessary steps been taken.

135. It was further submitted that Musa Yego admitted that there was intelligence report on heightened terrorist activities in the country which however were not specific to the University.

136. Counsel further submitted that Stephen Mwangi stated in his affidavit that the University Principal had written to the County Commissioner in March 2015 seeking enhanced security at the University. It is clear from this affidavit and the Parliamentary Committee findings that this request was inadequately considered. Further that the US embassy had on 13th March 2015 warned its citizens of a potential attack throughout Kenya while the UK Government had on 27th March 2015 less than a week before the attack, warned its citizens of a possible attack in Garissa County.

137. It is further urged that that the United Nations Report of the Monitoring Group on Somalia and Eritrea, indicated that the Monitoring Group obtained letters sent by the University Principal warning of a potential attack and requesting security upgrades, a fact admitted by Musa Yego.

138. Mr. Weche for the 1st, 2nd, 3rd, 4th and 6th Respondents submitted that the allegation that security agencies were aware of the specificity of the attack has not been proven. Counsel urged that as stated in the affidavit of Njenga Miiri, the intelligence the government security apparatus had received was of such a general nature and did not point to the possibility of the attack in issue or at all.

139. Mr. Yator for KDF submitted that there was no actionable intelligence or information that the University was to be specifically attacked. Further that appropriate measures were taken to enhance national security and prevent terrorist activities not only in Garissa County but throughout Kenya.

140. We concur with the Respondent that the Petitioners have among other evidence exhibited newspaper cuttings as part of their evidence. We have duly considered the place of newspaper reports in evidence. Its trite law that newspaper reports without substantiation by a reporter through evidence directly adduced in court, are mere hearsay and of no evidential value and are not admissible as evidence. Our courts have reiterated this position and a few references would suffice.

141. The Court of Appeal in the case of Independent Electoral And Boundaries Commission[IEBC] v National Super Alliance[nasa] Kenya & 6 Others[2017] eKLR held:

> " On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86[1] [b] of the *Evidence Act* which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the

paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of Laxmi Raj Shetty v State of Tamil Nadu1988 AIR 1274, 1988 SCR [3] 706, the Supreme Court held that a newspaper is not admissible in evidence."

142. Similarly, in the case of Gitobu Imanyara & 2 Othersv Attorney General[2016] eKLR the Court while discussing the import of newspaper articles stated thus:

> However the only evidence produced in support of quantum of damages is the a copy of the Daily Nation newspaper coverage. Clearly, therefore, the primary documents that the appellants rely on are newspaper articles.
>
> In Wamwere v The A.G and Randu Nzau Ruwa & 2 Others v Internal Security Minister &Another [2012] eKLR; If we may borrow the words of the court in the Ruwa case, with tremendous respect to the appellants, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the 2nd appellant to demonstrate losses he suffered. In any event as we have stated elsewhere in this judgment that even if the Magazines were confiscated thereby occasioning any losses, the 2nd appellant had no locus standi to bring a cause of action for the said losses.

143. It is clear from the exposition of the law as set out in the cited cases that newspaper articles without other corroborative evidence, are inadmissible in evidence.

144. Having so found, the natural question we pose, is whether on the evidence before Court, the state and the Respondents carried out their obligation within the expected threshold in law to protect the lives and security of the students at the University at the material time. The applicable threshold has been a subject of discussion in our local and even in international jurisprudence and we eschew any attempt to re-invent the wheel.

145. In the case of Mahmut Kaya v Turkey Application No. 22535/93 the European Court of Human Rights held that for the special duty of care to arise it must be established that the authorities "knew at the time of the existence of a real and immediate risk to the life of an identified individual or indiviuals from criminal acts of a third party".

146. In the case of Osman v The United Kingdom [87/1997/871/1083] the European Court of Human Rights stated:

> " For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention. In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person [see paragraph 115 above], it must be established to its satisfaction that the authorities knew or ought to have

known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."

147. The court went on to state:

> " The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life [see paragraph 107 above]. Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 [see, mutatis mutandis, the above-mentioned McCann and Others judgment, p. 45, § 146]. For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

148. Locally, in the case of Charles Murigu case [supra], a 3 Judge bench of this Court stated:

> " 47. It is therefore our finding that the State through its security agencies, including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in *the Constitution*, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction."

149. The Court went on to state:

> " 61. We have also determined that the State's duty to protect those rights would only be activated if it is demonstrated that the police or other State agencies had prior information that a section of the members of the public in a certain area, or specific individuals, were in danger of being subjected to acts of violence against their person or property and that the police, negligently or deliberately, failed to act on such information leading to a violation of the rights protected under *the Constitution*"

150. The decision was affirmed by the Court of Appeal in Charles Murigu case [supra], where it was stated:

> " We think ourselves that the mere fact that an individual under section 70 of the former Constitution was guaranteed the right to life, liberty, security of the person and the protection of the law; the protection for the privacy of his home and other property and simply because the police under section 14 of the repealed Police Act are enjoined to ensure the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, that per se does not impose liability on the Government for damages caused to a victim of mob violence or civil disorder. To hold otherwise will be to introduce the concept of strict liability and raise the bar of Government

> responsibility to a utopian level. It will in effect impose on the Government responsibility for all types of criminal acts in which the victims are injured, lose lives or property."

In this dispute the police were accused of failure to prevent the attacks before they occurred or to stop them. No doubt the best and most useful activity that the police can carry out is crime prevention. If crimes are successfully prevented before they occur, the costs and suffering associated with the effects of crime can be avoided or significantly reduced. But the reality the world over, even in the most developed nations, crime prevention is a mirage. That is why we have on the rise terrorist attacks, robberies and sexual offenses against children, among many other criminal acts.

151. We have considered the facts before us. We note that the issue of terrorism is not new, the State having dealt with terrorist attacks in the past such as the 1998 US embassy bombing, the 2002 attack on Paradise Hotel in Kikambala, the 2013 attack on Westgate Mall and the 2014 Mandera bus and quarry attacks. It is conceded by the Respondents that there was intelligence on the possibility of terrorist attacks around the country but that none was specific to the University.

152. We further take judicial notice that at the material time, Al Shabaab attacks in the North Eastern region of the country were many and had one common thread. The attacks targeted non-Muslims in the region as seen in the Mandera bus and quarry attacks. This was a matter of both general or local notoriety and we take judicial notice of the same. In this regard we are guided by the provisions of the *Evidence Act* which stipulates the matters of which a court may take judicial notice.

153. The law as set out in Sections 59 and 60 of the *Evidence Act* is explicit on facts of which the courts can take judicial notice and requiring no proof. Specifically, Section 60[1][o] of the *Evidence Act* stipulates:

The courts shall take judicial notice of the following facts–

[o] all matters of general or local notoriety.

154. Section 60[2] of the Act goes on to empower courts to rely on relevant books or documents of reference as follows:

> In all cases within subsection [1] of this section, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

155. Illuminating this issue, the Supreme Court in the case of Monica Wangu Wamwere & 4 Others v The Attorney general, SC Petition no. 26 of 2019, stated:

> On this issue, we begin our consideration from the premise of uncontested historical facts. On 28th February, 1992 mothers of political prisoners, who had been detained by the then regime, together with their supporters convened at Freedom Corner. They went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. It is common ground that on 3rd March, 1992 police officers stormed Freedom Corner and dispersed the demonstrators. This incident drew widespread press coverage nationally and internationally as well as condemnation across the globe. It is a matter that we can comfortably take judicial notice of as a matter of general notoriety.

For instance, the distinguished historian, Prof. Tabitha Kanogo of the Department of History of the University of California Berkeley, in her book 'Wangari Maathai', [Ohio University Press, 2020] at pages 128 – 135 captures the material events at Freedom Corner elaborately. We quote her at length:

"Maathai adopted novel methods to deal with the concerns raised by the mothers of political prisoners. Significantly, a segment of Uhuru Park dubbed "Freedom Corner" became the site for anti-government

rallies demanding the release of the fifty-two detainees and imprisoned political dissenters. The struggle lasted for close to one year, from February 28, 1992, to early 1993. Maathai's ideas and strategies for moving forward included the use of a hunger strike ...

The hunger strikers drew large crowds of supporters but did not change official thinking. On the fourth day of the strike, March 3, 1992, the government moved to break the strike, unleashing a violent assault on the strikers and their supporters ...

Smoked out of the Freedom Corner, the protestors moved to the basement of a church adjacent to Uhuru Park—the All Saints Cathedral of the Anglican Church of Kenya— where they remained holed up and were joined by many supporters from all walks of life, ..." See also Daniel Branch, Kenya: Between Hope and Despair, 1963- 2011 [Yale University Press, 2011] at page 189.

156. Further, in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others, SC Petition 23 of 2014; [2015] eKLR this Court observed at paras. 71-75:

> " The Oxford Dictionary of Law [ed. Jonathan Law and Elizabeth A. Martin], 7th ed. [Oxford University Press, 2009] [at page 306] thus defines "judicial notice":
>
> 'The means by which the court may take as proven certain facts without hearing evidence. Notorious facts...may be judicially noticed without inquiry.'
>
> Judicial notice is important to the effective discharge of the judicial mandate, as contemplated by *the Constitution* of Kenya, 2010. Vindication of this perception is crystal-clear, from the case-law experience worldwide.
>
> In Commonwealth Shipping Representative v P. & O. Branch Service [1923] A.C. 191 at p. 210, Lord Sumner in the English House of Lords thus observed:
>
> 'Judicial notice refers to facts which a judge can be called upon to receive and to act upon, eitherfrom his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.'

157. The Court went on to state:

> " There are many cases in which judicial notice has commended itself to Kenya's Courts. Here is a typical example. In Republic v Simon Wambugu Kimani & 20 Others, HC Criminal Revision No. [2015] eKLR, the learned Judge observed:
>
> 'In my view, the Court was fully entitled to take judicial notice of notorious prevailing facts in the public domain, even where the same were not formally brought to the attention of the Court by either the prosecution or the defence.'"
>
> Based on the foregoing historical accounts, there is no doubt that the Freedom Corner incident took place.

158. We acknowledge that we have taken judicial notice of the volatile nature of the security situation in North Eastern Kenya and the numerous terrorist attacks in that region targeting non-Muslims prior to the attack at the University, the more prominent ones being the Mandera bus and quarry attacks. In our considered view, the earlier attacks ought to have been a wake up call on the Respondents for more vigilance and action especially noting the large population of non-Muslim students at the University.

159. Further, there was a travel advisory by the UK Government specific to Garissa County in addition to other places. Given the existing fragile security situation in North Eastern generally, this advisory

ought to have stirred up the Respondents to put in place preventive measures in vulnerable institutions determinable from the composition of the population therein.

160. There is also evidence that the University Principal had by a letter dated 16th March 2015 to the County Commissioner requested enhancement of security at the institution. He stated in his replying affidavit at paragraph *16* as follows:

> "[I]t is indeed true that the 4th Respondent sought security from the 3rd Respondent. The request for additional security was not sufficiently considered by the 3rd Respondent however, the number of policemen was increased from two to four police officers."

161. From the foregoing it is quite evident that the threat of an attack at the University was not idle, but very real.

162. The Respondents admitted that they held various security meetings prior to the attack. By their own admission therefore, they were aware of the danger and imminence of an attack. They thus owed a duty to the University community to enhance security. When a request for reinforcement was made, the Respondents added to the security detail a paltry 2 officers! The inadequate number of security officers at the gate clearly facilitated the unrestricted access to the University by the attackers.

163. In our view therefore, the Respondents and in particular the IG knew or ought to have known that the University with a big non-Muslim population was an attractive and soft target for a terrorist attack. We are satisfied that the prevailing circumstances and available intelligence were sufficient basis upon which the State ought to have heightened preventive measures to avert any potential attack or to mitigate the effects of such an attack.

164. Additionally, the University did not put in place any warning system in case of an attack, as a result of which the students were caught unawares. Some were killed or injured during their usual morning devotions, while others were asleep. Indeed, the Principal confirmed this by listing in his replying affidavit, measures taken to enhance security at the University following the attack, including construction of a stone perimeter wall with razor wire; four manned gates at different points which lock from inside and open out wards to allow easy egress in case of an emergency; installation of barricades at the entrance to the University; installation of CCTV system; 2 watchtowers; one high level floodlight; street lighting within the University compound, etc. This fortifies our finding that there was dereliction of duty on the part of the Respondents and they were only jolted into action by the tragic incident, a classic case of closing the stable door after the horse has bolted.

165. We now turn to the response to the attack. The evidence on record shows that the attack commenced at around 5am. From the averments of Musa Yego we note that the initial response to the attack was by the NPS who arrived at 6 am followed by the KDF at 11 am. While this team may be commended for their efforts and rescue of 600 students, it emerges from the evidence that the elite Recce Squad which was the most suitable in an operation of this nature did not arrive until several hours later. According to the Petitioners, the Recce Squad arrived at 5pm while the Respondents maintain they arrived at 2pm. The Petitioners alleged that the delay in arrival of the Recce Squad was occasioned by the personal use of their Cessna aircraft to transport the Commandant's daughter in law and her children from Mombasa to Nairobi. This fact is denied by the Respondents. In spite of this denial, the Respondents have not offered a simple answer as to why the Cessna plane was not immediately available or any explanation for the delayed deployment of the Recce Squad.

166. From the foregoing state of affairs, it is clear in our minds that there was inordinate unexplained delay in the deployment of the Recce Squad, the most effective response team in the operation. Even if it were true that they arrived at 2pm and not 6pm, that still was over 8 hours after the commencement of

the attack. Our finding is that there was clear dereliction of duty on the part of the Respondents which gave the attackers plenty of time to continue with the carnage. It follows therefore that the Petitioners' legitimate expectation of police action that was preventive, responsive, expeditious and efficient was violated.

167. Had the police conducted themselves in a more professional manner by being preventive, responsive, expeditious and efficient as per Section 24 of the *National Police Service Act* and Article 244 of *the Constitution*, the University attack would have been prevented, or at the very least, the carnage limited.

168. As we make the above observations and findings, we are not ignorant of the challenges posed by terrorists the world over. The developed world despite enormous resources have had its fair share of devastating terrorist attacks, case in point being the 9/11 attack in the United States of America. On the University attack however, the State, the security operatives and the University administration failed the students who had travelled from far and wide in their thirst for education and the quest to lay a solid foundation for their future. We say this very clear in our minds that any terrorist activity needs to be considered in its circumstances in terms of prevention and response. In this particular case however, the Respondents cannot escape culpability for acts of commission and omission that led to the devastating loss of lives and limbs.

**Whether the acts or omissions by the Respondents violated the rights of the Petitioners**

169. The Petitioners' case is that by virtue of acts and omissions by the Respondents, their constitutional rights to freedom and security of the person and the right to life under Articles 26 [1] & Article 29 [a], [c], [d], [e] & [f] of *the Constitution* were violated. The evidence on record demonstrates a harrowing experience by the victims of the attack on the material day. In addition to the failure to prevent the attack the Petitioners assert that the response to the same was unreasonably delayed and uncoordinated. Additionally, they faulted the design of the hostels which they said lacked adequate emergency exits.

170. The Petitioners' case further, is that through the failure of the State to prevent the attack or mitigate the effects of the attack, their children lost their lives and others were injured. They claim that the death and injuries of their children is a violation of their right to life and security of the person as guaranteed under Articles 26[1] and 29 respectively, of *the Constitution*. They further complain of violation of Articles 4 and 6 of the African Charter on Human and Peoples' Rights as well as Article 3 of the Universal Declaration of Human Rights.

171. The Respondents contend that the Petition is incompetent and does not meet the threshold set out in the Anarita Karimi case. It is urged that the Petitioners sought to rely on an allegation that the security agencies were aware of the specificity of the attack, a fact not proven. It was further contended that the Petitioners have not met the burden of proof and placed reliance on the Leonard Otieno case [supra]. In sum, it is urged that the Petitioners failed to adduce any evidence that there was prior intelligence on the attack or that the Respondents failed to take measures within the scope of their powers to avoid the risk.

172. We have duly considered the rival submissions on this issue. The rights to life and freedom and security of the person are sacrosanct and are recognized by *the Constitution*, regional and international conventions. No one may be deprived of these rights except as authorized by law.

173. The articles of *the Constitution* that the Petitioners allege to have been violated are reproduced hereunder:

Article 26[1]

Every person has the right to life.

Article 29

Every person has the right to freedom and security of the person, which includes the right not to be—

a. deprived of freedom arbitrarily or without just cause;

b. detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

c. subjected to any form of violence from either public or private sources;

d. subjected to torture in any manner, whether physical or psychological;

e. subjected to corporal punishment; or

f. treated or punished in a cruel, inhuman or degrading manner

174. Article 4 of the African Charter on Human and People's Rights, a regional convention provides:

> " Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."
>
> Article 6 of the Charter provides:
>
> " Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

175. At the international arena, the Universal Declaration on Human and People's Rights at Article 3 provides:

Everyone has the right of life, liberty and the security of person.

176. It is not disputed that the attack at the University resulted in death and injuries. We have already found that the Respondents failed to prevent the attack or mitigate the effects thereof, despite having prior knowledge and the wherewithal so to do, thereby occasioning bodily injuries and loss of life. The analysis we have made above demonstrates a clear abdication of constitutional and statutory duty on the part of the Respondents. Arising from that state of affairs, the Petitioners' rights to life under Article 26 and freedom of the person and under Article 29 of *the Constitution*, Articles 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights, were violated by the Respondents, through the unnecessary loss of lives and injuries following the terrorist attack.

177. We are fortified in this finding by the persuasive decision in the case of Association of Victims of Post Electoral Violence and Interights versus Cameroon [272/2003] where the African Commission held:

> 124. It appears that complainants drew the infringement of the enjoyment of their rights and freedoms hence the violation of Article 2 of the Charter, from the fact that the respondent State failed to take adequate measures to prevent the violence which led to the physical harm and material damage suffered by the victims.
>
> 125. The African Commission is of the view that there is no doubt in the present case that the victims of the post elections violence suffered from damage which infringed the enjoyment of their rights. Respondent State did not debate the fact of harm being caused to the victims,

but rather argued that the post-election events are act of God and therefore it is beyond the capability of the State of Cameroon which should not be held liable.

126. The African Commission is therefore in the position to hold that the provisions of Article 2 of the African Charter have been violated because the victims were enjoying their rights and freedoms when they were attacked. Such attacks which infringed their rights and freedoms were made possible because the State of Cameroon failed to fulfill its obligation to protect which incumbent upon the State.

**Whether the state contravened the provisions of Article 241[3] of *the Constitution* in deploying military officers/KDF.**

178. On this issue, the Petitioners submitted that KDF was deployed at the University in contravention of Article 241[3][b] of *the Constitution*. Further that as per the Parliamentary report on the Westgate terrorist attack, KDF ought not to have been deployed in the response to that attack as the Recce Squad had already pinned down the terrorists by the time KDF soldiers arrived. This, they submitted, resulted in confusion over the command and control structure in the operation at Westgate.

179. It was submitted that the IG through Director of Operations in NPS should assume command of all internal security operations. Further that deployment of KDF in internal affairs like the Westgate and Garissa University attacks led to poor coordination resulting in a long siege and led to loss of life. KDF are not trained in fighting in closed quarters and should only be deployed as a last option.

180. It is the Petitioners' case that KDF were not deployed for assistance as contemplated under Article 241[3][b] but rather took control of the situation.

181. For the 1st, 2nd, 3rd, 4th and 6th Respondents, it was submitted that the circumstances of the case warranted the intervention of KDF, whose mandate is to assist in times of emergencies. Further that due to the fact that the students had been held hostage at the University, KDF had to step in to avert loss of lives.

182. The 5th Respondent submitted that the deployment of KDF was pursuant to a request by the Garissa National Police Command to aid the NPS and that command of the operation at all times was under the IG. It is submitted that there was proper coordination of the operation with the NPS being the lead security agency. No tanks were deployed in the rescue operation and there was no bombing.

183. We have considered the rival positions of the parties on this issue. It is not contested that KDF was deployed at the University at around 11 am. The question we must grapple with, is whether the deployment was within the law.

184. Article 241[3] of *the Constitution* provides:

> [3] The Defence Forces-
>
> [a] are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;
>
> [b] shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and [emphasis added]
>
> [c] may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly.

185. A reading of Article 241[3][b] indicates that KDF may be deployed in situations of emergency or disaster. Two conditions must however be met. First, the deployment must be for the purpose of assisting and cooperating with other authorities in response to such emergency or disaster. Second, a report of such deployment must be made to the National Assembly.

186. From the evidence on record, we are satisfied that the attack at the University constituted an emergency as contemplated in Article 241[3][b] of *the Constitution*. In those circumstances, the deployment of KDF would be, subject to compliance with the law, appropriate.

187. It is however not possible from the evidence before us, to tell whether KDF took command of the operation or played their constitutional role of assisting and cooperating with the NPS, and we place no fault in this regard. However, there is no evidence whatsoever that a report of the deployment was made to the National Assembly as required by Article 241[3][b]. The Petitioners having shown that the said constitutional provision had not been complied with, the burden of proof shifted to the Respondents to prove that there was compliance, a burden they did not discharge. We therefore find and hold that the deployment of KDF at the scene of the University attack, much as it was necessary in the circumstances of the case, was not in full compliance with the law, and was specifically in contravention of Article 241[3][b] of *the Constitution*.

**Whether an order for the setting up of a ministry of state in charge of anti-terrorism/establish judicial commission of inquiry should be granted**

188. The Petitioners have sought an order directed at the Attorney General to advise the President to set up a ministry of state in charge of ant-terrorism. They submitted that while they recognize the independence of other arms of government, public interest leans towards the grant of the order sought. It was urged that the public interest arises out of the numerous cases of terrorist attacks and that there is thus need for such a ministry to provide policy guidelines and oversee the fight against terrorism.

189. The 1st, 2nd, 3rd, 4th and 6th Respondents submitted that there is a principle of independence of the arms of government which provides for separation of powers. It is the executive that has the mandate under Article 132[3][b] to establish ministries and such mandate should not be interfered with by this Court.

190. We are alive to the provisions of Article 1 of *the Constitution* which stipulates that all sovereign power belongs to the people of Kenya, which power shall be exercised only in accordance with *the Constitution*. Clause [3] delegates that sovereign power to the three arms of government namely, Parliament, Executive and the Judiciary and it is expected that each will carry out the functions assigned to it without interference from the other two.

191. The mandate to create ministries and government departments is vested in the Executive arm of Government pursuant to Article 132[3][b] which provides that the President shall direct and co-ordinate the functions of ministries and government departments.

192. In the case of Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017] eKLR the Supreme Court had this to say on separation of powers:

> 62. A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, *the Constitution* is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.
>
> 63. From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

a. each arm of Government has an obligation to recognize the independence of other arms of Government;

b. each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

c. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

d. for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

e. in the performance of the respective functions, every arm of Government is subject to the law.

193. In the case of Law Society of Kenya v AG & another; National Commission for Human Rights & another [Interested Parties] [2020] eKLR, Makau, J. stated:

> 36. It is my view that where a constitution has reposed specific functions in an institution or organs of state, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of *the constitution*.

194. We recognize that *the Constitution* is the supreme law of the land and binds all persons and all State organs at both levels of Government. There is good order and hygiene, and indeed a constitutional obligation, for the three arms of Government to carry out their functions as mandated by *the Constitution*. The mandate to create ministries is vested under Article 132[3][b] in the Executive which should be allowed to discharge this mandate without interference. Any attempt by this Court to prescribe the manner in which the Cabinet is constituted would be encroaching on the mandate of the Executive and therefore unconstitutional. We decline the invitation by the Petitioners in this regard.

195. The Petitioners have also asked that this Court direct the Attorney General to advise the President to set up a commission of inquiry on the steps the state has taken to prevent terrorism and avoid a repetition of an attack in an education facility; the state and the relevant bodies have taken following the recommendations of the reports of the 7th and 8th Respondents; culpability of state officers in the attack and recommendations for their prosecution and life sentence with no possibility of parole for terrorist attackers, and, that the recommendations be forwarded to the necessary bodies for formulation and enactment into law.

196. This is opposed by the 1st, 2nd, 3rd, 4th, and 6th Respondents who submitted that they conducted their own investigations as per their mandate. As such, there is no reason for this Court to order that the same be done.

197. The law relating to commissions of inquiry is contained in the Commission of Inquiry Act. Section 3[1] provides:

> " The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct

or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest."

198. From our reading of Section 3[1] of the Commission of Inquiry Act, we find no provision stipulating that the President can be compelled or supervised to discharge his mandate as clearly stipulated therein. It must also be noted that Section 3 of the Act is not couched in mandatory terms. As such the President is at liberty to exercise his powers at his own discretion and at his time and when he deems it fit and advisable so to do.

199. The law is clear that the mandate of setting up a commission of inquiry is vested in the President. We have already pronounced ourselves on the principle of separation of powers. Accordingly, we decline to grant the order sought.

**Whether the Petitioners have proved claim for and quantum of damages**

200. The Petitioners in Petitions Nos 104 of 2019 and 353 of 2022 seek an order for compensation under Article 23[3][e] made up of special, general and exemplary damages for violation of their rights, while the Petitioners in Petitions Nos. 209-215 of 2021 seek general damages under Article 23[3][e] for violation of the right to life and security of the person.

201. The 1st, 2nd, 3rd, 4th and 6th Respondents submitting on damages stated that none had been proved and the Petitions ought to fail. Counsel urged the Court not to adopt the multiplicand and multiplier method applied by the Petitioners. However, that should the Court be inclined to grant any damages, a global sum that is just and reasonable should apply. Counsel proposed the sum of Kshs. 100,000/= for each deceased.

202. Counsel also argued that the 1st Petitioner herein cannot seek damages on behalf of the other Petitioners, especially the deceased ones. He relied on Section 39 of the *Law of Succession Act* and submitted that the 1st Petitioner lacks the locus standi to seek quantum damages on behalf of the estates of the deceased persons without taking out letters of administration. He urged this Court to disregard the prayers as sought by the Petitioners and dismiss the Petition with costs to the 1st, 2nd, 3rd, 4th, and 6th Respondents.

203. Section 39 of the *Law of Succession Act* provides the persons in the order of priority, to whom the net intestate estate of a deceased intestate who as left no surviving spouse or children, shall devolve. With respect, the 1st Petitioner is not claiming damages for itself but for the estates of the deceased students. Besides, Articles 22 and 258 of *the Constitution* respectively provide that every person has the right to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or that *the Constitution* has been contravened, or is threatened with contravention. Such person may act in their own interest, on behalf of another person who cannot act in their own name, as a member of, or in the interest of, a group or class of persons or in the public interest. In light of this, our finding is that the challenge to the standing of the 1st Petitioner to seek damages on behalf of the other Petitioners is without merit.

204. In the same vein, the challenge on the limited grant of letters of administration issued to David Olimba Onyango and Benson Thinwa Wanjau relating the same estate of Dennis Olimba Onyango, becomes a non-issue.

205. While compensation is one of the remedies available to a petitioner under Article 23[3] of *the Constitution*, such compensation is unlike that in ordinary claims for damages under tort, breach of contract, land use etc. The objective of the constitutional remedy of compensation is not compensatory or punitive but is intended to vindicate the rights denied, violated, infringed or threatened or to act

as deterrence of future violations. Our courts have set out the principles to be applied in claims for compensation in constitutional petitions.

206. The Petitioners sought damages for the violation of constitutional rights. Article 23[3] of *the Constitution* empowers this court to grant appropriate relief in any proceedings seeking to enforce fundamental rights and freedoms such as this one. What amounts to "appropriate relief" was discussed by the South African Constitutional Court in Minister of Health & Others v Treatment Action Campaign & Others [2002] 5 LRC 216 at page 249 as follows:

> " [A]ppropriate 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 court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

207. And in Akusala A. Borniface v OCS Langata Police Station & 4 others [2018] eKLR relied on by the Respondents, Okwany, J. stated:

> " 41. Having regard to the above judicial experience and philosophy, it is clear 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 but that such discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case in view of the fact that 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.
>
> 42. In the instant case I find that the appropriate determination is to award reasonable damages in addition to the declaration of violation of constitutional rights. As I have already noted in this judgment, the petitioner prayed for an award of Kshs. 10 million for damages, I am however of the view that an award of Kshs. 2 million will be appropriate in the circumstances of this case. I am guided by the decision in the case of Lucas Omoto Wamari v Attorney General & another [2017] eKLR wherein the Court of Appeal upheld an award of Kshs. 2 million for violation of constitutional rights under circumstances that were similar to the instant case.

208. The principles applicable in the award of damages for constitutional violations under *the Constitution* were exhaustively discussed by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004 wherein it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. As Per Lord Nicholls at Paragraphs *18* & 19 the threshold is as follows:

> " When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The

comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches."

209. In Peters v Marksman & Another [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in Fuller v A-G of Jamaica [Civil Appeal 91/1995, unreported], where the Court held that:

> "It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable...Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

210. The Supreme Court sitting on appeal in Gitobu Imanyara & 2 Others v Atorney General, Petition NO. 15 OF 2017 while addressing with the issue of award of damages in constitutional petitions recognized the special place and distinction between damages in ordinary civil claims and in Constitutional petitions. The court stated:

> "This Court has acknowledged the difficulty in awarding damages in constitutional violations in William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others, SC. Petiton No. 2 of 2018; [2021] eKLR where it noted:
>
> " .....that the questions and issues that a Court has to consider in order to make an award of damages with regards to a constitutional violation is manifestly different to what the Court would consider in say, tortious or civil liability claim. In the latter, the issues are clear cut and quantification of the appropriate award is in most instances, straightforward. The same, however, is not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard that has been developed in our jurisprudence that recognizes that an award for damages in constitutional violations is quite separate and distinct from other injuries."

211. In 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] the Court of Appeal rendered itself as follows:

> " 8. Reference was made to decisions in the case of Arnacherry Limited v AG [2014] eKLR where special damages were awarded in a petition for vindication of the rights to property under Article 40 of *the Constitution*, and in The Attorney General v Siew Chand Ramanoop [Privy Council Appeal No. 13 of 2004] 2005, UKPC 15 where it was held that the comparable law for measure of the damages is a useful guide in assessing the amount of this compensation. Also cited were the decisions in Ntandazeli Fose v The Minister of Safety and Security [Case CCT 14/96] Constitutional Court of South Africa, Minister of Police v Vongani Sharon Mboweni & Another [657/2013] ZASCA 107 and President of the Republic of South Africa & Another v Modder Klip Boerdery [PTY] LTD CCCT 20/04 for the position that an appropriate award can be made to compensate the injured party for loss that they suffered as a result of violation of their constitutional rights.
>
> 9. The Respondents in opposition submitted that the burden of proving constitutional violation and infringement rests with the person alleging, and to this they placed reliance on the case of Anarita Karimi Njeru v the Republic [1976-1980] KLR. They contended that the Appellant did not prove his case to be awarded the damages and did not specifically plead the award of Kshs 32,0000 and introduced it on appeal.
>
> 10. Our starting point in considering the issue in this appeal is the applicable law to the Appellant's constitutional petition in the trial Court. Articles 22 and 23 of *the Constitution* grants the High Court authority to enforce and uphold the Bill of Rights in claims of infringements of rights, and to grant appropriate relief, including an order for compensation. *The Constitution* does not define the term compensation, and recourse is in this regard had to the definition in Black's Law Dictionary Tenth Edition at page 343 which is the "payment of damages or a other act that a court orders to be done by a person who has caused injury to another". The Appellant in his Petition dated 29th July 2015 filed in the trial Court sought a declaration that as a result of the breach of his rights, he had suffered loss and damage, and compensation for the said breach and violation in terms of the losses suffered.
>
> 11. The trial Judge while relying on the decision by the South African Constitutional Court in Ntanda Zeli Fose v Minister of Safety and Security,1996 [2] BCLR 232 [W], acknowledged that compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the Constitution*, as a distinct remedy and additional to remedies in private law for damages. Further, that the comparable common law measures of damages will be a useful guide in assessing the amount of compensation, which will depend on the facts and circumstances of each case. In this particular case, the trial Judge found that the alleged loss of stock in trade in the sum of Kshs 32,000, 000/= had not been proved to the required standard, and that an award of global sum of Kshs

1,000,000/= for violation of the Appellant's rights and compensation for the loss incurred would be adequate.

12. We are of the view that the trial Judge did apply the correct principles of law in determining liability for compensation in constitutional petitions and the quantum. It is necessary to point out that the trial Judge did not rule out the possibility of payment of compensatory damages where proven, and indeed, the range of common law damages including general, special, nominal and punitive damages may be available in constitutional petitions. General damages are given for losses that the law will presume are the natural and probable consequence of a wrong, and may be given for a loss that is incapable of precise estimation, such as pain and suffering or loss of reputation."

212. The correct inference from the myriad of court decisions above is that an award of general damages in a constitutional petition seeking compensation for violation of rights is discretionary depending on the circumstances of each case. As regards special damages, the running thread is that the same are awarded for losses that are not presumed but which have been specifically proved and that can be quantified.

213. At this point we lay down a few examples of past awards in similar circumstances.

214. In the case of Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR, the petitioners therein sought amongst others, general and special damages and costs of future medical expenses as reliefs for alleged violations they attributed to actions or omissions attributable to the Kenyan government. The Court stated:

> "As regards general damages, we must use our discretion in awarding the same. We shall do so being guided by precedent of other similar cases. In Peter Otieno Ouma v Attorney General [40] the plaintiff, a 23 year old student at Nairobi Institute of Business Studies was similarly shot and lost consciousness. He was hospitalised for 5 months at Kenyatta National Hospital and later transferred to National Spinal Injury Unit where he spent 3 months. His injuries were classified as fracture of thoracic vertebrae T12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function. On 11 June 2010, he was awarded Kshs. 4,000,000.00 as general damages."

215. Similarly, in Peter Omari Ogenche v Attorney General Nairobi HCCC No. 196 of 2008, a case which arose from a shooting incident related to post-election violence, the plaintiff, a 27 year old who was engaged in part time taxi driving and car washing, was shot and became paraplegic with urine and stool incontinence. He had a residual bullet entry scar L1 region. He had an impaired bladder muscle tone and therefore had to use an indwelling catheter to assist in collecting urine bag due to the loss of urine control. As a result, he was unable to walk; control stool and urine; and engage in active sexual life. He was predisposed to recurrent chest and urinary tract, and skin infections and therefore required frequent medical check-ups, special bed which can be turned by hydraulic or electric system and regular physiotherapy and splints to stabilise the spine. He was awarded Kshs. 3,500,000.00 on 10th June 2010 for pain suffering and loss of amenities.

216. In another case of George Efedha Madora v Attorney General [2012] e KLR the Plaintiff was awarded Kshs 3,500,000.00 for pain and suffering. The plaintiff had sustained fracture of thoracic vertebrae t12 with shrapnel still in place; complete loss of sensation in both lower limbs; complete loss of lower

limbs; loss of bladder control with urinary retention; loss of bowel control with constipation; soft tissue injuries to the left ankle joint; and loss of sexual function.

217. The Petitioners referred us to the case of Odillia Mutaka Mwani, et al., v Al Qaeda Case No. 99-cv-125 [GMH] 2022-04-20, a US decision where damages were awarded as follows:

> " For pain and suffering, the Court imposed a baseline award of $5 million and departed upward for more serious injuries, so that Plaintiff Shah was awarded the baseline $5 million for PTSD resulting from the attack; Plaintiffs Otiende, Nderitu, and Mogi, who suffered from both PTSD and permanent scarring, were awarded $6 million each; and Plaintiffs Buluma and Muema, who had both PTSD and vision problems, were awarded $7.5 million each. Id. at *12. Judge Facciola also awarded $150 million per Plaintiff in punitive damages and pre-judgment interest on the pain and suffering damages calculated from the date of the bombing to the date of the award. Id. at *12–13. Addressing how to apply the findings of the bellwether evidentiary hearing to the remaining Plaintiffs, he accepted Plaintiffs' proposal to submit a Standard Form 95 for each Plaintiff "to enable the Court to determine an appropriate damages matrix for the remaining plaintiffs."

218. With profound respect, we find this decision far removed from the circumstances of Kenya and completely outside the relevance and comparability with assessment of damages in our jurisdiction. It is trite law that the guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent, and comparable awards. In the case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR the Court of Appeal held:

> " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

219. We add, for good measure, that such past awards must be within the context of our jurisdiction as the parameters to be used are based on local circumstances including but not limited to the economic and social factors affecting parties to a suit. A foreign judgement therefore remains unhelpful in that regard.

220. In our instant case, the Petitioners who were injured had varied degrees of injury. The injuries in each case are well set out in the medical reports. We are in those circumstances to consider what is the fair award in each of the cases. We acknowledge that we were disadvantaged in that, other than receiving the medical reports as annexures to affidavits on record, no expert evidence was called to substantiate the degree of injuries in respect of each victim. We readily acknowledge our limitation in interpretation of medical terms and reports. That explains why courts out of necessity call for expert evidence through professionals to testify and explain matters that are beyond the ordinary understanding of lay people. Perhaps, with benefit of hindsight, the Petitioners could have benefited from the tested evidence of medical experts.

221. A word of caution though. A deliberate stand must be taken to guard against adulteration of petitions on violation of constitutional rights with ordinary civil claims. It will be appreciated that the Rules governing constitutional petitions do not provide a convenient mechanism for determination of claims for tortious liability and award of damages unlike claims under the *Civil Procedure Act* and other Statutes which avail a wide latitude to a party to ventilate such disputes. The choice of the jurisdiction in which to sue must of necessity be a deliberate and conscious one.

222. In assessing general damages due for the breaches of *the Constitution*, we have fully addressed our minds to the applicable principles and precedents on awards made by courts in the past that were placed before us. We have endeavored to do the best we can in assessing the injuries based on our perusal of the medical reports.

223. Where there was loss of life, and noting that the damages sought were not ventilated by way of evidence as would be expected under the *Fatal Accidents Act* and the *Law Reform Act*, the order on damages that commends to us is a global sum in general damages for violation of the right to life.

224. As regards damages for the injuries, as noted above, the Petitioners in this category suffered injuries of varying extent. We have already alluded to the lack of specific proof of the extent of, and effect of the injuries on the victims. In those circumstances therefore, we are inclined to award a global sum in general damages for injuries sustained whose assessment shall vary from Petitioner to Petitioner based on how we perceive the specific injuries, as can be gleaned from the medical reports. For emphasis, we reiterate here the limitation in assessing damages based on the material before us. Further, we cannot lose sight of the public policy considerations as pointed out by the Supreme Court in the Imanyara decision [supra] and noting the burden to the innocent tax-payer as observed by Majanja, J. in the case of Benedict Munene Kariuki & 14 Others v The Attorney General Petition Number [2011] eKLR.

225. It is now opportune to set out the nature of injuries suffered by each Petitioner as shown in Petition 353 of 2022.

226. Reachel Munjiru Gikonyosuffered a gunshot wound to her 12th thoracic vertebra, resulting in a spinal cord injury that caused complete paralysis from the T12 level downwards, she has incontinence of stool and urine due to the spinal cord injury. She also has bullet wounds on the right of side of her chest, both thighs, and her left big toe. As a result of her injuries, she has complete paralysis from the T12 level downwards and continues to suffer from both stool and urine incontinence, experiences recurring thrombosis in her left leg and chronic lower back pain, particularly when sitting for extended periods. The scars from her injuries are still present, and she has been classified as having sustained grievous harm.

227. Dancan Obwamu sustained multiple injuries, they include; a bullet wound on his right wrist and right elbow, a grenade wound on his left shoulder, a bullet wound on his right shoulder [posterior] and occipital scalp.Present findings indicate that his healing is fair, but he has sustained grievous harm and soft tissue injuries. He experiences pain in his right wrist upon exertion and is unable to lift heavy objects. The permanent degree of incapacity for his right upper limb is assessed at 10%.

228. Anderson Owalla Ogola sustained multiple injuries and received treatment at Kenyatta National Hospital. His injuries included entry and exit bullet wounds on his lower lip and right cheek, a grenade wound on his right shoulder, and another entry and exit bullet wound on his right hand. He also suffered fractures to his right second and third metacarpal bones, an entry bullet wound to the right side of his chest with no exit wound, fractures to two ribs on the right side, and an entry bullet wound to his right knee without an exit wound. Currently, his healing is fair. He has scars at the sites of his injuries and experiences stiffness in his right second and third fingers. The injuries he sustained are classified as grievous harm and include both soft tissue injuries and fractures. The permanent degree of incapacity is assessed at 2% for each affected finger. Future medical expenses, including surgical release of the stiffness and physiotherapy, are estimated at Kshs. 100,000.00.

229. Alfred Kithu Mutuasustained significant injuries and subsequently received medical treatment at both Kenyatta National Hospital and Mutwangambe Dispensary. Injuries Sustained are; An entry and exit bullet wound on his right foot and a fracture to his right 5th metatarsal bone. Alfred's healing process is

fair. He continues to experience pain in his right foot, particularly when exerting himself. The injuries he sustained were classified as grievous harm. Despite this, his overall prognosis remains fair.

230. Risper Nyakara Nyang'au sustained bullet wounds to both thighs and her right knee, along with fractures in her right tibia and fibula. Despite receiving treatment at Kenyatta National Hospital and Moi Referral Hospital, she continues to experience significant effects. These include visible scars at the injury sites and ongoing pain in her right knee during exertion, coupled with stiffness that limits her ability to fully flex the joint. Medical assessment indicates a permanent 15% incapacity in her right lower limb, reflecting the serious nature of her injuries and their enduring impact on her daily life.

231. Mercy Chepkorirsustained gunshot wounds to the left leg and a fracture to the left tibia/fibular. As a result of the injuries, she complains of pain on her left leg on exertion [walking]. She is unable to lift heavy objects, she sustained grievous harm injuries and Healing is expected but some pain and weakness are to persist.

232. Narius Kipng'eno received medical treatment at Kenyatta National Hospital and Longisa Hospital. The current findings indicate that Narius experiences weakness in his right upper limb, limiting his ability to lift heavier objects, 5% permanent incapacity is assessed for his right upper limb. He has itchy scars at the sites of his injuries, sustained severe soft tissue injuries and continues to experience significant limitations in the use of his right upper limb due to the injuries sustained during the attack.

233. Stanley Mwangangisustained entry and exit bullet wounds to his left thigh. He received treatment at Kenyatta National Hospital, where he underwent management for severe soft tissue injuries. Presently, he experiences pain in his left thigh upon exertion, likely due to residual scarring from the injuries. Despite this, his healing progress is assessed as fair, and the prognosis for his recovery is also considered fair.

234. Kasyoka Mwambeko sustained entry/exit bullet wounds to the left hand, left thigh and left leg. As a result of these injuries she sustained multiple severe soft tissue injuries, scars at sites of injuries and her prognosis is fair.

235. Evaline Chepkemoisustained entry/exit bullet wounds on the left thigh and fracture to the left femur, Entry bullet wounds to the right arm, grenade wound and fragments to the face. And as a result of her injuries; she cannot run, walk or stand for a long time and sustained grevious Harm injuries and soft tissue, and permanent degree of incapacity is assessed at 10% to the lower left limb.

236. Ronald Magembe Moranga received treatment at Armed Forces Memorial Hospital, where his injuries were assessed and treated. The injuries included entry and exit bullet wounds in the jaws, bullet wounds on the left hand affecting the thumb, middle, and fourth fingers, leading to amputation of some fingers. Presently, he exhibits scars at the injury sites, total deafness in the left ear, and permanent incapacity assessed at 10% for the left thumb and 2% each for the left middle and fourth fingers. These injuries were classified as grievous harm with a lasting impact on his physical health.

237. Annastaciah Mikwasuffered bullet wounds in both thighs and fractured femurs on both thighs multiple injuries treated at Defence Forces Memorial Hospital including. Healing is ongoing, with continued wound care post-implant removal, she is unable to run, walk, or stand for extended periods due to pain and weakness. Permanent incapacity of 10% assessed for each lower limb. Additionally, future medical expenses including removal of implants for Kshs. 200,000 [all inclusive]. Recovery is ongoing with expected but persistent pain and weakness, necessitating ongoing medical care and rehabilitation.

238. Ben Mwiti Kaberia suffered from grenade wounds on his left thigh and back, as well as bullet wounds on his right thigh and right side of the neck. He was treated at Kenyatta National Hospital. His current

condition reveals a fair healing status, albeit with enduring challenges, he continues to experience pain in his lower limbs, particularly during exertion such as walking. His ability to stand or walk for prolonged periods is severely limited, and he faces difficulty in lifting heavy objects. Medical evaluation has determined a permanent incapacity of 15% affecting his lower limbs, alongside visible scarring at the sites of his injuries. These injuries have inflicted severe damage to his soft tissues, contributing to his ongoing physical limitations and discomfort.

239. James Muthengi sustained injuries and received treatment at Kenyatta National Hospital, including; bullet wound on his right leg, injury on his right archilles tendon, a fracture on his right tibia/fibular and degloving injury on his right ankle. His healing is fair but he complains of pain on his right leg during exertion, he cannot walk or stand for a long time, he sustained grievous harm injury and soft tissue injuries. Permanent degree of incapacity is assessed at 5% on the right lower limb there is also a soft tissue deformity on his right leg.

**Disposition**

240. From the foregoing, we are satisfied that the Petitioners have proved violations of their constitutional rights by the Respondents. We therefore make the following orders:

a. A declaration be and is hereby issued that the state and the Respondents have the responsibility to prevent and combat terrorism and to protect citizens from terrorist attacks and that the state abdicated on this responsibility during the Garissa University College attack.

b. A declaration be and is hereby issued that the Respondents failed/neglected to take adequate measures to prevent the attack, mitigate the effect of the attack and/or ease the escape and rescue operations and as a result of their reckless and negligent acts the Petitioners' children lost their lives and their constitutional rights were violated.

c. A declaration be and is hereby issued that the Petitioner's right to legitimate expectation of police action that was preventive, responsive, expeditious and efficient before and after the attack as espoused in Article 244 of *the Constitution* of Kenya and Section 24 of the *National Police Service Act* was violated.

d. A declaration be and is hereby issued that the Respondents compromised or violated the rights to life, security of person of the Petitioners and the legitimate expectation of the Petitioner's under Article 26 of *the Constitution*, Article 29 of *the Constitution* of Kenya, Article 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.

e. A declaration be and is hereby issued that the State contravened the provisions of Article 241[3] of *the Constitution* of Kenya in deploying military officers in response to the attack without full compliance with the law.

f. An order be and is hereby issued for compensation as enshrined and provided for under Article 23[3][e] of *the Constitution* made up of a global award of damages to the deceased persons and injured Petitioners against the Respondents jointly and severally, as follows:

i. For each deceased person Kshs. 3,000,000.00

ii. Rachael Munjiru Gikonyo Kshs. 10,000,000.00

iii. Dancan Obwamu Kshs. 4,000,000.00

iv Anderson Owalla Ogola Kshs. 3,000,000.00

v Alfred Kithu Mutua Kshs. 1,500,000.00

vi. Risper Nyakara Nyang'au Kshs. 5,000,000.00

vii. Mercy Chepkorir Kshs. 2,500,000.00

viii. Narius Kipng'eno Kshs. 3,000,000.00

ix. Stanley Mwangangi Kshs. 1,200,000.00

x. Kasyoka Mwambeko Kshs. 1,200,000.00

xi. Evaline Chepkemoi Kshs. 4,000,000.00

xii. Ronald Magembe Moranga Kshs. 5,000,000.00

xiii. Annastaciah Mikwa Kshs. 6,000,000.00

xiv Ben Mwiti Kaberia Kshs. 7,000,000.00

xv James Muthengi Kshs. 3,500,000.00

g. Interest in f] above shall accrue at court rates from the date of this judgment.

h. This being a matter of public interest there shall be no orders as to costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2024.**

**.....**

**A. K.NDUNG'U.**

**JUDGE**

**.....**

**M. THANDE D. KEMEI**

**JUDGE JUDGE**