



**Siddique w/o Arshad Sharif & 2 others v Attorney General & 4 others (Constitutional Petition E009 of 2023) [2024] KEHC 9667 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9667 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CONSTITUTIONAL PETITION E009 OF 2023**

**SN MUTUKU, J**

**JULY 8, 2024**

**BETWEEN**

**JAVERIA SIDDIQUE W/O ARSHAD SHARIF ..... 1<sup>ST</sup> PETITIONER**

**KENYA UNION OF JOURNALISTS ..... 2<sup>ND</sup> PETITIONER**

**KENYA CORRESPONDENTS ASSOCIATION ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 3<sup>RD</sup> RESPONDENT**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**Duty of bodies in the criminal justice system to inform complainants and/or their families of the progress or outcome of investigations.**

*The main issues for determination were whether the shooting of a person under mistaken identity by police officers was a violation of the rights to life, human dignity, equality, freedom and security of the person and freedom from discrimination; and the duty of bodies in the criminal justice system to inform the complainants or their family members of the progress or outcome of investigations. The High Court held that the fatal shooting of Arshad Sharif by Kenyan police officers was unlawful, arbitrary, and unconstitutional. It held that the respondents (OAG, NPSC, IGP, and DPP) violated Sharif's rights to life, dignity, and security of the person under articles 26, 28, and 29 of the Constitution. The court further found that the failure to conduct prompt, independent, and effective investigations and to take appropriate action, including prosecution, violated both constitutional and international legal obligations. The court awarded Kshs. 10 million in general damages to the 1st petitioner and issued mandatory orders compelling the respondents to conclude investigations and provide status updates to the family.*



Reported by John Ribia

**Constitutional Law** – *fundamental rights and freedoms – right to life – right to human dignity – right to equality and freedom from discrimination – freedom and security of the person – where a person had been shot down and killed by police in a case of mistaken identity - under what conditions was the use of force that may lead to the intentional taking of life by police officers permissible - whether the shooting of a person under mistaken identity by police officers was a violation of the rights to life, human dignity, equality, freedom and security of the person and freedom from discrimination – Constitution of Kenya articles 3, 10, 21(1), 23, 24, 25(c), 26, 27, 28, 29, 35(1), 47, 50(2), 156 (4), 157 (10), 165(3)(b), 244(a), 245(2 (b), and 246 (3); African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 3, 4, 5, and 7(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 articles 1, 2, 4, 6, 7, 12, and 14(1) and (2); International Covenant on Civil and Political Rights (ICCPR), 1966 articles 2(3), 6, and 7.*

**Constitutional Law** – *constitutional bodies in the criminal justice system – roles of the Independent Policing Oversight Authority, the National Police Service Commission, the Inspector General of National Police and the Office of the Attorney General – complaints – duty of investigative and prosecutorial agencies to keep a complainant or his family informed of the progress or outcome of investigations – right of access to information - whether failure to inform complainants or their family members of the progress or outcome of investigations was a violation of their right of access to information - whether the Independent Policing Oversight Authority, the National Police Service, and the Director of Public Prosecutions had a duty to update the family of a deceased who died at the hands of the police of the progress of the investigations and the outcome of the investigations - whether the failure to conclude the conduct of independent, prompt and effective investigations and to take appropriate action including prosecution of the perpetrators of the fatal shooting of Arshad Sharif was a violation of the rights to life, torture, inhuman and degrading treatment - Constitution of Kenya articles 3, 10, 21(1), 23, 24, 25(c), 26, 27, 28, 29, 35(1), 47, 50(2), 156 (4), 157 (10), 165(3)(b), 244(a), 245(2 (b), and 246 (3); Access to Information Act (Cap 7M) section 6; Independent Policing Oversight Authority Act (Cap 86) section 3; National Police Service Act (Cap 84) sections 8, 8A, 49, 51, and schedule VI; National Police Service Commission Act (Cap 85) sections 10(g)(i), and 11; Office of The Attorney-General Act (Cap 6A) section 5; Office of The Director of Public Prosecutions Act (Cap 6B) sections 5, and 6; African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 3, 4, 5, and 7(1); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 articles 1, 2, 4, 6, 7, 12, and 14(1) and (2); International Covenant on Civil and Political Rights (ICCPR), 1966 articles 2(3), 6, and 7.*

### **Brief facts**

On October 23, 2022, Arshad Sharif, a prominent Pakistani investigative journalist living in self-imposed exile in Kenya, was fatally shot in Kajiado County while travelling as a passenger in a Toyota Land Cruiser. Kenyan police officers shot him in what was later described as a case of mistaken identity. The officers were reportedly trailing a different vehicle, a Mercedes Benz Sprinter van believed to have been stolen from Pangani, Nairobi. Following the incident, the Inspector General of Police admitted that the shooting was an error and expressed regret, promising investigations. The Independent Policing Oversight Authority (IPOA) also announced that it would conduct prompt inquiries. However, the petitioners, including Sharif's widow and two journalists' associations, contended that no meaningful investigations had taken place, and no prosecutions had been initiated against the officers responsible.

Despite multiple written requests, the family of the deceased received no updates on the progress of the investigations. The petitioners claimed violations of Sharif's constitutional rights to life, dignity, and fair treatment, as well as breaches of international human rights instruments. They accused the respondents of failing to carry out timely, independent, and effective investigations, thereby perpetuating a culture of impunity and denying justice to the deceased and his family.



## Issues

- i. Under what conditions was the use of force that could lead to the intentional taking of life by police officers permissible?
- ii. Whether the shooting of a person under mistaken identity by police officers was a violation of the rights to life, human dignity, equality, freedom and security of the person and freedom from discrimination.
- iii. Whether the failure to conclude the conduct of independent, prompt and effective investigations and to take appropriate action including prosecution of the perpetrators of the fatal shooting of Arshad Sharif was a violation of the rights to life, torture, inhuman and degrading treatment.
- iv. Whether failure to inform complainants or their family members of the progress or outcome of investigations was a violation of their right of access to information.
- v. Whether the Independent Policing Oversight Authority, the National Police Service Commission, and the Director of Public Prosecutions had a duty to update the family of a deceased who died at the hands of the police of the progress of the investigations and the outcome of the investigations.

## Held

1. The High Court was seized with the requisite jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened. He who alleges must prove. Under section 107 of the Evidence Act, the burden of proof lay on the petitioners to prove that the respondents violated the rights of the deceased.
2. A petitioner approaching the court in a constitutional petition must plead his/her case with precision. The provisions of the Constitution alleged to have been violated must be specifically specified.
3. In performing their functions, the respondents were obligated to respect, uphold and defend the Constitution. Further, the national values and principles of governance in article 10 bound the respondents whenever they were applying, interpreting the Constitution or implementing public policy decisions. The national values and principles of governance include the rule of law, human dignity, equity, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.
4. Article 35(1) of the Constitution guaranteed every citizen the right to access to information held by the State or another person and required for the execution or protection of any right or fundamental freedom. The information may be limited in line with article 24 of the Constitution. Section 6 of the Access to Information Act allowed limitation of right of access to information under article 24.
5. Save for stating that the information sought by the petitioners was privileged, the 2<sup>nd</sup> and 4<sup>th</sup> respondents did not adduce any evidence to show in what manner the information they possess after the investigations was privileged. Even assuming that the information was protected by the law, the respondents, especially the 2<sup>nd</sup> and 4<sup>th</sup> (DPP and IPOA) ought to have given updates to the family of the deceased regarding the information gathered during investigations into the circumstances surrounding the fatal shooting of the deceased, which was not disputed, and any anticipated further action.
6. Nothing would have stopped the respondents from informing the family of the deceased of the status of the investigations and whether prosecution was anticipated and if so, all the evidence gathered would be shared at the pre-trial stage or, for that matter, the decision reached about the shooting and whether anyone was found culpable or not. By their actions to do so, the respondents violated the rights of the petitioners.
7. The petitioners had pleaded with precision and specificity the rights and freedoms said to have been violated by the respondents. The deceased was a foreign national and the circumstances of his shooting, as far as could be discerned from the material placed before the court, was being discussed at high government levels involving some of the respondents, the Ministry of Foreign Affairs and the Pakistani High Commission. It was imprudent on the part of the respondents to keep the petitioners, especially the family of the deceased, in the dark without updates of the progress of the investigations and the outcome of that investigation.



8. By shooting the deceased in the circumstances disclosed in the petition and which shooting had been admitted save for the allegation that it was mistaken identity, the respondents violated the rights of the deceased under articles 26, 27, 28 and 29 of the Constitution.
9. The 1<sup>st</sup> respondent, could not escape responsibility by claiming that the functions of that office exempted that office from any responsibility in the matter. The 1<sup>st</sup> respondent's functions under section 5(1) of the Office of the Attorney General Act (OAG Act) included advising Government Ministries, Departments, constitutional commissions and State Corporations on legal matters and on all matters relating to the Constitution, international law, human rights, and in facilitating, promoting and monitoring the rule of law, the protection of human rights and democracy. The Inspector General of the National Police Service (3<sup>rd</sup> respondent) had the responsibility to act on the recommendations of the IPOA, including compensation to victims of police misconduct. The 3<sup>rd</sup> respondent, too, could not escape responsibility. The 5<sup>th</sup> respondent (National Police Service Commission) could not escape responsibility by virtue of article 246 of the Constitution that commanded that office to observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service.
10. Failure to conduct independent, prompt and effective investigations and commence prosecution or to complete those investigations or in any other manner act on the outcome of those investigations by the respondents violated the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under article 21(1) of the Constitution, articles 6 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and articles 2 and 7 of the International Covenant on Civil and Political Rights (ICCPR).
11. The deceased was subjected to torture. The State Party was required under articles 6 and 7 of CAT to take into custody any person who may have committed torture under article 4 of CAT and take appropriate action against such a person including prosecution.
12. The petitioners met the threshold, the rights of the deceased as pleaded were violated and that each respondent had a role to play to ensure that the petitioners, specifically the 1<sup>st</sup> petitioner, was updated on the status and outcome of the investigations and what action, if any, was being taken or was likely to be taken to bring culprits to book. The petitioners' rights under article 47 of the Constitution were violated. The respondents were jointly and severally, by their actions and or omissions while performing their respective functions, violated the rights of the petitioners.

*Petition allowed.*

### **Orders**

- i. *Declaration issued that the use of lethal force for law enforcement purposes was an extreme measure that should be resorted to only when strictly necessary to protect life or prevent serious injury from an imminent threat; that the intentional taking of life by police officers was permissible only if it was strictly necessary to protect life from an imminent threat and that the use of lethal force against Arshad Sharif by shooting him on the head was arbitrary, unproportionate, unlawful and unconstitutional.*
- ii. *Declaration issued that the unlawful shooting to death of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on October 23, 2022 violated his right to life under article 26 of the Constitution; right to equal benefits and protection of the law under article 27 of the Constitution; right to dignity under article 28 and right to security of the person under article 29 of the Constitution.*
- iii. *Declaration issued that the petitioners were entitled to effective remedies as guaranteed by article 23 of the Constitution; article 2(3) of the ICCPR; article 14 of CAT and article 7(1) of the Banjul Charter for the violations of Arshad Sharif's fundamental rights and freedoms through the unlawful and admitted shooting of Arshad Sharif by the Kenyan Police officers at Kajiado County on October 23, 2022.*
- iv. *Declaration issued that failure to conclude the conduct of independent, prompt and effective investigations and to take appropriate action including prosecution of the perpetrators of the fatal shooting of Arshad Sharif, if found culpable, further violated the positive obligation to investigate and prosecute violations*



- of the right to life, torture, inhuman and degrading treatment under article 21(1) of the Constitution, article 6 and 7 of CAT; article 2 and 7 of the ICCPR.
- v. Declaration issued that article 244(a) and 246(3) of the Constitution commanded the respondents to take appropriate actions, including to punish and prosecute police officers who killed Arshad Sharif, if found culpable. Consequently, a mandatory order was issued compelling the respondents to conclude investigating, take appropriate action including disciplinary action and prosecution of the police officers who shot and killed Arshad Sharif at Kajiado County Kenya on October 23, 2022 if found culpable.
  - vi. Order issued compelling the respondents to supply the petitioners with the update of the status of the investigations and the recommendations the respondents, especially the 2<sup>nd</sup> and the 4<sup>th</sup> respondents, had arrived at in regard to the appropriate action to be taken at the conclusion of the investigations.
  - vii. Judgment entered in favour of the 1<sup>st</sup> petitioner against the respondents jointly and severally for a global sum of Kshs 10,000,000/= by way of general damages, which sum shall attract interest at court rates from the date of filing this Petition until payment in full.
  - viii. Costs of the Petition.

## Citations

### Cases

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154; (1976 - 1980) KLR 1272 - (Explained)
2. *E W A J K A & L M A v Director of Immigration and Registration of Persons & Attorney General* Petition 352 of 2016; [2018] KEHC 8961 (KLR) - (Mentioned)
3. *Fredrick Masaghe Mukasa v Director of Public Prosecutions, Attorney General, Director of Criminal Investigations & Independent Police Oversight Authority* Civil Appeal 44 of 2017; [2019] KECA 256 (KLR) - (Mentioned)
4. *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & Rosemary Njoki Ngari & Rosemary Njoki & Grace Munene* Civil Application 14 of 2013; [2013] KECA 106 (KLR) - (Mentioned)
5. *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties)* Constitutional Petition E128 of 2022; [2022] KEHC 438 (KLR) - (Mentioned)
6. *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
7. *MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)* Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR) - (Applied)
8. *Republic v Registrar of Co-Operatives Ex Parte Kandara Farmers Co-Operative Society Limited* Children Miscellaneous Application 302 of 2002; [2004] KEHC 1671 (KLR) - (Mentioned)
9. *Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another; Law Society of Kenya (Interested Party); Article 19-Eastern Africa Curiae (Amicus Curiae)* Petition 314 of 2016 & Judicial Review 306 of 2016 (Consolidated); [2016] KEHC 3581 (KLR) - (Explained)

### United Kingdom

*Rheir Shipping Co SA v Edmunds* (The Popi M) [1985] 1 WLR. 948 - (Mentioned)

### Statutes

#### Kenya

1. Access to Information Act (cap 7M) section 6 - (Interpreted)
2. Civil Procedure Act (cap 21) section 27 - (Interpreted)



3. Constitution of Kenya articles 3; 10; 21 (1); 23; 24; 25 (c); 26; 27; 28; 29; 35 (1); 47; 50 (2); 156 (4); 157 (10); 165 (3) (b); 244 (a); 245 (2) (b); 246(3) - (Interpreted)
4. Evidence Act (cap 80) section 107 - (Interpreted)
5. Independent Policing Oversight Authority Act (cap 86) section 3 - (Interpreted)
6. National Police Service Act (cap 84) sections 8, 8A, 49, 51; Schedule VI- (Interpreted)
7. National Police Service Commission Act (cap 85) sections 10(g)(i); 11- (Interpreted)
8. Office of the Attorney-General Act (cap 6A) section 5 - (Interpreted)
9. Office of the Director of Public Prosecutions Act (cap 6B) section 5, 6 - (Interpreted)

#### **Instruments**

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 articles 3, 4, 5, 7 (1)
2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 articles 1, 2, 4, 6, 7, 12; 14(1),(2)
3. International Covenant on Civil and Political Rights (ICCPR), 1966 articles 2(3); 6; 7

#### **Advocates**

*Mr. Ochiel* for Petitioners

*Mr. Kipkuto* for 4th Respondent

*Ms Akunja* for 2nd Respondent

## **JUDGMENT**

1. The 1<sup>st</sup> Petitioner is the wife of Arshad Sharif, deceased, who is described in the Petition as a prominent Pakistani Investigative Journalist. It is stated that he was killed for reasons related to his work and that at the time of his death, the deceased was in Kenya on a self-imposed exile having fled his country two months prior to his death.
2. The Petition is dated 19<sup>th</sup> October 2022. It is a seventy-seven (77) paragraph document divided into sections. The Respondents are sued in their capacities as constitutional offices in their areas of operation.
3. The facts of the case, as stated under Section C of the Petition show that the deceased was shot on the night of 23<sup>rd</sup> October 2023. It is stated that officers from the Kenya Police shot the deceased on the head while the deceased was travelling as a passenger in motor vehicle registration number KDG 200M, a Toyota Landcruiser (V8) at Tinga Market in Kajiado County. At the time of the shooting the police are said to have been trailing motor vehicle registration number KDJ 700F, a Mercedes Benz Sprinter van allegedly stolen from Pangani Nairobi.
4. It is stated that the Inspector General of the National Police Service admitted that officers from the Service had 'fatally wounded' the deceased in a case of 'mistaken identity' and expressed regret for 'the unfortunate incident'. It is stated that the Inspector General undertook that the matter was being investigated for appropriate action by competent authorities at the time. It is further stated that the 4<sup>th</sup> Respondent equally promised speedy investigations.
5. The Petitioners claim that since those statements were issued, no investigations have been carried out and that if any investigation has commenced, they have not been prompt, independent, impartial, effective and accountable; that no prosecution of those responsible for the shooting have commenced; that the family of the deceased has not obtained justice through investigations and prosecution of those responsible for the killing of the deceased.



6. It is claimed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have ignored the 1<sup>st</sup> Petitioner's request for a status update nor have the perpetrators been prosecuted. The Petitioners are accusing the Respondents of cover-up.
7. Section D of the Petition speaks to the constitutional provisions and international instruments giving legal background to this Petition including Article 26 of the Constitution that protects the right to life and Article 47 of the Constitution on the right of every person to administration that is fair and right to be given written reasons if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action.
8. The Petitioners have articulated the particulars of the constitutional violations. It is their case that the actions of the officers of the National Police Service in their excessive, arbitrary, unreasonable and lethal use of force and unlawful killing of the deceased violated Article 26 of the Constitution, Article 6 of the International Convention on Civil and Political Rights and Article 4 of the Banjul Charter protecting the right to life and shielding every person from arbitrary deprivation of the right to life and invasion of their bodily integrity.
9. The Petitioners have argued that the shooting of the deceased violated his entitlement to equal benefit and protection of the law under Article 27 of the Constitution, Article 2 of the ICCPR and Article 3 of the Banjul Charter as well as depriving the deceased a right to fair trial which is non-derogable under Article 25 (c) and 50 (2) of the Constitution. They have argued that the shooting of the deceased violated Articles 28 and 29 which guarantee every person inherent dignity and right to have that dignity protected and respected and the right to freedom and security of the persons and freedom from any form of violence respectively; violation of Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 5 of Banjul Charter as well as Article 7 of the ICCPR.
10. It is the Petitioner's case that the shooting of the deceased and failing to investigate that shooting or to offer his family remedies violates Article 47 of the Constitution which guarantee expeditious and fair administrative action; Article 50 on fair hearing; Article 12 of CAT which demands prompt and impartial investigation; Article 14 of the Convention Against Torture entitling victims to redress including enforceable right to fair and adequate compensation to the dependants in case of death and Article 2 of the ICCPR entitling victims to effective remedy.
11. The Petitioners argue that the omission by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to initiate disciplinary action against the police officers who unlawfully killed the deceased violates Article 244(a) of the Constitution requiring the National Police Service to meet the highest standards of professionalism and discipline among its members and Article 246(3) of the Constitution that gives the NPSC disciplinary control over persons holding or acting in offices within the Service.
12. The Petitioners hold the respondents liable jointly and severally for the acts of the police officers who were acting in the cause of duty.

### Reliefs sought

13. The Petitioners are seeking the following reliefs:
  - a. A declaration does issue that the use of lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary to protect life or prevent serious injury from an imminent threat. The intentional taking of life by police officers is permissible only if it is strictly necessary to protect life from an imminent threat. Thus, the use of lethal



force against Arshad Sharif by shooting him on the head was arbitrary, unproportionate, unlawful and unconstitutional.

- b. A declaration does issue that the unlawful shooting to death of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on 23<sup>rd</sup> October 2022 violated his right to life under Article 26 of the Constitution; right to equal benefits and protection of the law under Article 27 of the Constitution; right to dignity under Article 28 and right to security of the person under Article 29 of the Constitution.
- c. A declaration does issue that the Petitioners are entitled to effective remedies as guaranteed by Article 23 of the Constitution; Article 2(3) of the ICCPR; Article 14 of CAT and Article 7(1) of the Banjul Charter for the violations of Arshad Sharif's fundamental rights and freedoms through the unlawful and admitted shooting of Arshad Sharif by the Kenyan Police officers at Kajiado County on 23<sup>rd</sup> October 2022.
- d. A declaration that the failure to conduct independent, prompt and effective investigations and to commence a prosecution for the killing of Arshad Sharif by Kenyan police officers further violates the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21(1) of the Constitution, Article 6 and 7 of CAT; Article 2 and 7 of the ICCPR.
- e. A declaration that Article 244(a) and 246(3) of the Constitution commands the Respondents to punish and prosecute police officers who killed Arshad Sharif. Consequently, a mandatory order does issue compelling the Respondents to conclude investigating, take disciplinary action and charge in court the police officers who shot and killed Arshad Sharif at Kajiado County Kenya on 23<sup>rd</sup> October 2022.
- f. An order compelling the Respondents to supply to the Petitioners copies of all documents, files, reports, letters, electronic mail (email) or evidence, if any medium, including but not limited to films, photographs, videotapes in their custody, possession relating to the shooting in questions.
- g. An order directing the 1<sup>st</sup> Respondent to issue a public apology, including an acknowledgment of the facts, and acceptance of responsibility to the family of Arshad Sharif within 7 days of this court's order.
- h. Damages for violation of the 1<sup>st</sup> Petitioner's constitutional rights.
- i. Costs of this suit.

### **Responses by 1<sup>st</sup> and 3<sup>rd</sup> Respondents**

14. The 1<sup>st</sup> Respondent filed Grounds of Opposition dated 20<sup>th</sup> November 2023 that the 1<sup>st</sup> Respondent is a Constitutional Office established under Article 156(4) of the Constitution and Section 5 of the Attorney General Act No. 49 of 2012 whose functions include to be the principal legal adviser to the Government and to represent the National Government in Court in civil and constitutional matters; that contrary to the allegations by the Petitioner the 1<sup>st</sup> Respondent does not exercise command over the Kenya Police Officers; that the Petitioner has not met the threshold for grant of the orders sought and that the Petitioner has not laid any basis why the 1<sup>st</sup> Respondent has been sued as there are no allegations of breach levelled against the 1<sup>st</sup> Respondent in the Petition.
15. It is further stated that the 3<sup>rd</sup> Respondent exercises overall and independent command over police service as per section 8 of the National Police Service Act No. 11a of 2011 with no control or direction



of the 1<sup>st</sup> Respondent and that the 4<sup>th</sup> Respondent has confirmed through their Replying Affidavit that they conducted comprehensive investigations and forwarded the file containing collected evidence, investigation report and recommendations to the 2<sup>nd</sup> Respondent and were awaiting approval of the same by the 2<sup>nd</sup> Respondent and therefore the 1<sup>st</sup> and 3<sup>rd</sup> Respondents should not have been dragged to Court.

### **Responses by 2<sup>nd</sup> Respondent**

16. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 11<sup>th</sup> December 2023 by Gikuhi Gichuhi in opposition to the Petition. He has deposed that on 23<sup>rd</sup> October 2022, at around 2100 hours a shooting incident involving police officers occurred along Losinyai Road within Kamukuru area, Kajiado County whereby Arshad Muhammad Sharif, a Pakistani national aged 50 years was fatally wounded by police officers attached to GSU Training Camp in Magadi; that the 4<sup>th</sup> Respondent undertook the investigations in line with its mandate including attending the post mortem which was conducted at Chiromo Mortuary on 24<sup>th</sup> October 2022 which examination confirmed that the deceased died as a result of gunshot wounds on the head and chest from a high velocity firearm at an intermediate range.
17. It was deposed that after the conclusion of the investigations, the file was forwarded to the 2<sup>nd</sup> Respondent for perusal and advice; that the 2<sup>nd</sup> Respondent independently reviewed the investigation file and flagged further areas that the 4<sup>th</sup> Respondent needed to cover before any conclusive decision was made; that the 2<sup>nd</sup> Respondent called a meeting with the 4<sup>th</sup> Respondent on 24<sup>th</sup> January 2023 to address the areas of concern; that following that meeting, the 2<sup>nd</sup> Respondent held a meeting with officials from the Pakistani High Commission on 26<sup>th</sup> January 2023, following a request for mutual legal assistance by the Inspector General of Police Islamabad to facilitate effective investigation, to update them on the progress of the investigations; that on 21<sup>st</sup> February 2023 the 2<sup>nd</sup> Respondent wrote to the 4<sup>th</sup> Respondent requiring clarification on the gaps that had been identified for further investigations and updated the Ministry of Foreign Affairs providing an update on the status of the investigations.
18. It is deposed that the 4<sup>th</sup> Respondent submitted the investigation file on 16<sup>th</sup> March 2023 addressing the areas of concern identified by the 2<sup>nd</sup> Respondent; that the file was re-submitted again to the 4<sup>th</sup> Respondent on 27<sup>th</sup> May 2023 directing the 4<sup>th</sup> Respondent to conclusively cover the highlighted areas; that on 29<sup>th</sup> May 2023 the 4<sup>th</sup> Respondent forwarded the investigation file back to the 2<sup>nd</sup> Respondent; that due to the complexity of the issues raised in the file, the 2<sup>nd</sup> Respondent was of the view that there was need for a joint comprehensive analysis of the investigation file before any decisions was made and that before this was done, the 2<sup>nd</sup> Respondent became aware of this Petition.
19. The 2<sup>nd</sup> Respondent has deposed that it has been proactive in ensuring that effective investigations into the incident to facilitate prosecution, if this became necessary. The 2<sup>nd</sup> Respondent deposed that the correspondence between it and investigative agencies is protected by privilege and cannot be disclosed at the stage of investigations to protect the integrity of the investigation's outcome.
20. It is the case for the 2<sup>nd</sup> Respondent that the Petitioners have not placed any material before the Court to demonstrate that the 2<sup>nd</sup> Respondent has been lax in the performance of its duty.
21. The 2<sup>nd</sup> Respondent took issue with prayer 7(e) of the Petition arguing that it is unconstitutional as it purports to bestow prosecution powers on the 1<sup>st</sup> Respondent yet the sole prosecuting authority lies with the 2<sup>nd</sup> Respondent; that the 2<sup>nd</sup> Respondent enjoys decisional independence and is not under the discretion or control of anybody in the discharge of its mandate; that the circumstances surrounding



the shooting of the deceased are complex and the agencies involved in investigations should be allowed to perform their mandate without interference.

22. The 2<sup>nd</sup> Respondent terms the Petition as misconceived and premature and that the Petitioners have failed to demonstrate with particularity the manner in which the 2<sup>nd</sup> Respondent has infringed on their rights and sought dismissal of the Petition with costs to the 2<sup>nd</sup> Respondent.

#### **Responses by 4<sup>th</sup> Respondent**

23. Through a Replying Affidavit sworn by Evans Kipsang, an investigator of the 4<sup>th</sup> Respondent on 5<sup>th</sup> January 2024, the 4<sup>th</sup> Respondent has stated that it learned of the shooting of the deceased through mainstream and social media on the 24<sup>th</sup> October 2022 and on its own initiative registered the incident under Ref. No. IPOA/CMU/002815-2022.
24. The 4<sup>th</sup> Respondent received a letter dated 24<sup>th</sup> October 2022 on 25<sup>th</sup> October 2022 from the 2<sup>nd</sup> Respondent requesting it to initiate investigations into the incident. Pursuant to its mandate, the 4<sup>th</sup> Respondent commenced investigations and prepared three duplicate files which it forwarded to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent returned the files to the 4<sup>th</sup> Respondent to conduct further investigations to fill in existing gaps, which was done and the files re-forwarded to the 4<sup>th</sup> Respondent.
25. The 4<sup>th</sup> Respondent avers that it conducted thorough investigations and forwarded the file to the 2<sup>nd</sup> Respondent contrary to what is alleged in paragraph 6 of the Supporting Affidavit and that it will give the status of the update once it gets directions from the 2<sup>nd</sup> Respondent. It is the case for the 4<sup>th</sup> Respondent that the allegations in paragraphs 8 and 9 of the Petition cannot be attributed to the 4<sup>th</sup> Respondent and that the 4<sup>th</sup> Respondent is a stranger to the allegations contained in the body of the Petition and in particular in paragraph 76 of the Petition as those allegations are outside the mandate of the 4<sup>th</sup> Respondent.

#### **Responses by 5<sup>th</sup> Respondent**

26. The 5<sup>th</sup> Respondent opposed the Petition through Grounds of Opposition dated 15<sup>th</sup> November 2023. It is its case that its mandate is spelt out under Article 246(3) of the [Constitution](#) and includes recruitment and appointment of persons to hold or act in offices in the Service, confirm appointments, and determine promotions and transfers within the National Police Service, exercise disciplinary control over and remove persons holding or acting in offices within the Service and perform any other functions prescribed by national legislation.
27. It is the case for the 5<sup>th</sup> Respondent that it remains under the independent command and discipline of the Service under the Office of the Inspector General as per Section 8A of the [National Police Service Act](#), 2011; that the independent command is set out in Article 245 (2) (b) of the [Constitution](#) and is distinguishable from the Human Capital Management and attendant powers of the 5<sup>th</sup> Respondent in Article 246 (3) of the [Constitution](#).
28. It is the case for the 5<sup>th</sup> Respondent that the Petition is based on events relating to the use of force by police officers who, while in exercise of such powers are subject to direction, control and chain of command of the Service; that paragraphs 8 and 9 of the Petition specifically relate to police in pursuit of a stolen motor vehicle and that the 5<sup>th</sup> Respondent is barred by section 10(g)(i) of the [National Police Service Act](#) from conducting investigations of criminal nature and that the Petitioners have not demonstrated any acts or omissions by the 5<sup>th</sup> Respondent to exercise disciplinary control considering that is no report nor any request addressed to it with particulars to summon or investigate any police officer for disciplinary infractions in the court of their duties in relation to this Petition.



29. The Petition was canvassed through written submission with highlighting of the submissions through virtual proceedings on 8<sup>th</sup> May 2024.

### **Petitioners' submissions**

30. The Petitioners' submissions are dated 24<sup>th</sup> March 2024. The submissions reiterated the case for the Petitioners as captured in their pleadings.
31. The Petitioners have identified four (4) issues for determination as follows:
- i. Whether the Respondents violated Arshad Sharif's right to life?
  - ii. Whether the Respondents subjected Arshad Sharif to torture and cruel, inhuman and degrading treatment and violated his right to dignity?
  - iii. Whether the Respondents have delayed in investigating and prosecution of the Arshad Sharif case thus compounding the violation?
  - iv. What are the appropriate reliefs?
32. Under the first issue it is submitted that a deprivation of life without legal basis as in this case is arbitrary and violates Article 26 of the *Constitution*, Article 6 of the *ICCPR* and Article 4 of the *Banjul Charter* which provisions protect the right to life and shield every person from arbitrary deprivation of the right to life and invasion of their bodily integrity and further violated Article 27 of the *Constitution* and Article 2 of the *ICCPR* and Article 3 of the *Banjul Charter* entitling every individual equal protection of the law. It is submitted that the summary execution deprived the deceased of the right to fair trial, a non derogable right under Article 25(c) and 50 (2) of the *Constitution*.
33. Under the second issue it is submitted that the summary execution of the deceased violated his right to dignity contrary to Article 28 and Article 29 of the *Constitution* that guarantees freedom and security of a person including freedom from any form of violence from either public or private sources, torture, corporal punishment or to be treated or punished in a cruel, inhuman and degrading manner. It was submitted that the rights of the deceased under this issue were violated contrary to Article 5 of the *Banjul Charter*, Article 7 of the *CAT* and Article 29 of the *Constitution*.
34. Under the third issue, it was submitted that the delay to investigate and prosecute the shooting of the deceased for over a year violates Article 47 of the *Constitution* which guarantees expeditious and fair administrative action and Article 50 on fair hearing. It was submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents failed to respond to the 1<sup>st</sup> Petitioner's repeated requests for information on the status of the investigations in the matter; that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have not initiated any disciplinary action on the police officers who unlawfully shot the deceased thereby violating Article 244(a) and Article 246(3) of the *Constitution*. That the delay further violated Article 12 of *CAT* demanding prompt and impartial investigation of alleged acts of torture or cruel, degrading and inhuman treatment and Article 14 of *CAT* entitling the victims to redress including an enforceable right to fair and adequate compensation to the dependents in the case of death and Article 2 of *ICCPR* entitling victims to effective remedy.
35. Under the fourth issue, it was submitted that depending on the circumstances of each case, appropriate relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. The Petitioners relied on *E. W. A & 2 others v Director of Immigration and Registration of Persons & another* [2018] eKLR at para 24 to support their submissions on this issue.



36. In his highlighting of the written submissions on 8<sup>th</sup> May 2024 through virtual link, Mr. Ochiel, learned counsel for the Petitioners emphasized on the violations of the rights of the deceased including right to life, freedom from torture, inhuman and degrading treatment and right to dignity, right to fair administrative action.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' submissions**

37. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents' written submissions are dated 28<sup>th</sup> March 2024. Mr. Sekwe, learned counsel, highlighted the submissions through virtual link on 8<sup>th</sup> May 2024. He identified two issues for determination: whether the Petitioners are entitled to the reliefs sought and costs of the petition.

38. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents highlighted the mandate of the 4<sup>th</sup> Respondent to investigate and recommend to the 2<sup>nd</sup> Respondent to take appropriate action. It was submitted that the 3<sup>rd</sup> Respondent has been coordinating with the 4<sup>th</sup> Respondent whenever the 3<sup>rd</sup> Respondent was called upon to do so; that due to the nature of the case and given that the law does not provide time limitation for handling reports made to the 4<sup>th</sup> Respondent, the Petitioners should exercise patience and let the offices mandated to handle the matter proceed without interference.

39. It was submitted the use of lethal force for law enforcement is not allowed in the police service and policies and legislation has been put in place under the Sixth Schedule of the [National Police Service Act](#) to offer guidance and that any officer found to have violated the provisions of the law has always been subjected to disciplinary action.

40. It was submitted that the right to access to information is not absolute and can be limited. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent cited section 6 of the [Access to Information Act](#) on limitation of right of access to emphasize on their submissions.

41. It was further submitted that the Petitioners have not laid a basis why the 1<sup>st</sup> Respondent has been sued as there are no allegations of breach have been leveled against the 1<sup>st</sup> Respondent; that the 3<sup>rd</sup> Respondent exercises oval and independent command over police service and is not in any control or direction of the 1<sup>st</sup> Respondent. It was submitted that the Petition is premature and lacks merit and precision as to the alleged rights that have been infringed.

42. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted that he who alleges must prove as provided under section 107 of the [Evidence Act](#) and cited *Rheir Shipping Co. SA v Edmunds* [1995] 1WLR 948 at 955 where it was held that:

“No judge likes to decide a case on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”

43. On the issue of costs, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents cited section 27 of the [Civil Procedure Act](#) and [Republic v Rosemary Wairimu Munene, Ex Parte Applicant vs Ibururu Dairy Farmers Co-operative Society Ltd](#) Judicial Review Application No. 6 of 2014 to the effect that the issue of costs is discretionary and that the basis rule on attribution of costs is that costs follow the event.

44. They submitted that the Petitioners are not entitled to the reliefs sought and that the Petition dated 19<sup>th</sup> October 2023 lacks merit and ought to be dismissed with costs.



## 2<sup>nd</sup> Respondent's submissions

45. The 2<sup>nd</sup> Respondent has submitted that it not in dispute that on 23<sup>rd</sup> October 2022 at around 2100hrs a shooting incident occurred along Losinyai Roaf within Kamukuru area in Kajiado County involving the police officers and the deceased herein who was fatally wounded and that investigations commenced. That the investigations were concluded and files forwarded to the 2<sup>nd</sup> Respondent for perusal and advice. That several meetings were held between the 2<sup>nd</sup> Respondent, 4<sup>th</sup> Respondent, Officials from the Pakistani High Commission and Ministry of Foreign Affairs to facilitate effective investigations into the incident.
46. The 2<sup>nd</sup> Respondent has submitted that the correspondence between the 2<sup>nd</sup> Respondent and other agencies are confidential and is protected by privilege and cannot be disclosed at this point to protect the integrity of the outcome of the investigations; that the investigation agencies need to be given time and allowed to discharge their functions without interference; that there is no material placed before the Court to demonstrate laxity on the part of the 2<sup>nd</sup> Respondent and that the Petition is misconceived and premature as the Petitioners have failed to demonstrate the manner in which the 2<sup>nd</sup> Respondent has violated their rights. The 2<sup>nd</sup> Respondent urged that the Petition be dismissed.

## 4<sup>th</sup> Respondent's submissions

47. The 4<sup>th</sup> Respondent filed submissions dated 24<sup>th</sup> April 2024 and highlighted the same through oral submissions by Mr. Kipkuto, learned counsel through virtual link on 8<sup>th</sup> May 2024. The 4<sup>th</sup> Respondent highlighted three issues, namely: whether the 4<sup>th</sup> Respondent delayed in investigations in this matter; whether the Petitioners are entitled to the reliefs sought and costs of the Petition.
48. The 4<sup>th</sup> Respondent submitted that their mandate is to carry out investigations and make recommendations which they forward to the 2<sup>nd</sup> Respondent for action and that they do not have prosecutorial powers. They cited *Frederick Masaghe Mukasa v Director of Public Prosecutions & 3 others* [2019] eKLR to emphasize their mandate.
49. They submitted that the Petitioners have misunderstood the process and procedure through which investigations are conducted and that if the reliefs sought by the Petitioners are granted the 4<sup>th</sup> Respondent will not be able to collect or fill the gaps identified by the 2<sup>nd</sup> Respondent and would hamper the 4<sup>th</sup> Respondent's further investigations should the 2<sup>nd</sup> Respondent directs further investigations be conducted.
50. On whether the Petitioners are entitled to the reliefs sought, it was submitted that by seeking to be supplied with all the evidence collected will interfere with the statutory and administrative powers of the 4<sup>th</sup> Respondent; that the documents and evidence requested by the Petitioner contain content and data of 3<sup>rd</sup> parties including witnesses, police officers, suspects and victims.
51. The 4<sup>th</sup> Respondent has cited section 6 of the Information Act on limitation of right to access to information and *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others* (Interested Parties) (Constitution Petition E128 of 2022) [2022] KEHC 438 (KLR) to the effect that "... the Court remains alive to the position that entities created under the *Constitution* and the law ought to be accorded the latitude to discharge their functions and that any judicial intervention must be in the clearest cases..."
52. It was submitted that the Petitioners are not entitled to the grant of the reliefs sought in the Petition. They submitted that the 4<sup>th</sup> Respondents conducted thorough investigations; that the Petitioners have



not demonstrated in any way how the evidence and documents in possession of the 4<sup>th</sup> Respondent are in any danger of being lost or otherwise; that the Petitioners have not demonstrated that the Respondents have failed to investigate the matter thus compounding the violation of the right to life under Article 26 of the Constitution and that the Petitioners have made fundamental wrong understanding with regard to the applicable law on the mandate of the 4<sup>th</sup> Respondent with regard to the conduct of the independent investigations and its role in prosecution.

53. On the issue of costs, it was submitted that costs follow the event as provided under section 27 of the Civil Procedure Act. The 4<sup>th</sup> Respondent has submitted that the Petition be dismissed with costs.

#### **5<sup>th</sup> Respondent's submissions**

54. The 5<sup>th</sup> Respondent has submitted on two issues:
- a. whether the 5<sup>th</sup> Respondent violated the Petitioners' constitutional rights as alleged or at all.
  - b. Whether the Petitioners are entitled to the orders sought.
55. While citing Articles 244 and 246 (3) of the Constitution, the 5<sup>th</sup> Respondent has submitted that its mandate is limited to the human capital management of the members of the National Police Service; that the events giving rise to this Petition relate the use of the police powers under section 49 and 51 of the National Police Service Act and which powers include power to investigate crimes by police officers and that in the exercise of these operations, section 8A of the National Police Service Act applies in that the police officers are subject to the independent command, control, direction and discipline of the Service as enforced by the Inspector General of Police.
56. It was submitted that section 10(g)(i) of the National Police Service Commission Act expressly bars the 5<sup>th</sup> Respondent from conduction investigations of a criminal nature; that there are no specific charges of indiscipline on the particular officers nor complaint to the 5<sup>th</sup> Respondent which makes the events of the Petition a public enquiry that other public investigative agencies are mandated by the Constitution to carry out.
57. It was submitted that the Petitioners are not entitled to the reliefs sought and that the Petition ought to be dismissed with costs.

#### **Analysis and determination**

58. I have taken time to read and understand the Petition and all the supporting documents, the responses in opposition, the written submissions and oral highlights made in court by all the parties. I have identified the following issues for determination:
- a. Whether the Petitioners have met the threshold in this petition?
  - b. If so, what reliefs are available?

#### **Whether the Petitioners have met the threshold in this petition?**

59. The jurisdiction of this court in determining this matter is not questioned. However, there is no harm in affirming that this court is seized with the requisite jurisdiction to determine this matter as provided under Article 165 (3) (b) of the Constitution that clothes this court with jurisdiction to, determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.



60. The Petitioners have sued five (5) respondents alleging violation of the rights of the deceased as pleaded in the Petition. It is trite that he who alleges must prove. The burden of proof lies on the Petitioners to prove that the Respondents violated the rights of the deceased. Section 107 of the Evidence Act provides that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
61. The threshold to be met is well settled in law. A petitioner approaching the court in a constitutional petition must plead his/her case with precision. The provisions of the Constitution alleged to have been violated must be specifically specified. This requirement is well set out in the case of Anarita Karimi Njeru v Republic [1979] KLR, where the court observed as follows that:
- “... if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”
62. In Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal observed as follows on the issue of pleading a constitutional petition with precision:
- (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
- ... The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules... was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing....
63. The facts of this case are not disputed. The facts show that on 23<sup>rd</sup> October 2022, Arshad Sharif, a Pakistani national described as an investigative journalist on self-imposed exile in Kenya was travelling as a passenger in motor vehicle registration number KDG 200M Toyota Landcruiser (V8) along Magadi Road in Kajiado County when he was fatally shot by police officers. The police have since explained that the shooting was as a result of mistaken identity as the police were trailing a stolen motor vehicle (Mercedes Benz Sprinter Van) registration number KDJ 700F when they shot the deceased.
64. The Petitioners have accused the respondents of delay in conclusion of the investigations and in the prosecution of the officers involved and in failing to give the Petitioners updates of the investigations and decision to prosecute.
65. The Petitioners claim that the deceased’s right to life under articles 26 of the Constitution, 2 and 4 of the Banjul Charter, 6 of the ICCPR and General Comment 36 of Article 6 of ICCPR were violated. They claim that the execution of the deceased violated his right to equal benefit and protection of the



- law under Article 27 and 50 (2) of the Constitution, Article 2 of the ICCPR and Article 3 of the Banjul Charter.
66. They claim that the deceased was subjected to torture contrary to Article 28 and 29 of the Constitution, Article 5 of the Banjul Charter, Articles 1, 2 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 of ICCPR.
67. The Petitioners claim that the delay in investigations and prosecution compounded these violations contrary to Article 47 of the Constitution, 2(3) (a) to (c) of ICCPR, articles 4,12 and 14 of CAT.
68. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have stated in their response to the allegations by the Petitioners that contrary to the allegations by the Petitioner the 1<sup>st</sup> Respondent does not exercise command over the Kenya Police Officers and that the 3<sup>rd</sup> Respondent exercises overall and independent command over Police Service as provided under section 8 of the National Police Service Act with no control or direction of the 1<sup>st</sup> Respondent.
69. The 2<sup>nd</sup> Respondent stated in its response to the Petition that it has been proactive in ensuring that effective investigations into the incident to facilitate prosecution, if this became necessary, and that the correspondence between it and investigative agencies is protected by privilege and cannot be disclosed at the stage of investigations to protect the integrity of the investigation's outcome.
70. The 4<sup>th</sup> Respondent has responded that it conducted thorough investigations and forwarded the file to the 2<sup>nd</sup> Respondent and that it will give the status of the update once it gets directions from the 2<sup>nd</sup> Respondent. It is the case for the 4<sup>th</sup> Respondent that the allegations in paragraphs 8 and 9 (which give facts of this Petition) of the Petition cannot be attributed to the 4<sup>th</sup> Respondent and that the 4<sup>th</sup> Respondent is a stranger to the allegations contained in the body of the Petition and in particular in paragraph 76 of the Petition as those allegations are outside the mandate of the 4<sup>th</sup> Respondent.
71. The 5<sup>th</sup> Respondent's case is that its mandate is spelt out under Article 246(3) of the Constitution and includes recruitment and appointment of persons to hold or act in offices in the Service, confirm appointments, and determine promotions and transfers within the National Police Service, exercise disciplinary control over and remove persons holding or acting in offices within the Service and perform any other functions prescribed by national legislation.
72. From the positions taken by each respondent, it is clear to this court that they are all claiming that they had no obligation to act as alleged by the Petitioners. Theirs seem to this court like a blame game with a view to exonerating themselves from the obligation of taking appropriate action in respect of the circumstances giving rise to this Petition. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents claim privilege of the information gathered through investigations.
73. To fully understand the roles of each of the respondents, I have read the relevant provisions of the Constitution of Kenya and the relevant legislation actualizing those provisions of the Constitution in respect of each the roles of each respondent. For clarity purposes, it is prudent to reproduce those functions in this judgment.

### **Functions of the Respondents**

74. The functions of the 1<sup>st</sup> Respondent are provided under Article 156 (4) of the Constitution and section 5 of the Office of the Attorney General, Cap. 6A. The 1<sup>st</sup> Respondent is the principal legal adviser to the Government and represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. The functions of the 1<sup>st</sup> Respondent under section 5 (1) of the Office of the Attorney General Act include advising



- Government Ministries, Departments, constitutional commissions and State Corporations on legal matters and on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid.
75. The 1<sup>st</sup> Respondent is mandated under section 5(2) of the Office of the Attorney General Act to “provide efficient and professional legal services to the Government and the public for the purpose of facilitating, promoting and monitoring the rule of law, the protection of human rights and democracy.”
76. The 2<sup>nd</sup> Respondent is established under Article 157 of the Constitution with powers “to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.”
77. The 2<sup>nd</sup> Respondent has the mandate to “exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.” The Office of the Director of Public Prosecutions Act, Cap. 6B, gives effect to Article 157 and 158 under section 5. In performing those functions, the 2<sup>nd</sup> Respondent is guided by section 6 of the Act which provides that:
- Pursuant to Article 157 (10) of the Constitution, the Director shall:
- a. not require the consent of any person or authority for the commencement of criminal proceedings;
  - b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and
  - c. be subject only to the Constitution and the law.
78. The 3<sup>rd</sup> Respondent is established under Article 245 of the Constitution with the mandate to exercise independent command over National Police Service and perform functions provided under section 10 of the National Police Service Act, Cap. 84 which include “to act on the recommendations of the Independent Policing Oversight Authority, including compensation to victims of police misconduct.”
79. The 4<sup>th</sup> Respondent is established under section 3 of the Independent Policing Oversight Authority Act, Cap. 86. The purpose of this Act is “to provide for civilian oversight of the work of the Police; to establish the Independent Policing Oversight Authority; to provide for its functions and powers and for connected purposes”. The objective of the Authority is to:
- a. hold the Police accountable to the public in the performance of their functions;
  - b. give effect to the provision of Article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and
  - c. ensure independent oversight of the handling of complaints by the Service.
80. The functions of the Authority are spelt out under section 6 of the Act as follows:
- (a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations; (b) receive and investigate complaints by members of the Service;



- (c) monitor and investigate policing operations affecting members of the public;
  - (d) monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;
  - (e) conduct inspections of Police premises, including detention facilities under the control of the Service;
  - (f) co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;
  - (g) review the patterns of Police misconduct and the functioning of the internal disciplinary process;
  - (h) present any information it deems appropriate to an inquest conducted by a court of law;
  - (i) take all reasonable steps to facilitate access to the Authority’s services for the public;
  - (j) subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;
  - (k) make recommendations to the Service or any State organ; (l) report on all its functions under this Act or any written law; and
  - (m) perform such other functions as may be necessary for promoting the objectives for which the Authority is established (emphasis added).
81. The 5<sup>th</sup> Respondent is established under Article 246 of the Constitution. Its functions include “observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service”. The 5<sup>th</sup> Respondent has powers under section 11 of the National Police Service Commission Act, Cap. 85, to *inter alia*:
- a. conduct public inquiries on matters relating to its mandate as provided under Article 246 (3) of the Constitution and publish the outcome the outcome of such inquiries;
  - b. issue summons to witnesses; and
  - c. take lawful disciplinary action on any officer under its control.
83. In performing their functions, the Respondents are obligated to respect, uphold and defend the Constitution as commanded by Article 3 the Constitution. Further, the national values and principles of governance in Article 10 bind the respondents whenever they are applying, interpreting the Constitution or implementing public policy decisions. These national values and principles of governance include the rule of law, human dignity, equity, equality, human rights, non-discrimination, good governance, integrity, transparency and accountability.
84. The shooting incident giving rise to this Petition occurred on 23<sup>rd</sup> October 2022. The Petitioners were forced to file this Petition on 24<sup>th</sup> October 2023, a year after the shooting incident, because as pleaded in the Petition, no information was forthcoming to the 1<sup>st</sup> Petition regarding the update of the status of the investigations or any action taken against the perpetrators of the shooting. Even at this stage of the proceedings, as far as this court is aware, no information has been availed to the Petitioners.



85. This court has seen letters dated 20<sup>th</sup> May 2023 from counsel for the Petitioners addressed to Chairperson of the 4<sup>th</sup> Respondent, dated 30<sup>th</sup> June 2023 addressed to the Secretary, Commission on the Administration of Justice and dated 31<sup>st</sup> July 2023 addressed to the 2<sup>nd</sup> Respondent. There is no evidence that these letters were responded to or the information sought in those letters provided to counsel for the Petitioners.
86. Article 35 (1) of the Constitution guarantees every citizen the right to access to information held by the State or another person and required for the execution or protection of any right or fundamental freedom. This court appreciates that the information referred to above may be limited in line with Article 24 of the Constitution which provides that:
- A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
- (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
87. Section 6 of the Access to Information Act, Cap. 7M allows limitation of right of access to information under Article 24 in respect of information whose disclosure is likely to:
- (a) undermine the national security of Kenya;
  - (b) impede the due process of law;
  - (c) endanger the safety, health or life of any person;
  - (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made; (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
  - (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;
  - (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
  - (h) damage a public entity's position in any actual or contemplated legal proceedings; or
  - (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.



88. Save for stating that the information sought by the Petitioners was privileged, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents did not adduce any evidence to show in what manner the information they possess after the investigations is privileged. Even assuming that the information is protected by the law as claimed, to my mind, the Respondents, especially the 2<sup>nd</sup> and 4<sup>th</sup>, ought to have given updates to the family of the deceased regarding the information gathered during investigations into the circumstances surrounding the fatal shooting of the deceased, which is not disputed, and any anticipated further action if need be, in the matter.
89. What would have stopped the Respondents from informing the family of the deceased of the status of the investigations and even telling them that the status of the investigations and if prosecution is anticipated and if so, all the evidence gathered would be shared at the pre-trial stage or, for that matter, the decision reached about the shooting and whether anyone was found culpable or not? By their actions in failing to do this, the respondents violated the rights of the Petitioners.
90. In *Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission* [2016] eKLR, the Court stated as follows in respect to disclosure of information:
- “ [270] Article 35(1) (a) of the *Constitution* does not seem to impose any conditions precedent to the disclosure of information by the state. I therefore agree with the position encapsulated in *The Public’s Right to Know: Principles on Freedom of Information Legislation – Article 19* at page 2 that the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances and that public bodies have an obligation to disclose information and every member of the public has corresponding right to receive information. Further the exercise of this right should not require individuals to demonstrate a specific interest in the information”.
91. Turning to other rights and freedoms alleged to have been violated, it is my considered view that the Petitioners have pleaded with precision and specificity the rights and freedoms said to have been violated by the Respondents. The deceased was a foreign national and the circumstances of his shooting, as far as can be discerned from the material placed before the court, was being discussed at high government levels involving some of the Respondents, the Ministry of Foreign Affairs and the Pakistani High Commission. It was imprudent on the part of the Respondents to keep the Petitioners, especially the family of the deceased, in the dark without updates of the progress of the investigations and the outcome of that investigation.
92. The right to life is guaranteed under Article 26 of the *Constitution*. Sub-article 3 provides that A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law. Article 27 (1) and (2) of the *Constitution* provide that (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. Further, Article 29 of the *Constitution* provides that:
- Every person has the right to freedom and security of the person, which includes the right not to be—
- (a) deprived of freedom arbitrarily or without just cause;
  - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
  - (c) subjected to any form of violence from either public or private sources;



- (d) subjected to torture in any manner, whether physical or psychological;
  - (e) subjected to corporal punishment; or
  - (f) treated or punished in a cruel, inhuman or degrading manner.
93. To my mind, by shooting the deceased in the circumstances disclosed in the Petition and which shooting has been admitted save for the allegation that it was mistaken identity, the Respondents violated the rights of the deceased under Articles 26, 27, 28 and 29 of the *Constitution*. The 1<sup>st</sup> Respondent, in my view, cannot escape responsibility by claiming that the functions of that office exempt that office from any responsibility in this matter. The 1<sup>st</sup> Respondent's functions under section 5 (1) include advising Government Ministries, Departments, constitutional commissions and State Corporations and legal matters and on all matters relating to the *Constitution*, international law, human rights, and in facilitating, promoting and monitoring the rule of law, the protection of human rights and democracy, especially in a matter like this one.
94. The 3<sup>rd</sup> Respondent has the responsibility to act on the recommendations of the Independent Policing Oversight Authority, including compensation to victims of police misconduct." In my view, the 3<sup>rd</sup> Respondent, too, cannot escape responsibility. In the same breath, the 5<sup>th</sup> Respondent cannot escape responsibility by virtue of Article 246 of the *Constitution* that commands that office to observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service.
95. Failure to conduct independent, prompt and effective investigations and commence prosecution or to complete those investigations or in any other manner act on the outcome of those investigations by the Respondents violated the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21(1) of the *Constitution*, Articles 6 and 7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*(CAT) and Article 2 and 7 of the *ICCPR*.
96. In my view, the deceased was subjected to torture which is defined under Article 1 of *CAT* in the following terms:
- “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
97. The State Party is required under Articles 6 and 7 of *CAT* to take into custody any person who may have committed torture under Article 4 pf CAT and take appropriate action against such a person including prosecution.
98. After subjecting the evidence of all the parties, the relevant provisions of the law including international instruments cited by the Petitioners, to scrutiny, it is my finding that the Petitioners have met the threshold in a constitutional proceeding like this one. They have persuaded this court that the rights of the deceased as pleaded were violated and that each respondent had a role to play to ensure that the Petitioners, specifically the 1<sup>st</sup> Petitioner, was updated on the status and outcome of



the investigations and what action, if any, was being taken or was likely to be taken to bring culprits to book.

99. It is also my considered view that the Petitioners' right under Article 47 of the Constitution was violated.

### **What reliefs are available to the Petitioners**

100. The Petitioners have pleaded the nature of the reliefs they are seeking from the Respondents. In my view, after careful analysis of the pleadings, submissions and the law, some of the reliefs sought, especially compensation, may not be applicable to all the Petitioners.

101. I have considered the applicable law for the reliefs sought including Article 14 (1) and (2) of CAT provide that:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

102. I have also considered article 2 (3) of the ICPPR which provides that:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of Judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

103. I have also considered precedents on the issue of compensation for violation of fundamental rights and freedoms under the Constitution of Kenya. There is consensus that compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. In this regard, I agree with the Court in MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment), the Court stated that:

“It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.<sup>45</sup>The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the courts.<sup>46</sup> Monetary compensation for violation of fundamental rights is now



an acknowledged remedy in public law for enforcement and protection of fundamental rights; Such claim is distinct from, and in addition to remedy in private law for damages for tort.<sup>45</sup>*Mbogo & another v Shab*{1968} EA 93<sup>46</sup>VK Sircar, Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf><sup>0qw-</sup>

104. I find and hold that the Petitioners are entitled to reliefs and that the 1<sup>st</sup> Petitioner and the family of the deceased are entitled to compensation. The 1<sup>st</sup> Petitioner has not stated the amount the family of the deceased is seeking in damages. It is left to the discretion of this Court to arrive at an appropriate figure in damages. In arriving at that figure, I am alive to the fact that a lost life cannot be compensated in monetary terms nor is the pain and suffering the family must have gone through.

105. The challenges faced by courts in awarding compensation in a matter like this was expressed by the Court in the *MWK case* I have cited above as follows:

“It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms.”

106. Bearing all the circumstances of this case in mind, it is my view that a global award of Kshs 10,000,000 is an appropriate award for compensation.

## Conclusions

107. In view of the analysis above and guided by the law and authorities cited, I find and hold that the Respondents, jointly and severally, by their actions and or omissions while performing their respective functions as shown above, violated the rights of the Petitioners. Consequently, I grant the following reliefs:

- a. A declaration does and is hereby issued that the use of lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary to protect life or prevent serious injury from an imminent threat; that the intentional taking of life by police officers is permissible only if it is strictly necessary to protect life from an imminent threat and that the use of lethal force against Arshad Sharif by shooting him on the head was arbitrary, unproportionate, unlawful and unconstitutional.
- b. A declaration does and is hereby issued that the unlawful shooting to death of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on October 23, 2022 violated his right to life under article 26 of the *Constitution*; right to equal benefits and protection of the law under article 27 of the *Constitution*; right to dignity under article 28 and right to security of the person under article 29 of the *Constitution*.
- c. A declaration does and is hereby issued that the Petitioners are entitled to effective remedies as guaranteed by article 23 of the *Constitution*; Article 2(3) of the *ICCPR*; article 14 of *CAT* and article 7(1) of the *Banjul Charter* for the violations of Arshad Sharif's fundamental rights and freedoms through the unlawful and admitted shooting of Arshad Sharif by the Kenyan Police officers at Kajiado County on 23<sup>rd</sup> October 2022.



- d. A declaration does and is hereby issued that failure to conclude the conduct of independent, prompt and effective investigations and to take appropriate action including prosecution of the perpetrators of the fatal shooting of Arshad Sharif, if found culpable, further violates the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under article 21(1) of the Constitution, article 6 and 7 of CAT; article 2 and 7 of the ICCPR.
- e. A declaration does and is hereby issued that Article 244(a) and 246(3) of the Constitution commands the Respondents to take appropriate actions, including to punish and prosecute police officers who killed Arshad Sharif, if found culpable. Consequently, a mandatory order does and is hereby issued compelling the Respondents to conclude investigating, take appropriate action including disciplinary action and prosecution of the police officers who shot and killed Arshad Sharif at Kajiado County Kenya on 23<sup>rd</sup> October 2022 if found culpable.
- f. An order does and is hereby issued compelling the Respondents to supply the Petitioners with the update of the status of the investigations and the recommendations the Respondents, especially the 2<sup>nd</sup> and the 4<sup>th</sup> Respondents, have arrived at in regard to the appropriate action to be taken at the conclusion of the investigations.
- g. Judgment be and is hereby entered in favour of the 1<sup>st</sup> Petitioner against the respondents jointly and severally for a global sum of Kshs 10,000,000/= by way of general damages, which sum shall attract interest at court rates from the date of filing this Petition until payment in full.
- h. Costs of this Petition.

108. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 8<sup>TH</sup> DAY OF JULY 2024**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Ochiel for the Petitioners

Mr. Kipkuto for the 4<sup>th</sup> Respondent

Ms Akunja for the 2<sup>nd</sup> Respondent

