Katiba Institute v Attorney General & 3 others; Independent Medico-Legal Unit & 3 others (Interested Parties) (Constitutional Petition 26 of 2019) [2023] KEHC 265 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 265 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CONSTITUTIONAL PETITION 26 OF 2019

JM NGUGI, J

JANUARY 26, 2023

BETWEEN

KATIBA INSTITUTE ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 2ND RESPONDENT

COUNCIL OF GOVERNORS ..... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 4TH RESPONDENT

AND

INDEPENDENT MEDICO-LEGAL UNIT ..... INTERESTED PARTY

COUNTY GOVERNMENT OF NAKURU ..... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

INDEPENDENT POLICING AND OVERSIGHT AUTHORITY ... INTERESTED PARTY

Failure to operationalize the county policing authorities established under section 41 of the National Police Service Act is unconstitutional

Reported by Kakai Toili

Devolution – county governments – county assemblies – legislative authority *– power to enact laws relating to county policing authorities – whether county assemblies were vested with legislative competence to make laws concerning county policing authorities under section 41(9)(a) of the National Police Service Act – Constitution*

of Kenya, article 6(2), Fourth Schedule part 2 clause 14; National Police Service Act (cap 84) sections 41(9)(a) and 41(13).

***Statutes – interpretation of statutory provisions – section 41 of the National Police Service Act** – establishment, functions, and operationalization of county policing authorities – whether operationalization of county policing authorities under section 41 would undermine or interfere with policing by the National Police Service – whether delay or failure to operationalize county policing authorities was unconstitutional – Constitution of Kenya, articles 47, 243, 245 and 259(8); National Police Service Act(cap 84) section 41.*

***Constitutional Law – interpretation of the Constitution** – principles and canons of constitutional interpretation – purposive interpretation and promotion of constitutional values – Constitution of Kenya, article 259(1)(a) and (d).*

Brief facts

The National Police Service Act was assented to on August 27, 2011, and its commencement date was August 30, 2011. Section 41 of the National Police Service Act provided for the establishment of a county policing authority (CPA). However, section 41 had never been operationalized. In exercise of the powers conferred by section 41(8), the Chairperson of the Council of Governors, in consultation with the Cabinet Secretary, Ministry of Interior and Coordination of National Government, issued guidelines to operationalize the CPA in 2015. Despite that, no CPA had been established in any of the counties.

The petitioner argued that the legal framework under section 41 was geared towards ensuring oversight, police accountability to the public, community policing, and public participation to build a close relationship between communities and the police. However, failure, neglect or/refusal on the part of the respondents had curtailed the process of operationalization of the CPA. The petitioner contended that the failure to operationalize section 41 was a violation of articles 10, 47, 259(8) and 238(2)(a) and (c) and 244(a) and (e) of the Constitution, for which they urged the court to grant the relief of *mandamus* and other appropriate reliefs.

The 1st, 2nd, and 4th respondents opposed the petition and argued that section 41 could not be operationalized because the section offended various provisions of the Constitution. The respondents argued that the Fourth Schedule to the Constitution distributed functions between the two levels of Government to the effect that the responsibility to provide and maintain national security was delegated to the National Government and was also retained by it. Therefore, county governments were not constitutionally obligated to undertake and perform the function of national security. They contended that the Constitution did not contemplate the performance and function of national security by the county governments and so far, there had been no amendment to confer that function to county governments.

Issues

i. Whether the delay or failure to operationalize county policing authorities under section 41 of the *National Police Service Act* was unconstitutional.
ii. Whether the operations of county policing authorities would interfere with policing by the National Police Service.
iii. Whether county assemblies had legislative authority to make laws relating to county policing authorities under section 41(9)(a) of the *National Police Service Act*.
iv. What were the applicable canons of constitutional interpretation?

Relevant provisions of the Law

National Police Service, Cap 84

Section 41 - County Policing Authority

(1) There shall be established a County Policing Authority in respect of each county which shall comprise-

(a) the Governor who shall be the chairperson;

(b) a representative of the National Intelligence Service;

(c) county representatives appointed by the Inspector-General, who shall comprise the heads of the National Police Service, and the Directorate of Criminal Investigations at the county level;

(d) two elected members nominated by the County Assembly;

(e) the chairperson of the County Security Committee;

(f) at least six other members appointed by the Governor, from among the following categories of persons ordinarily resident in the county—

(i) the business sector;

(ii) community based organizations;

(iii) women;

(iv) persons with special needs;

(v) religious organizations; and

(vi) the youth.

(1A) The Governor may authorise the Deputy Governor to chair the meetings of the County Policing Authority in his absence.

(2) The members referred to in subsection (1)(e) shall be recruited through a competitive process by the office employing public officers in the county.

(3) The names of members nominated under subsection (1)(e) shall be forwarded to the County Security Committee for vetting and subsequent thereto, the County Assembly for approval.

(4) In nominating and appointing members under subsection (1)(e) the nominating bodies, public service office at the County level and Governor shall—

(a) uphold the principle of one third gender representation;

(b) ensure geographical representativeness of the county, and may nominate more than one representative in respect of each category.

(5) Notwithstanding subsection (1)(e), the membership of the County Policing Authority shall be proportional to the number of constituencies in the County.

(6) In the absence of the chairperson, the members shall elect one of their member to chair the meetings of the County Policing Authority.

(7) A person shall not be qualified for appointment as a member under subsection (2), if that person—

(a) has violated the Constitution;

(b) is adjudged bankrupt;

(c) is not of good character or moral standing;

(d) has been convicted of a felony; or

(e) has not been resident or employed in the county for a continuous period of not less than three years.

(8) Members appointed under subsection (1)(e) shall serve for a term of two years and shall be eligible for reappointment for one further term.

(9) The chairperson of council of governors in consultation with the Cabinet Secretary shall issue and publish in the Gazette guidelines to be followed during the nomination, appointment, removal from office, vacancy of office and filling of vacancy of members of the Authority.

(10) The functions of the Authority shall be to—

(a) develop proposals on priorities for police performance in the county;

(b) monitor trends and patterns of crime in the county including those with a specific impact on women and children;

(c) deleted by Act No 25 of 2015, Sch.

(d) monitor progress and achievement of set targets;

(e) provide oversight of the budget of the funds of the county policing authority;

(f) provide feedback on performance of the police service at the county level;

(g) provide a platform through which the public participate on the all aspects relating to county policing;

(h) deleted by Act No 11 of 2014, section 25.

(i) ensure policing accountability to the public;

(j) receive reports from Community Policing Forums and Committees; and

(k) ensure compliance with the national policing standards.

(11) Every Authority shall prepare, publicize and submit quarterly reports to the Inspector-General, Cabinet Secretary, County Assembly and Governor—

(a) accounting for the status and progress on each of the functions with which it is charged; and

(b) the impediments to the performance of those functions.

(12) The officer responsible for co-ordination of operations of the National Police Service in the County shall designate a police officer not below the rank of Assistant Superintendent of Police, as the secretary to the Authority.

(13) Deleted by Act No 25 of 2015, Sch.

(14) Nothing in this section shall authorize any Authority to interfere with—

(a) the investigation of any particular offence or offences;

(b) the enforcement operations of the law against any particular person or persons;

(c) the employment, assignment, promotion, suspension or dismissal of any member of the Service; or

(d) the operations of the Service.

(15) Every County Policing Authority may establish such committees as may be necessary for the performance of its functions under this Act.

Held

1. The petition clearly articulated the alleged violations and outlined the supporting arguments with sufficient precision to give the respondents reasonable notice of the case they faced. It therefore met the constitutional and jurisprudential test of specificity.
2. The applicable canons of constitutional interpretation were well settled and included:
    a. The Constitution must be interpreted in a manner that promotes its purposes, values, and principles and advances good governance, as expressly provided under article 259(1)(a) and (d). Those purposes, values, and principles were stated in the Preamble and article 10 and were further discoverable through purposive interpretation.
    b. Interpretation must be purposeful and informed by the broader objectives of the Constitution.
    c. The Constitution must be read holistically, adopting a structural approach that gives effect to its intended meaning.
    d. Interpretation should be liberal and organic, rather than mechanistic or strictly positivistic, recognizing the Constitution as a living document.
    e. The Constitution contained its own theory of interpretation, aimed at protecting and preserving its values, objects, and purposes.
    f. Non-legal considerations may be relevant in ascertaining the true meaning and values of the Constitution.
    g. There was a general presumption of constitutionality of statutes, with the burden of proof lying on the party alleging unconstitutionality.
3. Section 41 of the National Police Service Act was not unconstitutional. The respondents, upon whom the burden of proof lay, failed to demonstrate its alleged inconsistency with the Constitution.
4. The County Policing Authorities (CPAs) envisaged under section 41 were intended to enhance police oversight, prevent abuse, safeguard human rights, and strengthen community-police relations. These

objectives were fully aligned with, and not detrimental to, national security goals under article 238(2)(b) and were consistent with articles 238, 239, 243, 244, and 247.

5. The apprehension that section 41(9)(a) allowed county assemblies to legislate on policing functions was unfounded. The section merely empowered CPAs to develop proposals on police performance priorities in consultation with the National Police Service. Section 41(13) expressly prohibited CPAs from interfering with police functions. Any proposals would necessarily involve cooperation and coordination between the Service and county governments as envisaged by article 6(2) and part 2, clause 14 of the Fourth Schedule.
6. CPA membership included three National Police Service representatives, two of whom were appointed by the Inspector-General (IG) under section 41(1)(c), preserving the IG's constitutional and operational independence as safeguarded under article 245.
7. Articles 186(1) and (3), 187(2), and the Fourth Schedule were clear and unambiguous in delineating national and county functions. Section 41 struck the intended constitutional balance by enhancing public participation in policing without undermining the National Police Service's independence, thereby giving effect to articles 1, 2, 3, and 10.
8. Parliament's drafting of section 41 reflected its intent to foster constructive engagement between the police and local communities, without compromising operational autonomy. Quarterly reporting obligations to the IG, Cabinet Secretary, County Assembly, and Governor ensured centralized control of national security alongside local-level collaboration.
9. A delay of over a decade since the enactment of the National Police Service Act and seven years since the issuance of CPA operational guidelines was an inordinate and unjustifiable failure to implement a constitutional statute. Such failure was per se a constitutional violation, given the Act's purpose of giving effect to articles 243 and 245.
10. The prolonged non-implementation of section 41 undermined the rule of law, a foundational value under article 10. Constitutional powers and duties must be exercised in accordance with the Constitution and the law; deliberate failure to perform a statutory obligation constitutes a violation.
11. Security was a right under the Bill of Rights, and the National Police Service was constitutionally obligated to deliver it. Article 47 guaranteed the right to fair administrative action that was expeditious, efficient, lawful, reasonable, and procedurally fair.
12. By failing to implement section 41 without unreasonable delay, the respondents breached article 259(8) and violated article 47. Such inaction constituted an abuse of discretion as defined in section 7(2) of the Fair Administrative Action Act, which includes unreasonable delay or failure to act on a statutory duty.
13. Article 47 and the Fair Administrative Action Act reflect constitutional principles of public service under article 232(1)(b) and (c): efficiency, responsiveness, promptness, and effectiveness. A delay of ten (10) years was manifestly unreasonable and constitutionally unacceptable.

Petition allowed.

Orders

i. *A declaration was issued that the respondents' failure, neglect, or refusal to operationalize the CPAs established under section 41 of the National Police Service Act was unconstitutional and in violation of articles 2(1), 3(1), 6(2), 6(3), 10(2), 47(1), 73(1), 232(1), 238(2), 239(5) and 244 of the Constitution.*
ii. *A declaration was issued that the respondent's failure to constitute CPAs was contrary to the principle of public participation and co-operative governance between the two levels of Government found in articles 6(2) and 10(2) of the Constitution.*
iii. *An order of mandamus was issued compelling and directing the 2nd to 3rd respondents to, within six (6) months of the date of the instant judgment, operationalize the CPAs, through issuance of guidelines, policies, financing of and appointments to the authorities.*

iv. *The 2nd to 3rd respondents were directed to file an affidavit in the court within nine months of the court's decision indicating the status of their compliance with order (iii) above.*

v. *Each party to bear their own costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *Coalition on Violence Against Women, v Kenya Human Rights Commission (Interested Party); Kenya National* Petition 122 of 2013; [2020] KEHC 9208 (KLR) - (Mentioned)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Mentioned)
4. *Council of Governors & 5 others v Senate & another* Civil Appeal 204 of 2015; [2019] KECA 704 (KLR) - (Mentioned)
5. *In re Speaker of the Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013; [2013] eKLR - (Mentioned)
6. *In the Matter of the National Land Commission* Advisory Opinions Application 2 of 2014; [2015] KESC 3 (KLR) - (Mentioned)
7. *In the Matter of Kenya National Human Rights Commission* Supreme Court Advisory Opinion No 1 of 2012; [2012] eKLR - (Applied)
8. *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Mentioned)
9. *Kenya Revenue Authority v Kiragu & 5 others* Civil Application E047 of 2023; [2023] KECA 1002 (KLR) - (Mentioned)
10. *Kithinji, Dickson v Peter Munya & 2 others* Election Petition 1 of 2013; [2013] KEHC 2723 (KLR) - (Mentioned)
11. *Mbae v Speaker, County Assembly of Nakuru & another; Registrar of Political Parties & 49 others (interested parties)* Constitutional Petition E004 of 2022; [2022] KEHC 1490 (KLR) - (Explained)
12. *Mboya v Attorney General, National Assembly & Senate* Petition 472 of 2017; [2018] KEHC 6933 (KLR) - (Mentioned)
13. *Mumo Matemu v Trusted Society of Human Rights Alliance & another* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
14. *Muslim for Human Rights (MUHURI) & another v Inspector General of the National Police Service & 2 others* Petition E070 of 2021; [2024] KEHC 3233 (KLR) - (Mentioned)
15. *Njoya & 6 others v Attorney General & 4 others* Miscellaneous Civil Application 82 of 2004; [2004] KEHC 1467 (KLR) - (Mentioned)
16. *Orion East Africa Ltd v Permanent Secretary Ministry of Agriculture & another* Petition 100 of 2012; [2013] KEHC 3943 (KLR) - (Explained)
17. *Rai & 3 others v Rai & 4 others* Civil Application 307 of 2003; [2007] KECA 21 (KLR) - (Followed)
18. *Republic v Cabinet Secretary for Internal Security & others* Judicial Review 292 of 2017; [2017] KEHC 2485 (KLR) - (Mentioned)
19. *Republic v Kenya National Examination Council & 2 others ex-parte LMB & 319 others* Judicial Review Application 3 of 2018; [2018] KEHC 4711 (KLR) - (Mentioned)
20. *Senate & 2 others v Council of County Governors & 8 others* Petition 25 of 2019; [2022] KESC 7 (KLR) - (Mentioned)
21. *Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others* Application 1 (E002) of 2022; [2022] KESC 18 (KLR) - (Mentioned)
22. *Thuo, David Gathu v Attorney General & another* Constitutional Petition 2 of 2019; [2021] KEHC 8692 (KLR) - (Mentioned)

United States

Fletcher v Peck 10 US 6 Cranch 87 87 (1810) - (Mentioned)

India

Hamdarddawa Khana v Union of India Air 1960 AIR 554, 1960 SCR (2) - (Mentioned)

Canada

In re Secession of Quebec [1998]2 SCR 217 - (Mentioned)

Regional Court

Ndyanabo v Attorney General of Tanzania [2001] EA 495 - (Followed)

Texts

Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya articles 10, 47, 238(2)(a)(c); 244(a)(e); 259(8) - (Interpreted)
2. Fair Administrative Action Act (cap 7L) section 7(2) - (Interpreted)
3. National Police Service Act (cap 84) sections 41(8); 42; 43; 44; 96; 97; 126(1)(e); 126(2)(a)- (Interpreted)
4. Supreme Court Act (cap 9B) section 3 - (Interpreted)

Advocates

None mentioned

JUDGMENT

Introduction

1. The *National Police Service Act*, No 11A of 2011 ("the Act") was assented to on 27/08/2011. Its commencement date is 30/08/2011. Section 41 of the Act provides for the establishment of a County Policing Authority ("CPA") as follows:

> County Policing Authority
>
> (1)
>
> 1. There shall be established a County Policing Authority in respect of each county which shall comprise—
>
> (a) the Governor who shall be the chairperson;
>
> (b) a representative of the National Intelligence Service;
>
> (c) county representatives appointed by the Inspector-General, who shall comprise the heads of the National Police Service and the Directorate of Criminal Investigations at the county level;
>
> (d) two elected members nominated by the County Assembly;
>
> (e) the chairperson of the County Security Committee;

(f) at least six other members appointed by the Governor, from among the following categories of persons ordinarily resident in the county—

(i) the business sector;

(ii) community based organizations;

(iii) women;

(iv) persons with special needs;

(v) religious organizations; and

(vi) the youth.

(1A) The Governor may authorise the Deputy Governor to chair the meetings of the County Policing Authority in his absence.

(2) The members referred to in subsection (1)(e) shall be recruited through a competitive process by the office employing public officers in the county.

(3) The names of members nominated under subsection (1)(e) shall be forwarded to the County Security Committee for vetting and subsequent thereto, the County Assembly for approval.

(4) In nominating and appointing members under subsection (1)(e) the nominating bodies, public service office at the County level and Governor shall—

(a) uphold the principle of one-third gender representation;

(b) ensure geographical representativeness of the county; and may nominate more than one representative in respect of each category.

(5) Notwithstanding subsection (1)(e), the membership of the County Policing Authority shall be proportional to the number of constituencies in the County.

(6) In the absence of the chairperson, the members shall elect one of their member to chair the meetings of the County Policing Authority.

(7) A person shall not be qualified for appointment as a member under subsection (2), if that person—

(a) has violated *the Constitution*;

(b) is adjudged bankrupt;

(c) is not of good character or moral standing;

(d) has been convicted of a felony; or

(e) has not been resident or employed in the county for a continuous period of not less than three years.

(7) Members appointed under subsection (1)(e) shall serve for a term of two years and shall be eligible for reappointment for one further term.

(8) The chairperson of council of governors in consultation with the Cabinet Secretary shall issue and publish in the Gazette guidelines to be followed during the nomination, appointment, removal from office, vacancy of office and filling of vacancy of members of the Authority.

(9) The functions of the Authority shall be to—

(a) develop proposals on priorities, for police performance in the county;

(b) monitor trends and patterns of crime in the county including those with a specific impact on women and children;

(c) deleted by Act No 25 of 2015, Sch.;

(d) monitor progress and achievement of set targets;

(e) provide oversight of the budget of the funds of the county policing authority;

(f) provide feedback on performance of the police service at the county level;

(g) provide a platform through which the public participates on the all aspects relating to county policing;

(h) deleted by Act No 11 of 2014, s 25(h);

(i) ensure policing accountability to the public;

(j) receive reports from Community Policing Forums and Committees; and

(k) ensure compliance with the national policing standards.

(10) Every Authority shall prepare, publicize and submit quarterly reports to the Inspector-General, Cabinet Secretary, County Assembly and Governor—

(a) accounting for the status and progress on each of the functions with which it is charged; and

(b) the impediments to the performance of those functions.

(11) The officer responsible for co-ordination of operations of the National Police Service in the County shall designate a police officer not below the rank of Assistant Superintendent of Police, as the secretary to the Authority.

(12) Deleted by Act No 25 of 2015, Sch.

13) Nothing in this section shall authorize any Authority to interfere with—

(a) the investigation of any particular offence or offences;

(b) the enforcement operations of the law against any particular person or persons;

(c) the employment, assignment, promotion, suspension or dismissal of any member of the Service; or

(d) the operations of the Service.

(14) Every County Policing Authority may establish such committees as may be necessary for the performance of its functions under this Act.

3. This section, therefore, has been in the Statute books for the last more than a decade. Indeed, as will be revealed shortly, it was amended twice to, apparently, make it more efficacious.

4. This section has, however, never been operationalized. However, in exercise of the powers conferred by section 41(8) of the *Act*, the Chairperson of the Council of Governors in consultation with Cabinet Secretary issued the Guidelines to operationalize the County Policing Authority in 2015 vide Gazette Notice No 114 (Vol CXVII – No 2) of 09/01/2015. Despite this, no CPA has been established in any of the 47 counties.

5. The Petitioner, a "constitutional research, policy and litigation institute established to further the implementation of Kenya's 2010 Constitution and generally to seek the development of a culture of constitutionalism in Kenya", believes that the failure to operationalize section 41 of the Act and to establish CPAs is a violation of articles 10; 47; 259(8) and 238(2)(a) and (c) and 244(a) and (e) of the *Constitution* for which they urge the Court to grant the relief of mandamus and other appropriate reliefs.

6. The 1st, 2nd and 4th respondents opposed the petition. In sum, they concede that section 41 of the Act has not been operationalized. They, however, argue that the section cannot be operationalized because the section offends various provisions of the *Constitution* and, in particular, articles 185(2); 186(1) and 187(2). In short, the 1st, 2nd and 4th respondents argue that section 41 of the Act is ill-conceived and, by virtue of being inconsistent with the *Constitution*, ought not to be operationalized.

7. The 1st and 3rd interested parties supported the petitioner's case and urged the court to make a finding that the respondents were in violation of the *Constitution* and to give appropriate reliefs.

8. As stated, the petition dated 14/11/2019 relates to the implementation of Section 41 as read with sections 42, 43, 44, 96, 97, 126(1)(e) and 126(2)(a) of the *Act*, all of which concern the establishment and operationalization of CPA in each County. The petitioner seeks the following prayers:

a. A declaration that the respondents' failure, neglect, or refusal to operationalize the County Policing Authorities established under section 41 of the *National Police Service Act* is unconstitutional and in violation of articles 2(1), 3(1), 6(2), 6(3), 10(2), 47(1), 73(1), 232(1), 238(2), 239(5) and 244 of the *Constitution*.

b. A declaration be issued to the effect that the respondent's failure to constitute County Policing Authorities is contrary to the principle of public participation and cooperative governance between the two levels of government found in articles 6(2) and 10(2) of the *Constitution*.

c. An Order of Mandamus do issue compelling and directing the 2nd to 3rd respondents to immediately operationalize the County Policing Authorities, through issuance of guidelines, policies, financing of and appointments to the Authorities.

d. That the 2nd to 3rd respondents be directed to file an affidavit in this honourable court within 3 months of this court's decision indicating the status of their compliance with order (c) above.

e. That the respondents bear the petitioner's costs or in the alternative each party bears their own costs.

f. Any other relief that this honourable court may deem just and fair to order.

9. In view of the nature of the case and polycentricity of the issues raised by the parties, this court, on 04/02/2020, directed the County Government of Nakuru, the Kenya National Commission on Human Rights (KNCHR) and Independent Policing and Oversight Authority (IPOA) to be enjoined as interested parties or *amicus curiae*.

10. The petition was canvased by way of written submissions. The petitioner's submissions are dated 22/02/2021; the 1st, 2nd and 4th respondents submissions are dated 24/05/2021 and the 3rd interested party's submissions are dated 03/08/2022. The other parties did not file submissions.

A. The Petitioner's Case

11. According to the petitioner, the preamble and articles 1(1), 2, 3 and 10 of the *Constitution* bind all state organs and state officers to exercise authority in accordance with the *Constitution* as the supreme law of the land, upon which actions the aspiration for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law would be established through the sovereign power derived from the citizens and directly by the citizens.

12. The petitioner argues that the legal framework under section 41 of the Act is geared towards ensuring oversight, police accountability to the public, community policing and public participation to build a close relationship between communities and the police. However, failure, neglect or/refusal on the part of the respondents has curtailed the process of operationalization of the CPA established under that section.

13. The petitioner contends that article 47 of the *Constitution* provides for a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Therefore, the passage of more than nine years since the enactment of the Act has denied Kenyans the opportunity to contribute to fashioning delivery of services by the police that reflect their needs and priorities and flies in the face of the *Constitution* which made critical changes in the running of national security agencies. For this reason, the petitioner has called upon this court to intervene and compel the 2nd and 3rd respondents to immediately perform their constitutional and statutory duty of operationalizing the CPA. The petitioner relies on *Judicial Service Commission v Mbalu Mutava & another*, Civil Appeal No 52 of 2014 [2015] eKLR, *Republic v Cabinet Secretary for Ministry of Interior & Coordination of National*

*Government ex parte Patricia Olga Howso*n [2013] eKLR and *Republic v Cabinet Secretary for Ministry for Internal Security Ex parte Gragory Oriaro Nyauchi & 4 others* [2017] eKLR and argues that the delay occasioned by the respondents has been consistent and is an abuse of their discretionary power.

14. The petitioner claims that since the respondents have violated the *Constitution* and the law, this court is empowered under article 22, 159(2)(e) and 259 of the *Constitution* to interpret and determine this matter. The petitioner opines that a holistic approach requires this court to take judicial notice of Kenya's long standing history, from independence, of using the Police as a tool of violence and a mechanism of authoritarian control to the extent of which until the late 1990's, the NPS specifically had a section known as "Special Branch" that was complicit in political executions, arbitrary detention, torture and enforced disappearances of individuals singled out as dissidents and critics of government. Subsequently, the Police have developed a reputation of brutality, partisanship and general abuse of the rule of law, constitutionalism and basic human rights and fundamental freedoms. As a result, ineffective accountability mechanisms meant that the Police were never taken to task over their abuses. In this regard, the petitioner relies on *Coalition on Violence against Women & 11 others v Attorney General of the Republic of Kenya & 5 others* wherein it was held that during the post 2007-2008 post-election violence, the police were involved in acts of sexual violence against citizens and were either directly responsible for the violation of people's rights or failed to investigate allegations of sexual abuse.

15. As such, Kenya's history of Police abuse informed the development of the *Constitution*, particularly with regard to the establishment of NPS. The Petitioner's narrative is that during *the Constitution* making process, the Kenyan people expressed their desire to the *Constitution* of Kenya Review Commission (hereinafter "CKRC") for a NPS that respects the people and *vice versa* and one that works closely with communities to ensure their security and safety. To this end, recommendations were made which endorsed an NPS that incorporated devolved structures and functions. Thus, the current functions and powers of County Governments within the *Constitution*'s devolution framework that includes "ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of functions and powers and participation in governance at the local level" as provided for under part 2 clause 14 of the fourth schedule.

16. The petitioner is categorical that the wishes of the Kenyan people and the recommendations by CKRC became part of the *Constitution* vide article 243 and 244 of the *Constitution* which established NPS. Thereafter in 2011, Parliament enacted the Act to give effect to the constitutional provisions wherein Part VI of the Act established CPAs in each County.

17. The petitioner asserts that CPAs are meant to provide critical assistance and civilian oversight to the Police; and are a platform through which communities can participate in county policing and present their findings about crime and conduct of the Police. Therefore, since the *Constitution* states that NPS, like all other national security organs, must comply with the law and statute, it is the respondents duty to operationalize CPAs as required under the *Act*.

18. The petitioner argues that the delay occasioned by the 2nd and 3rd respondents is intentional, unreasonable and unconstitutional and is tantamount to acting as if NPS is not subject to constitutional and statutory authority, and undermining democracy and democratic process. As a result of which they have deprived the public of their constitutional right under article 239(5) and 244 to be informed of police actions that have a direct impact on their everyday lives.

19. The petitioner also argues that the 1st, 2nd and 4th respondents admitted in their replying affidavit that they were unwilling to operationalize CPA and were claiming that the same violates the *Constitution*. This, according to the petitioner, is a direct violation of article 238(2)(b) and 259 of the *Constitution*

as it disregards the presumption of constitutionality: every Act of Parliament is presumed to be constitutional unless proven otherwise. For this preposition, the petitioner reasons that the burden of proof lies with the 1st, 2nd and 4th respondents, which they have failed to satisfy and rely on *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 and *The Institute of Social Accountability & aanother v National Assembly & 4 others* [2015] eKLR.

20. Secondly, the petitioner argues that the inordinate delay and failure by the respondents to implement and operationalize CPA violates article 10 of the *Constitution* and goes against the principles, objects and functions of NPS as provided for under articles 6(3), 238 and 244 of the *Constitution*. The petitioner states that the respondents have attempted to justify their constitutional violation by suggesting that CPA would create two parallel report chains, one under NPS and another under CPA. This, the petitioner explains is far from the truth since the operational independence of NPS is under the Inspector General and that of CPAs is under the Inspector General, Cabinet Secretary, Governor and County Assembly. This arrangement, the petitioner argues, ensures that the national security function remains centralized in the National Government. While on the other hand, the involvement of the Governor and County Assembly ensures CPA provides a platform through which the public participates in all aspects relating to county policing as envisioned under Part 2 Clause 14 of the fourth schedule. In this regard, the Petitioner relies on *Muslims for Human Rights (MUHURI) & another v Inspector General of Police & 5 others*, *In the Matter of the National Land Commission, Supreme Court Advisory Opinion No 2 of 2014, Pevans East Africa Limited v Betting Control and Licensing Board & 2 others and Stopforth v Minister of Justice & others*.

21. Adopting the analysis in the two latter cases, the petitioner opines that a court establishes a criterion for determining the purpose of a statute by observing the following principles:

    i. First, look at the preamble of the Act or at other indications in the Act as to the object that has been achieved.

    ii. Second, study the various sections wherein the purpose may be found.

    iii. Third, look at what led to the enactment (not to show meaning, but also to show mischief the enactment was intended to deal with).

    iv. Fourth, draw logical inferences from the context of the enactment.

22. The petitioner pivots from this to argue that the purpose of the Act is clear as the object states that it is an Act of Parliament that gives effect to article 238, 239, 243, 247 and 244 of the *Constitution*: to provide for the operations of NPS and for connected purposes. This, the petitioner says, defines the context the statute is enacted and the extent it shall be implemented. In this regard, the petitioner contends that the purpose of including section 41 of the Act was to actualize article 238(2)(c) and 244(e) of the *Constitution* which states that in performing their functions and exercising their powers, NPS shall respect the diverse culture of the communities within Kenya and foster and promote relationships with the broader society. This is inferred from the definition of community policing which is the approach to policing that recognizes voluntary participation of the local community in the maintenance of peace in conjunction with the police, while respecting the different responsibilities of the police and the public as envisaged under section 96 of the Act.

23. The petitioner further argues that the function of CPA is clearly outlined and does not interfere with the operations of the Police. According to it, the purpose of establishing CPAs is aligned to the constitutional values and principles to foster corporation with the public.

24. In short, the petitioner's plea is that the delay, failure and refusal on the part of the 1st, 2nd and 3rd respondents to implement and operationalize section 41 of the Act is unlawful, unreasonable, unfair

and shows lack of goodwill of NPS to collaborate and ensure cohesiveness between NPS and the local community/public and feeds into the misconception that policing services lie outside the public domain. As a consequence, the purpose of judicial review is to check public bodies to ensure that they do not misuse their power or carry out their duties in a manner that is detrimental to the public. In this regard, the petitioner relies on *Republic v Kenya National Examinations Council ex parte Gathengi & others*, Civil Appeal No 266 of 1996 and has called upon this court to issue the orders for mandamus sought, compelling the respondents to establish CPAs within such a time as the court may define and that the court retain jurisdiction to ensure compliance.

The 1st, 2nd and 4th Respondent's Case

25. The petition is opposed by the 1st, 2nd and 4th respondents vide their replying affidavit dated 23/11/2020. They argue that the implementation of section 41 of the act has not been undertaken as it violates the provisions of articles 185(2), 186(1) and (3), 187(2), 245 and the fourth schedule of the *Constitution* and so the 2nd respondent cannot proceed to operationalize the same. It is their argument that the fourth schedule of the *Constitution* clearly distributes functions between the two levels of government to the effect that the responsibility to provide and maintain national security is donated to the National Government and is also retained by it. Therefore, County Governments are not constitutionally obligated to undertake and perform the function of national security.

26. They contend that the relationship between the National Government and County Governments and the transfer of functions if at all one would happen, has also been spelt out thereunder. In this regard, it is their claim that *the Constitution* does not contemplate the performance and function of national security by the County Governments and so far, there has been no amendment to confer that function to County Governments.

27. It is their argument that the drafters of the *Constitution* did not intend that the control of NPS be undertaken by other persons either alongside or on behalf of the Inspector General. They further argue that in formulating, debating and eventually passing the Act, Parliament erred and regrettably so, in forming CPA and electing Governors to chair the same. The Respondents agree with the Petitioner's submissions that the police service has been used as a political tool of violence and that may have been the real reason for the public's desire for a police service that works closely with the people. However, it is their contention that the drafters of the *Constitution*, in trying to bring abuse of police power by politicians to an end, could not have contemplated giving such mandate to a Governor, who is a politician, and which group of individuals is believed to have been the cause of such abuse.

28. The 1st, 2nd and 4th respondents contend that section 41 of the act is unconstitutional by virtue of article 2 of the *Constitution* to the extent that the supreme nature of the *Constitution* connotes that no person may claim or exercise state authority except as authorized under *the Constitution*, and any law that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of *the Constitution* is invalid. According to them, the principle derived from article 2 of the *Constitution* requires that all government actions must comply with the law and any claim to exercise lawful authority rests in the powers accorded under the *Constitution* and relies on *Muslims for Human Rights (MUHURI) & another v Inspector General of Police & 5 others* (*supra*).

29. They further rely on article 259(1) of the *Constitution* which provision they state must be given a holistic and contextual interpretation as stated *In the Matter of Kenya National Human Rights Commission*, Supreme Court Advisory Opinion No 1 of 2012.

30. Applying the principles in the above stated cases, the 1st, 2nd and 4th respondents contend that section 41 of the Act is unconstitutional to the extent that the Governor or a member of the County Executive

Committee is the chairperson of CPA. To this end, it is their argument that other functions conferred by national legislation as provided for under article 183(1)(d) of the *Constitution* ought to be in compliance with the fourth schedule. According to them, the roles of CPAs as stipulated under section 41(9) of the Act connotes that they will be playing a major and important function in national security, being that they will be a link between the police and the public, playing an oversight role, thus influencing decision making. Yet, the function of national security is not devolved and the *Constitution* does not provide the same.

31. It is their argument that had the drafters of the *Constitution* intended for a Governor to play a role in NPS, nothing would have stopped them from clearly stating so and Parliament is not free while legislating to donate roles of the National Government to the County Government. Instead, Parliament is bound to pass legislations that are in compliance with the *Constitution*. They rely on *Senate & 48 others v Council of County Governors & 54 others* [2019] eKLR for the proposition that if a certain power is granted to a specific organ, body or level of government, then no other entity can lawfully exercise that power.

32. The 1st, 2nd and 4th respondents also argue that section 41 of the Act creates a parallel reporting chain in the national security and relied on *Apollo Mboya v Attorney General & 2 Others* [2018] eKLR for the proposition that courts ought to be guided by articles 159 and 259 of the *Constitution* which requires them to promote and protect the purposes, principles, spirit and values of the *Constitution* so as to bridge the gap between what the law is and what it is intended to be.

33. They have invited this court to look at definition of the term "reporting" and "account" in their plain meaning which are respectively defined under the Oxford English dictionary as: to give a spoken or written account of something that one has observed, heard, done or investigated and to give an explanation of something. It is their view that the term "reporting" gives rise to two parameters upon which after the stipulated actions have been undertaken, then the reporting officer gives an account to another person or office who is in a superior position to the one giving the report. To this end, they argue that article 245 of the *Constitution* establishes the office of the Inspector General as being independent in its command over NPS, and therefore, since section 41(10) of the Act requires reports to be given to four different offices in so far as the mandate of the CPA is concerned, the same jeopardizes or affects the national security. They rely on *Council of Governors & 5 others v Senate & another* [2019] eKLR for the proposition that the *Constitution* cannot subvert itself and an Act of Parliament cannot alter clear provisions in the *Constitution* and confer privileges not provided for or stipulated therein to an office or state officer.

34. The 2nd and 4th respondents state that they are well aware of their responsibilities under articles 239(5) and 244 of the *Constitution* and in compliance with the same, they have enhanced implementation of community policing initiatives and nyumba kumi across the country up to the village level. According to the 1st, 2nd and 4th respondents, this initiative is a strategy of anchoring community policing at the household level or any other generic cluster for example a residential court, in an estate, a block of houses, a manyatta, a community of interest, a gated community, a village or a bulla. To this end, they contend that KNCHR was a party in the formulation of the of the nyumba kumi initiative and that it cannot be gainsaid the impact it has had in the society in so far as security is concerned. Based on this, they argue that the public and the community has been given an avenue to give their concerns regarding national security through a participatory process.

35. They further state that institutions such as Internal Affairs Directorate within the NPS, whose mandate is to hear complaints from the public about the Police and which was established under section 87 of the Act, plays an oversight role over NPS. Also, that other institutions playing the role of oversight include Ethics and Anti-Corruption Commission (EACC) and Kenya National and Human

Rights Commission (KNHCR); and that in addition, NPS is accountable to Parliament. It is their argument that all these mechanisms are geared towards toward ensuring compliance of article 239(5) and 244 of the *Constitution* and the respondents have ensured that there are avenues and means within which the public can relate well with the police.

36. In this regard, they argue that the petitioner has not proffered any evidence to demonstrate that their failure to form CPAs has created a lacuna or that the public are not being involved in policing. Based on this ground, it is their submission that they have not violated articles 239(5) and 244 of the *Constitution* and that the mere fact that CPAs have not been operationalized does not ipso facto denote that the said articles have been violated.

37. Lastly, the 1st, 2nd and 4th respondents assert that the petitioner has not pleaded this matter with reasonable precision as is required in constitutional petitions as was enunciated in *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272 wherein it was held that constitutional violations must be pleaded with a reasonable degree of precision, and which case was cited with approval in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

38. The 1st, 2nd and 4th respondents argue that despite the petitioner referencing Articles 1, 2, 3, 6, 10, 47, 73, 232, 238, 239, 243 and 244 of the *Constitution* in its title, they have provided little or no particulars as to the allegations and the manner of the alleged infringements of the said constitutional provisions. According to the respondents, the petitioner has not shown how the public has been denied an opportunity to participate in policing their own counties or how the police relations with the community has been affected by such delay. They have also not shown particulars on how failure to operationalize section 41 of the Act has caused the public to suffer, how such failure will allow blatant violation of the *Constitution* and the Act or how such failure is an abdication of the 1st, 2nd and 4th respondents duties and a violation of the *Constitution*.

39. In this regard, the 1st, 2nd and 4th respondents rely on *David Gathu Thuo v Attorney General & another* [2021] eKLR which reaffirmed the principle in *Anarita Karimi Njeru v The Republic* (*supra*) and held that in the absence of well laid allegations and particulars, a petition before court cannot be said to have met the threshold established. Reference was also made to *Dr Rev Timothy Njoya v Attorney General and Kenya Review Authority*, HC Constitutional and Human Rights Division Petition No 479 of 2013 wherein it was held that one must plead his case with some degree of precision and set out the manner in which the *Constitution* has been violated and by whom and even state the article of Constitution that has been violated and the manner in which it has been violated.

40. They further contend that assuming this petition was competent, it would not pass the test of burden of proof as it is trite law that he who alleges must prove his claim which must be propounded on an evidentiary foundation. In this regard, they relied on *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR wherein it was held that it is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the preposition he asserts to prove his claim.

41. The 1st, 2nd and 4th respondents state that despite the fact that the petitioner has argued that it has been more than 9 years since the impugned Section was passed by Parliament, they showed good faith by formulating the guidelines provided for under section 41(8) of the *Act*. As a result, the County Governments were to forward names of members of CPAs to the Cabinet Secretary but there is no evidence that has been shown to this court that this requirement was met.

42. In a nutshell, they contend that the petitioner cannot fault them for not operationalizing one mechanism and claim that failure to do so is unconstitutional as other avenues have been availed and operationalized.

The 3rd Interested Party's Case

43. Having been enjoined as an interested party, the KNCHR states that the purpose of their submissions is to provide this court with relevant information in respect to the claims raised by the petitioner on failure by the respondents to operationalize CPA as contemplated under Section 41 of the Act.

44. The 3rd interested party states that in the discharge of its mandate under article 59(1)(d) and (e) of the *Constitution*, it has conducted numerous investigations which include a documentation of 300 cases in July 2007 that implicated the police in extra judicial killings and which report was transmitted to the President at the time, the late HE Mwai Kibaki and was also made available to all relevant government departments with the recommendations that the appropriate authorities act on the findings. It also states that following the said report, the United Nations Special Rapporteur on extra judicial killings and arbitrary executions visited Kenya in February 2009 to investigate inter alia killings by the police and whether those responsible were held to account and to propose constructive measures to reduce killings and impunity. After the said investigations and based on his findings, the UN Special Rapporteur came to the conclusion that government security forces engaged in widespread brutality and the same had not been seriously investigated by the police.

45. The 3rd interested party also states that in September 2015, it conducted investigations with regard to the conduct of security agencies involved in the fight against terror and documented 25 cases of extra judicial killings and 81 cases of enforced disappearances, including several other cases of enforced disappearances all of which implicated the police, and several other complaints against the police.

46. It further states that in the year 2014, the Cabinet Secretary for the Ministry of Interior and Coordination of National Government issued a directive ordering all refugees residing outside their designated refugee camps of Kakuma and Dadaab to immediately return to their respective camps failure to which they would face the law. Following this directive, there were several cases of arbitrary arrests and assault which culminated in a report titled "Return of the Gulag-Usalama Watch". Other reports include: "You got Brains, we got Brawn" and "The Busia Five Report" all of which are investigations of police brutality.

47. It is the 3rd interested party's position that the said documented incidences of gross human rights violations, torture, extra judicial killings and enforced disappearances by the police are just but a small fraction of the complaints raised against NPS. Apparently, other numerous complaints reported against the police have made it impossible for some of the institutions mandated with oversight of the police such as IPOA and KNCHR to conduct meaningful investigations, consequently affecting the confidence the public has on the police.

48. In resolving the issue presented in this petition, the 3rd interested party states that this court need to take a holistic approach in the interpretation of *the Constitution* and also take into account the aspirations of the people of Kenya towards a government that is based on the essential values of human rights, equality, freedom, democracy, social justice, good governance, transparency, accountability, public participation and *the Constitution* which is the supreme rule of law binding all persons and state organs at the two levels of government. In which regard, any act or omission in relation to *the Constitution* is invalid. It also contends that this court is beholden to take judicial notice of police brutality and inefficiencies in Kenya to remedy the prevalence that is embedded in the country.

49. The 3rd interested party reiterated the assertions of the petitioner with regard to article 10 of the *Constitution* and stated that article 6(2) and (3) of the *Constitution* provides for two levels of government that are distinct and interdependent and should conduct their mutual relations on the

basis of consultation and cooperation. It begins by stating that a growing phenomenon in police operations throughout the world today is either external or civilian oversight of police.

50. Further, the 3rd interested party reiterated the petitioner's submissions and contends that the respondents assertion that the operationalization of CPA will interfere with the independence of the NPS, disregards the presumption of constitutionality and relies on *Fletcher v Peck*, 10 US (6 Cranch) 87, 128 (1810) wherein it was held that courts should not pronounce a law as being unconstitutional "on slight implication and vague conjecture" but instead "the opposition between the *Constitution* and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other".

51. It contends that the burden of proof with regard to unconstitutionality of the impugned sections lies with the respondents and they have not demonstrated to this court how the said sections are invalid for being inconsistent with the *Constitution*. To this end, it relies on *Fletcher v Peck* (*supra*) wherein it was stated that "legislation will be upheld if any 'rational basis' for its passage can be imagined". Based on this, the 3rd interested party contends that the relevant basis is that the law was passed so as to promote the relationship between the police and the public, to allow for counties to participate in the policing functions, to provide oversight and monitor implementation among others and relies on *Council of County Governors v Attorney General & another* [2017] eKLR wherein it was held that "in determining whether a statute is constitutional or not, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself". It also relies on the Supreme Court of India Case, *Hamdarddawa Khana v Union of India Air* wherein it was held that "in examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts is directed to problems which are manifest by experience...".

52. The 3rd interested party further contends that the inaction by the Respondents to implement section 41 of the *Act* has led to the inability of the public to participate in county policing and in providing oversight. It argues that the respondents do not have the power to decide the suitability or lack thereof of an Act of Parliament. In this regard, it relies on *Kenya Country Bus Owners Association v Cabinet Secretary for Transport & Infrastructure & 5 others* [2014] eKLR for the proposition that under article 153(4) of *the Constitution*, Cabinet Secretaries are bound to act in accordance with the *Constitution*. In the same breath, it also relies on *Republic vs. Somerset County Council exp Fenwings and others* [1995] 1 All ER 513 and *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others* [2016] eKLR and states that the inordinate delay of over 10 years contravenes the spirit of article 47 of the *Constitution* and has negatively affected the relationship between the police and the public.

53. In summary, the 3rd interested party supports the petition; and submits that the reasons advanced by the respondents on their failure to operationalize CPA are untenable in the circumstances. It also submits that the 1st, 2nd and 4th respondents insistence that the impugned sections are unconstitutional, amounts to second guessing Parliament and acting outside their statutory power. Further, their actions are unlawful and unconstitutional as the establishment of CPA sets out to transform the relationship between the police and the public and connotes transformative constitutionalism.

54. The 3rd respondent and the 1st, 2nd and 4th interested parties did not take part in this petition and neither did they file their submissions, save for the 1st interested party who took part in the application that was filed by the 1st, 2nd and 4th respondents.

55. Before I start my analysis, I must point out that during the proceedings of this matter, the 1st, 2nd and 4th respondents made an application for an order of stay of proceedings pending legislative process of

proposed amendments to the Act by Parliament. Suffice to say, this court dismissed the application vide a ruling dated 22/06/2022 on the ground that this court cannot stay proceedings indefinitely and await a legislative process whose timelines are unknown and unknowable based on sparse evidence placed before it that suggested that the decision to seek the amendments to the statute was not a new development; but that it had been mulled and acted upon even when the petition herein was filed.

Analysis and Determination

56. From a keen perusal of the pleadings and submissions of the parties, the issues that fall for determination are:

    a. Whether this petition meets the threshold required for constitutional petitions.

    b. Whether section 41 of the *National Police Service Act* is unconstitutional

    c. If (ii) above is in the affirmative, whether the petitioner discharged the burden to prove that failure to operationalize section 41 of the section 41 of the *National Police Service Act* is a constitutional violation.

    d. What reliefs, if any, to grant.

a. Does the Petition Meet the Required Threshold for Specificity?

57. The respondents argue that the petition falls short of the test of specificity set out in *Anarita Karimi Njeru v Republic* [1979] eKLR. They cited the Court of Appeal's exposition of the rule in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

58. In the *Mumo Matemu* case, the Court of Appeal reformulated the test in *Anarita Karimi Njeru* case thus:

> We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

59. The question is whether the present petition complies with the principle requiring that constitutional petitions are pleaded with reasonable precision.

60. The 1st, 2nd and 4th respondents argue that despite the petitioner referencing Articles 1, 2, 3, 6, 10, 47, 73, 232, 238, 239, 243 and 244 of the *Constitution* in its title, they have provided little or no particulars as to the allegations and the manner of the alleged infringements of the said constitutional provisions. According to the respondents, the Petitioner has not shown how the public has been denied an opportunity to participate in policing their own counties or how the police relations with the community has been affected by such delay. The respondents further claim that the petitioners have also not shown particulars of how failure to operationalize Section 41 of the Act has caused the public to suffer; how such failure will allow blatant violations of the *Constitution* and the Act or how such failure is an abdication of the 1st, 2nd and 4th respondents duties and a violation of the *Constitution*.

61. The respondents are clearly catching at the straws on this one. It is one thing to disagree on the likely practical constitutional consequences of the alleged failure to comply with the terms of the Act, but it is quite another to claim that the alleged violations have not been pleaded with reasonable precision. The petition is quite straightforward in its claim that the delay or refusal of the respondents to operationalize section 41 of the Act deprives the public of their constitutional rights under articles 238(b); 239(5) and 244 of the *Constitution* to be informed of the actions of the Police Service. They further claim that the failure to operationalize the section violates article 10 of the *Constitution* on the principles and values of governance – specifically the values of participation of the people, the rule of law, inclusiveness, good governance, transparency and integrity.

62. The alleged violations and an outline of the arguments are precisely laid out in the petition and gave the respondents reasonable notice of the case they faced. It requires no belaboring to conclude that the Petition easily passes muster under the test of specificity set out in *Anarita Karimi Njeru v Republic* [1979] eKLR and re-affirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

b. Is Section 41 of the National Police Serve Act Unconstitutional and, Therefore, Incapable of being Operationalized?

63. In sum, the respondents argue that section 41 of the Act is unconstitutional and, therefore, incapable of being operationalized. They state that it they that are, in fact, being faithful to the constitutional by withholding operationalization of the *Act*. In particular, the respondents base their arguments on the unconstitutionality of section 41 of the *Act* on two premises:

    a. First, they argue that section 41 of the Act is unconstitutional because the *Constitution* bequeaths the duty to maintain national security on the National Government while section 41 impermissibly delegates that function to the County Governments.

    b. Second, the respondents argue that section 41 of the *Act* impermissibly creates two parallel reporting chains in national security matters.

64. The respondents argue, in essence, that since they duty bound to respect and uphold the *Constitution*, it cannot be a violation of the self-same Constitution for them to refuse to comply with a section of the statute that runs afoul of the *Constitution*. In an oblique fashion, therefore, they invite the court to find section 41 of the *Constitution* as unconstitutional.

65. So, is section 41 of the Act unconstitutional and unfit for operationalization?

66. In order to respond to that question, it is important to interpret the section against the constitutional texts the respondents claim it violates and to do so utilizing the Canon of constitutional interpretation established by our jurisprudence. That Canon of constitutional interpretation was recently re-stated in a three-judge bench in *Peter Kibe Mbae v Speaker, Nakuru County Assembly & another; and Registrar of Political Parties & 49 others (Interested Parties)* [2022] eKLR into six general precepts as follows:

    a. First, the *Constitution* must be interpreted in a manner that promotes its purposes, values and principles and contributes to good governance. This is the express provision of article 259(1)(a) and (d). These constitutional purposes, values and principles are expressly stated in the preamble and in article 10 of the *Constitution*. They are also discoverable through purposive interpretation of the *Constitution* as outlined below.

    b. Second, the *Constitution* must be interpreted and be given a construction which is purposeful. The Court of Appeal put it most felicitously in *Speaker of the National Assembly of the Republic*

of Kenya & another v Senate of the Republic of Kenya & 12 others (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR): -

> 43 .....As explained by Vincent Crabbe in his text Legislative Drafting: Volume 1 at pages 231 to 233 ..... Construction of a legal provision on the other hand is wider in scope than interpretation, and is directed at the legal effect or consequences of the provision in question. .....a Constitution is in this respect different from an Act of Parliament, and describes it as a living organism capable of growth and development. In his words "a constitution is a mechanism under which laws are made, and not a mere Act which declares what the law should be"
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> 45. We are persuaded by this explanation, and indeed the approach suggested therein has been adopted by the Kenyan Courts. A holistic and purposive interpretation of the *Constitution* that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts.
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> 48. A purposive interpretation on the other hand acknowledges that the meaning of language is imprecise, and measures words against contextual, schematic, and purposive considerations. Aharon Barak in the text, "*Purposive Interpretation in Law*" at page 111 explains that:
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> > "According to purposive interpretation, the purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text. The author of the text created the text. The purpose of the text is not part of the text itself. The judge formulates the purpose based on information about the intention of the text's author (subjective purpose) and the "intention" of the legal system (objective purpose)."
>
> 49. As such, the purposive interpretation avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime.

c. Third, the *Constitution* must be interpreted holistically; only a structural holistic approach breathes life into *the Constitution* in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion* Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

> But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

d. Fourth, the *Constitution* must be given a liberal and organic not a mechanistic and positivistic interpretation. It must not be interpreted as one would a mere statute. The Supreme Court

pronounced itself on this principle in *Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

> The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The*Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The*Constitution* has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

e. Fifth, the *Constitution* has provided its own theory of interpretation to protect and preserve is values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in In *In Re the Speaker of the Senate & another v Attorney General & 4 others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):

> (155) In both my respective dissenting and concurring opinions, In the Matter of the Principle of Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai& 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the *Constitution*, 2010 and the *Supreme Court Act*, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.
>
> (156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the *Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the *Constitution*. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises,

such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the *Constitution* has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.

f. Sixth, in interpreting *Constitution of Kenya, 2010*, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* [2014] eKLR. It stated thus:

> (356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the *Constitution* that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.
>
> (357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:
>
> > [232] ...References to *Black's Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts.
> >
> > (233) It is possible to set out the ingredients of the theory of the interpretation of the *Constitution*: the theory is derived from *the Constitution* through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the *Supreme Court Act*, that introduce non-legal phenomena into the interpretation of the *Constitution*, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore,

> this court as the custodian of the norm of the *Constitution* has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the *Supreme Court Act*, is to "facilitate the social, economic and political growth" of Kenya.

67. To these six precepts, we can add a seventh one, relevant when a portion of a statute is challenged as unconstitutional: it is that there is a general presumption that statutes are constitutional with the practical consequence that the burden of proof lies on a person alleging otherwise. This precept and how it operates in practice is well captured in the decision of *EM Githinji in Center for Rights Education and Awareness & 2 others v John Harun Mwau & 6 others* [2012] eKLR which, in relevant part, states as follows:

    a. Under article 259 of *the Constitution*, the court is enjoined to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under article 159(2)(e) of *the Constitution* to protect and promote the purposes and principles of *the Constitution*.

    b. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).

    c. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the *Act* itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.

    d. The *Constitution* should be given a purposive, liberal interpretation.

    e. That the provisions of *the Constitution* must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.

    f. The spirit of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.

68. The Respondents argue that under the 4th Schedule of *the Constitution*, national security and national Police Services are functions to be undertaken solely by the National Government. Indeed, paragraphs 6 and 7 of the Fourth Schedule provides:

    6. National defence and the use of the national defence services.

    7. Police Services, including –

        (a) the setting of standards of recruitment, training of police and use of the Police Services;

        (b) criminal law; and

        (c) correctional services.

69. The 1st, 2nd and 4th respondents argue that these provisions are clear that these functions are to be performed by the National Government only. This, the 1st, 2nd and 4th respondents is accentuated by articles 238, 239, 243, 247 and 244 of the *Constitution* which provide for the principles of national security, national security organs, establishment of the National Police Service, objects and functions of the National Police Service and other Police Services.

70. The 1st, 2nd and 4th respondents argue that while the Act was enacted by Parliament to give effect to the above-cited articles of the *Constitution*, section 41 thereof provides that the Governor or a member of the County Executive Committee appointed by the Governor of each county shall be the chairperson of the CPA. They argue that this is unconstitutional because the command and control of the National Police Service is constitutionally under the Inspector General of Police. The *Constitution*, they argue, has not given or donated or even contemplated that any such control is to be exercised by any other person or office. It was, therefore, the 1st, 2nd and 4th respondents argue, an error for Parliament to have an elected Governor chairing the CPA. This is because, the 1st, 2nd and 4th respondents insist, the CPA contravenes the independent command of the office of the Inspector General of Police as contemplated by article 245(2)(b).

71. Additionally, the 1st, 2nd and 4th respondents argue that the requirement that the CPAs prepare quarterly reports to the Inspector General of Policy, Cabinet Secretary, the Governor and the County Assembly creates a parallel reporting system in the national security sector hence interfering with the independent command of the Inspector General of Police.

72. In addition, the 1st, 2nd and 4th respondents rely on the structure of articles 185 and 186 of the *Constitution* to make their argument. Article 185(2) provides that:

> "A county assembly may make laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the fourth schedule."

Article 186(1) provides that:

> "Except otherwise provided by this Constitution, the powers of national government and county governments, respectively, are set out in the Fourth Schedule."

Article 186(3) provides that:

> "A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government"

Article 187(2) provides that:

> "If a function or power is transferred from a government at one level to a government at the other level –
>
> a. arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and
>
> b. constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule."

73. Article 245 establishes the office of the Inspector General of the Police and also addresses his independent command over the NPS and performance of any other functions prescribed by national legislation.

74. The 1st, 2nd and 4th respondents assert that the implementation and operationalization of CPAs will interfere with the functions of NPS as it creates two parallel reporting chains. It would seem that section 41(9) as read with section 41(13) of the *Act* and article 185(2) of the *Constitution* is the foundation of that assertion.

75. Having considered these arguments by the 1st, 2nd and 4th respondents I am not persuaded that section 41 of the *Act* is unconstitutional. Given the burden of proof is on them to demonstrate the fact and extent of unconstitutionality, I am not persuaded that they have discharged their burden.

76. As pointed out above, the court, as indeed, the 1st, 2nd and 4th respondents, is obligated to construe both the*Constitution* and the Act in a manner that advances human rights and fundamental freedoms. It is, therefore, incumbent upon the court to view the objects and purposes as well as the legislative intention of section 41 of the Act in context. As the petitioners pointed out without answer by the 1st, 2nd and 4th respondents, the CPAs were established to provide oversight of the Police and curb police abuse and human rights violations. The aim is to create a civilian oversight body at the local level to promote societal cohesiveness and free exchange of ideas between the Police Service and the communities they serve. These human rights goal are consonant with not inimical to the national security goals and objectives and the express requirements of article 238(b) of the *Constitution*.

77. As the 3rd interested party persuasively argued, CPAs are meant to create mechanisms for communication between the Police and the communities and to develop critical Police-Public relationships which are necessary to ensure national security. In part, this constructive engagement between the Police and the Public through the CPAs at the local level is meant to discontinue the destructive pattern of human rights abuses by the Police Service. Additionally, CPAs as established under section 41 of the Act serves the purpose of fostering and promoting relationships between the Police Service and the broader society as required by article 244(e). Seen from this perspective, therefore, it is incorrect to say that the creation of CPAs militates against the constitutional principles enunciated in articles 238, 239, 243, 247 and 244 of the *Constitution*.

78. There is an expressed fear that given the functions of CPA, County Assemblies would have the leeway to make laws with regard to the functions of CPAs. As I understand it, this apprehension is triggered by the words "develop proposals on priorities, for police performance in the county" in section 41(9)(a) of the Act. However, that section does not give County authority to make laws that relate to the functions of CPAs. In any case, section 41(13) is very clear that CPAs shall not interfere with the functions and operations of NPS. If there were to be any proposals if at all, the same would involve consultation, coordination and cooperation between NPS and County Governments as envisaged under article 6(2) and Part 2 Clause 14 of the Fourth Schedule of the *Constitution*. Even then, the membership of CPA has three NPS representatives, two of whom are to be appointed by the Inspector General as provided for under section 41(1)(c) of the Act. Therefore, the independence of the Inspector General of Police and his functions remain intact as envisaged under article 245 of the *Constitution* which also provides that he shall perform other functions prescribed by national legislation and the *National Police Service Act* is a national legislation that he is subjected to.

79. Article 186(1) and (3), 187(2) and the Fourth Schedule of the *Constitution* go in tandem. All the provisions thereunder are plain, clear, precise and unambiguous. The language used by Parliament with regard to the functions of CPA *vis-a-vis* that used with regard to non-interference of the functions and operations of NPS under Section 41 of the Act leaves no doubt as to the steps taken by Parliament

to give effect to provisions of the *Constitution* as is required of them and by extension, fulfill the desire of the Kenyan people in so far as the relationship between the police and the public is concerned, thereby fulfilling the provisions of articles 1, 2, 3 and 10 of the *Constitution*.

80. The 1st, 2nd and 4th respondents' argument that section 41 of the Act creates a parallel report chains in the Police Service. However, this interpretation of section 41 of the Act appears overblown. The phrasing of section 41 of the Act clearly shows the appreciation and respect that Parliament had towards the operational independence of the NPS. The intention of Parliament is create a Police Service which has clear structures for constructive engagement and collaboration with the public and communities at the county level. As created, the operations of the CPAs do not interfere with policing: the operational independence of the Police is assured under the Inspector General of Police and section 41 of the Act unambiguously provides that CPAs "shall prepare, publicize and submit quarterly reports to the Inspector General, Cabinet Secretary, County Assembly and Governor." As the Petitioner has argued, this ensures that the national security function remains centralized in the National government while providing a platform through which the public participates in all aspects of policing at the county level.

81. The conclusion, then, is that the arguments by the 1st, 2nd and 4th respondents that section 41 of the Act would run afoul the *Constitution* if it is operationalized simply do not pass muster: correctly conceived in its historical context, section 41 of the Act is in line with the objects, purpose and principles of the *Constitution*.

c. Is the Delay or Failure to implement Section 41 of the Act a Constitutional Violation?

82. As alluded to above, it has been ten years since the Act was enacted by Parliament and about seven years since the guidelines with respect to Section 41 were formulated and gazetted. There is no question that this amounts to an inordinate delay in complying with a statutory provision. Since, as analyzed above, the Act is a constitutional statute aimed at giving effect to articles 243 and 245 of the *Constitution*, that failure, is, in the first place, a per se constitutional violation. A willful refusal or failure to animate or implement a constitutional statute amounts to categorical violation of the *Constitution* without further proof of constitutional consequences, harms or injury.

83. Second, the delay or failure to implement section 41 of the Act amounts to a violation of the Rule of Law – one of the values in article 10 of the *Constitution*. A violation or infringement is automatically caused if and when a state organ or a state officer fails to perform its/or his obligations or goes over and beyond what is provided for by the law. The constitutional principle and the rule of law is that: where a power or discretion is conferred upon a body/organ or a person under the *Constitution*, that power or discretion must be exercised in accordance with or subject to the *Constitution*. Also, if the power is conferred by or under a law, it must be exercised in accordance with that law. In Reference *re Secession of Quebec* [1998]2 SCR 217, the Supreme Court of Canada stated:

> "(72) the rule of law principle requires that all government action must comply with the law, including the *Constitution*."

84. Under Chapter Four, the Bill of Rights, in the *Constitution*, security is a right and a fundamental freedom and being that NPS is under obligation to provide the same via various state organs, it has no choice but to do exactly that. Further, article 47 of the *Constitution* gives every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In *Orion*

East Africa Limited v Permanent Sectary, Ministry of Agriculture and Another [2012] eKLR Majanja, J held that:

> " The term "administrative action"...is not limited to decisions; it is an expansive term which includes any acts or omission that affects the rights and interests of citizens."

In *Keroche Industries Limited v Kenya Revenue Authority & 5 others*, Nyamu, J held that:

> " On the issue of discretion, Professor Sir William Wade in his Book, Administrative Law has summarized the position as follows –
>
> > 'The powers of public authorities are ...essentially different from those of private persons ... The whole conception of unfettered discretion is inappropriate to a public authority which possess powers solely in order that it may use them for the public good. But for public bodies, the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of public rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties, which it owes others; indeed, it exists for no other purpose... but in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith; only to indicate the better performances of the duties for whose merit it exists.'"

85. In the present matter, there is no question that the respondents expressly failed in their obligations to implement section 41 of the Act in an expeditious manner. Since no specific time was assigned during which they were to operationalize the section, under article 259(8) of the *Constitution* they were obligated to implement section 41 of the Act without unreasonable delay. That delay is, in turn, a violation of article 47 of the *Constitution*. This is because the failure to implement section 41 of the Act amounts to an abuse of discretion by the Respondents. Abuse of discretion is defined under section 7(2) of the *Fair Administrative Action Act* (FAAA) to include "unreasonable delay or failure to act in the discharge of a duty imposed under any written law."

86. As the petitioner argued, article 47 of the *Constitution* and the *FAAA* are in line with the constitutional values and principles of public service established under article 232(1)(b) and (c) of *the Constitution* to wit: efficiency, responsiveness, promptness and effectiveness. Where a public body is required to take action, the *Constitution* requires that such action be taken without unreasonable delay. It requires no belabouring to reach the conclusion that a delay of ten years is, indeed, unreasonable.

d. Is an Order for *Mandamus* Necessary to Compel the Respondents to Comply with the Statute and Constitution?

87. In a word, yes. The 1st respondent's failure and refusal to operationalize section 41 of the *Act* is willful and in violation of the statute and Constitution as analyzed above. Among other things, section 41 provides for an opportunity for the public to participate in consequential policing decisions affecting their lives. The failure is, therefore, consequential on their rights. Yet, there is no good reason for this failure by the respondents. it seems appropriate that the court utilizes its authority under article 23(3) of the *Constitution* to grant appropriate relief – which includes an order for mandamus.

Disposition and Orders

88. The upshot is that this petition is meritorious and must succeed. Consequently, I allow it and grant the following orders and declarations:

    a. A declaration be and is hereby issued that the respondents' failure, neglect, or refusal to operationalize the County Policing Authorities established under section 41 of the *National Police Service Act* is unconstitutional and in violation of articles 2(1), 3(1), 6(2), 6(3), 10(2), 47(1), 73(1), 232(1), 238(2), 239(5) and 244 of the *Constitution*.

    b. A declaration be and is hereby issued that the respondent's failure to constitute County Policing Authorities is contrary to the principle of public participation and cooperative governance between the two levels of government found in articles 6(2) and 10(2) of the *Constitution*.

    c. An order of mandamus is hereby issued compelling and directing the 2nd to 3rd respondents to, within six (6) months of today, operationalize the County Policing Authorities, through issuance of guidelines, policies, financing of and appointments to the Authorities.

    d. The 2nd to 3rd respondents are directed to file an affidavit in this honourable court within nine (9) months of this court's decision indicating the status of their compliance with order (c) above.

    e. Each party to bears their own costs.

89. Orders accordingly.

DATED AT NAIROBI THIS 16TH DAY OF JANUARY, 2023

JOEL NGUGI

JUDGE

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HILLARY CHEMITEI

JUDGE