



REPUBLIC OF KENYA



**Legal Advice Centre t/a Kituo Cha Sheria & 33 others v Cabinet Secretary,
Ministry of Education & 7 others (Petition 104 of 2019) [2021] KEHC 390 (KLR)
(Constitutional and Human Rights) (26 November 2021) (Ruling)**

*Legal Advice Centre t/a Kituo Cha Sheria & 33 others (Suing on Behalf of the Estates of their
Deceased Children, their Own Behalf and on Behalf of about 32 Parents of Garissa University College
Terrorism Attack Victims) v Cabinet Secretary, Ministry of Education & 7 others [2021] eKLR*

Neutral citation: [2021] KEHC 390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 104 OF 2019
P NYAMWEYA, M THANDE & DK KEMEI, JJ
NOVEMBER 26, 2021**

BETWEEN

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA 1ST PETITIONER
AGNES WAHITHE MWANGI 2ND PETITIONER
JANNAI S. NJEKA 3RD PETITIONER
PAUL KINYALA 4TH PETITIONER
JOHN MAINGI MWANGI 5TH PETITIONER
JOSEPH WANYIRI NGATIA 6TH PETITIONER
JOHN GITAU MUCHERU 7TH PETITIONER
PETER KINUTHIA WAINAINA 8TH PETITIONER
SUSAN GAKENIA KAMAU 9TH PETITIONER
KENNETH GATITHU NG'ANG'A 10TH PETITIONER
PAUL NYANGAU MOSIRIA 11TH PETITIONER
RISPER KERUBO MOSE 12TH PETITIONER
SAMUEL GEORGE OJORO 13TH PETITIONER
BENSON MUTUKU NDAMBUKI 14TH PETITIONER
CAROLINE ATIENO 15TH PETITIONER**



DANIEL WILLIAM NYABOGA	16 TH PETITIONER
EUNICE WANGARI MWANGI	17 TH PETITIONER
BENSON MALUNDA MUTOTE	18 TH PETITIONER
AGNES SYOMBUA MUSYIMI	19 TH PETITIONER
THOMAS AKELO WAYODI	20 TH PETITIONER
KARANI KADHENGI MENZA	21 ST PETITIONER
ANJELINE ADIPO NYADENGE	22 ND PETITIONER
PETER KIPKORIR KOMEN	23 RD PETITIONER
JOSEPH OMARI	24 TH PETITIONER
AFUSA CHITERI MUKOYA	25 TH PETITIONER
SIPRINE ANYANGO ODONGO	26 TH PETITIONER
PURITY WANJIRU NDUMIA	27 TH PETITIONER
ISAAC OCKEREMI ESIROMO	28 TH PETITIONER
HENREY MULI MULUI	29 TH PETITIONER
ZIPHORAH KARIMI NKANATHA	30 TH PETITIONER
FELIX WANJALA BARASA MUSABI	31 ST PETITIONER
JOSEPH KIKUVI MWANIA	32 ND PETITIONER
JULIUS MULU MWIKYA	33 RD PETITIONER
PHINEAS GICHOVI (SUING ON BEHALF OF THE ESTATES OF THEIR DECEASED CHILDREN, THEIR OWN BEHALF AND ON BEHALF OF ABOUT 32 PARENTS OF GARISSA UNIVERSITY COLLEGE TERRORISM ATTACK VICTIMS)	34 TH PETITIONER

AND

CABINET SECRETARY, MINISTRY OF EDUCATION	1 ST RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR SECURITY AND COORDINATION OF NATIONAL GOVERNMENT	2 ND RESPONDENT
INSPECTOR-GENERAL, THE NATIONAL POLICE SERVICE ... RESPONDENT	3 RD
GARISSA UNIVERSITY	4 TH RESPONDENT
CABINET SECRETARY MINISTRY OF DEFENCE	5 TH RESPONDENT
ATTORNEY-GENERAL	6 TH RESPONDENT
INDEPENDENT POLICING AND OVERSIGHT AUTHORITY ... RESPONDENT	7 TH
COMMISSION ON ADMINSTRATIVE JUSTICE	8 TH RESPONDENT



Disclosure of information contained in reports by security agencies on the Garissa University terrorist attacks was not in the public interest

Reported by Kakai Toili

Constitutional Law – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – limitation of the right to access of information - conditions to be met before a right or fundamental freedom could be limited - test for determining whether a restriction was appropriate - whether disclosure of information contained in reports by security agencies concerning terrorist attacks was in the public interest – Constitution of Kenya, 2010, article 24; Access to Information Act, 2016, section 6.*

Brief facts

On April 2, 2015, Kenya experienced a tragic and devastating terrorist attack, which took place at Garissa University. A total of 148 people died and 79 were injured. The petitioners filed the instant petition seeking among others orders that the court directs the 7th and 8th respondents to furnish it and the petitioners with the reports that they held touching on the Garissa University terrorist attack case.

According to the petitioners, the right to information was a constitutionally guaranteed right, and access to the information and reports regarding the Garissa University terrorist attack would enhance accountability by State officers and boost confidence in the Government. The petitioners contended that the ability of the petitioners to demand their rights and seek their protection would be enhanced by accessing the requested information in order to prove complacency and laxity by State and other office bearers in the Garissa University terrorist attack.

The petitioners further argued that the withholding of information by the 7th and 8th respondents did not outweigh the public interest in accountability by the State and the right to information and fair hearing. The petitioners claimed that the information they sought did not compromise national security.

Issues

- i. Whether disclosure of information contained in reports by security agencies concerning terrorist attacks could be said to be in the public interest.
- ii. What were the conditions to be met before a right or fundamental freedom could be limited?
- iii. What was the test for determining whether a restriction was appropriate?

Relevant provisions of the Law

Access to Information Act, 2016

Section 6 - Limitation of right of access to information

(2) *For purposes of subsection (1)(a), information relating to national security includes—*

1. *military strategy, covert operations, doctrine, capability, capacity or deployment;*
2. *foreign government information with implications on national security;*
3. *intelligence activities, sources, capabilities, methods or cryptology;*
4. *foreign relations;*
5. *scientific, technology or economic matters relating to national security;*
6. *vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;*
7. *information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;*
8. *information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;*
9. *cabinet deliberations and records;*



10. *information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;*
11. *information that is referred to as classified information in the Kenya Defence Forces Act; and*
12. *any other information whose unauthorized disclosure would prejudice national security.*

Held

1. The constitutional and legal provisions set out in article 35 of the Constitution of Kenya, 2010 (Constitution) and the Access to Information Act demonstrated that unless there was good reason, a citizen should not be impeded from accessing information that was in the possession of the State or a State entity that was needed for the advancement or protections of a right. Therefore, a purposive interpretation of those provisions leaned towards a conclusion that their dominant objective was the promotion of access to and disclosure of information by the State and State agencies, which should have been the normal course, and that withholding of information was only in exceptional circumstances.

2. Article 24 of the Constitution provided for limitations of rights and fundamental freedoms. There were two conditions that had to be met before a right or fundamental freedom could be limited:

1. There had to be a law in place on the limitation.
2. The limitation had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those enumerated in article 24 of the Constitution.

3. The burden on justifying the limitation on the right to access of information rested on the person resisting disclosure, as provided for in article 24(3) of the Constitution which stated that the State or a person seeking to justify a particular limitation should demonstrate to the court, tribunal or other authority that the requirements of the article had been satisfied. The 7th and 8th respondents had confirmed that they indeed held the reports in question. Accordingly, the burden had shifted to and rested with them to demonstrate to the court why the reports ought not be released. That was also stipulated in principle 4 of the Global Principles on National Security and the Right to Information (Tshwane Principles).

4. Although the right of access to information was not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents had to demonstrate that the limitation imposed on a constitutional right was fair, reasonable, necessary and justifiable in a democratic society, and that it fell within the exceptions provided in the Access to Information Act.

5. The test for determining whether a restriction was appropriate should be one of proportionality. A proportionality test was appropriate as it preserved rights, provided a framework for balancing competing rights and enabled other important public concerns, such as national security and public order, to be duly taken into account.

6. The 7th respondent was established under the Independent Policing Oversight Authority Act. Its mandate included *inter alia*, to hold the police accountable to the public in the performance of their functions; give effect to the provision of article 244 of the Constitution, that the Police should strive for professionalism and discipline and should promote and practice transparency and accountability; ensure independent oversight of the handling of complaints by the Service. In line with its mandate, the 7th respondent conducted investigations into the conduct of the security operation by the National Police Service and made recommendations in respect of gaps that were identified.

7. The 8th respondent was a commission established under the Commission on Administrative Justice Act. Its mandate as set out in section 8 of the Act included investigating any conduct in State affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that was alleged or suspected to be prejudicial or improper or was likely to result in any impropriety or prejudice. The mandate also included investigating complaints of abuse of power, unfair



treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. The 8th respondent conducted its own investigations of the terror attack in the interest of the public.

8. Under principle 4 of the Tshwane Principles, it was not sufficient for a public authority seeking to withhold information to simply assert that there was a risk of harm but such authority was under a duty to provide specific, substantive reasons to support its assertions. The exceptions should apply only where there was a risk of substantial harm to the protected interest and where that harm was greater than the overall public interest in having access to that information.

9. Section 6(2) of the Access to Information Act stipulated the nature of information relating to national security that could not be disclosed. The information sought by the petitioners in the reports by the 7th and 8th respondents related to the Garissa University terrorist attack which took place on April 2, 2015. The court took judicial notice of the fact that Kenya had been a target of terror attacks since 1998. Prevention of terrorism was not an event, but a continuous process of activities by security agencies. Standard operating procedure operations were reviewed and lessons learnt and implemented in the process. The information contained in the reports was clearly in the nature of information covered in sections 6(2)(a)(b)(c)(f)(g)(j)(k) and(l) of the Act.

10. Under section 6(4) of the Access to Information Act the court could require a public entity or private body to disclose information where the court formed the opinion that public interest in disclosure outweighed the harm to protected interests. In considering the public interest, section 6(6) of the Act required particular regard to being had to the constitutional principles on the need to—

1. ensure that the expenditure of public funds was subject to effective oversight;
2. promote informed debate on issues of public interest;
3. keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
4. ensure that any statutory authority with regulatory responsibilities was adequately discharging its functions.

11. Article 238(1) of the Constitution defined national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. The Government of Kenya through its various agencies was under an obligation to protect its people and territory against internal and external aggression. To achieve that, the security agencies engaged in military strategy and other operations as more particularly set out in section 6(2) of the Access to Information Act.

12. Just as terrorism impacted human rights and the functioning of society, so too could measure adopted by States to counter-terrorism. Terrorism had a serious impact on a wide range of fundamental human rights, and States, therefore, had not only a right but a duty to take effective counter-terrorism measures. Such measures and the protection of human rights were complementary and mutually reinforcing objectives, which had to be pursued together as part of the States' duty to protect individuals within their jurisdiction. Specifically, with regard to the limitation on the right to disclosure of information on terrorism-related activities strategies and sources, that limitation served a legitimate purpose of safeguarding national security, public safety, public order, and the human rights and freedoms of others.

13. The programs and activities employed to address the internal, foreign and defence security interests and concerns, were of necessity confidential and information relating thereto was highly sensitive. The disclosure of such information, including the identity of security agents or informants, or details of a sensitive investigative technique could harm national security by putting sources of information and security strategies at risk. That was the reason why the 7th and 8th respondents maintained that any information or activities relating to the terrorist attack at Garissa University be kept out of the public's eye, in the interests of national security.

14. Given the impact of terrorism on human rights, security and the functioning of various aspects of international and domestic societies, countering of international and domestic terrorism was an important objective. That objective not only permitted the limitation of certain rights, but also entailed a greater public



interest that outweighed the disclosure of sensitive information collected in the process. The public interest sought to be achieved by the limitation of disclosure of information on terrorist-related strategies and activities, was the effective and timeous thwarting of actual or potential threats of terrorism against the State and its citizens.

15. The court took judicial notice of the fact that the threat of terrorism across the world and in Kenya, in particular, was very real. Due to that threat, and being mindful that Kenya had been a target on several occasions, the release of the reports would pose a threat to national security and prejudice public interest. Directing the 7th and 8th respondents to release reports which contained the strategies employed by the security agencies in combating the threat to terrorism was likely to put Kenya and the lives of its citizens, in jeopardy.

16. On a balance of probabilities, the substantial harm to the overall public interest far outweighed the right of the petitioners to access the information sought. The petitioners had already been supplied with the abridged version of the report for their purposes. Accordingly, the application and threshold for limitation of disclosure of the subject reports had been demonstrated and met by the 7th and 8th respondents.

17. Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provided that nothing in the Rules should limit or otherwise affect the inherent power of the court to make such orders as could be necessary for the ends of justice or to prevent abuse of the process of the court. The court was thus expressly given powers to call a witness and evidence, on its own motion if such witness and evidence would assist the court in coming to a just decision.

18. Even though there was no specific law on disclosure to the courts of information that fell within the limitation under article 24 of the Constitution and section 6 of the Access to Information Act, 2016, the court had jurisdiction and discretion under article 165 of the Constitution to employ a procedure that would achieve substantive justice.

19. The duty of the court in any matter was to determine the issue in controversy with finality. Even though the threshold of limitation had been met, the court had the power and discretion to establish whether the information sought to be withheld on grounds of national security was confidential as alleged.

20. An in-camera inspection of the reports was not appropriate in the circumstances, and also not necessary given that the petitioners already had in their possession an abridged version of the same. That was particularly pertinent in light of the provisions of section 6(5) of the Access to Information Act, which provided that a public entity was not obliged to supply information to a requester if that information was reasonably accessible by other means.

21. [*Obiter*] “In conclusion, we note that there is no law in place on the procedures for the confirmation of sensitive and confidential information for purposes of its disclosure, and we have had to look to other jurisdictions for guidance. There is, therefore, need for a law to be enacted setting out the necessary procedures and protocols on disclosure of confidential and sensitive information, including information touching on national security.”

Application dismissed.

Orders

- i. *No order as to costs.*
- ii. *The Deputy Registrar of the Constitutional and Human Rights Division of the High Court at Nairobi was directed to transmit a copy of the ruling to the offices of the Attorney General and the Clerk of the National Assembly, for their attention on the proposed law reforms.*

Citations

Cases

East Africa;

1. *Elisha, Dullu Kora v Kenya School of Law & another* [2017] eKLR — (Mentioned)
2. *Jack Mukhango & 12 others v Attorney General & 2 others* [2017] eKLR — (Mentioned)



3. *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR — (Mentioned)
4. *Karen Kandie v Alassane Ba and another* Petition No 2 of 2015; [2017] eKLR — (Mentioned)
5. *Katiba Institute vs Presidents Delivery Unit & 3 others* [2017] eKLR — (Explained)
6. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR — (Explained)
7. *Kenya National Commission on Human Rights v Attorney General & 2 others* [2020] eKLR — (Mentioned)
8. *Kenya National Human Rights Commission & Anor v Attorney General & 3 others* [2017] eKLR — (Mentioned)
9. *Mary Nyawade v Banking Fraud Investigation Department & 2 others* [2017] eKLR — (Explained)
10. *Munir Sheikh Ahmed v Capital Markets Authority* [2018] eKLR — (Explained)
11. *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR — (Mentioned)
12. *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission* [2019] eKLR — (Mentioned)
13. *Raila Amolo Odinga & Anor v IEBC & 2 others* [2017] eKLR — (Mentioned)
14. *Rose Owira & 23 others v Attorney General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* ((2020) eKLR) — (Explained)
15. *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* [2016] eKLR — (Mentioned)

India;

Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal Civil Appeal No 10044/2010 — (Mentioned)

South Africa;

1. *Phumelela Gaming and Leisure Limited v Grundlingh and others* (CCT31/05) [2006] ZACC 6; 2006 (8) BCLR 883 (CC) (18 May 2006) — (Mentioned)
2. *Brummer v Minister for Social Development & others* CCT 25/09 2009 ZACC 21 — Explained
3. *M & G Media Ltd v President of the Republic of South Africa & others* (1242/09) (2013) ZAGPPHC 35; (2013) 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) — (Mentioned)
4. *Re Masetlha v president of the Republic of South Africa & another* (2008 (5) SA 31 (CC) — (Mentioned)

Canada;

1. *Canada (AG) v Khawaja* 2007 FCA 388, [2008] 4 FCR 3 at para 8 — (Explained)
2. *R v Oakes* (1986) 1 SCR 103 — (Explained)

United Kingdom;

1. *Corderoy and Ahmed v Information Commissioner, Attorney General's Office and Cabinet Office* ((2017) UKUT 495 (AAC); (2018) AACR 19 — (Mentioned)
2. *Conway v Rimmer* (1968) AC 910 — (Mentioned)
3. *Duncan Cammell Laird* (1942) AC 624 — (Mentioned)

Newzealand;

Zaoui v Attorney General (2005) 1 N NZLR 577 — (Mentioned)

United States of America;

United States v Reynolds 345 US 1(1953) — (Mentioned)

International Instruments & Conventions

1. Universal Declaration of Human Rights, 1948 article 19
2. Africa Charter on Human and Peoples Rights, 1966 article 9(1)



Statutes

East Africa;

1. Access to Information Act, 2016 (Act No 31 of 2016) sections 6 (1)(2) (a)(b), (c), (f) (g) (j) (k) (l)(4) (5)(6) — (Interpreted)
2. Commission On Administrative Justice Act, 2011 (Act No 23 of 2011) sections 8, 26, 27, 28, 29, 42, 50 — (Interpreted)
3. Constitution of Kenya, 2010 articles 2(5)(6), 10 (2) (c), 24(1), 25 (c), 35, 50(1) (2), 59 (2), 159, 165, 244 — (Interpreted)
4. Independent Policing Oversight Authority Act, 2011 (Act No 35 of 2011) sections 5, 6, 7, 24(5) — (Interpreted)

Advocates

None mentioned

RULING

1. On April 2, 2015, Kenya experienced a tragic and devastating terrorist attack, which took place at the Garissa University. A total of 148 people died and 79 were injured. The petitioners herein by a petition dated March 15, 2019 and amended on November 14, 2019, sought certain declaratory orders as well as compensation for the lives lost in the attack. Contemporaneously with the petition, the Petitioners filed an application dated November 14, 2019, seeking the following orders:
 1. That this honourable court be pleased to certify that the petition herein raises substantial questions of law and forthwith refer the case to the Hon The Chief Justice for appointment of a bench of an uneven number of Judges being not less than three (3).
 2. That this honourable court be pleased to direct the 7th and 8th respondents to furnish the petitioners and the honourable court with the reports that they hold touching on the Garissa University terrorist attack case.
 3. That there be no orders as to costs.
2. A ruling was delivered on the said application by Hon Justice A Makau on April 23, 2020, wherein the following orders were granted:
 - a) The Hon The Chief Justice to empanel a bench of uneven number of judges to hear and determine this petition.
 - b) respondents be and are hereby directed to furnish the petitioners and the honourable court with the reports that they hold touching on Garissa University terrorist attack case.
 - c) Costs of the application to abide the outcome of the petition.
3. Following the order of April 23, 2020, the 7th and 8th respondents' filed applications dated May 28, 2020 and June 8, 2020 respectively, in which they sought stay, review and vacation of the order directing the 7th and 8th respondents to produce the said reports.
4. Upon the Constitution of the bench by the Hon The Chief Justice, we became seized of this matter. On February 18, 2021, the applications dated May 28, 2020 and June 8, 2020 were compromised by consent of the parties, on terms *inter alia* that the order directing the 7th and 8th respondents to produce the said reports was set aside and that prayer 2 of the petitioners' application dated November 14, 2019 shall proceed to full hearing on merit. This consent was informed by the fact that the



directions that had been given by the certifying court, were to the effect that prayer 2 of the application dated November 14, 2019 was to be determined by the bench that was to be constituted.

5. Consequently, the subject of this ruling is prayer 2 of the petitioners' application dated November 14, 2019 in which the petitioners seek disclosure by the 7th and 8th respondents, of the reports of their investigation into the Garissa University terrorist attack. The parties took directions to canvass the said prayer by way of written submissions which were highlighted during a hearing held on April 8, 2021. An exposition of the parties' respective positions in the application is set out hereinbelow.

The Petitioners' Case

6. The application is supported by the grounds set out therein, together with the supporting affidavit of John Mwariri, an advocate practising with the 1st petitioner, sworn on even date. He contended that the petition herein raises substantive legal issues touching on gross violation of human rights during a terrorist attack. He further asserted that the issues raised in the petition are novel touching on terrorism, human rights and national security which have not been considered in any other forum in the country. According to the Petitioners, the right to information is a constitutionally guaranteed right and is the hallmark of any effective democracy. Therefore, access to the information and reports regarding the Garissa University terrorist attack will enhance accountability by state officers and boost confidence in the government.
7. Additionally, Mr Mwariri contended that the ability of the petitioners to demand their rights and seek their protection will be enhanced by accessing the requested information in order to prove complacency and laxity by state and other office bearers in the Garissa University terrorist attack. In addition, the withholding of information by the 7th and 8th respondents does not outweigh the public interest in accountability by the state and the right to information and fair hearing which the petitioners deserve.
8. Indeed, he averred that there is greater public interest in the respondents not being permitted to keep information confidential, particularly where such confidentiality prevents victims of human rights violations from seeking or obtaining a remedy for their violation from court. Furthermore, that the right to know is no less important at times of a terrorist attack, and when rights are in issue, the court ought to take notice that the government is more likely to engage in questionable behavior, complacency and laxity and employ secrecy to conceal its failures. Counsel urged that if the court is satisfied that the information is one which should not be furnished to the petitioners, the court and the advocates are proper persons to be furnished with such reports, since an advocate is a repository of confidentiality and is equipped to handle any information.
9. The petitioners claim that the information they seek does not compromise national security. They seek information on the following issues:
 - a) The time the elite Recce squad of the General Service Unit of the police arrived at the scene.
 - b) The cause of the delay in the elite squad arriving at the scene and the effect of such delay in preventing and mitigating the effects of the attack.
 - c) Whether the request by the Garissa University for beefing up of security before the attack was sufficiently considered by the senior police officers.
 - d) the number of intelligence reports to the relevant state officers and institutions and how they responded to the reports.
 - e) information of the response and co-ordination of the response by security officers.



- f) the response of the university and other state institutions in the wake of intelligence reports of an attack.
- g) laxity, complacency and culpability of state officers before and after the attack and the state officers interdicted following the attack.
- h) the recommendations against the state officers found culpable and the reasons for their culpability.
- i) the deployment of military officers rather than police officers who are trained to fight in built-in areas.
- j) more particulars on lack of capacity that was blamed for the attack.

The Responses

10. The 1st, 2nd, 3rd, 4th and 6th respondents did not file replies to the application and relied on the responses filed by the 5th, 7th and 8th respondents.

The 5th Respondent's Response

11. The Chief of Operations of the Kenya Defence Forces, Colonel Gelffin Guest Marrow swore a replying affidavit on March 5, 2021 on behalf of the 5th respondent in opposing the application. While supporting the position of the 7th and 8th respondents, the deponent averred that the right of access to information is not absolute as the same is limited under section 6 of the [Access to Information Act](#), No 37 of 2016 as read together with article 24 of the *Constitution of Kenya, 2010*. He was of the view that where disclosure of information held by national security organs or any other state organ will undermine the national security of Kenya, then by law the same should not be disclosed. According to him, it is against the greater public interest to produce the reports in possession of the 7th and 8th respondents.
12. Colonel Marrow further stated that neither him nor the personnel of the Ministry of Defence were interviewed prior to the making of the reports hence production of such reports is prejudicial to them. Be that as it may, that the onus of proof is on the petitioners and not the respondents and that the prayer sought is a fishing expedition which the court should not entertain.

The 7th Respondent's Response

13. Mr Jeremiah Arodi, the Director Investigations of the 7th respondent, swore replying affidavits on July 19, 2019 and February 13, 2020 respectively in response to the application. He explained that pursuant to the mandate under sections 5, 6 and 7 of the *Independent Policing Oversight Authority Act, 2011*, the 7th respondent on its own motion conducted investigations into the conduct of the security operation by the National Police and other security agencies with regard to the Garissa University terror attack. He averred that the purpose of the investigation was to establish whether there was any misconduct on the part of any member of the National Police Service, and where any gaps in the operation were identified, make recommendations for improvement to ensure the public is better secured. That upon conducting its investigations, the 7th respondent forwarded its report to the various security agencies with a view to improving conduct of future security operations and to safeguard members of the public. It further recommended that disciplinary action be taken with regard to members of the National Police Service who were found culpable of misconduct.
14. It was Mr Arodi's contention that in conducting its investigations, the 7th respondent interviewed witnesses from various national security agencies, including the National Police Service and the



National Security Intelligence Service on a strictly confidential basis, as the information they provided related to national security and in particular the ongoing security operations against Alshabaab terrorists. He stressed that the 7th respondent also relied on confidential information provided by security agencies relating to the troop strength of various contingents involved in the fight against terrorism, movement of security agencies in combating terrorists, and processes and channels of information gathering and sharing between security forces. According to Mr Arodi, this confidential information forms the entire corpus of the investigations report by the 7th respondent. Therefore, that the report is predicated on and contains critical confidential information from national security organs, information which if disclosed as sought, would seriously imperil current security operations against terrorists and undermine national security. Further, that the report is privileged and confidential, and is thereby not subject to disclosure pursuant to section 6 of the Access to Information Act and section 24 of the Independent Policing Oversight Authority Act, 2011.

15. Be that as it may, he averred that the right to access of information is not an absolute right but is subject to exceptions and the 7th respondent's report falls within those exceptions. In addition, he was of the view that failure by the petitioners to access the confidential information which it holds does not in any way prejudice the enforcement or realization of their rights, predicated on facts from other sources annexed to the petition. It was further his contention that the greater public interest militates against disclosure of confidential information very likely to prejudice the country's national security and place civilians and security forces at risk of terrorist attacks. In his view, an advocate's confidentiality relates to advocate-client relationship and cannot in any way shape or form a basis to be transposed to the question of disclosure of confidential information by a third party as sought in the application. He therefore urged that the application be dismissed as against the 7th respondent.

The 8th Respondent's Response

16. The 8th respondent on its part filed a replying affidavit sworn on February 24, 2020 by Leonard Ngaluma, the Commission's Secretary. He averred that similarly, they conducted investigations on their own motion into the circumstances of the terrorist attack on the Garissa University College, specifically with a view to establish whether there was any dereliction of duty by the responsible security organs and public officers, and to take steps towards improving the functioning of the said public offices. Further, that this was done pursuant to the 8th respondent's obligation under article 59(2) of the Constitution of Kenya as read with sections 8, 26, 27, 28 and 29 of the [Commission on Administrative Justice Act, 2011](#).
17. It was his further averment that, given the nature of the investigations, the 8th respondent conducted interviews with the relevant government security agencies whose main submissions entailed the intricacies of security protocols and mechanisms involved in securing the nation. Accordingly, in the course of the investigations the 8th respondent was able to appreciate various sensitive and highly confidential aspects of national security which matters were translated into a report with a particular reference to the attack on the Garissa University College. This report, he averred, was released to the relevant security organs for discussions and implementation, and its sole objective was to improve the functioning of these state organs.
18. Mr Ngaluma averred that out of its responsibility as a state organ to protect and uphold the integrity of the nation, the 8th respondent refrained from publicizing the entire contents of the said report which comprised highly sensitive information with the potential to undermine national security. Instead, the 8th respondent published an abridged version of the report in its press release of May 6, 2016 giving a detailed summary of the findings and recommendations. Indeed, he contended that just like



the decision to conduct the investigation was made in the interest of the public, the decision to keep confidential the rest of the contents of the report was made in the interest of the public.

19. Mr Ngaluma was of the opinion that the information contained in the report is privileged and exempted from disclosure to the public, pursuant to article 35 of the Constitution of Kenya and section 6 of the Access to Information Act, 2016 on the basis that such disclosure would undermine the national security of Kenya. In particular, the information in the report reveals the following:
- i) military strategy, covert operations, doctrine, capability and deployment;
 - ii) intelligence activities, sources, capabilities, methods and cryptology;
 - iii) scientific and technology aspects relating to national security;
 - iv) vulnerabilities and capabilities of systems, installations, infrastructures, projects, plans and protection services relating to national security;
 - v) information prepared in an investigative capacity in the course of lawful investigations relating to the detention, prevention or suppression of crime, enforcement of law and activities suspected of constituting threats to national security;
 - vi) information that should be provided to a state organ (a constitutional commission) when conducting investigations and examinations in the performance of its functions and;
 - vii) information whose unauthorized disclosure would prejudice national security.
20. Mr Ngaluma stated that in publishing the report in the press release dated May 6, 2016, the 8th respondent exercised its mandate pursuant to section 50 of the *Commission on Administrative Justice Act, 2011*, whereby it determines the matters which in its opinion, could be disclosed to the public in order to establish grounds for its findings and recommendations. Further, that the 8th respondent is required pursuant to the said section to maintain confidentiality in respect of all matters that come to its knowledge in the exercise of its duties and also prohibits staff from giving evidence in respect of such matters. Indeed, he called upon the petitioners to rely on the publicized report and urged to be allowed to withhold the entirety of the contents of the report.

Analysis and Determination

21. We have considered the application, the rival affidavits as well as the submissions advanced and the authorities cited therein, in favour of and against the prayer for disclosure of the subject reports. The right of access to information is guaranteed under article 35 of the Constitution which provides as follows:
- 1) Every citizen has the right of access to-
 - (a) Information held by the State; and
 - (b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.
 - 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 - 3) The State shall publish and publicise any important information affecting the nation.
22. In actualizing article 35 above, Parliament enacted the Access to Information Act 2016 which at section 2 defines "information" to include all records held by a public entity or a private body, regardless of



the form in which the information is stored, its source or the date of production. Section 4 of the Act provides as follows;

- (1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a) The State; and
 - b) Another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - 2) Subject to this Act, every citizen's right to access information is not affected by—
 - a) Any reason the person gives for seeking access; or
 - b) The public entity's belief as to what are the person's reasons for seeking access.
 - 3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - 4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
23. The right to access information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. International conventions ratified by Kenya also affirm this right. Article 19 of the [*Universal Declaration of Human Rights*](#) provides that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. Article 19(2) of [*International Convention on Civil and Political Rights*](#) also makes the right to information imperative when it states that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” And finally, article 9(1) of [*Africa Charter on Human and Peoples Rights*](#) states that “every individual has the right to receive information.”
24. Furthermore, the right to access information as a basis for accountability, responsiveness and openness was emphasized in the South African case of [*Brummer v Minister for Social Development & Others CCT 25/09 2009 ZACC 21*](#) where the court stated ;
- “[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”
25. Justice Chacha Mwita in [*Katiba Institute v Presidents Delivery Unit & 3 others \[2017\] eKLR*](#), extensively captured its importance when he noted that:
- “28. The right to access information is a right that the individual has to access information held by public authorities acting on behalf of the state. This is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public



authorities. Where they don't know what is happening in their government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. In that context, therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

29. The importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access."

26. In this regard, it is noted that the existence of this right and its purpose is not contested. What is in contest is whether the right is limited in the circumstances of the present application.

27. The following issues therefore arise for determination:

- i) Whether the respondents have met the threshold for limitation of the petitioners' right of access to the information sought.
- ii) Whether the court is obligated to call for and scrutinize the reports in question so as to establish whether they are amenable for disclosure.

Whether the respondents have met the threshold for limitation of the petitioners' right of access to the information sought.

28. Dr Khaminwa and Mr Mwariri appearing for the petitioners filed written submissions dated March 28, 2021. On the right of access to information as guaranteed by article 35 of the Constitution of Kenya, 2010 and the Access to Information Act, counsel submitted that access to information has been the subject of judicial determination where the court found that the state has a duty not only to publish information in the public interest but also provide open access which principles were pronounced in the case of *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* (2013) eKLR. It was further submitted that the principles regarding the right of access to information are also founded in article 19 of the *Universal Declaration of Human Rights*.

29. Counsel further submitted that whereas the right of access to information is not absolute, section 6(4) introduces public interest as a consideration when weighing whether information should be disclosed or not. To that end, counsel cited the Constitutional Court of South Africa case of *Phumelela Gaming and Leisure Limited v Grundlingh and others* (CCT31/05) [2006] ZACC 6; 2006 (8) BCLR 883 (CC) (18 May 2006) where it was held that a court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing common or customary law. Counsel further analyzed legislation in six (6) modern democracies being India, New Zealand, Nigeria, South Africa, United Kingdom and the United States of America and submitted that the test to be applied is one that weighs public interest in favour of disclosure against the potential harm of disclosure.

30. Regarding whether the 7th and 8th respondents have discharged their onus of establishing that the refusal of access to the reports was justified under the Act for the court to uphold the refusal, counsel submitted that the burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information. Even so, it had not been demonstrated that any of the reports fall within the exception stipulated in section 6 of the *Access to Information Act* nor article 24 of the *Constitution of Kenya*. In counsel's view, the 7th and 8th respondents merely asserted that



the information they hold will imperil national security without providing evidence of how national security will be prejudiced nor how the harm to national security weighs heavier than the disclosure to the petitioners.

31. To that end, counsel cited principle 4 of the Burden on Public Authority to Establish Legitimacy of Any Restriction of the Tshwane Principles (the Tshwane Principles) whereby it has been stated that in discharging the burden, it is not sufficient for a public authority simply to assert that there is a risk of harm but that the authority is under a duty to provide specific, substantive reasons to support its assertions. Indeed, counsel also cited the case of *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission* (2016) eKLR where it was held that the exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to that information. They contended that courts will not merely rely on blanket assertions by government regarding the nature of the information and cited the case of *M & G Media Ltd v President of the Republic of South Africa & others* (1242/09) (2013) ZAGPPHC 35; (2013) 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) where the principle of justification was enunciated.
32. On whether the human rights violations in the petition herein weigh in favour of the public interest in disclosure of the reports held by the 7th and 8th respondent, counsel submitted that when an individual's rights are violated as a result of misuse or abuse of state powers, then the individual should have access to an effective remedy and relied on article 2(3) of the *International Convention on Civil and Political Rights* and article 50 of the Constitution of Kenya for that proposition. Counsel further submitted that they seek to advance the case that there was general information and intelligence of a possible terrorist attack and that the state officers and institutions acted so negligently that they failed to prevent the attack and ameliorate the effects of the attack as a result of which their children's right to life, education, dignity and security of persons was violated and that their ability to demand for their rights and seek for protection can only be enhanced by being able to utilize available information with the 7th and 8th respondent to prove complacency and laxity by duty bearers.
33. It was their contention that the 7th and 8th respondents should not be permitted to keep information confidential particularly where such confidentiality prevents victims of human rights violations from seeking or obtaining a remedy from the court as is the case. Counsel further contended that the invocation of national security as a reason for non-disclosure in the current situation where human rights violations are sought to be remedied will harm the public interest and thus give rise to threats to the right of access to information and obviate the reason for enactment of laws protecting the right. In their view, access to information plays a role in ensuring fair trial provided under article 50(2) of the Constitution of Kenya as litigants are placed in a position in which they are able to advance their cases. It was therefore submitted that this is one of the rights that cannot be limited under article 25(c) of the Constitution of Kenya and the petitioners will not be accorded fair hearing under article 50(1) if at all some of the information in the attack is kept away from them. Indeed, it was submitted that the impact of the disclosure or non-disclosure is the ultimate fairness of the proceedings before a court as was considered in the case of *Re Masetlha v president of the Republic of South Africa & another* (2008 (5) SA 31 (CC)).
34. On whether the public interest in ensuring accountability of state officers and institutions during the Garissa attack and the several terrorist attacks weighs in favour of disclosure, counsel cited article 10(2)(c) of the Constitution of Kenya and submitted that there is need to expose wrong-doing and inefficiency on the part of state institutions and public officers to avoid recurrence of terrorist attacks leading to loss of lives in our country which position is reflected in section 6(6) of the Access to Information Act. To buttress their argument, counsel cited the case of *Orange Democratic Movement*



Party (ODM) v Independent Electoral and Boundaries Commission (2019) eKLR where the issue of access to information, accountability and maintaining public confidence was addressed. The right to access to information as a basis for accountability, responsiveness and openness was further emphasized in the case of Brummer v Minister for Social development & others (CCT 25/9) (2009) ZAAC 21. Counsel further submitted that in the Indian jurisdiction, public interest has been expanded to include accountability of officials and exposure of wrong and inefficiency of state officers. Reliance was placed on the case of Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal (Civil Appeal No 10044/2010)

35. Miss Mutindi appearing for the 1st, 2nd, 3rd, 4th and 6th respondents indicated to the court that she associates herself with the responses and submissions of the 7th and 8th respondents.
36. Special State counsel Mr Yator appearing for the 5th respondent filed written submissions dated April 4, 2021. It was his submission that the right to access to information is limited by article 24 of the Constitution and section 6(2) of the Access to information Act. While associating himself with the submissions of the 7th and 8th respondents, he submitted that if the information is released, then it will endanger the security agencies and lives of Kenyans. It was his submission that the 7th and 8th respondents as well as other state organs have a constitutional, statutory and national duty not to disclose the information sought by the petitioners, as such disclosure would be prejudicial to national security. He was also apprehensive that the release of the information to court might fall in the wrong hands. Be that as it may, he submitted that the onus of proof lies with the petitioners who in his view, are on a fishing expedition, as such, they would not be prejudiced since they already have sufficient information that they have annexed to the application and the petition. He therefore urged the court to dismiss their application with costs.
37. Mr. Kinoti appearing for the 7th respondent filed written submissions dated April 7, 2021. Counsel submitted that the only issue for determination is whether the petitioners have demonstrated sufficient grounds to warrant this courts to direct the 7th and 8th respondents to furnish the petitioners and the court with the reports that they hold touching on the Garissa University terrorist attack. He noted that while the petition is anchored on article 25 of the Constitution, this right is not amongst the non-derogable rights set out that article and may therefore be justifiably limited pursuant to article 24 of the Constitution. Indeed, he argued that section 6 of the Access to information Act which gives effect to article 35 of the Constitution provided various limitations, and contrary to the Petitioners' submissions, the 7th respondent has demonstrated that the reports fall squarely within the exception of national security as envisaged in section 6(1) and (2)(a), (c), (f)(g)(j)(k) and (l) of the Access to information Act. He therefore referred court to paragraphs 8, 9, 10, 11, 12 and 13 of the replying affidavit of Jeremiah Arodi sworn on July 19, 2019.
38. Moreover, that the information was obtained confidentially pursuant to inter alia section 24(5) of the IPOA Act. Indeed, counsel pointed out to the court that the above averments had not been controverted by the petitioners and therefore the same must hold true. Be that as it may, counsel submitted that short of disclosing the actual information in the report, the 7th respondent could not have been more articulate and detailed with regard to the nature of confidential information in the report and how its disclosure imperils national security. To buttress his argument, counsel cited the case of Kenya National Commission on Human Rights v Attorney General & 2 others (2020) eKLR where the court declined to declare *inter alia* imposition of curfew orders in Mandera County on the basis of lack of public participation.
39. Counsel also cited the US Supreme Court in the case of United States v Reynolds 345 US 1(1953) where the court while dealing with the question of disclosure of privileged information on national security



grounds, *vis-a-vis* litigants rights, the court found that it was not necessary for disclosure to be made even to a judge in chambers before the court could find the information was privileged. Similarly, in the UK *House of Lords case of Conway v Rimmer (1968) AC 910* Lord Reid held that the court in dealing with claims of privileged information noted that it is essential that there should be no disclosure of anything which might give any useful information to those who organize criminal activities. In the same case, Lord Morris held that if a responsible minister stated that production of a document would jeopardize public safety it is inconceivable that any court would make an order for its production.

40. Counsel also urged that in this case, the public interest in disclosure does not outweigh the harm to protected interest which in this case is national security. He contended that the petitioners have set out a false dichotomy between national security and public interest when in fact, national security is in the public interest and those two are not mutually exclusive concepts. To that end, counsel cited Lord Simon in *Duncan Cammell Laird (1942) AC 624* cited by Lord Reid in *Conway v Rimmer (supra)* where it was held that public interest is also the interest of every subject of the realm, and while in these exceptional cases the private citizen may seem to be denied what is to his immediate advantage, he like the rest of us would suffer if the needs of protecting the country as a whole were not ranked as a prior obligation.
41. It was further submitted that it is clear from the petition that disclosure of this information is not essential for the Petitioners to make out their case since the petition is supported by a plethora of documents which include a detailed report of the departmental committee on administration and national security into the Garissa University terror attack, report of the joint committee on administration and national security relating to terrorist attacks, parliamentary Hansard reports and other reports relating to the attack. Indeed, counsel urged that the Petitioners have not demonstrated how these documents fall short in material respect and how the report sought to be disclosed is the *sine qua non* for establishment of their case. Counsel urged that it is trite law that where it is shown, as in this case, that national security would be gravely and directly compromised by disclosure of information, the interest of litigants must give way to the public interest of securing national security. Indeed, he noted that pursuant to section 6(6) of the Act, interest of the litigants is not one of the factors the court is enjoined to consider when considering public interest under section 6(4).
42. To that end, counsel cited Lord Morris in *Conway v Rimmer (supra)* where he held that the public interest may require that relevant documents ought not to be produced if for example, national security would be or might be imperiled by the production and consequent disclosure of certain documents, the interest of a litigant must give way. Similarly, counsel relied on *United States v Reynolds (supra)* where the US Supreme Court noted that where there is a strong showing of necessity, the claim of privilege should not be lightly accepted but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.
43. Counsel urged that none of the decisions set out by the petitioners relate to national security. In addition to, the Tshwane Principles overly relied upon do not have a bearing on the issue as they do not form corpus of international law, whether customary or treaty nor domestic law applicable in Kenya. Be that as it may, the information sought is not essential to the petition and consequently the task, if any, of holding public bodies accountable through the petition can be achieved without need to disclose information which would imperil national security.
44. Miss Musembi appearing for the 8th respondent filed written submissions dated April 5, 2021. Counsel submitted that the right to access information on the production of the 8th respondent's investigative report is not an absolute right as listed in article 25 of the Constitution. It was her contention that article 24(1) expressly states that any limitation upon a constitutionally protected right must be anchored in law and that limitation should be reasonable and justifiable in an open and democratic



society. Counsel therefore relied on the Supreme Court case of *Karen Kandie v Alassane Ba & another, Petition No 2 of 2015 (2017) eKLR* and *Dullu Kora Elisha v Kenya School of Law & another (2017) eKLR* for the tests to be applied under article 24 of the Constitution. Counsel also cited the case of *Jack Mukhango & 12 others v Attorney General & 2 others (2017) eKLR* where the court stated that article 35 is not absolute and cannot operate in isolation and must be read together with other articles of the Constitution.

45. It was further submitted that limitation of the right can be illustrated through the Oakes Test developed by the Canadian Supreme Court when it sought to interpret the limitations clause in section 1 of the *Canadian Charter of Rights and Freedoms* that allows reasonable limitations on rights and freedoms through legislation, if it can be demonstrably justified in a free and democratic society. The two-part legal test in *R v Oakes (1986) 1 SCR 103* is outlined as follows; there must be a pressing and substantial objective for the law or government action; the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; the objective must be rationally connected to the limit on the charter right; the limit must minimally impair the charter right; and there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.
46. Counsel therefore submitted that the values that underpin a ‘free and democratic’ society and which should be used as the ‘ultimate standard’ for interpretation of the limitation clause are values such as respect for the inherent dignity of the human person, commitment to social justice, accommodation of a wide variety of beliefs, respect for cultural group identity, and faith in social and political institutions which enhances participation of individuals and groups in society.
47. Counsel further submitted that another factor that the state or the person seeking to justify the limitation must demonstrate, is the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. To that end, she relied on the case of *Jacqueline Okuta & another v Attorney General & 2 others (2017) eKLR* where the court held that the test for determining whether a restriction is appropriate is a proportionality test and that “a proportionality test preserves the rights, provides a framework for balancing competing rights and enables other important public concerns such as national security to be taken into account. The case of *Kenya National Human Rights Commission & another v Attorney General & 3 others (2017) eKLR* was also cited for a similar proposition. Counsel therefore urged that the proportionality test was applied in the limitation of the right when they released an abridged version of the report as sworn in their affidavit of February 24, 2020 and therefore the production of the investigation reports of the 7th and 8th respondents fall within the ambit of limitation provided in section 6 of the Act as read with article 24 of the Constitution.
48. Counsel also submitted that the Tshwane Principles, aim to ensure that information may only be withheld where the public interest in maintaining the information’s secrecy clearly outweighs the public interest in the right to information. Counsel referred the court to Principle 3 and 9 thereof, which state that no restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that the restriction is prescribed by law and that it is also good practice for national law to set forth an exclusive list of categories of information that are at least as narrowly drawn therein. Reliance was also placed on section 42 of the Commission on Administrative Justice Act, 2011 and it was submitted that after the conclusion of its investigations, it made a report to the public offices and organizations concerned with necessary recommendations. Whilst relying on section 50 of the Commission on Administrative Justice Act, 2011, she submitted that the information it holds, was privileged and that the reports being sought cannot be released to the public as per section 6(2)(g) of the Access to Information Act and thus urged the court to dismiss the application.



49. We note that the petitioners have relied on article 35 to urge that they have the constitutional right to the information held by the 7th and 8th respondents, namely the investigative reports relating the Garissa University terrorist attack on April 2, 2015. We note further that they have urged that this information is required to enable them exercise their right to a fair trial under article 50 of the Constitution. The constitutional and legal provisions set out in article 35 of the Constitution and the Access to Information Act demonstrate that unless there is good reason, a citizen should not be impeded from accessing information that is in the possession of the state or a state entity that is needed for the advancement or protections of a right. Therefore, a purposive interpretation of these provisions lean towards a conclusion that their dominant objective is the promotion of access to and disclosure of information by the state and state agencies, which should be the normal course, and that withholding of information is only in exceptional circumstances.

50. In the case of *Nairobi Law Monthly v Kenya Electricity Generating Company & 2 others* (*supra*) the court stated what the state should bear in mind when considering the request to access information:

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

36.The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information.”

51. The 7th and 8th respondents have in this regard confirmed that they did conduct independent investigations on the Garissa University terrorist attack and prepared reports thereon. However, they maintain that the said reports are confidential and touch on national security. They further contend that due to the nature of the reports, the release thereof could undermine the national security of Kenya. They further contended that fall within the limitations under section 6(1) and (2) of the Access to Information Act, 2016 and article 24 of the Constitution.

52. Article 24 provides for limitations of rights and fundamental freedoms as follows;

- 1) A right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature and right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;



- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and;
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

53. There are, therefore, two conditions that must be met before a right or fundamental freedom may be limited. They are: -

- i. There must be a law in place on the limitation;
- ii. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including those enumerated in article 24 of the Constitution.

54. In addition, the burden on justifying the limitation on the right to access information rests on the person resisting disclosure, as provided in article 24(3) which states that the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of the article have been satisfied. In the present case the 7th and 8th respondents have confirmed that they indeed hold the reports in question. Accordingly, the burden has now shifted to and rests with the 7th and 8th respondents to demonstrate to the court why the reports ought not be released. This is also stipulated in Principle 4 of the [*Global Principles on National Security and the Right to Information \(Tshwane Principles\)*](#) which provides:

The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information.

55. Therefore, although the right of access to information is not absolute, to satisfy the requirements set out under article 24 of the Constitution, the respondents must demonstrate that the limitation imposed on a constitutional right is fair, reasonable, necessary and justifiable in a democratic society, and that it falls within the exceptions provided in the Access to Information Act. Section 6(1) of the said Act provides for the limitations as follows:

- (1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—
 - (a) undermine the national security of Kenya;
 - (b) impede the due process of law;
 - (c) endanger the safety, health or life of any person;
 - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
 - (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
 - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
 - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;



- (h) damage a public entity's position in any actual or contemplated legal proceedings; or
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession

56. The Canadian Supreme Court in the case of *Republic v Oakes*, [1986] 1 SCR 103 considered the factors to consider in determining whether a limitation is reasonable and justifiable and held that:

“To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *R v Big M Drug Mart Ltd*, *supra*, at p 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

“Second, once a sufficiently significant objective is recognized, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R v Big M Drug Mart Ltd*, *supra*, at p 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question:

Third, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of “sufficient importance.”

57. This position has been adopted and reiterated by the Kenyan courts in various decisions. The High Court in the case of *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR stated as follows on limitation of rights:

“72A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation (“*proportionality stricto sensu*” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right.”



58. In the case of *Mary Nyawade v Banking Fraud Investigation Department & 2 others* (2017) eKLR, it was held as follows:

“57. The grounds for exception to disclose information should be clearly and narrowly defined. Otherwise it is too easy to broaden exceptions and withhold important information. The presumption is always in favour of disclosure, unless the information meets a so-called three-part test, deduced from international law:- (a) the information relates to legitimate interests protected by the law, and (b) disclosure of the information threatens to cause substantial harm to that interest, and (c) the harm to the interest is greater than the public interest in receiving the information.”

59. The steps to be taken by a judge in this respect were set out in the Canadian case of *Canada (AG) v Khawaja*, 2007 FCA 388, [2008] 4 FCR 3 at para 8 [Khawaja], as follows:

“The first step is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the rule set out by the Supreme Court of Canada in *R v Stinchcombe*, that is whether the information at issue may reasonably be useful to the defence. The onus is on the party seeking disclosure to meet this stage of the test. The second step is to determine whether disclosure of the information at issue would be injurious to international relations, national defence or national security. It is not the role of the judge at this stage of the test to second-guess or substitute his opinion for that of the executive. The burden of convincing the judge of such probable injury is on the party opposing disclosure. The judge must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence. The third step consists of determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure, and it is the party seeking disclosure that bears the burden of proving that the public interest scale is tipped in its favour.

60. The test for determining whether a restriction is appropriate should be one of proportionality as demonstrated by the international, regional and comparative human rights jurisprudence, as provided for in article 24 of the Constitution. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.

61. In the present application, it is noted that the 7th respondent is established under the *Independent Policing Oversight Authority Act (IPOA)*. Its mandate includes *inter alia*, to hold the police accountable to the public in the performance of their functions; give effect to the provision of article 244 of the Constitution, that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; ensure independent oversight of the handling of complaints by the service. In line with its mandate, the 7th respondent conducted investigations into the conduct of the security operation by the National Police Service and made recommendations in respect of gaps that were identified. The 7th respondent’s justification for not releasing the report in question is that the same contains critical confidential information from national security organs, information which if disclosed, would seriously imperil current security operations against the threat of terrorism and undermine national security.

62. On its part, the 8th respondent is a commission established under the Commission on Administrative Justice Act. Its mandate as set out in section 8 of the Act includes investigating any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in



National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. The mandate also includes investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector.

63. The 8th respondent also conducted its own investigations of the terror attack in the interest of the public. In the course of its investigations the 8th respondent did interact with security agencies who disclosed the intricacies of security protocol and mechanisms involved in securing the nation. Due to the fact that the report contained highly sensitive information with potential to undermine national security, the 8th respondent refrained from publicizing the entire contents of the report. In keeping with its practice of disclosing the findings of its investigations to the public, the 8th respondent published an abridged version in its press release of May 6, 2016. The 8th respondent maintained that the decision to keep the report confidential is an isolated case and was done in the public interest and constitutional duty. It is the 8th respondent's contention that the abridged version is sufficient for the petitioners' purposes.
64. We note that under principle 4 of the Tshwane Principles, it is not sufficient for a public authority seeking to withhold information to simply assert that there is a risk of harm but such authority is under a duty to provide specific, substantive reasons to support its assertions. In the case of *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission (2016) eKLR* the court held that the exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to that information.
65. The 7th and 8th respondent's in their averments have justified the withholding of their reports by citing national security considerations. They have averred that the reports contained information on the intricacies of security protocol and mechanisms involved in securing the nation in light of terrorist threats. Further, that the reports also contained highly sensitive information with potential to undermine national security. According to them the release of such a report therefore would greatly prejudice public interest and imperil national security.
66. Section 6(2) of the *Access to Information Act* stipulates the nature of information relating to national security that may not be disclosed as follows:
 - (a) military strategy, covert operations, doctrine, capability, capacity or deployment;
 - (b) foreign government information with implications on national security;
 - (c) intelligence activities, sources, capabilities, methods or cryptology;
 - (d) foreign relations;
 - (e) scientific, technology or economic matters relating to national security;
 - (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;
 - (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;
 - (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;



- (i) cabinet deliberations and records;
 - (j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;
 - (k) information that is referred to as classified information in the Kenya Defence Forces Act; and
 - (l) any other information whose unauthorized disclosure would prejudice national security.
67. It is not in dispute that the information sought by the petitioners in the reports by the 7th and 8th respondents relate to the Garissa University terrorist attack which took place on April 2, 2015. The court takes judicial notice of the fact that Kenya has been a target of terror attacks since the 1998. Indeed, the petitioners have enumerated the various terrorist attacks on Kenya in their amended petition dated November 14, 2019. The court also notes that prevention of terrorism is not an event, but a continuous process of activities by security agencies. As averred by the 5th respondent in answer to the petition, standard operating procedure operations are reviewed and lessons learnt and implemented in the process. The information contained in the reports is clearly in the nature of information covered in section 6(2)(a)(b)(c)(f)(g)(j)(k) and(l) of the Act.
68. It is further noted that under section 6(4) of the Access to information Act the court may require a public entity or private body to disclose information where the court forms the opinion that public interest in disclosure outweighs the harm to protected interests. In considering the public interest section 6(6) of the Act required particular regard to be had to the constitutional principles on the need to—
- (a) promote accountability of public entities to the public;
 - (b) ensure that the expenditure of public funds is subject to effective oversight;
 - (c) promote informed debate on issues of public interest ;
 - (d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
 - (e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.
69. In the present case, the petitioners seek disclosure of the reports in question in furtherance of the constitutional principles on the need to promote accountability of public entities to the public, namely the National Police Service and the Kenya Defence Forces, regarding their role in responding to the Garissa University terrorist attack. The 7th and 8th respondent however maintains that it has a duty to uphold the integrity of the nation as the release of the highly sensitive information could potentially undermine national security.
70. Having considered the submissions of the parties, we find that we are called upon to make a determination as to whether the release of the reports sought, will undermine the national security of Kenya. Article 238(1) of the Constitution defines national security as the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. The government of Kenya through its various agencies is under an obligation to protect its people and territory against internal and external aggression. To achieve this, the security agencies engage in military strategy and other operations as more particularly set out in section 6(2) of the Access to Information Act.



71. Just as terrorism impacts on human rights and the functioning of society, so too can measures adopted by States to counter terrorism. Terrorism has a serious impact on a wide range of fundamental human rights, and States therefore have not only a right, but a duty to take effective counter-terrorism measures. Such measures and the protection of human rights are complementary and mutually reinforcing objectives, which must be pursued together as part of States' duty to protect individuals within their jurisdiction. Specifically, with regard to the limitation on the right to disclosure of information on terrorism related activities strategies and sources, this limitation serves a legitimate purpose of safeguarding national security, public safety, public order, and the human rights and freedoms of others.
72. The programs and activities employed to address the internal, foreign and defence security interests and concerns, are of necessity confidential and information relating thereto is highly sensitive. The disclosure of such information, including the identity of security agents or informants, or details of a sensitive investigative technique could harm national security by putting sources of information and security strategies at risk. This no doubt is the reason why the 7th and 8th respondents maintain that any information or activities relating to the terrorist attack at Garissa University be kept out of the public's eye, in the interests of national security.
73. Furthermore, given the impact of terrorism on human rights, security and the functioning of various aspects of international and domestic societies, there is no doubt that countering of international and domestic terrorism is an important objective. This objective not only permits the limitation of certain rights, but also entails a greater public interest that outweighs the disclosure of sensitive information collected in the process. The public interest sought to be achieved by the limitation of disclosure of information on terrorist related strategies and activities, is the effective and timeous thwarting of actual or potential threats of terrorism against the State and its citizens.
74. We take judicial notice of the fact that the threat of terrorism across the world and in Kenya in particular is very real. Due to this threat, and being mindful that Kenya has been a target on several occasions, we agree with the respondents that release of the reports would pose a threat to national security and prejudice public interest. To direct the 7th and 8th respondents as urged by the Petitioners, to release reports which contain the strategies employed by the security agencies in combating the threat to terrorism, is in our view likely to put this country and the lives of its citizens, in jeopardy.
75. After considering and analyzing the facts the law and the cited authorities, we make a finding, that on a balance of probabilities the substantial harm to the overall public interest far outweighs the right of the petitioners to access the information sought. Suffice it to add that the petitioners have already been supplied with the abridged version of the report for their purposes. Accordingly, our view is that the application and threshold for limitation of disclosure of the subject reports has been demonstrated and met by the 7th and 8th respondents.

Whether the court is obligated to call for and scrutinize the reports in question so as to establish that the same are confidential and affect national security.

76. The petitioners' counsel submitted that issues of national security do not fall beyond the jurisdiction of the court. In their view, the court can still examine the report, and counsel relied on article 159(1) and 160 of the Constitution of Kenya and principle 6 of the Tshwane Principle for the proposition that the reports held by the 7th and 8th respondent can still be furnished to the court and the court can make a determination of the issues before it, based on that information. To that end, counsel cited the South African case of *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) (2013) ZAGPPHC 35; (2013) 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) where the constitutional court affirmed the position that issues of national security are not beyond the jurisdiction of the court.



77. Indeed, it was submitted that the court should not rely on blanket and overboard assertions by the 7th and 8th respondent claiming national security and urged the court to be guided by the pronouncement in the case of *Corderoy and Ahmed v Information Commissioner, Attorney General's Office and Cabinet Office* (2017) UKUT 495 (AAC); (2018) AACR 19 (United Kingdom) for the proposition that in determining whether there is sufficient evidence to support an exemption claim, courts are willing to examine the documents in question rather than merely rely on blanket assertions by the government. They also urged that the reports can be availed to the Petitioners' advocates who are bound by the duty of confidentiality. In this regard, they relied on the case of *Zaoui v Attorney General* (2005) 1 N NZLR 577.
78. On whether the court should apply the measures proposed by the petitioners, counsel for the 7th respondent submitted that the petitioners have not sought the order in their application, and urged that parties are bound by their pleadings. To buttress that argument, counsel cited the Supreme Court of Kenya in the case of *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR where it was held that in absence of pleadings, evidence if any, produced by the parties cannot be considered. Similarly, he cited the High Court in *Rose Owira & 23 others v Attorney General & anor; Kenya National Commission on Human Rights & 4 others (Interested Parties)* (2020) eKLR where it was held that submissions cannot be used as an avenue to raise new issues which have not been raised in pleadings and urged that the petitioners' submissions to that effect should not be considered. It was also submitted that even assuming the court could consider the same (*quod non*), it is not possible to disclose documents to advocates on record who would be under a duty to disclose the information to their clients. That unlike other jurisdictions like the United States and United Kingdom, our country does not have a system of specially vetted counsel appointed to receive confidential information.
79. In addition, that the case herein belongs to the petitioners and not their advocates, and in that case, confidentiality cannot be maintained. Furthermore, our legal system does not provide a procedure for submission of confidential records *ex parte* to courts for examination before determination on disclosure in our Access to Information Act, as compared to section 80 of the South African Promotion of Access to Information Act. Accordingly, the petitioners' reliance on South African jurisprudence, predicated on a special jurisdiction in the South African Law, in a bid to translocate that special procedure to Kenya where none is provided for in our law, cannot work.
80. In a rejoinder, counsel for the petitioners submitted that the judicial officers occupy the highest position in our society, a pillar of the Kenyan society and that they have a right to look at the documents and information and tell the petitioners whether the information should be released or not. That a judicial officer has authority to demand for the information and consider it. They told the court that they did not know what information the 7th and 8th respondent have and it is only just that the court should be given the opportunity to look at that information. They stated that the Bill of rights, chapter 4 of the Constitution is now a norm of international laws and section 6(4) of the Access to Information Act allows for security information to be furnished in certain circumstances. Again, the Tshwane principles apply in Kenya by virtue of article 2(5) and 2(6) of the Constitution. They opined that the respondents have by-passed their obligation to accountability whilst pursuant to article 159 of the Constitution, the court is entitled to obtain information including national security information and should not be denied if the court needs it.
81. As regards lack of law on disclosure of information to the courts, the counsel submitted that the country cannot legislate on everything and that the court can borrow principles from other democracies and other jurisdictions for example South Africa where the court has stated that it can examine documents. Further, that under article 20 of the Constitution, the courts are required to develop the law and under article 20(b) of the Constitution, the court can adopt an interpretation that



most favours the enforcement of the Bill of rights which are principles of international law. Lastly, it was submitted that the burden does not shift to the petitioners who have claimed that the 7th and 8th respondents have the reports and it is for them to prove that the same cannot be released on grounds of national security.

82. The petitioners have proposed that should the court find that the information should not be furnished to them, then the court should direct that the same be furnished to counsel and the court. The Respondents oppose the request and maintained that the greater public interest militates against disclosure of confidential information very likely to prejudice the country's national security and place civilians and security forces at risk of terrorist attacks. Further, that an advocate's confidentiality relates to advocate-client relationship and cannot form a basis to be transposed to the question of disclosure of confidential information by a third party, as sought in the application. The respondents were of the further view that even if the information were to be released to the court, the same would still pose a danger of the information getting into the wrong hands.
83. It is noted in this respect that rule 3(8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. In addition, rule 20 provides as follows as regards the manner of hearing of petitions:
20. (1) The hearing of the petition shall, unless the court otherwise directs, be by way of—
- (a) affidavits;
 - (b) written submissions; or
 - (c) oral evidence.
- (2) The court may limit the time for oral submissions by the parties.
- (3) The court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.
- (4) The court may on its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence is likely to assist the court to arrive at a decision.
- (5) A person summoned as a witness by the court may be cross examined by the parties to the petition.
84. This court is thus expressly given powers to call a witness and evidence, on its own motion if such witness and evidence will assist the court in coming to just decision. In addition, even though there is no specific law on disclosure to the courts of information which falls within the limitation under article 24 of the Constitution and section 6 of the Access to Information Act, 2016, the court has jurisdiction and discretion under article 165 of the Constitution to employ a procedure that will achieve substantive justice.
85. Further, the duty of the court in any matter is to determine the issue in controversy with finality. Even though we have arrived at the finding that the threshold of limitation has been met, the court has power and discretion to establish whether the information sought to be withheld on grounds of national security is confidential as alleged. A similar position was held in the House of Lords Case of *Conway v Rimmer* [1968] AC 910 where the court found that the court is the final arbiter when dealing with the question whether the public interest necessitated the non-disclosure of relevant evidence.



86. There is however a dearth of authorities in our jurisdiction on the procedure and protocols to be employed by the court in determining whether the nature of the information exempted is confidential and affects national security. In *Munir Sheikh Ahmed v Capital Markets Authority* [2018] eKLR the court cited the case of *Tweed v Parades Commission for Northern Ireland* where Lord Bingham put the responsibility of making the decision as to whether to disclose or not in the court's hands as follows:

“ 4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skillfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.”

87. Where the court makes a determination that disclosure of confidential information should be made, various protocols may be followed. The court may call for a redacted version of the information sought. The court could also direct that the information be presented to the Judge in chambers by the authorized officer of the agency concerned for scrutiny by the court in the absence of the parties. The court could also call for the information in camera to be seen by the Judge in chambers and the parties' respective counsel only under certain protocols of secrecy and confidentiality. Lastly, the court can choose to solely rely on affidavit evidence as regards the nature of information sought to be disclosed.

88. On the procedure for disclosure of redacted confidential information, the court in *Munir Sheikh Ahmed v Capital Markets Authority* case (*supra*) held as follows:

16. The procedure to be followed on disclosure was also addressed by the House of Lords in the said case, where there was consensus that the judge considering disclosure should first receive and inspect the documents in question so that he or she may decide their relevance to justify disclosure in the interests of fair disposal of the case. If the judge decides that disclosure is necessary, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If the judge decides the contrary in the case of any of the documents, that documents will not be disclosed to the applicant.

17. I am persuaded that this would be the most appropriate procedure to apply in the circumstances of this application in the interests of justice, and to also verify whether the limitations provided in section 6 of the Access to Information Act are applicable.”

89. An example of in camera hearings on disclosure of confidential and sensitive information are those held in public interest immunity claims under the *UK Criminal Procedure and Investigations Act 1996* and *Criminal Procedure Rules 2005*, part 25. In such cases, the prosecutor in criminal proceedings may apply to the judge for authority to withhold the material. Claims for public interest immunity involving security material must be accompanied by a certificate signed by the Secretary of State, who is typically the Home Secretary. When determining whether a claim is appropriate, the Home Secretary must conduct a careful balancing exercise which entails taking detailed advice from prosecuting counsel on the material's relevance to the issues in the case into account. However, the decision on a public interest immunity claim is ultimately one for the trial judge alone.



90. Additionally, in civil proceedings the UK *Justice and Security Act 2013* provides that a court may order a "closed material procedure" in certain civil proceedings in order to ensure that sensitive material can be considered as part of the case, while also being adequately protected.

91. Reliance on affidavit evidence in a claim of privileged information was the subject of discussion in the *Reynolds* case. The US Supreme Court when dealing with the question of disclosure of privileged information on national security grounds and stated:

"The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination. The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed."

92. In the *Reynolds* case the respondents sought an investigative report relating to an air crash that claimed the lives of their husbands. The appellants opposed the production on grounds that the report touched on the national security of the United States of America. The court allowed the Appeal and remitted the matter to the lower court to enable the appellants present to the trial court their claim of privilege not to release the report. In doing so, the Supreme Court stated as follows:

"The court must be satisfied from all the evidence and circumstances, and from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. If the court is so satisfied, the claim of privilege will be accepted without requiring further disclosure...."

93. Similarly, Lord Reid in the UK House of Lords in the case of *Conway v Rimmer* (1968) AC 910 held that the court in dealing with claims of privileged information noted that it is essential that there should be no disclosure of anything which might give any useful information to those who organize criminal activities. In the same case Lord Morris, held that if a responsible minister stated that production of a document would jeopardize public safety it is inconceivable that any court would make an order for its production.

94. In the *Reynolds* case, the court explained the factors to be considered by the courts in deciding whether to hold an in camera hearing or rely on affidavit evidence as follows:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion of privilege is appropriate,



and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

95. We are persuaded by the findings in the cited decisions. In the present application, it is our view that an in camera inspection of the reports as sought by the petitioners, is not appropriate in the circumstances herein, and also not necessary, given that the Petitioners already have in their possession, an abridged version of the same. This is particularly pertinent in light of the provisions of section 6(5) of the Access to Information Act, which provides that a public entity is not obliged to supply information to a requester, if that information is reasonably accessible by other means.
96. Furthermore, the respondents have demonstrated to us by their affidavits that the release of the reports would greatly compromise national security in view of the ever present threat of terrorism in our country. Lastly, as shown hereinabove, this court is allowed to rely on affidavit evidence in the hearing and determination of petitions by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. We are therefore not inclined to order an examination of the 7th and 8th respondents' reports by the court or the petitioners' advocates, for the foregoing reasons.
97. In conclusion, we note that there is no law in place on the procedures for confirmation of sensitive and confidential information for purposes of its disclosure, and we have had to look to other jurisdictions for guidance. There is therefore need for a law to be enacted setting out the necessary procedures and protocols on disclosure of confidential and sensitive information, including information touching on national security.

The Disposition

98. In the final analysis, prayer 2 of the petitioners' notice of motion application dated November 14, 2019 is declined, and the same is hereby dismissed with no order as to costs, this being a public interest matter.
99. We additionally direct the Deputy Registrar of the Constitutional and Human Rights Division of the High Court at Nairobi to transmit a copy of this ruling to the offices of the Attorney General and the Clerk of the National Assembly, for their attention on the proposed law reforms.
100. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2021

.....

PAULINE NYAMWEYA

JUDGE

.....

MUGURE THANDE

JUDGE

.....

DAVID KEMEI



JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER 2021

.....

MUGURE THANDE

JUDGE

In the presence of:

..... **for the Petitioners**

..... **for 1st Respondent**

..... **for 2nd Respondent**

..... **for 3rd Respondent**

..... **for 4th Respondent**

..... **for 5th Respondent**

..... **for 6th Respondent**

..... **for 7th Respondent**

..... **for 8th Respondent**

