



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**[CORAM: KIMONDO, ABURILI & ONYIEGO JJ]**

**PETITION NUMBER 88 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE (CIPEV)**

**BETWEEN**

**JOHN MUIRURI KIMANI.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....RESPONDENT**

**MYOT WELFARE ASSOCIATION**

**(KALENJIN COUNCIL OF ELDERS)....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. On 27<sup>th</sup> December 2007, Kenyan voters braved long queues to elect their leaders including the president. But what began as a bright day ended in a cloud of darkness. The presidential results announced were fiercely contested by Mr. Raila Amolo Odinga, who claimed that he was robbed of victory. Immediately after the announcement of the results devastating violence erupted in all but two of the then provinces in both urban and rural parts of the country.

2. Following the flare-up of the violence, the African Union (AU) appointed a Panel of Eminent African Personalities (hereafter *the Panel*) to mediate the crisis and return the country to normalcy. As part of the negotiations, the Kenya National Dialogue and Reconciliation team (hereafter *KNDR*) was formed comprising of representatives of both sides of the political divide.

3. After nearly two months of dialogue an accord was reached, violence ceased and a coalition government formed, with Raila Amolo Odinga as Prime Minister and Mwai Kibaki as President. Subsequently, a Commission of Inquiry into Post-Election Violence (hereafter *CIPEV*) chaired by Philip Waki, Judge of Appeal, was established vide Gazette Notice No. 4473 of 2008. Members of the Commission were sworn into office on 3<sup>rd</sup> June 2008.

4. CIPEV's terms of reference were to: investigate the facts and circumstances relating to the acts of violence following the 2007 presidential elections; investigate actions or omissions of state security agencies; and, perform any other task deemed necessary to fulfill their core mandate.

5. On 15<sup>th</sup> October 2008, CIPEV submitted its report to the President and the Prime Minister. It also submitted to Kofi Annan, the Chair of the Panel, a separate sealed envelope containing names of those persons suspected of instigating the violence.

6. To break the cycle of impunity, CIPEV also recommended the setting up of a Special Tribunal for Kenya (hereinafter *the Tribunal*) to try the alleged perpetrators. Having failed to establish the tribunal, Kofi Annan handed over the sealed secret envelope to the Office of the Prosecutor of the International Criminal Court (hereafter *OPICC*). Subsequently, six Kenyans were charged before the International Criminal Court (hereinafter *the ICC*). They were later discharged for various reasons.

7. It is the non-submission of the sealed envelope to the President that prompted the filing of the instant Petition. The Petitioner seeks orders for disclosure of or quashing of the contents of the sealed envelope.

### **The Parties**

8. The Petitioner is a Kenyan citizen and brings these proceedings under Articles 22 (1) and 258 (1) of the Constitution.

9. The Respondent is the Attorney General sued pursuant to Article 156 of the Constitution in his capacity as the principal legal adviser to the Government; the person authorized to represent the national government in court or in any other legal proceedings other than criminal proceedings; and, the state officer enjoined to promote, protect and uphold the rule of law and defend the public interest.

10. The interested party is an Association registered under the Societies Act whose objectives include the promotion of peaceful co-existence with their neighbours and to facilitate conflict resolution.

### **History of the Petition**

11. The original petition dated 10<sup>th</sup> March 2015 was filed by David Nyekorach Matsanga a Ugandan citizen and John Muiruri Kimani, the Petitioner herein. The initial respondents were Justice Philip Waki, the OPICC and the Attorney General.

12. Justice Waki raised a Preliminary Objection dated 18<sup>th</sup> March 2015 challenging his inclusion in the petition; and, the capacity of the 1<sup>st</sup> petitioner, a non-citizen. The Preliminary Objection was upheld on 12<sup>th</sup> May 2017. Earlier, on 13<sup>th</sup> November 2015, the Court had enjoined Myot Welfare Association (Kalenjin Council of Elders) as an interested party.

13. On 16<sup>th</sup> June, 2016 the petitioner sought leave to amend the petition. Leave was granted on 12<sup>th</sup> May 2017. In the amended petition, John Muiruri Kimani remained the sole petitioner while the Attorney General and OPICC were the respondents. Subsequently, the Chief Justice constituted a 3-Judge bench to hear the petition.

14. The petitioner failed to serve the OPICC and withdrew his claim against it on 26<sup>th</sup> July 2018. That left the Attorney General as the only respondent.

### **The Petitioner's Case**

15. The Amended Petition dated 16<sup>th</sup> June 2017 seeks the following reliefs:

i. A declaration that CIPEV abdicated its legal and mandatory obligation under the Commissions of Inquiry Act by failing to handover the full and/or its entire Report to the President of the Republic of Kenya as required by the Act and the Constitution of Kenya;

ii. A declaration that the failure by CIPEV to hand over and/or transmit the full and/or its entire Report to the President of the Republic of Kenya and the concealment and/or non-disclosure of part of the said Report by CIPEV was unlawful, improper, illegal and unconstitutional;

iii. A declaration that the Government of the Republic of Kenya abdicated its legal and constitutional mandate by failing to acquire, obtain and/or demand for the full and entire Report prepared by CIPEV;

iv. A declaration that the handing over and/or transmission of part of the Report prepared by CIPEV, being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the post-election violence, to the Chair of the Panel, Kofi Annan was unlawful;

v. A declaration that the handing over and/or transmission of part of the Report prepared by CIPEV, being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the post-election violence, by the Chair of the Panel, Kofi Annan to the OPICC was unlawful, improper and/or illegal;

vi. A declaration that the continued concealment and/or withholding of the contents of the Report prepared by CIPEV, being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the post-election violence, and the OPICC is a violation of the Petitioner's right of access to information as guaranteed under Article 35 of the Constitution of Kenya;

vii. An order compelling Justice Philip Waki to submit to the President of the Republic of Kenya the Report prepared by CIPEV,

being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the post-election violence, which was submitted by himself to the Chair of the Panel, Kofi Annan;

viii. A mandatory injunction be and is hereby issued directing and/or compelling the OPICC to return and/or disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007;

ix. An order of mandamus compelling the Attorney General to obtain and disclose to the Republic of Kenya the concealed contents of part of the Report by CIPEV being the sealed envelope containing the names of persons suspected to have borne the greatest responsibility for the violence that erupted during and after the General Elections held in 2007;

x. That the Respondents be and are hereby ordered to publish and/or publicize, the entire, full and proper Report prepared by CIPEV including the sealed/secret envelope containing the names of persons suspected to have borne the greatest responsibility for the post-election violence, which was submitted and/or handed over to the Chair of the Panel, Kofi Annan;

xi. In the alternative to prayers vii), viii), ix) and x) above, an order of certiorari to quash the contents of the sealed/secret envelope containing a list of the names and relevant information of persons suspected to have borne the greatest responsibility for the post-election violence, which was submitted and/or handed-over to the Chair of the Panel, Kofi Annan be and is hereby issued;

xii. Any other orders as the Court may deem fit and just to grant; and

xiii. An order for costs.

16. The petition is premised on the grounds set out on the face of it and the petitioner's affidavit sworn on 30<sup>th</sup> March 2015.

17. The Petitioner averred that the *Agreement on the Principles of Partnership of the Coalition Government* was signed to end the wave of violence and laid the ground for the enactment of the **National Accord and Reconciliation Act** of 2008.

18. That as a result, the KNDR formulated four main agenda as the most necessary in ending the prevailing crisis and prevent future eruption of violence. He stated that, in its Agenda 4, KNDR identified the curtailment of impunity as a critical factor in dealing with the electoral violence. He also stated that Agenda 4 was supposed to address long term issues, including constitutional, legal and institutional reforms; land reforms; tackling youth unemployment, tackling poverty, inequity and regional development imbalances, consolidating national unity and cohesion, and addressing impunity, transparency and accountability.

19. The petitioner asserted that CIPEV was one of the crucial Commissions for the achievement of Agenda 4. That its mandate included investigation of the violence, investigation of the actions or omissions of state security agencies and to "*make recommendations as necessary; and to recommend measures of a legal, political or administrative nature, as appropriate, including measures to bring to justice those persons responsible for criminal acts.*"

20. The petitioner further stated that CIPEV presented its report to the President and the Prime Minister on 15<sup>th</sup> October 2008. The petitioner also claimed that a sealed envelope was handed over to the Chair of the Panel of Eminent Persons containing a list of the names of the individuals suspected by CIPEV to have borne the greatest responsibility for the violence.

21. He averred that among the recommendations was the formation of a Special Tribunal for Kenya to carry out further investigations into the electoral violence as well as prosecute the culprits failing which the envelope was to be transmitted to OPICC.

22. It is the petitioner's case that, CIPEV having been established under the **Commissions of Inquiry Act**, it was mandated by section 7 (1) of the Act to submit the entire Report to the President and the National Assembly, and not to any other person.

23. Moreover, the Petitioner contended that CIPEV having been established under the laws of Kenya and heavily funded by the Government ought to have presented a full report for scrutiny by the public and also for the benefit of the persons named in the said list. According to the Petitioner, the failure to present the entire report as prescribed in the Act; and, the eventual disclosure of some names in public by the OPICC led to uncertainty and unnecessary speculation. He further contended that this was illegal and violated Article 35 of the Constitution on the right of access to information.

24. The petitioner urged the Court to order full disclosure of the contents of the sealed envelope or in default, to quash the entire Report.

### **The Interested Party's Response**

25. In support of the petition, the interested party filed an affidavit sworn on 24<sup>th</sup> August 2018 by Major Retired John Seii, the Chairman of Kalenjin Council of Elders. The deponent averred that the main objectives of the Kalenjin Council of Elders are to, *inter alia*: promote peaceful co-existence with all neighbours of the Kalenjin Community, based on the tenets of mutual respect and shared values; promote the relevant culture and customs of the Kalenjin Community; promote self-reliance among members of the Community and enhance self-esteem; facilitate conflict resolution on various issues; and, counsel the youth on good conduct, discipline, respect for progressive cultural values and socially acceptable enterprises.

26. He averred that, Chapter 3 of the CIPEV Report indicts the Kalenjin Community for past violence in the Rift Valley based on the Akiwumi Report. In his view, the said Chapter holds the Kalenjin Community guilty of mobilizing violence, burning possessions of other

communities, maiming, gang-raping and hacking to death large numbers of defenceless families mostly from the Kikuyu Community.

27. He further averred that the Kalenjin Community did not challenge the assertions of the Akiwumi Report because the government had declared that the Report was biased and discriminatory of the Kalenjin and Maasai communities.

28. It was therefore his averment that despite repudiation of the Akiwumi Report by the Government, the CIPEV Report adopted its findings and conclusions as facts, thereby perpetuating a culture of bias against the Kalenjin Community, in violation of Articles 27 and 47 of the Constitution.

29. The interested party also claimed that it was denied the right to be heard, contrary to Article 50 of the Constitution.

### **The Respondent's Reply**

30. The respondent filed grounds of opposition dated 26<sup>th</sup> July 2018 but only filed on 20<sup>th</sup> September 2018. He contended that the amended petition was not pleaded with precision; that the petitioner had not made out a case under Article 35(1) (b) of the Constitution; and, that the petitioner needed to show that he required the information allegedly held by the State for the exercise of or protection of another right.

31. The Respondent contended that section 7 of the **Commissions of Inquiry Act** mandates the Commissioners to submit their findings to only the President and the National Assembly. He stated that the petitioner was not entitled to mandamus against the Attorney General.

32. It was the respondent's case that the CIPEV Report released on 15<sup>th</sup> October 2018 was complete. He stated that the secret envelope having been handed over to the Chair of the panel who in turn handed it over to the OPICC, this petition is an academic exercise.

33. The respondent maintained that the amended petition is incompetent, misconceived, misplaced and an abuse of the court process because the petitioner's rights and fundamental freedoms were not violated.

34. The respondent also contended that the 2010 Constitution cannot apply retrospectively in this case.

### **The Petitioner's Submissions**

35. The petitioner filed his submissions together with a list and bundle of authorities on 5<sup>th</sup> September 2018. He isolated the following six issues for determination: firstly, whether the court is seized of jurisdiction to hear the matter; secondly, whether the proceedings have been rendered moot; thirdly, whether the amended petition is competent; fourthly, whether the petition meets the requirements of Article 35 of the Constitution; fifthly, whether the Commission acted *ultra vires* the Act; and, lastly, whether the Constitution applies retrospectively in this case.

36. Regarding jurisdiction, counsel submitted that Article 165 (6)(7) of the Constitution clothe the court with supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function to ensure the fair administration of justice.

37. In his view, CIPEV having been established under the **Commissions of Inquiry Act**, was exercising quasi-judicial functions and therefore fell within the supervisory jurisdiction of the High Court.

38. Counsel submitted further that these proceedings are still relevant because the discharge of the six suspects by the ICC was without prejudice and did not bar future prosecution. He relied on **The Prosecutor v Uhuru Muigai Kenyatta** ICC-01/09-02/11 where the Court held:

***"It would be open to the Prosecution to bring new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action."***

39. Counsel further cited **The Prosecutor v William Samoei Ruto and Joshua Arap Sang** ICC-01/09-01/11 where the Court held:

***"Taking into account all that has been said in these reasons, with particular regard to Parts II, III and IV, I would be disposed to decide as follows: -***

***i) the proceedings are declared a mistrial due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses.***

***ii) the charges are hereby vacated and the accused are discharged from the process, without prejudice to their presumption of innocence or the Prosecutor's right to re-prosecute the case at a later time."***

40. Reacting to the respondent's request to the Deputy Registrar for a copy of the supporting affidavit to the amended petition, counsel submitted that it was redundant to file a fresh supporting affidavit. He relied on the decision in **David Jonathan Grantham & Another v National Social Security Fund** Nairobi High Court Civil case 630 of 2004[2005] e KLR.

41. With reference to the right to access to information, counsel relied on Article 35 of the Constitution and the decision in **Andrew Ireri Njeru & 34 Others v County Assembly of Embu & 3 Others** Embu High Court Pet. 8 of 2014 [2014] eKLR where Mwangi J stated:

*“From Article 35(3) it is clear that the obligation to publish relates to information “affecting the nation,” that is, information of a national character that affects the welfare of the nation as a whole. In my view the kind of information that would attract the sanction of this right could be classified into at least two general categories. Information of a nature that directly and substantially affects any of the Bill of Rights or their enforcement as contained in Chapter Four of the Constitution; and secondly, information which a provision of the Constitution itself requires to be published—such as statutes [sic] and gazettes and also reports required to be published by independent offices or commissions. This list is, of course, not exhaustive.”*

42. He also relied on *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others* Nairobi High Court Pet. 278 of 2011 [2013] eKLR and *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission & Another* Nairobi High Court Pet. 314 of 2016 [2016] eKLR. In the latter case, it was held:

*“[279] Article 35(1)(a) employs the phrase is “held by the State.” The “State” is defined in Article 260 of the Constitution as “the collectivity of office, organs and other entities comprising the government of the Republic under this Constitution.” That the Commission is a state organ is therefore not in dispute. Accordingly, it is under the obligation to furnish a citizen with information held by it under the said provision. It is therefore my view that the reason when Kenyans request for information were turned away on the basis that they had no interest in the information sought or that the information in question did not concern them was buried with the retired Constitution and is no longer tenable.*

*“[280] once the information is proved to be in possession of the Respondent, it is my view that the burden shifts to the Respondent to show why the said information ought not to be disclosed to the applicant.”*

43. Reliance was also placed on section 4(2) of the **Access to Information Act** which provides that:

*“Subject to this Act, every citizen's right to access information is not affected by—*

*(a) any reason the person gives for seeking access; or*

*(b) the public entity's belief as to what are the person's reasons for seeking access.”*

44. Counsel was of the view that the disclosure of the entire CIPEV Report would deter the re-occurrence of the violence that accompanies every election cycle in Kenya.

45. On whether CIPEV acted *ultra vires* by submitting a secret report to the Panel, counsel submitted that the mandate of CIPEV was clearly set out under Gazette Notice No. 4474 as read with section 7 of the Act. In his view, CIPEV was obliged to submit a full report to the President and the National Assembly and not to the Panel.

46. He further placed reliance on *Githu Muigai & Another v. Law Society of Kenya & Another*, Nairobi High Court Pet. 286 of 2014 [2015] eKLR where it was held:

*“[79] In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic v Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others* [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp. v Anthony Sefu Dar-es-Salaam HCCA No. 19 of 1971* [1973] EA, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.”*

47. Counsel further referred to *R v Judicial Commission of Inquiry into the Goldenberg Affair and 2 others ex parte George Saitoti* Nairobi High Court Misc. Civ. Appl. 102 of 2006 [2006] eKLR where the court stated:

*“In the case of Attorney General v Fulham Corporation [1921]1Ch 440 it was held that illegality might also consist of using powers in manner totally different from that envisaged.*

*“Section 7 of the Commissions of Inquiry Act Cap 102 of the Laws of Kenya reads:*

*“It shall be the duty of a Commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire to conduct the inquiry in accordance with the directions conferred in the commission and in due course, to report to the President, in writing, the result of the inquiry and the reasons for the conclusions arrived at, and also if so required by the President, to furnish to the President a full record of the proceedings, of the commission.*

*“It is therefore clear to the court that a commission appointed under Commissions of Inquiry Act such as the Goldenberg*

***Commission has a statutory duty to submit a full, fair and impartial Report and failure to so act may render the commission's findings, determinations, decisions and recommendations ultra vires the Act and in particular section 7. Whether or not the Commission has jurisdiction concerning any matter or was acting in excess of jurisdiction depends on any finding whether or not it acted within its purview under the Section and the terms of its commission.***

48. On retrospectivity of the law, counsel relied on **Samuel Kamau Macharia and another v Kenya Commercial Bank Nairobi**, Supreme Court, Application No. 2 of 2011 [2012] eKLR where the Court held that a constitution is not limited in its application like an ordinary legislation. He also cited **Maisha Nishike Limited v The Permanent Secretary Ministry of Lands & 5 Others** Nairobi High Court Pet. 95 of 2012 [2013] eKLR, and submitted that the provisions of the **Commissions of Inquiry Act** were saved by the new Constitution. Counsel urged the Court to allow the petition with costs.

#### **Interested Party's Submissions**

49. Learned counsel for the interested party associated himself fully with the submissions of the petitioner. His key submission was that the interested party was denied an opportunity to rebut the allegations made against the Kalenjin as a Community individually or collectively.

50. According to the interested party, the Kalenjin were unfairly labeled as attackers and warriors against other communities without being heard in violation of the **Fair Administrative Action Act**. Reliance was placed on the cases of **Republic v University of Nairobi Ex-Parte Lazarus Wakoli Kunani & 2 others** Nairobi High Court J.R. 219 of 2016 [2017] eKLR and **Republic v Minister for Local Government & Another ex-parte Paul Mugeithi Joel**, High Court, Nairobi Misc. Civ. 80 of 2008 [2008] eKLR which restated the scope of judicial review.

51. Counsel underscored the importance of the right to a hearing; and, the power of the court to review the decision. He relied on the cases of **Republic v Public Procurement Oversight Authority Ex Parte Getrio Insurance Brokers Limited** Nairobi High Court Civ. Appl. 261 of 2010 [2011] eKLR and **Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo** Nairobi High Court Misc. Civ. Appl. 284 of 2013 [2016] eKLR.

52. Counsel also relied on **Halsbury's Laws of England**, 5<sup>th</sup> Edition Vol. 61 page 539 para 639 which states:

***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice....."***

53. Counsel submitted that an administrative body should be fair and adhere to procedural rules. He relied on Article 47 of the Constitution and section 4(3) of the **Fair Administrative Action Act**. He also cited **Resley v The City Council of Nairobi** [2006] 2 EA 311 and **Geothermal Development Company Limited v Attorney General & 3 others** Nairobi High Court Pet. 352 of 2012 [2013] eKLR.

54. In counsel's opinion, the entire CIPEV Report is null and void for want of compliance with the Act and the Constitution. He relied on **Macfoy v United Africa Ltd** [1961] 3 All E.R. 1169.

55. In conclusion counsel submitted that notwithstanding the lapse of CIPEV's mandate, the court has residual power to review the Commission's findings.

#### **The Respondent's Submissions.**

56. The respondent did not file a replying affidavit or written submissions despite accommodation by the court. In his oral submissions, counsel relied on the grounds of opposition dated 26<sup>th</sup> July 2018 but only filed on 20<sup>th</sup> September 2018.

57. Counsel raised the issue of justiciability given that the cases before the ICC were discontinued. He submitted that the Attorney General is not the appropriate respondent. In his view, the petition should have been directed towards the executive or the National Assembly.

58. Learned counsel submitted that the existence of the alleged envelope is merely speculative; and, that the court cannot act in vain. His view was that Article 35 of the Constitution can only be invoked when there is a violation of a specific right; and, that the disclosure is necessary to protect the right.

59. He submitted that the right to information cannot apply retrospectively. Counsel stated that under the gazette notice establishing the Commission, the Report was to be submitted to the President, Panel of Eminent African Personalities and the National Assembly. He submitted that there was no proof that the Attorney General was in possession of the envelope, and that it would therefore be unreasonable to order him to produce it.

60. On the claim by the interested party that it was not heard, counsel submitted that there was a public notice of the hearings and that the interested party slept on its rights. He also argued that the interested party did not prove any injury suffered.

61. In his rejoinder, counsel for the petitioner submitted that the sealed envelope in question existed and was specifically referred to at pages 18-19 of the Report.

62. Regarding paragraph 4 of the Gazette Notice on submission of the Report to the President or the Panel of Eminent African Personalities, counsel submitted that the gazette notice cannot supersede Section 7 of the Act. He submitted that the Attorney General was the right respondent acting in the public interest; and, being the principal legal adviser to the Government.

63. On justiciability, counsel was of the view that the ICC cases can be revived; and that it is thus necessary that the sealed envelope be retrieved from wherever it reached.

#### **Determination**

64. From the pleadings, depositions and submissions, the following issues arise for determination:

- (a) **Whether this court has jurisdiction to entertain the petition;**
- (b) **Whether there is a justiciable cause of action against the respondent;**
- (c) **Whether the Constitution applies retrospectively to this petition;**
- (d) **Whether the Commission's submission of the final CIPEV Report to the Panel of Eminent African Personalities violated section 7 of the Commissions of Inquiry Act;**
- (e) **Whether the handing over of a separate sealed envelope to the Chair of the Panel instead of the appointing authority was unlawful;**
- (f) **If the answer in (d) is in the affirmative, whether the petitioner is entitled to disclosure of the contents of the sealed envelope. Paraphrased, whether the petitioner's rights under Article 35 of the Constitution have been violated;**
- (g) **Whether the interested party is entitled to the reliefs sought;**
- (h) **Whether the petitioner is entitled to grant of judicial review orders of mandamus and certiorari; and**
- (i) **What other orders should the Court make?**

#### **Whether the Court has jurisdiction to entertain the petition**

65. From the onset, we observe that although the petitioner elaborately addressed the Court on the issue of jurisdiction, the respondent did not challenge it. The respondent's main objection to the petition was essentially based on proof of allegations and competence of the amended petition.

66. Article 22 (1) of the Constitution guarantees every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Under Article 23 (1), the Court has jurisdiction in accordance with Article 165, to hear and determine the applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Article 165 (6) and (7) vest in this Court supervisory jurisdiction over subordinate courts, tribunals, body or person exercising judicial or quasi-judicial function.

67. We find that CIPEV was a judicial body pursuant to section 13 of the **Commissions of Inquiry Act**. To that extent, it was subject to the supervisory jurisdiction of the High Court under Articles 165(6) (7) and 23(1) of the Constitution. Accordingly, we find and hold that this petition is properly before us.

#### **Whether there is a justiciable and competent cause of action against the respondent**

68. The respondent contended that there is no justiciable cause of action against the Attorney General. Firstly, on account that the Commission wound up its business; and, secondly, that there is no proof of injury suffered by the petitioner to warrant the orders sought. The petitioner and the interested party were of a contrary opinion.

69. It is trite law that for a party to succeed in a constitutional petition seeking redress of a denial, violation or infringement of, or threat to his right or fundamental freedoms, he must plead with precision the right allegedly denied, violated, infringed, or threatened with infringement. This principle was espoused in **Anarita Karimi Njeru v Republic** No. 1 [1979] KLR 154 and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** Nairobi Court of Appeal, Civ. App. 290 of 2012 [2013] eKLR. In the latter case, it was held:

*“Yet the principle in Anarita Karimi case referred (Supra) underscores the importance of defining the dispute to be decided by the court ... cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleading assist in that regard and the tenets of substantive justice; as they give fair notice to the other party. The principles in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing issue in constitutional petition is an extension of this principle.”*

70. It is common ground that CIPEV operated within the set timelines and that it has since wound up its business. However, this Court retains residual or inherent power to revisit and interrogate the process or some of the findings of the Commission. We are fortified by the decision in **Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex parte George Saitoti** [supra]. In that case, the ex parte applicant who was adversely mentioned in the Commission of Inquiry into the Goldenberg Affair had his name removed from the Report well after the mandate of the Commission had lapsed.

71. In the instant petition, the petitioner alleges that there still exists the risk of the ICC cases being reopened because the discharge of the six suspects was without prejudice. In addition, the petitioner asserts that the materials in the alleged sealed envelope are still relevant.

72. We have perused the ICC determinations in **Prosecutor v Uhuru Muigai Kenyatta** and **Prosecutor v William Samoei Ruto and Joshua Arap Sang** [supra]. In the said cases, the Court held that the discontinuance of the prosecution of the accused was not a bar to future prosecution “based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action.”

73. In our humble view, therefore, the mere fact that the CIPEV wound up its work does not render the Report immune from challenge. We accordingly find the dispute herein justiciable.

#### **Whether the Commission’s submission of a separate sealed envelope to the Panel instead of the appointing authority was ultra vires**

74. The pith of the petitioner’s complaint is that the CIPEV acted ultra vires by submitting the sealed envelope, which was part of the final report, to the Chair of the Panel instead of the President as the appointing authority and the National Assembly, contrary to section 7 of the **Commissions of Inquiry Act**. On the part of the respondent, it was contended that the Gazette Notice No. 4474 of 23<sup>rd</sup> May 2008, allowed the report to be submitted to the President, National Assembly and Panel of Eminent African Personalities.

75. Gazette Notice No. 4474 of 23<sup>rd</sup> May, 2008 sets out the terms of reference for CIPEV. At paragraph 4 it states:

***“The Commission shall produce and submit to the President and the Panel of Eminent African Personalities a final report on its findings and recommendations.”***

76. Section 7 of the **Commissions of Inquiry Act** provides:

***“It shall be the duty of a Commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire to conduct the inquiry in accordance with the directions conferred in the commission and in due course, to report to the President, in writing, the result of the inquiry and the reasons for the conclusions arrived at, and also if so required by the President, to furnish to the President a full record of the proceedings, of the Commission.***

77. A plain reading of section 7 of the Act leaves no ambiguity that a report of a commission established under the Act shall be submitted to the President and the National Assembly. Although the Gazette Notice No. 4474 provided that the report of the CIPEV be submitted to the Chair of the Panel, the Gazette Notice cannot supersede the Act.

78. However, this Court remains alive to the unique circumstances under which CIPEV was established. As noted in the CIPEV Final Report-

***“The 2007-2008 post-election violence was more widespread than in the past. It affected all but 2 provinces and was felt in both urban and rural parts of the country.”***

79. We take judicial notice that the violence that rocked the country in 2007-2008 threatened the very existence of Kenya as a Nation. Peace in the country was only restored through a protracted negotiated settlement which involved the intervention of other nations and actors of goodwill. One of the main findings of CIPEV’s investigations was that:

***“The post-election violence was more than a mere juxtaposition of citizen to citizens opportunistic assaults. It established that these were systematic attacks on Kenyans based on their ethnicity and their political leanings.....Guilty by association was the guiding force behind deadly revenge attacks, with victims being identified not for what they did but for their ethnic association to other operators...”***

80. We appreciate that legal order does not support actions contrary to it. However, extraordinary circumstances sometimes call for extraordinary measures. In the instant case there were exceptional circumstances that called for protection of the public interest and public good. The ensuing violence had the character of a crisis, an emergency that would have jeopardized the very existence of the state and the political Community.

81. In those circumstances, respect for the rule of law rested precisely in accepting publicly and openly the extra-legal character of the conduct by those who negotiated for a political solution to the political question. See **Republic v Ministry of Health & 3 others Ex-parte Kennedy Amdany Langat & 27 others**, High Court, Nairobi, JR. No. 2 of 2018 as consolidated with JR. NO. 709 of 2017 [2018] eKLR.

82. Furthermore, CIPEV at page 18 of the Report was alive to the fact that recommendations made by previous commissions of inquiry were never implemented. To deal with the impunity CIPEV developed a self-executing mechanism by recommending the setting up of the Special Tribunal for Kenya to investigate and try the suspects. In default, the Panel was to submit the sealed envelope to OPICC.

83. Granted the backdrop under which CIPEV was operating, it is understandable why the Report had to be submitted to the Panel outside the framework of section 7 of the Act. We thus find that the submission of the Report to the Panel under the prevailing circumstances was justified.

#### **Whether the Constitution applies retrospectively to this petition**

84. The respondent contended that CIPEV undertook the inquiry prior to the promulgation of the 2010 Constitution. In his view, the right under Article 35 of the Constitution cannot apply retrospectively. The petitioner on the other hand argued that the Constitution, unlike an ordinary legislation, can look backwards and forward.

85. However, we are well guided by the Supreme Court in **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others** (supra) where it was held:

*“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way a Constitution may and does embody retrospective provisions, or a provision with retrospective ingredients.”*

86. Accordingly, we find and hold that the Constitution applies retrospectively in this petition.

**Whether the handing over of a separate sealed envelope to the Chair of the Panel instead of the appointing authority was unlawful? And, whether, the petitioner is entitled to disclosure of the contents of the said sealed envelope**

87. Issue number (e) and (f) framed above are intertwined and therefore we propose to deal with them together.

88. The petitioner’s further complaint is that the appointing authority only received a partial report which excluded the sealed envelope submitted exclusively to the Chair of the Panel, containing names of the persons who bore the greatest responsibility for the post-election violence. He also submitted that the public inquiry was financed by the Kenyan Government. He therefore claimed that non-disclosure of that information denied him and the Kenyan people access to the full report.

89. In response to this argument, the respondent contended that the existence of the alleged envelope was speculative; and, that the court cannot act in vain. He submitted that Article 35 is a stand-alone provision which can only be invoked when there is a violation of a specific right; and, that the disclosure is necessary to protect the right. His view was that the petitioner failed to prove violation of, or threat to his rights.

90. The question we have to answer is two-fold: whether the petitioner is entitled to a disclosure of the contents of that envelope; and whether failure to disclose the said contents violates Article 35 of the Constitution which guarantees the right to access information.

91. We have already found that the submission of the Final CIPEV Report to the Panel of Eminent African Personalities in contravention of section 7 of the **Commissions of Inquiry Act** was excusable and justifiable in the circumstances.

92. Article 35 of the Constitution provides:

*1. Every citizen has the right of access to—*

*(a) information held by the State; and*

*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

*2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*3. The State shall publish and publicise any important information affecting the nation.*

93. The Article has been operationalized by the enactment of **Access to Information Act**. Access to information is a critical governance and accountability tool. Without access to information, higher values of democracy, rule of law and social justice cannot be achieved. This position was succinctly captured in **Famy Care Ltd v Public Procurement Administrative Review Board and others** High Court Pet. 43 of 2012 [2013] eKLR where it was held:

*“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble of the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”*

94. This was further elaborated in **Nairobi Law Monthly Co. Ltd v Kenya Electricity Generating Company Limited & 2 Others** [supra] where the court stated:

*“...in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.....A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information is under a Constitutional obligation to provide the information sought.”*

95. It is an undisputable fact that the Final CIPEV Report was a public report and therefore qualifies as public information for purposes of

Article 35. However, the right to access information is not absolute. Article 35 falls outside the Bill of Rights and therefore the right can be limited subject to Article 24 of the Constitution. In addition, the petitioner must demonstrate that he has suffered injury as a result of non-disclosure of the information sought.

96. The burden of proof that a right has been denied, violated, infringed or threatened to be infringed always lies with the petitioner. It is not in doubt that the sealed envelope has existed since 2008. We observe that neither the petitioner nor the interested party proved that they requested for the information in question, and that the respondent declined to supply it.

97. The petitioner also failed to prove that the sealed envelope was submitted by CIPEV to the President, the National Assembly or the Attorney General or that it ever got its way back to the state machinery after its submission to the Chair of the Panel and eventually, to the OPICC. The petitioner simply stated that the sealed envelope must be with the Government and that if the Attorney General does not have it, he should look for it and if he does not avail it, the court should quash that part of the report.

98. It is common knowledge that the sealed envelope was handed over to the Chair of the Panel. CIPEV had recommended that to eradicate impunity, there be established a Special Tribunal for Kenya to investigate and try the suspects. In default, the Commission recommended that the names in the sealed envelope be forwarded to OPICC.

99. Following the failure to establish the Special Tribunal, the sealed envelope was transmitted to the OPICC leading to the prosecution of six Kenyans. As observed above, the CIPEV wound up its activities; its Chairman was removed from these proceedings; and, the petitioner withdrew his case against the OPICC. Even assuming for a moment that the envelope is in the custody of the ICC, that court enjoys immunity from national courts. Accordingly, this court has no jurisdiction to compel the ICC to produce the sealed envelope.

100. The petitioner further claimed that the Attorney General has refused to confirm whether the State is in possession of the sealed envelope. He implored us to compel the respondent to produce it, or in default to quash the entire Report. The latter alternative prayer “to quash the *entire* report” was not part of the thirteen prayers in the amended petition. His principal prayer was to quash the contents of the sealed envelope. It is trite that a party is bound by his pleadings. We say no more.

101. To succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with illegality, irrationality or procedural impropriety. See **Republic v Inspector General of Police Ex-parte Patrick Nderitu** Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR and **Civil Service Union v Minister for Civil Service** [1985] A.C. 374.

102. Therefore, in the absence of proof that the Attorney General ever received the sealed envelope we find no basis to compel him to produce it. Accordingly mandamus cannot issue.

103. Regarding the prayer for certiorari, the petitioner required to demonstrate that the sealed envelope is capable of being brought before this Court for quashing. As observed earlier, the CIPEV report has been implemented and one of its offshoots is the promulgation of the 2010 Constitution. Neither the Chairman of the Panel nor the Chairman of CIPEV nor the ICC are parties to these proceedings. It is not also lost on us that the petition has been brought seven years after the CIPEV Report was released to the public on 15<sup>th</sup> October, 2008. In our humble view, the petitioner is guilty of *laches*. See **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & others** Civil Appeal No. 266 of 1996 [1997] eKLR.

104. In our humble view, it would be unjust to quash the entire Report which made several other useful recommendations which have already been implemented, besides the materials in the sealed envelope. To quash the entire Report will have far reaching ramifications. We find that the disclosure of the sealed envelope does not outweigh CIPEV’s contribution towards restoration of peace, the fight against impunity and the birth of a new Constitution. For all those reasons, certiorari is declined.

#### **Whether the interested party is entitled to the reliefs sought?**

105. The interested party’s case was that it was denied a hearing or an opportunity to rebut adverse allegations leveled against the Kalenjin as a Community individually or collectively. It contended that the Kalenjin were unfairly labeled as attackers and warriors against other communities without being heard, in violation of their right to fair administrative action guaranteed in Article 47 of the Constitution and the **Fair Administrative Action Act**. It also alleged discrimination.

106. The respondent countered those allegations and contended that there was a public notice for the CIPEV hearings and that therefore the interested party squandered the opportunity to appear before the Commission. He also submitted that the interested party failed to prove any injury.

107. In our humble view, the interested party was urging what amounted to a cross-petition. The issues raised in the supporting affidavit of Major Retired John Seii, the Chairman of Kalenjin Council of Elders are dissimilar to those by the petitioner. For example, the interested party raised issues of being condemned unheard and being discriminated by CIPEV.

108. Those were fresh matters not raised by the petitioner. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. It cannot bring a claim totally independent of the petitioner’s claim in these proceedings. The interested party should have filed its own petition or sought to be enjoined as a co-petitioner. This principle of law was succinctly captured by the Supreme Court in **Francis Karioko Muruatetu & another v Republic**, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR where it was held:

**“[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third**

*parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.*

*[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.” [Emphasis added]*

109. See also **Methodist Church in Kenya v Mohamed Fugicha & 3 others** Supreme Court Petition No 16 of 2016 [2019] eKLR. Accordingly, we find and hold that the interested party is not entitled to the reliefs sought.

#### **Disposition and final orders**

110. For all the above reasons, we find and hold that the amended petition dated 16<sup>th</sup> June 2017 and the interested party’s case are devoid of merit and are hereby dismissed.

111. Costs ordinarily follow the event. However, given the nature of the petition, we are inclined to order that each party shall bear its own costs.

It is so ordered.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of June 2019.**

**KANYI KIMONDO**

**JUDGE**

**R. E. ABURILI**

**JUDGE**

**J. N. ONYIEGO**

**JUDGE**