REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 10 OF 2014

IN THE MATTER OF: ARTICLES 2, 3, 4, 10, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 35, 39, 40, 43, 48, 49, 50, 51, 53 AND 56 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2, 22 (1) AND (2), 23, 165 (3) (b) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULE 3 & 17 OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION PRACTICE AND PROCEDURE RULES 2012

AND

IN THE MATTER OF: ARTICLE 2, 3, 10, 12, 14 (1) AND 15 OF CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

AND

IN THE MATTER OF: ARTICLE 2, 3, 6, 7, 8, 9, 10, 13 (1), 17, 25 AND 26 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF: ARTICLE 1, 2, 3, 4, 7 (a), 12, 17, 19, 22 AND 23 OF THE AFRICAN (BANJUL) CHARTER ON HUMAN AND PEOPLES' RIGHTS

BETWEEN

FEDERATION OF WOMEN LAWYERS & 5 OTHERS..... PETITIONERS

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Kipsang & Ms. Kawere Advocates for the Petitioners

Ms. Lutta for the Respondents

JUDGMENT

Introduction

The petitioners, by way of a petition dated 9th December 2014, filed this suit as a matter of public interest on the behalf of the residents of Tana River, Tana Delta and Tana North Region, who are the alleged victims of tribal clashes that were experienced in that area in the year 1980, 2001 and 2012.

The 1st Petitioner, **the Federation of Women Lawyers Kenya (FIDA –K)** is a non-governmental and non-profit organization registered under Section 10 of the Non-Governmental Organizations Co-ordination Act.

The 2nd, 3rd, 4th, 5th and 6th petitioners are Kenyan women who were residents of the Tana River, Tana Delta and Tana North Region.

The 1st respondent, the Inspector General of Police, is the head of the Kenya Police Service. The 2nd respondent is the National Land Commission. The 3rd respondent, the Hon. Attorney General, is the Chief Legal Adviser to the Government vested with the authority to defend civil suits against the Government.

The Petition

The petitioners' case was as stipulated in their petitions, affidavits and submissions made on their behalf by their advocates, **Mrs. Kipsang** and **Mrs. Kawere**. Learned counsels grounded the approach to the interpretation of infringement of human rights violations and the substitute rights in our constitutional order characterized in the following language under the notion of state responsibility.

> **(a). The Pokomos consider themselves as the indigenous inhabitants of Tana Delta. Their main source of income is crop farming along the Tana River. They also practice animal rearing but on a small scale. On the other hand, Ormas are predominantly pastoralists' (Orma) movement across the Tana Delta in search of grazing fields and watering points with undue regard to demarcated farmlands. The high migration in search of pasture water during dry spells was triggered by an uncharacteristically high influx of cattle in the region contributing to further strain on the already scarce water resource. This posed a challenge to the implementation of the existing community agreement on use of land and compensation for breach of the same. The government has not effectively regulated migration of livestock to make it sustainable so that only numbers that can be supported by a given area are allowed.**
>
> **(b). There is negative ethnicity between the two communities in the Tana Delta region having deep seated animosity towards each other emanating from their distinct livelihoods and competing political interests. This has generated a lack of respect for each other's property leading to the wanton destruction of property between the Pokomo and Orma communities. The government has therefore failed to carry out proper, efficient and viable peace talks between the two communities over the years and encourage alternative dispute resolution to avert the conflict. The government has neither established effective, efficient, viable and practical peace building and reconciliation initiatives nor undertaken an urgent review of the existing peace building mechanisms within the region having in mind that the problem has been festering for a long time, that has led to wanton loss of life and property.**
>
> **(c). There was skewed and/or inadequate security. The number of security personnel deployed was not adequate vis-à-vis the vastness of the Tana Delta region. Security personnel were not adequately resourced hampering their ability to respond effectively to crisis or distress calls. The region suffers from cyclic violence which should have been a strong indicator of the need to beef up security in the area. The government failed to take timely action on intelligence received by it. There were glaring indicators of potential violence in the region and the communities have over time resorted to protecting themselves as well as their economic interests leading to a proliferation of small arms and light weapons. This can also be attributed to laxity of the government in managing and controlling Kenya's porous borders to Somalia in order to prevent the proliferation of firearms. This has also encouraged the mobilization of youth to participate in the violence prior to and during the attacks.**
>
> **(d). The petitioners' human rights and freedoms have been denied, infringed and violated by the failure of government officials and its official agencies to prevent wanton loss of life and destruction of property.**
>
> **(e). The petitioners' human rights and freedoms have been denied, infringed and violated by complete lack of access to health care amenities during the skirmishes from July 2012 to January 2013 which continues to be carried out in a clandestine manner.**
>
> **(f). Due to lack of adequate security and safety the residents of Tana Delta, Tana River and Tana North Districts have been inflicted by wounds, maimed, killed and several displaced.**
>
> **(g). The Regular, Administrative police officers and General Service Unit failed to arrest the criminals instead arresting youth from Pokomo Community and confining them in police cells without charges to date.**
>
> **(h). The police also arrested Orma Community Youth and with interventions of political leaders released them without referring any charges.**
>
> **(i). The police have failed to inform the parents of the arrested youth the whereabouts of the youth and this has caused anxiety to the communities some of whom are poor, illiterate, uniformed and unrepresented thereby unable to claim their**

fundamental rights.

(h). The police failed to promote peace, law and order and the government has failed to ensure peace is sustained in the area thus denying the petitioners security of person and right to own property.

(i). The government since independence has failed to demarcate, survey, adjudicate, subdivide, allocate and register the petitioners individual land parcels and thus fueling constant interference and trespass of animals to agricultural land thus resulting in conflict over land and environmental use.

(j). The government has failed to ensure the victims especially women and children are protected from sexual abuse, and gender based violence thus exposing them to constant danger of armed youth and men who raped them at will while the government treats the issue as a Tana River/Tana Delta non-issue.

(k). The government has failed to observe, respect, protect and fulfill the rights and fundamentals freedoms of the communities living in the said region.

Thus from this background, it's the petitioners' perspective that the state failed to seize the opportunity to address the key concerns touching on infringement and violations of the Constitution. The contents of the rights for example what was thought to be due for redress must be construed broadly in each particular instance in order to allow the declarations sought were couched in a manner in the following language:

(a). Article 2, of the convention on the elimination of all forms of discrimination against women, condemns discrimination against women in all its forms, establishes the legal protection of the rights of women and ensure, through competent public institutions, the effective protection of women against any act of discrimination. The women in the Tana River, Tana Delta and Tana North region suffered the worst form of discrimination by being neglected, unprotected by their own government.

(b). Article 3 of the convention on the elimination of all forms of discrimination against women seeks to ensure the full development and advancement of women in all fields for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. The women of Tana River, Tana Delta and Tana North region have not been availed the ample opportunities to better themselves and their families as human beings by not provided them with security, shelter and a livelihood. They thus cannot advance themselves their society.

(c). Article 10, of the convention on the elimination of all forms of discrimination against women provides for the rights of all women to be included in the all areas of the field education. Children, including the girls of Tana River, Tana Delta and Tana North region, have not gotten opportunities to attend school as a result of the clashes but rocked the Tana River, Tana Delta and Tana North region and hence have been denied the rights to access education and the advancements that come with it.

(d). Article 12, of the convention on the elimination of all forms of discrimination against women provides for the elimination of discrimination against women in the field of health care. Despite the physical, sexual and emotional abuse, neglect and maltreatment that women and all persons of Tana River, Tana Delta and Tana North region experienced, no proper medical and health services have been offered, provided or made accessible for them.

(e). Article 14(1) of the convention on the elimination of all forms of discrimination against women obligates the state to take into account the particular problems faced by the rural women and their roles, work and ensure application of the provisions of the this convention to women in rural areas. The Tana River, Tana Delta and Tana North region live in a rural area and their livelihood depends on their farming and livestock rearing.

(f). Article 15 of the convention on the elimination of all forms of discrimination against women accords women equality before the law in civil matters and their legal capacity to be identical.

(g). Article 2 of the Universal declaration of Human rights and Article 1 of the African (Banjul) Charter on Human and Peoples' Rights entitles everyone to all rights and freedoms. A violation of these rights and freedoms amounts to a violation of this international law ratified by Kenya.

(h). Article 3 of the Universal declaration of Human rights and Article 4 and 6 of the African (Banjul) Charter on Human and Peoples' Rights entitles everyone to the right to life, liberty and security of person. This rights were violated and despoiled by the government's act or omission in one or the other by the loss of life experienced during the violence and the insecurity witnessed then.

(i). Article 6 of the The Universal declaration of Human rights and Article 2 of the African (Banjul) Charter on Human and People's Rights provide for recognition everywhere as a person before the law. Women, including those within the Tana River, Tana Delta and Tana North region are entitled to be legally recognized before the government and its agencies, their grievances heard and determined.

(j). Article 7 of the Universal declaration of Human rights and Article 3 and 12 of the African (Banjul) Charter on Human and Peoples' Rights provides for equality before the law and an entitlement, without any discrimination, to equal protection of the law. The government failed to protect the citizens of the Tana River, Tana Delta and Tana North region and the violations occasioned to them should therefore be addressed equal to any other before the law and before this Honourable Court.

(k). Article 8 of the Universal declaration of Human Rights recognizes the right of every individual to an effective remedy for acts violating the fundamental rights granted him by the constitution or by law. These violations were apparent in the Tana River, Tana Delta and Tana North region during the violent clashes witnessed and thus they deserve reliefs, redress and remedies for violations of their fundamental rights and freedoms.

(l). Article 9 of the Universal declaration of Human rights provides that no one shall be subjected to arbitrary arrest, detention or exile. Individuals arrested during the crisis have either not been arraigned in Court or have been released without no justifiable reason whosoever.

(m). Article 10 of the Universal declaration of Human right and Article 7(A) of the African (Banjul) Charter on Human and Peoples' Rights entitles everyone to a fair and public hearing by an independent and impartial tribunal, as the case may be, in the determination of his rights and obligations. The petitioner and the entire population of the County of Tana River, Tana Delta and Tana North pray that this Honourable Court does so for them.

(n). Article 13(1) of the Universal declaration of Human rights and Article 12 of the African (Banjul) Charter on Human and Peoples' Rights entitles everyone to the Right to freedom of movement and residence within the borders of each state, as the case may be, a right all the people within the Tana River, Tana Delta and Tana North region are entitled to.

(o). Article 17 of the Universal declaration of Human rights provides for everyone's right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property.

(p). Article 26 of the Universal declaration of Human rights and Article 17 of the African (Banjul) Charter on Human and Peoples' Rights provides for the right to education.

The petitioners particulars in support thereof was to the effect that the people of Tana River, Tana Delta and Tana North Region derive their rights and fundamental freedoms from the Constitution and that it supremacy asserts that these rights and freedoms override any action by the government and its agencies. They further claim that the violence witnessed in the Tana River, Tana Delta and Tana North Region was illegal and exposed the government's complacency, irresponsibility, inability and capability to effectively protect, secure and assure the people of the said region of their safety and protection of their property.

It is also the petitioner's contention that the government failed to act and salvage the lives and property of the people in Tana River, Tana Delta and Tana North Region in direct disregard and violation of the Constitution's provisions and Laws. Consequently, the rights and of the women and children were violated as they remained vulnerable to the violence and its consequences including sexual abuse and gender based violence as armed youth and men raped them at will.

It is the petitioner's case that the government ought to have effectively regulated the migration of livestock to ease the tension between the Pokomo tribe which are mainly farmers and the Orma tribe which is mainly pastoralists. Further, the petitioner asserts that there were glaring indicators of potential violence in the region leading to a proliferation of small arms and light weapons which further excercibated the violence.

The petitioners aver that their human rights and freedoms have been denied, infringed and violated by the failure of the government to prevent the wanton loss of life and destruction of property, complete lack of access to health care amenities and lack of security and safety during the skirmishes. Further the petition alleges that the government and particularly the police failed to arrest the perpetrators of the violence and instead arrested their youth and confined them in police cells without charges to date. The police also failed to inform the parents of the arrested youth their whereabouts which has caused anxiety to the community living in Tana River, Tana Delta and Tana North Region.

In conclusion the petitioners allege that the government since independence has failed to demarcate, survey, adjudicate, subdivide, allocate and register the petitioners individual parcels of land further fueling constant interference and trespass of animals onto their agricultural land resulting in conflict over land and environmental use.

The petitioners filed this petition seeking the following reliefs:

(1). A declaration that the government failed to observe, respect, protect, promote and fulfill the human rights of the communities living in Tana River, Tana Delta and Tana North Region.

(2). A declaration that the failure of the government was a violation of the fundamental rights and freedoms of the communities living in Tana River, Tana Delta and Tana North Region.

(3). A declaration that the government is liable for the violation of the fundamental rights and freedoms of the communities living in Tana River, Tana Delta and Tana North Region.

(4). A declaration that the communities living in Tana River, Tana Delta and Tana North Region are entitled to compensation from the government for the violation of their fundamental rights and freedoms.

(5). A declaration that the police were using brutal force which violated, infringed and threatened the rights and fundamental freedoms in the bill of rights.

(6). An order for compensation for the petitioners and all the affected residents of Tana River, Tana Delta and Tana North

Region for Kenya Shillings Five Billion (Kshs.5,000,000,000.00/=).

(7). An order for general damages for pain and suffering for all the victims, survivors from all the communities living in Tana River, Tana Delta and Tana North Districts.

(8). An order that the report by the Judicial Commission of inquiry into the perennial tribal clashes in the Tana River, Tana Delta and Tana North Region be published by the government and made public.

(9). An order compelling the Inspector General of Police to establish police posts/stations within a radius of Twenty (20) kilometers or any other reasonable distance under the current administrative boundary marks.

(10). An order that the National Land Commission be compelled to carry out its mandate of investigation in the present and historical land injustices in the Tana River, Tana Delta and Tana North Region and recommend appropriate redress and National Land Policy to the National Government.

(11). Any other order that this Honourable Court may deem fit and just to grant.

(12). Costs of the petition be borne by the respondents.

The Petitioners' Evidence

PW1 testified that she has lived in Tana River County and that from 6th August 1980, there were clashes between Ngao and Kipao area. That she is a farmer in Ngao location and herders grazed their animals in farmers' farms. That on that day 10 Ormas and 2 Pokomos died. That again in 2001 there was war in Reketa and many people died including four people that she knows and she ran away from that place. That houses, schools and hospitals were destroyed, domestic animals maimed and also people were kidnapped. She testified that she reported to the police, that the police were usually on one side and discriminate. She testified that in Gamba area there are police and Witu area until Kipini there are no police, she confirmed that there is none in Galili location, Kipao location until Tarasaa.

PW2 testified that on 22nd August 2018 in the morning, people went on their normal activities such as fishing and farming. That across the river her cousin was killed and his private parts cut off, she testified that other people were speared while fishing. She confirmed that the war has been there for a longtime, that they went to Tarasaa Police Station and that they did not get help from police. On cross-examination, PW2 confirmed that there has been war in the area since 1980 and the government is doing nothing to restore peace.

PW3 in her testimony stated that on 10th January 2013, she saw smoke coming from Kibusu and heard gun shots, the village was invaded and houses were torched, children were killed and that they ran away. That she saw a child who had been shot and was hanging on the tree and there was a lot of blood oozing. That she knows **Dharama** had forgotten her child in the house and when she came for the child she found the house had been burnt with the child inside. Also that there was a man who was blind who had hidden in the bathroom outside however he was attacked and killed. She also testified that in the year 1980, she witnessed Orma community who came to Kipao and invade their shamba and beat them up. She stated that the attackers killed people with spears. She testified that the only police station was in Itsowe and there is none at Kibusu, Ngao all the way to Tarassa. She confirmed that the war destroyed all properties and the war has been there since 1980.

A Ruling delivered by **Justice Chitembwe** on 17th November 2017 adopting all witness statement to support the petitioners case, all pointing to the issues that there violence resulted in the massive destruction of property loss of lives, loss of livelihoods and that during that period there were less police officers who were not adequately armed to deal with the violence.

The petitioner's case also relied of photographic evidence of houses burnt down in the skirmishes, maimed and injured people living in the Internally Displace camps as well as copies of Death Certificates of some of the people murdered during the skirmishes.

Petitioners' submissions

In her submissions, Mrs. Kipsang Learned counsel for the petitioners, stated that it was the duty of the Government of Kenya, through the Police Service, and other security agencies, to protect the life and property of its citizens and that it had failed to do so in the case of the petitioners, thereby depriving them of their fundamental right to life, right to inherent dignity and the right to have the dignity respected and protected, freedom and security of the persons; the right to privacy and the right to property. That owing further to the failure by the police to perform their legal duty and responsibility of affording protection to citizens of the Tana River, Tana Delta and Tana North Region saw over 170 residents dead, 19,979 people were displaced, property and livelihoods completely destroyed as 668 houses burnt down and about 250 herds of cattle slaughtered, women raped and children defiled.

She also contended that Kenya is a signatory to various international instruments which recognize the right to life, property and its security. In this regard, she placed reliance on Article 4 and 14 of the African Charter on Human and People's Rights which guarantees the said right to property and provides that such a right can only be encroached upon in the interest of the public and in accordance with due process.

She further submitted on behalf of the petitioners that pursuant to Article 2 (5) and (6) of the Constitution, International Law and rules form part of the Laws of Kenya and that Kenya as a state was consequently liable to compensate the petitioners for their loss under the "due diligence principle" which imposes responsibility on a state when non-state actors infringe on individual rights within its jurisdiction.

In making these submissions, she relied on the cases of: **Minister of Police v Rabie 1986 (1) SA 117 A, Peter Ndegwa Kiai t/a Pema**

Wines & Spirits v Attorney General & 2 others {1997} eKLR, Stephen Iregi Njuguna v The Hon. Attorney General, Civil Appeal No. 55 of 1997 {1995 – 1998} 1 EA 252 and Sengendo v Attorney General {1972} EA 140.

In addition, **Mrs. Kipsang** submitted that the state was liable for the damage suffered by the petitioners because it failed in its duty under the 'due diligence' concept for having neglected to take appropriate steps to prevent the eruption of violence despite having information that it would occur; for failure of state agencies to effectively respond when called upon or to take measures against individuals who were instigating the violence; for failure to arrest any individuals involved in the contravention of the petitioners' rights, for arresting the youth in that region, neglecting to inform their parents of the arrests, failing to charge them in a Court of Law and for failure to investigate the alleged violation of their fundamental rights and freedoms.

The petitioners thus urged the Court to find that they were entitled to a declaration that their fundamental rights and freedoms under Articles 19,21,26,28,29,31,39 and 40 of the Constitution of Kenya 2010 had been violated and to compensation by way of damages for the said violations. They further relied on the cases of **Ntanda Zeli Fose v The Minister of Safety and Security CCt 14/96, John Muruge Mbogo v Chief of Defence Forces & Another {2018} eKLR, Koigi Wamwere v Attorney General {2015} eKLR and Florence Amunga Omukunda & Another v Attorney General & 2 others** where the applicants were paid compensation for violation for their fundamental rights and freedoms.

It was the submission of the petitioners that due to the fact that the police had been warned and were aware of the likelihood of the violence the government and in particular the security agencies were obliged to put into place preventive security measures in order to protect the people of Tana River, Tana Delta and Tana North. The petitioner submitted that the police failed to protect them as there were no police in Kibusu village, Ngambo village and Shirikisho village near their homes. The petitioners further claimed that the police violated the rights of the community by arresting the youth and never preferring charges against them nor informing their parents of their arrest.

The 1st and 3rd Respondents' case

In response to the petition the respondents filed a Replying Affidavit by **Mr. Walter Aliwa** who was the then Police Coordinating Commander, Tana River County filed on the 17th of May 2016, witness statement by **Mr. Walter Aliwa** filed on the 24th November 2016, witness stamen by **Mr. Patrick Nyabaga Okeri** filed on the 15th October 2018 current Police Coordinating Commander, Tana River County filed on 16th October 2018 and a witness statement by **Mr. Mike Kimoko** former Deputy County Commissioner, Tana Delta Sub-county filed on 244th November 2016. The 1st and 3rd respondents called two witnesses:

DW1, the Police Coordinating Commander, Tana River County, **Mr. Patrick Nyabaga Okeri,** admitted that there was violence in the Tana River, Tana Delta and Tana North regions in the years 2012 to 2013. It was his testimony that Tana River County at the moment has 300 Kenya Police Officers, 336 Administrative Police Officers and 30 Criminal Investigation Officers making a total of about 664 Police Officers. That whereas the police population ratio in the country is currently 1:800 against the recommended ratio by the United Nations of 1:400 and the Police population ratio in Tana River County is 1:361. That contrary to the grim picture painted by the petitioners of government not providing security to the people it is evident that Tana River County is one of the most if not the most policed counties in the Republic. That apart from the police installations there is a military camp at Minjira and there are other security personnel drawn from Kenya Wildlife services, Kenya Prisons Services and Kenya Forest Service's who also form part of the county intelligence and security committees.

DW1 further admitted that the government has a duty to prevent violence and to protect its citizens. He stated that the violence in Tana River region is tribally instigated pitting the pastoralists and farmers. That the government has over the tried to bring harmony among the communities and at the village level peace committees have been established with representatives from all communities. The committees educate and sensitize communities and that key to sensitization is respect to the law and community members are urged to separate individual criminal actions and move away from blaming a community for criminal action committed by an individual member of a community and further let the Law take its course. That the government formed a commission of inquiry investigate the cause of the clashes which fact is admitted by the petitioners.

DW1 stated that the government has provided social amenities, schools, hospitals, land and security. On security he stated that the Kenya Police Reserve formed in 1948 assisted the police especially in the rural areas where it complemented the police in areas that are remote or where it was difficult to access a police station. Further that during the clashes the government established temporary police camps in the villages. He stated that the attackers during clashes attacked and killed several police officers in different incidents who were deployed in the villages. As such that it is not true that the government failed to observe, respect, protect, promote and fulfill the human rights of the communities and that no wrong doing has been disclosed on the part of the police or any other state agency. He stated also that the government had made more efforts to boost security in the area and to that effect the Inspector General of Police had upgraded Wenje Police Post to a fully-fledged police station, working to upgrade and improve the National Police Reservist regulations, to upgrade the existing security agencies operating in the region including working with the County Government through the County Policing Authorities (CPA). He produced as evidence the guidelines on recruitment and removal of members of the CPA gazette on 9th January 2015, he further stated that the provision of medical services is a devolved function handled by the county government.

DW2 Mike Kimoko, the Deputy County Commissioner, Tana Delta Sub-County, averred that conflict in Tana River can be attributed to the nature dynamics of tribal conflicts. That two disasters and floods predispose the Tana River population to vulnerability especially on resource utilization and that conflict occurs over the use of land ownership, pasture and water resources as well as boundary disputes. He admitted that violence in certain areas led to the loss of lives, injury and loss of property and the same was not caused by any fault of the government in providing security.

The 1st and 3rd Respondent's submissions

In the respondents' submissions by **Ms. Lutta** filed on the 26th April 2019, it was their contention that Tana River County is the most policed

county in the country as the police population ratio is 1:361 as at 2015 which is higher than the United Nations recommended policing ration of 1:400 and the country's ratio of 1:800.

Ms. Lutta stated that the police as a disciplined force had discharged its duties during the violence diligently and professionally in accordance with their mandate of maintaining law and order and providing security to Kenyans and their property round the clock; that they did this by dispatching police officers to hot spots within the region to disperse and arrest those who were burning and looting property and also those who were killing people; that they did so despite the danger to their own lives as had been demonstrated where six police officers were killed and their vehicles torched by the violent youth.

It was her contention also that the government had put in place mechanisms to mitigate the circumstances specifically:

i. Mapping of conflict zones and strategic deployment of security personnel and Law enforcement agencies.

ii. Strategic and equitable resource distribution and facilitation through devolution.

iii. Strengthening and capacity development of peace committees.

iv. Public participation in policing such as the Nyumba Kumi initiative.

v. Initiation and promotion of the Tana River Delta land use plan framework.

vi. Systemic and people driven review of the land tenure system (individual land ownership has been proffered in areas where there are no communal conflicts whereas various dispute resolution mechanism are being exhausted in disputed areas).

vii. Promotion and revitalizing alternative conflict/dispute resolution mechanisms which do not contravene the Law and the Constitution such as the role of the Gasa, Matadeda peace declarations and inter-communal peace bench-making and celebrations.

viii. Promotion of sustainable partnership in dispute resolution and conflict management with CBOs, NGOs, Faith based organizations, Private Sector and international organizations.

ix. Sensitization and education on environmental governance and sustainable use of scarce resources.

x. Citizen empowerment and sensitization on peace, law and order and on human rights through partnership between the government and the civil organizations in the region.

xi. Promotion of diversified resource use and income multiplication such as non-reliance on one mode of trade.

xii. Strengthening of legal sanctions in mitigating crime and other offences.

xiii. Information sharing, diligent implementation of early warning systems and interrogation and implementation of intelligence.

It was her contention that sporadic, spontaneous and unprecedented spates of conflict in that region do not in any way point to the failure of the government machinery and or its organs but the wide dynamism of factors some beyond the government's control such as climate change. She further submitted that it is the responsibility of organizations such as the 1st petitioner to educate the communities on the importance of peaceful coexistence.

She also averred that no liability had been disclosed on the part of the police or any other state organ to warrant an award of damages or grant of the orders sought. She submitted that in fact several persons had been arrested and prosecuted in court while others have to routinely report to several police stations as a way to monitor behavior.

The respondents submission by Learned counsel **Ms. Lutta** relied on the following authorities; **Anarita Karimi Njeru v Republic {1976 – 1980} KLR 1272, Joseph Ihuo Mwaura & 82 others v The Attorney General Petition No. 489 of 2009, Mary Rono v Jane & William Rono Court of Appeal at Eldoret Civil Appeal 66 of 2002, Beatrice Wanjiku & another v Attorney General & others Petition No. 190 of 2011** to submit that the Petitioner had not established a primafacie case.

She submitted that those who engaged in acts of thuggery were apprehended and charged in Court for various offences including murder, robbery with violence and incitement to violence and that the respondents had fulfilled their mandate to maintain Law and order during the skirmishes and that there were sufficient deployment of security personnel.

Lastly on the issue of compensation the respondents submitted that the petitioners are not entitled to any such award as they failed to give evidence on the value of the alleged losses they suffered and as such that any compensation would be without basis. For this submission **Ms. Lutta** relied on the cases of **James Omwoyo Meroka & 2 others v Attorney General & 3 others, Dendy v University of Witwatersrand Johannesburg & others {2006} 1 LRC 291 and Gitobu Imanyara & 2 others v Attorney General {2016} eKLR.**

On the matter of the Judicial Commission of Inquiry Report, she submitted that the Act, The Commissions of inquiry Act 102 does not prescribe the action to be taken by the President and the National Assembly upon receipt of the Report and it places no obligation or legal requirement that the President ought to avail the report. On this she relied on the following authorities; **The Court of Appeal's decision in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others, John Peter Mureithi & 2 others v Attorney General & 4 others {2006} eKLR, National Association for Financial inclusion of the Informal Sector v Minister of Finance & Another Petition No. 4 of 2012 {2012} eKLR and Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & others Nairobi Petition No. 155A of 2011 {2011} eKLR.**

Issues and Determination

Having considered the Petition, the affidavits on record, oral testimony and submissions made on behalf of the parties, I find that three key issues emerge for determination and are as follows:

(I). Whether FIDA is seized of the requisite locus standi in the petition at hand.

(II). Whether the state owed the petitioners a specific duty under Articles 27 (5), 29, 31, 39 and 40 of the Constitution, 2010 to protect their individual lives and property.

(III). If the answer to the first issue is in the affirmative, whether that duty was breached and whether the breach, if any, led to the violation of the petitioners' constitutional rights as alleged; and finally,

(IV). Whether the petitioners are entitled to the reliefs sought.

Legal Analysis

(I). Whether FIDA is seized of the requisite locus standi in the petition at hand.

The Non-Governmental Organizations Co-ordination Act, (Cap 134 of the Laws of Kenya) (The NGO Act) defines a Non-Governmental Organization as:

"Private voluntary groupings of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves, inter alia, for the benefit of the public at large and for the promotion of social welfare."

In line with this objective therefore, Non-Governmental Organizations have, both at an international and national level, been critically instrumental in filing claims of a Constitutional nature in the interest of the public.

Public interest litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter *vis a vis* the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.

In **John Harun Mwau & 3 others v Attorney General & 2 others, Petition No. 23 of 2011; {2012} eKLR,** the court held that it had a discretion in awarding costs in instances of challenge to contraventions of the Constitution. The court thus remarked (paragraphs 179; 180):

"The intent of Article 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights. In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the Law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed…"

For my part, therefore on the evidence I would have held that the petitioners had demonstrated sufficient material for locus standi to seek remedies under Article 23 of the Constitution to be granted by the Court.

(II). Whether the respondents owed the petitioners a duty to protect them during the period of the ethnic clashes and in particular the August 2012 tribal violence experienced in the Tana River Region.

Every member of our society asserts vide the Republic Constitution has a right to be protected by the state in the enjoyment of right to life under Article 26, right to equality and from discrimination in Article 27, right to human dignity and the right to have that right respected. Under Article 28, right to freedom and security of the person under Article 29 of the Constitution.

This doctrine of protection by the state was clearly defined in **Calvin case 7 Co. Rep La, 77 Eng Reports at 336:**

"As the relationship between sovereign and subject in terms of a mutual bond and obligation, under which the subject

owed allegiance or obedience, while, the sovereign was bound to govern and protect his subjects – these reciprocal obligations were inherent in the very nature of the relationship between king and subject – thus, to be under the kings protection was to be under the protection of the Law."

In the same token **John Locke Second Treatise of Government {1988} 3rd Edition 1698** based this relationship on the social contract and the Theory of natural rights which based on the consent of free individuals to enter into society and establish government for the preservation of their nature rights, that all being equal and independent, no one ought to harm another in his life, health, liberty or possessions. In a state of this nature, however, an individual often lacks the power to defend himself against invasion by others, rendering the enjoyment of his rights very unsecure. For this reason, individuals agree to form a community for mutual preservation of their lives, liberties and estates. That because government is established for this purpose, it is obliged to secure every individual's life, liberty and property, when it acts contrary to this trust, the government is dissolved and the community regains the right to establish a new form of government.

Blackstone, preferred and defined the test of this social contract as follows:

"That the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or in other words, that the community should guard the rights of each individual member, and that in return for this protection, each individual should submit to the Law of the community, without which submission of all, it was impossible that protection should be certainly extended to any" (See William Blackstone commentaries on the Laws of England St. George Tucker Edition Report 1969).

"Therefore, under a traditional legal order the government of the day is enjoined and has an obligation to take reasonable measures for the prevention of violence, and by prosecuting violators of the Law under the Penal Code so that personal security of every citizen is guaranteed."

The Courts jurisdiction to enforce infringements and violations championed in the Constitution is to be found under Article 22 and the approach is in accordance with Article 24 on limitations of rights and fundamental Freedoms in the same Constitution.

This petition also invites the comment on the inevitable distinction between the Constitution as the Supreme Law of the Land and the statutes or legislation which may flow from its existence. In one important respect **Crabbe V. C. R. A. C.** in understanding statutes, **Cavendish Publishing Ltd {1994}** had this to say while drafting the Ugandan Constitution in 1966, as fundamental Law it:

"(1). Contains the principles which the government is established.

(2). Regulates the powers of the various authorities it establishes.

(3). Directs the persons or authorities who shall or may exercise certain powers.

(4). Determines the manner in which the powers it confers are to be confined or exercised and specifies the limits to which powers are confined in order to protect individual right and prevent the abusive exercise or arbitrary power"

As explained by **Alexander Hamilton in the Federalist No. 78 at (E. H. Scott Edition 1898)**:

"A constitution is in fact, and must be regarded by the Judges as a fundamental Law. It must therefore belong to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilables variance between the two, that which has the superior obligation and validity ought, of course, to be preferred, in other words, the intention of the people to the intention of their agents."

Learned Author **Charles Mwaura in his textbook on principles of Constitutional Law** an introduction of the Constitution of Kenya with cases and materials **(Law Africa Publishing Co. Ltd {2014})** explicitly eschewed the functions of a constitution in this regard:

"First, Constitutions generally divide powers vertically, among different institutions of government. These divisions are usually along functional lines; thus, there is a legislative branch that is authorized to make law, an executive branch that is empowered to implement the law, and a judicial branch that is responsible for rendering authoritative resolutions to disputes concerning the interpretation and application of the law. It is the function of the Constitution to determine precisely where these dividing lines should be situated, how rigidly they should be enforced, and what should happen if they are crossed. Second, along with these 'vertical' dividing lines, Constitutions generally also divide power horizontally, that is, they allocate power to different tiers of government. For example, the Kenya Constitution defines how power is to be shared between county governments and the central government. Third, a key function of the Constitution is to lay down not only the internal divisions of power within government, but also to determine where government power stops and individual freedom begins. This is where the Bill of Rights comes in."

Accountability: It has been said:

"absolute power tends to corrupt, and the absolute power corrupts absolutely. A key purpose of a Constitution is to assume that those entrusted with power exercise their power responsibility and are called to account when they do not."

To forge national unity:

> **"Since a Constitution proclaims and represents the values of the society, it inevitably plays a role of moulding the national identity. Furthermore, it defines the structures for civil and political communities, and the protection of the rights of minorities and individuals. These structures are designed to provide political stability, and rest, in principle, on common values and goals. In pluralistic societies, such as Kenya, the process of constitution-making is at the same time an important mechanism for securing a modicum of national identity or 'togetherness' as well as for enhancing, social and inter-cultural trust. This requires recognition of the fact that citizens of divided societies embody multiple identities, and that the notion of national identity provides 'space' for their coexistence"**

To protect the people:

> **"As a guardian for fundamental rights, the Constitution protects individuals from the arbitrary exercise of power by the government. In so far as a constitutional text is authoritative and embodies constitutionalism, it protects substantive rights of the people. (John Locke in his book Two Treaties of Government wrote): "Unlimited sovereignty remains with the people who have the normative power to void the authority of their government (or some part thereof) if it exceeds its constitutional limitations."**

In many of the contexts in which the question of interpretation and construing the articles of the Constitution based rights it has been laid down the test to be applied in the decision making process. With regard to this issue on interpretation I place reliance on Article 259 of the Constitution which provides thus:

> **"This Constitution it shall be interpreted in a manner that:**
>
> **(a). promot*es its purpose, values and principles;***
>
> **(b). advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
>
> **(c). permits the development of the law; and**
>
> **(d). contributes to good governance."**

So broadly are the Courts required to apply the above guidelines and principles in granting reliefs or declarations sought in specific cases under Article 23. According to the picturesque judicial obiter dictum was given by **Mutunga C. J** in the matter of the **principle of Gender Representation in the National Assembly and senate (Supreme Court Application No. 2 of 2012)** where he held interalia:

> **"That when searching for principles or guidance on how to interpret the constitution, one needs to look nowhere else, that the open-textural provisions of the Constitution, to notice that unlike many Constitutions, the framers intended that Courts would not have to fashion any requisite principle or approach or rules of Constitutional interpretation aside from what the Constitution provides. Fortunately, to interpret the Constitution, we need not go further than its specific Articles that give us the necessary guidance into its interpretation. It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles, achieve this collective purpose."**

This is a nice example of the conceptual framework of interpretation of the Supreme Law in deference to the traditional dichotomy of the wide ranging Common Law requirements. The tide on this turned once again in the matter of the **Kenyan National Commission on Human Rights Supreme Court Advisory opinion No. 1 of 2012 {2014} eKLR** a case which is an important hallmark on this issue stated:

> **"A holistic interpretation of the Constitution must mean interpreting the Constitution in context. It is the contextual analysis of a Constitutional provision, reading it alongside and against other provisions, so as to maintain, a rational application of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances." (See also Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others {2014} eKLR)**

A similar principle was applied in the case of the **Law Society of Kenya v Centre for Human Rights and Democracy & 13 others {2013} eKLR** where the Court of Appeal found that:

> **"When interpreting the Constitution, the proper approach is first a faithful adherence to the interpretative blueprint set out in Article 259 and the precise national values and principles of Government under Article 10 of the Constitution."**

The rationale for this was more the earliest jurisprudence in a brilliant judicial exploit by **Ringera J in Njoya & others v Attorney General & others {2008} LLR** where the Court corroborated this position by holding that:

> **"The Constitution should be interpreted as a living document, and not like an Act of Parliament because as the Learned Judge pointed out "it is the Supreme Law of the Land, it is a Living instrument with a soul and a consciousness, it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleological to give effect to those values and principles."**

In the year 2010 the country re-engineered the political, economic and social order by promulgation of the new Constitution. The situation was transformed by the introduction of a comprehensive Bill of Rights. The remedies christened the fundamental Rights and Freedoms set out in Chapter 4 of the Constitution then became available through a Constitutional proceedings invoking Article 22, 23, 24 and 25 of the Constitutions to establish a basis of the claim and the remedy sought for a particular violations or infringement.

The interpretations of these rights by the Court, therefore shall follow Article 259 (1) of the Constitution and the benefit of the jurisprudence which sets out the test tailored on constitutional supremacy and the role of the Court to give effect to the letter and spirit of the Law.

The novel aspect of the second – stage test as thus formulated in **Regina v Big M. Drug Mart Ltd {1985} 18 D.L.R. 321** – as thus formulated designed a strong principle enough to justify generous approach to interpretation on rights guaranteed in the Constitution in the following passage:

> **"The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the [Canadian Charter of Rights and Freedoms] itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be …. A generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."**

The state protects its citizens through the security agencies pursuant to Article 245 of the Constitution and Section 24 of the National Police Service Act. It is the Constitutional organ responsible for maintaining Law and Order, preservation of peace, protection of life and property as well as the prevention and detection of crime including the apprehension of offenders. The people's sovereign power as stipulated in Article 1 of the Constitution is delegated to the three state organs to wit parliament, National executive and the Judiciary and as such the communities of the Tana River, Tana Delta and Tana North regions have delegated obligations also to uphold the Constitution. Consequently, they no longer have the power to take up arms and defend themselves save for limited ***"except to the extent authorized by this Constitution or other written Laws."***

Further, the same Section 24 imposes a positive obligation on the police to protect the people from the threat of violation of their rights and fundamental freedoms. As can be seen, Section 24 above shows that the National Police Force is the organ of State responsible for preventing crime, preserving peace, maintaining Law and order and protecting its citizens' life and property. These obligations have also been provided for under the Constitution, 2010 which at Article 243 that established the National Police Service.

I am guided by the decision in **Association of Victims of Post Electoral Violence and Interights v Cameroon, Association of Victims of Post Electoral Violence and Interights v Cameroon {272/2003} para 88 and 89** where it was held that:

> **"The respect for the rights imposes on the state the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a State to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to the State even where it is established that the State itself or its officials are not directly responsible for such violations but have been perpetrated by individuals… According to the permanent jurisprudence of the Commission, Article 1 imposes restrictions on the authority of the State institutions in relation to the recognized rights. This Article places on the State parties the positive obligation of preventing and punishing the violation by private individuals of the rights guaranteed and not directly attributable to the State can constitute, as had been indicated earlier, a cause of international responsibility of the State, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims."**

This principle of Positive obligation has also been recognized by the **European Court of Human Rights in Mahmut Kaya v Turkey, Application No. 22535/93, European Court of Human Rights** where it was held that:

> **"the Court recalls that the first sentence of Article 231 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction… this involves a primary duty of the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive measures to protect an individual or individuals whose life is at risk from criminal act against individual."**

Further, in the case of **Osman & another v Ferguson & another {1993} 4 ALL ER the European Court of Human Rights** held that:

> **"a state has a positive obligation to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual."**

I have also relied on the Inter-American Court of Human Rights decision in the case of **Velaoquez Rodriguez v Honduras, Judgment of July 27, 1985** where it was held that:

"the state has an obligation to prevent human rights abuses and to punish those responsible for such violations."

The High Court in Kenya has also had the opportunity to pronounce itself on that subject and in **Gullid Mohamed Abadi v O.C.P.D. Isiolo Police Station & 2 others {2006} eKLR Onyancha J** when **interpreting Section 14 (1) of the Repealed Police Act** stated as follows:

> **"the duties of the police force in Kenya include the prevention and detection of crime and the apprehension of offenders. The police force is also to protect life and property. If it is asked, 'which crime is to be prevented and detected' an appropriate answer would be that any crime committed within the Republic is targeted under the above law provision. That means that the police force has a duty to prevent or detect crimes as well as preserve life and property and apprehend possible offenders. The property and life to be protected must be the life and property of Kenyan citizens including that of the government and of those who at any given time claim the protection of the Kenyan Law. Otherwise there is no other life or property in Kenya that the above law provision would be referring to except those found and living in Kenya."**

I am in agreement with the Learned Judges in so far as the duty of the police is to protect life and property of citizens living in Kenya as such I find that the state through its security agencies, including the police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction. This position is not entirely disputed by the respondent. However, the point of departure from this position is that the said duty is a general one owed to the general public and not to specific individuals. This therefore calls for an examination of the extent of that duty and determining whether it was breached in the circumstances of this case.

In the case of **Zimbabwe Human Rights NGO Forum v Zimbabwe {2006} AHRLR 128 ACHPR {2006} para 147** the court observed that:

> **"The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfill its responsibility to protect individuals from abuse of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the state. The doctrine of due diligence requires the state to organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridical ensuring the free and full enjoyment of human rights."**

Essentially this means that if the necessary ingredients are found to exist, the positive obligation of a state is discharged only if it can be prove that it enacted legislation, policies and regulations geared at preventing the infringement of human rights**. (See Florence Amunga Omukanda & Another v Attorney General & 2 others {2016} eKLR).** It is evident that the petitioners in this case did indeed report the violence to the police however it is worth noting that police did respond to these reports of violence and as evidenced by the petitioner's own admission in **paragraph 3.2.18** of the petition that ten (10) police officers were killed and two (2) police vehicles were torched.

In my view, the National Police Service cannot be said to have been vicariously liable for acts of violence alleged by the petitioners. Applying this finding in this case leads one to conclude that the police did all they could in the circumstances to mitigate and contain the violence in Tana River, Tana Delta and Tana North Regions.

> **(III). Whether the state owed the Petitioners a specific duty under Article 27 (5), 29, 31, 39 and 40 of the Constitution, 2010 to protect their individual lives and property.**

The Fundamental Rights complained of by the petitioners fall within the ambit of Article 27 on equality before the Law and guarantee of non-discrimination on any of the grounds against any person including race, sex, pregnancy, marital status, health status, ethnic or social origin colour, age, disability, religion, conscience, belief, culture, dress, language or birth. This right specifies that an individual should not be treated differently by the Law or the government based on the prohibited grounds in Article 27 (4) of the Constitution.

In this flood of enthusiasm for rights based constitutional declarations by the petitioners there must be evidence to demonstrate that the state or the Laws discriminate against them based on any of these grounds. Factored in subsection (4) of the right on equality and freedom from discrimination.

These provisions reinforce the rights of universality and equality of all citizens, including vulnerable groups, the women and children within our borders. What the Constitution provides under Article 53 (1) is to pay special attention to children whereas Article 54 provides for the need and special protection of persons with disabilities. Nevertheless, despite the special provisions for these groups none enjoys superior rights or differential treatment with other citizens.

Clarity has been gained in this area by **Hogg** on **Constitutional Law of Canada 3rd Edition (Carswell Ontario 1992)** where he observed thus:

> **"What is meant by a guarantee of equality? It cannot mean that the Law must treat everyone equally. The criminal code imposes punishments on persons convicted of criminal offences, no similar burdens are imposed on the innocent Education Acts require children to attend school, no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distributions of property of a person who dies leaving a Will from that of a person who dies leaving no Will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with Law incomes Laws never provide the same treatment for everyone."**

Yet another pointer to this petition in the same direction is the assessment by the petitioners that the women and girls of Tana River, Tana Delta and Tana North have been neglected, violently attacked, denied opportunities, to carry out any means of production, lack of access to health, education, security, housing etc.

Thorny questions indeed often arise whether the government policy has discriminated against some members of the categorized sub-districts in Tana River county.

According to **Charles Mwaura** in his book on principles of Constitutional Law (supra):

> **"Equality requires that everyone, regardless of tribal, gender, religious, generational and regional differences, should get an equal share in the distribution of public resources, including public infrastructure, employment opportunities and capacities. A strict principle of equal distribution is not required, but it is morally necessary to justify impartially, any unequal distribution the burden of proof lies on the side of those who favour any form of unequal distribution. Equality essentially requires, then, that where the exercise of governmental power results in unequal treatment, it should be properly justified, according to consistently, applied, persuasive and acceptable criteria."**

The petitioners case was that during the intertribal clashes in 2012 and 2013 the scale of violence occasioned houses being burnt down, deaths of innocent citizens, loss of property and deprivation of any income generating activity. Further, that the deployment of the security apparatus and personnel was skewed, in a manner that they could not preserve Law and Order.

The respondents did not agree and submitted that the Government took the necessary steps to contain the criminal activities triggered by the clashes. I am required to assume the following facts to which the petitioners have pleaded. That the acts of violence impacting on the right to life under Article 26 and right to private property in Article 40 of the Constitution were perpetuated collectively by the state to deploy security forces in a timely manner and the counter insurgency was due to the inadequate police stations. Suffice, it shall be to state the test which underlines for the Court to weigh in determining whether there is inequality and discrimination before the Law by a claimant. For example, the matter was considered by the analysis in the case of **R v Turpin {1989} 1 S.C.R. 1296, was summarized and described in this way (at paras. 130-31):**

> **"The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics. Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15 (1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others. A similar approach was taken by McLachlin J. in Miron (at para. 128): The analysis under s. 15(1) involves two steps. First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s.15(1) or an analogous ground that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics."**

In **Miron and Egan, Lamer CJ and La Forest, Gonthier and Major JJ**. Articulated a qualification which, as described in **Benner v Canada (Secretary of State), {1997} 1 S.C.R. 358 (at para. 64):**

> **"focuses on the relevancy of a distinction to the purpose of the legislation where the purpose is not itself discriminatory and recognizes that certain distinctions are outside the scope of s. 15". This approach is, to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group."**

> **"It has subsequently been explained, however, that it is not <u>only</u> through the "stereotypical application of presumed group or personal characteristics" that discrimination can occur, although this may be common to many instances of discrimination. As stated by Sopinka J. in Eaton v Brant County Board of Education, {1997} 1 S.C.R. 241, at paras. 66-67: ……. the purpose of s. 15(1) of the Charter is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons."**

Therefore, for purposes of this petition the Court has to make a finding whether any action taken by the state official in the purported exercise of his or her authority is deemed to be discriminatory against the petitioners.

In my view from the evidence this would permit abridgement of rights through administration discretion and decision making process to deploy security during the skirmishes and accordingly would require an extension of the meaning ascribed to Article 27 (4) of the Constitution. The seminal question is whether the main source of the petitioners' constitutional infringements and violations as petitioned could be held to constitute tort like harms in Constitutional terms given the unusual circumstances of the intertribal clashes occurrence in Tana River County.

The petitioners have divided the harms done to the citizens in the following doctrinal categories: loss of life, property, personal injuries, internal displacement inadequate provision of security, medical, education, safety and individual security of the persons.

They argue that the injuries and deprivation of life, liberty and or property came about as a result of the state violation of the Constitution within the meaning conceived in the context of the petition, it must be admitted, however at the first instance that the residents of the particularized sub-counties engaged in the impugned conduct against each other and each one of them was also aware that the probable consequences of the unlawful act was injury to the other of the type complained of by the petitioners.

It is impossible for the state generally speaking to situate itself within this paradigm where private citizens full of age and capacity trigger civil unrest even use greater force against each other only to turn around and ask the state to assume liability.

In addition, the Constitutional provides for a criminal justice system in which the investigations are vested in the National Police Service on cognizable and noncognizable offences the set fundamentals in this petition revolves around the question whether the police failed in their primary responsibility to protect life, liberty and property of the petitioners. It is the protection of these rights which bolsters the petition asking for prerogative declarations and award of damages.

Part of the task of the Court is to establish whether the petition as framed and supported by evidence and discharge the burden of proof that the manner in which the police maintained Law and order to protect the precious human rights of the petitioners was in contradiction of the Constitution.

As the petitioner submits the county suffers from cyclic violence which the state has failed to put in place policies and administrative regulatory framework for protection of citizens being its paramount responsibility under the Constitution. This submission was met by a rejoinder from the respondent that in the case at bar the petition must fail because there is in place evidence such Laws, intertwined with establishment of police stations and administrative units to discharge the onerous task in relation to maintenance of Law and order, detection of crime, investigations and prevention of crime.

The question therefore turns upon a very simple consideration. Whether in the case of Tana River County securing the freedoms, liberties, right to life, right to private property and maintaining the peace, Law and order is inconsistent with Article 2 of 3, 10, 14, 15 of CEDAW or Article 2 of the Human Rights, Article 6 of the Universal declaration of Human Rights, Article 2 of the African Charter on Human and Peoples Rights etc.

While there were some arguments here in favour of the petitioners on historical injustices that is not sufficient of evidence for a declaration under Article 23 of the Constitution. There is nothing in particular with respect to the criterion under Article 27 (4) of the Constitution that women and girls of Tana River are discriminated against on all aspects of their lives regarding right to life, health, education, security, dignity, socio-economic rights that justifies all appropriate remedy for a Constitutional breach. It is also unnecessary to consider whether the state could be properly subjected to a challenge under Article 27 (4) of the Constitution and other international conventions relied upon by the petitioner where it acted in accordance to the existing legislative provisions but fell short of the legitimate expectations of the citizens.

It is unfortunate that the state may have underperformed in guaranteeing the fundamental rights and freedoms to the petitioners but that stands in contrast with deprivation of such rights enshrined in Article 26, 27, 28, 29, 40, 43, 47 and 49 of the Constitution.

In the present matter, it is clear that the answer cannot be found by seeking to categorize Tana River County as a discriminated devolved unit by the National Government. Although, there are a number of issues in this petition sought to be decided on the basis of Constitutional infringement and violations, it is evident from the pleadings, the alleged actions by the respondents are not in contravention with Article 27 (1) & (4) of the Constitution.

The question which remained unanswered by the petitioners was whether the entire process of conceptualizing the petition did ignore the distribution of functions between the National Government and County Governments under Fourth schedule of the 2010 Constitution. Some of the alleged acts of marginalization are against the better and spirit and structure of the Constitution under Article 174, 175, 176 and the fourth schedule on devolved services. Whether there has been failure by the National Government to observe its own constitutional mandate during the tribal skirmishes for it to be in contravention of Article 27, 28, 29 and 40 of the Constitution has not been demonstrated by any primafacie evidence for a declaration to that effect, and for the redress where appropriate.

I find it difficult to understand what the petitioners meant by discrimination as it appears no evidence was adduced to show that the National Government failed to exercise authority, in deploying security personnel to stop the tribal clashes, investigate the criminal activities and bring to account all those responsible in committing crimes under the Penal Code. In the case of **S v Manamela {2000} 5 (BCLR 491)** a balance has to be struck between a general rule or policy and at the same time keep an eye whether by their very nature the act or omission by any person or authority is inconsistent or in contradiction of the provisions of the Constitution. The Court held that:

> **"In essence, the Court must engage in a balancing exercise and arrive at a global Judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be – ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness."**

The petition embraces the need to take into account the historical heritage of Tana River County, relevant factors that past administration failed to consider, including the fact that the state has scarce budgetary resources which should be appropriated giving regard to the economic policy guidelines to secure the equality of opportunities and development pertinent to each county. Though no statute was singled out for purpose and tenor of the petition, the scheme of parent legislation in vesting powers upon the police to provide security as a national function remains unimpugned by the petitioners.

The place of an infringement of a constitutional right as a ground for court's intervention can be decided in adherence to the principles in **Smith Dakota v North Carolina 192 US 268 {1940},** where the Court held that:

> **"No one provision of the Constitution is to be segregated from the others and considered alone, but all the provisions bearing upon a particular subject are to be brought into view and interpreted jointly so as to effectuate the greater purpose of the instrument. The constitution must be interpreted as one integrated whole."**

The general duty rule was first enunciated in the **De Shaney case**. That rule is to the effect that members of the public have constitutional right to sue state actors who fail to protect them from harm inflicted by third parties. This principle of duty owed to the public at large has been frequently applied in cases involving complaints of inadequate protection during riots or mob violence in Kenya. The assumed acts of violence mainly may be governed by the Law, with respect to that issue and most important the occurrence, the parties involved and whether the obligations by the state in respects of acts done was solely due to negligence.

The test articulated in the case of **Charles Murigu Murithii & 2 others v Attorney General {2019} eKLR** the court stated that:

> **"…. Because there is no common law right of recovery for damages caused by mob violence, the government will be liable only where it is demonstrated that the resulting damage could have been prevented through exercise of reasonable diligence by the police or where it is shown that there was implicit official acquiescence in the volatility of the situation, or where there is, like in some jurisdictions, statutory basis for holding the Government liable, or where the police are altogether indifferent. In some situations, the Government may also consider gratis payment to victims out of benevolence. We think ourselves that the mere fact that an individual under Section 70 of the former constitution was guaranteed the right to life, liberty, security of the person and the protection of the Law; the protection for the privacy of his home and other property and simply because the police under Section 14 of the repealed Police Act are enjoined to ensure the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, that per se does not impose liability on the Government for damages caused to a victim of mob violence or civil disorder. To hold otherwise will be to introduce the concept of strict liability and raise the bar of Government responsibility to a utopian level. It will in effect impose on the government responsibility for all types of criminal acts in which the victims are injured, lose lives or property."**

I am of the opinion that for one to succeed in a claim for alleged violation of constitutional rights as a result of damage to property, it must be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police have prior information of warning of the likelihood of violence taking place in a particular area or against specific homes but fail to offer the required protection.

In such cases, therefore the state may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is closely connected to the event. Such a liability would however have to be determined on the facts and circumstances of each case.

In the present case and bearing in mind the ratio of the police to the population in this country, it would be unreasonable and unrealistic to expect the police to be in every corner and in every home, providing security and protection to everyone and their properties.

Further, the respondents have shown and enumerated various efforts including setting up of more police stations, a military installation as well as strategies to facilitate peace building and conflict resolution mechanism within Tana River County.

Consequently, I find that the petitioners have failed to prove that; the Government owed the petitioners a specific duty of care; that the police ignored impeccable information of an impending attack against specific person (s); that the police negligently or deliberately failed to offer protection to the victims and their property; that the police or other Government agencies played a part in the creation of insecurity or did some acts that rendered the victims more vulnerable or increased their danger. As such the petitioners have failed to prove that the government is liable for the infringement of their fundamental rights and freedoms. I am persuaded from the evidence before me that the government indeed did all that it could in the circumstances and continues to do so to preserve the peace in that region.

However, having stated this, it is also my considered opinion that where the allegations of violations of Constitutional rights and fundamental freedoms are alleged against the state the same ought to be investigated as seen in the case of **Velasquez Rodgriguez v Honduras** where the court stated that:

> **"The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention."**

Consequently, the state in this present case, a matter that is not disputed by either party, went ahead and appointed a commission of inquiry termed as the Judicial Commission of Inquiry but has to date declined to make public the report on the findings and recommendations of this Commission.

On this matter of making the report of the Judicial Commission of Inquiry into the Tana River County violence pubic I shall rely on the precedence set out in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others {2014} eKLR** where the court held that:

"A body or organ performing statutory duties has discretion when handing matters falling within its mandate. There is a margin of discretion conferred by the Constitution and the Law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the Law, whereas the Act gives discretion to the executive on how to handle the report which is a matter of great public interest and safety the petitioners seek this court to compel the executive to act in a specific manner which is contrary to the Act and also to the doctrine of separation of powers."

I also rely on the case of **John Peter Mureithi & 2 others v Attorney General & 4 others {2006} EKLR** where the court considering the **Provisions of the Commissions of Inquiry Act Cap 102** and stated that:

"From the above Provisions it is clear that when the President is presented with a report he has a complete discretion on what to do with it. The court has not doubt that the President has before him great policy choices to make concerning the Report which has been availed to him, but it is not the province of the Court to interfere with Policy considerations. There is no statutory requirement that upon receipt of any report, he has to act in a particular way."

Furthermore, since the right to information as envisioned in the Constitution is not absolute and having been presented with no evidence of that a specific request had been made and the request declined, I am of the opinion that this court cannot compel the Executive and in particular the President on his performance of statutory powers.

(IV). Whether the Petitioners are entitled to the reliefs sought

On damages the contours of Constitutional tort liability is confined to when a claimant establishes that an act or omission of an agent, servant or employee of the state, while exercising due care in execution of duty conferred by a statute or regulation failed to exercise or perform that duty or in execution of the duty he abused the office.

If the petitioners had brought themselves within the rubric of the Law suggestive likely principles to be followed are as expressed in the **Siewchand Ramanoop v The Attorney General of 787 PC Appeal No. 13 of 2004:**

**"when exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under Section 14 is discretionary and, moreover, the violation of the constitutional right will not always be conterminous with the cause of action at Law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. (*emphasis ours*). *All these elements have a place in this additional award. Redress" in Section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions punitive damages" or exemplary damages" are better avoided as descriptions of this type of additional award*. *(emphasis ours).*

It will not always be the case, however that the government authority can at once be put in a position to compensate for infringement of the Kenyan Constitutional Bills of rights and Freedoms without determining whether damages will be appropriate and just in the circumstances. But as this permissive interpretation is subject for one to look to the function of Constitutional Rights Law. There are both broad and narrow aspects to consider **TA. Eaton**, causation in **Constitutional Torts {1982}, 67 10 WA L. Review 443 at page 444** came up with conventional standards of principles that have been found applicable in the hands of the justices thus:

"One must look to the functions of Constitutional Rights Law, to protect individual rights against the will of the majority, as expressed in legislation, and against the power of the government, as exercised by its officials. A constitutional remedy should vindicate guaranteed rights and prevent or alter future infringements and, in egregious cases, punish the infringer. In granting a remedy, a Court must seek a balance competing interests, by enforcing rights and freedoms guaranteed by the charter, without imposing an excessive burden on government conduct."

In determining whether damages are an appropriate remedy to redress a Constitutional wrong a Court should ask the following questions:

(1). What are the purposes of the constitutional guarantee?

(2). What other remedies are available to redress the infringement of that guarantee? Do they provide an effective means of vindicating the plaintiff's rights and deterring similar unconstitutional conduct without interfering disproportionately with the implementation of legitimate government policy? Would a remedy in damages achieve these purposes any more effectively, taking into account who will eventually pay?

(3). Was the conduct of the defendants so egregious as to warrant punishment through the imposition of damages? Is there any other mechanism available for effective punishment?

(4). Has the plaintiff suffered consequential injuries which should be compensated?

I shall also rely on the case of **Agricultural Development Corporation v Harjit Pandhal Singh & Another {2019} eKLR:** the 1st respondent in that appeal claimed from the Agricultural Development Corporation (ADC) a total of Agricultural Development Corporation (ADC) a total of KSHS.532,000,000/= being the total value of sugarcane crop and assets destroyed by squatters during the 2007/2008 post-election violence as well as for loss of profit and income. They attributed the losses to breach of a contract of a lease by ADC. The Attorney General (the 2nd respondent) was later joined in the proceedings on behalf of the Government on account of its alleged negligence of duty and failure to accord the 1st respondent peace and security. The Environment and Land Court at Eldoret **(A. Ombwayo J)** found ADC and the Government jointly liable, and awarded to the 1st respondent Kshs.100,000,000/= lost income and profit with costs and interest and against the Government the Court awarded Kshs.150,000,000/= for breach of statutory duty. ADC appealed and the Attorney General cross-appealed. In setting aside, the decision of the Learned Judge the Court stated that:

> **"The general constitutional and statutory duty of the Government or police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with the police, or some form of privity exists or where from the known individual circumstances, it is reasonable for police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the government, but would also be detrimental to public interest and impracticable in the context of this county. There was no evidence that the 1st respondent or the police anticipated that the post-election violence would erupt. There was no evidence that the 1st respondent had reported to police that there was likelihood of his farm being invaded by riotous mob or that he sought police protection. On the contrary, there was evidence that the violence was widespread, spontaneous and unplanned and that the police did all what was reasonably practicable to restore peace. In the circumstance, the 1st respondent did not prove liability in tort against the Government and the Judgment of the trial court fixing the Government with liability was erroneous."**

Similarly, I am also of the opinion that the mere fact that the Tana River, Tana Delta and Tana North residents are guaranteed the right to life, liberty, security of the person and the protection of the Law, that primafacie does not impose liability against the Government for damages caused to the victims.

There are five approaches which the petitioners took but failed to convince this Court to draw inference from the evidence on the alleged violations and infringement of the Constitution.

First and foremost, that it adopted a Law and or policy, by-Laws or executive orders that infringed on the guaranteed rights or fundamental freedoms in the Bill of Rights which was denied, violated prior to or at the time the inter-tribal clashes occurred.

Secondly, both the National and County Government model of governing under Article 129, 130, 174, 175, 176, 186, 189 of the Constitution and the fourth schedule on transfer and functions of the County Government directly or indirectly was the primary cause of the petitioners' inequality, and infringement of the guaranteed rights in the Constitution and other international treaties or conventions as provided for under Article 2 (5) of the Constitution.

Thirdly, that for the infringement and violations of the petitioners' rights which they duly suffered they were denied a right to a fair hearing and due process to entitle the state, have the crimes committed against the right to life, malicious damage to property, the victims of rape, defilement or any other cognizable offence in the Penal Code investigated, prosecuted and sanctioned appropriately within the criminal justice system.

Fourth, that the Constitutional wrongs complained of were as a result of inadequate institutional and functional capabilities, inadequate financial resources and lack of other social-economic interventions which became avenues of infringement, or violations imposing liability for a remedy in contravention of Article 27 (1) & (4) of the Constitution.

In any event on the alleged historical injustices to land regulation and tenure within Tana River County, Article 67 (1) (e) of the Constitution established the National Land Commission interalia: ***"to initiate investigations on its own initiative or on a complaint, filed into present or historical land injustices and recommend appropriate redress."***

This means that the Court should not be the one which is to subject the jurisdictional issue over the land question in Tana River County to the commission. Accordingly, its arguable that the residents of Tana River County have the right and power to expressly call for the mandate of the commission to altogether factor in the county as a devolved unit of concern to redress the Land Rights

In both situations in the case at hand, I hold the view that the cause of action primarily on the basis of the principles of comity and the doctrine of separation of powers demands of this Court to refrain from interfering with the state Constitutional mandate under the guise that the petitioners' human rights have been violated to warrant a declaration for compensation.

Last but not least the principle of equality does not mean absolute equality nor does it connote identical treatment. The precise legal and evidential burden of proof is for the petitioners to proof that other citizens in the same similar circumstances within the Republic of Kenya are treated more favorably than in their case that justifies the Courts jurisdiction to deter further infringement and violations of the Constitution.

I ascribe to the philosophy by the framers of our Constitution that every person is entitled to the human rights prescribed in the Bill of Rights as a covenant and first duty of the state to its people, subject to the provisions of Article 24 on limitations of rights of the Constitution. The social contract is to bring into existence one nation and one people with real sense of national identity premised on the national values and principles of governance under Article 10 of the Constitution. Tackling freedom from discrimination on any of the grounds under Article 27 (4) of the Constitution is a dual dimension of proportional and substantive equality, markedly **Freeman 1988** argued on this that:

> **"One, is locked into the subtle Constraints of the equal opportunity game, including a pressure to legitimize its results (the qualified 'get ahead) and a resistance to deviation from its premises. If equality of opportunity does not work, then rights acquisition by itself cannot deliver on its substantive promise." (See Freeman Racisms, Rights and the quest for equality of opportunity a critical legal essay, Harvard Civil Rights – Civil Liberties Law Review Vol 23 No. 2; 1988 Pg 295-392)**

Applying these principles to the petition and taking into account the importance of the Bill of Rights as guaranteed and protected by the Constitution the evidence on discrimination against the petitioners, that they were treated differently based exclusively on what happened at the time of the clashes require very weighty reasons to justify invoking Article 23 for the various remedies to accrue for their benefit in adherence to the Constitution. Unfortunately, to this Court it remains unclear on pre-existing disadvantage, prejudice or vulnerability on which the claim is based that is disproportionate to any such class of persons elsewhere in Kenya.

For all these reasons this petition in substance otherwise fails and it is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF MAY, 2020

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R. NYAKUNDI

JUDGE