REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NUMBER 410 OF 2018

ROSE OWIRA.....1ST PETITIONER

CHRISTINE MMBONE MADIGA.....2ND PETITIONER

MILKA WANJIKU.....3RD PETITIONER

EVALINI ILUSA.....4TH PETITIONER

FRANCISCA MONTHEE.....5TH PETITIONER

ISAAC MUNYUA NGONYIRI.....6TH PETITIONER

ROSE SYOMBUA KISULU.....7TH PETITIONER

ESTHER WANJIRU NG'ANG'A.....8TH PETITIONER

PERIS KEMUNTO.....9TH PETITIONER

VALD KIRIGA.....10TH PETITIONER

STELLA MARIES NTHENYA.....11TH PETITIONER

ROSE ESEME.....12TH PETITIONER

MARY WANJIRU.....13TH PETITIONER

JOSEPHAT ONGAYA.....14TH PETITIONER

ANN NJERI NYAMBURA.....15TH PETITIONER

MOTHERS AND WIDOWS OF VICTIMS OF EJKS.....16TH PETITIONER

LUCY WAMBUI GATHUCI.....17TH PETITIONER

MILKA WAIRIMU KAMANDE.....18TH PETITIONER

ALBINA KATHURE.....19TH PETITIONER

BINTO ALIO MOHAMMED.....20TH PETITIONER

ISMAEL WAINAINA KARIUKI.....21ST PETITIONER

PAMELLA AKINYI.....22ND PETITIONER

LILLIAN ACHIENG.....23RD PETITIONER

INTERNATIONAL JUSTICE MISSION.....24TH PETITIONER

VERSUS

ATTORNEY-GENERAL.....1ST RESPONDENT

INSPECTOR-GENERAL OF POLICE.....2ND RESPONDENT

AND

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....1ST INTERESTED PARTY

INDEPENDENT POLICING

OVERSIGHT AUTHORITY.....2ND INTERSTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION.....4TH INTERESTED PARTY

INDEPENDENT MEDICO-LEGAL UNIT (IMLU).....5TH INTERESTED PARTY

JUDGEMENT

Introduction

1. Rose Owira, Christine Mmbone Madiga, Milka Wanjiku, Evalini Ilusa, Francisca Monthee, Isaac Munyua Ngonyiri, Rose Syombua Kisulu, Esther Wanjiru Ng'ang'a, Peris Kemunto, Vald Kiriga, Stella Maries Nthenya, Rose Eseme, Mary Wanjiru, Josephat Ongaya and Ann Njeri Nyambura being the respective 1st to 15th petitioners, and Lucy Wambui Gathuci, Milka Wairimu Kamande, Albina Kathure, Binto Alio Mohammed, Ismael Wainaina Kariuki, Pamella Akinyi and Lillian Achieng being the respective 17th to 23rd petitioners are each related to a deceased person said to have died in the hands of the Kenyan police. The 16th Petitioner, Mothers and Widows of Victims of EJKS, is an unincorporated self-help group that brings together relatives of persons allegedly killed by the police. The 17th to 23rd petitioners are members of the group. The 24th Petitioner, International Justice Mission (IJM), is an international human rights agency registered in Kenya as a company limited by guarantee.

2. The 1st Respondent, the Attorney General, is the principal legal adviser to the Government of Kenya. The 2nd Respondent, the Inspector-General of Police, exercises independent command over the National Police Service and performs other functions prescribed by the law.

3. The Kenya National Commission on Human Rights (KNCHR) is the 1st Interested Party. The KNCHR derives its existence from Article 59 of the Constitution and is established under the Kenya National Commission on Human Rights Act, 2011 with the mandate to promote and protect human rights. The 2nd Interested Party, the Independent Policing Oversight Authority ('IPOA') is established under the Independent Policing Oversight Authority Act, 2011 ('IPOA Act') to provide civilian oversight over the work of police in Kenya. The 3rd Interested Party, the Director of Public Prosecutions (DPP) exercises prosecutorial mandate on behalf of the State by virtue of Article 157 of the Constitution. The DPP is empowered by the Constitution to direct the 2nd Respondent to investigate any information or allegation of criminal conduct and the 2nd Respondent shall comply with any such direction.

4. In the course of the proceedings the 4th Interested Party, Kenya Human Rights Commission ('KHRC') and the 5th Interested Party, Independent Medico-Legal Unit ('IMLU') successfully applied to join the proceedings. The KHRC is a non-governmental organisation whose main purpose is the protection and promotion of human rights in Kenya. The IMLU is a human rights non-governmental organisation working against torture, violence and discrimination.

5. Through their petition dated 16th November, 2018 the petitioners seek the following reliefs:-

> **a) A declaration that the 2nd Respondent has failed in his constitutional obligation to investigate instances where the use of force by police officers led to death, in total violation of Article 244 (c) of the Constitution, and paragraph 6 of the Sixth Schedule of the National Police Service Act.**

b) A declaration that the failure by the 2nd Respondent to investigate instances where the use of force led to death amounts to a violation of the Petitioners' right to equal protection and benefit of the law.

c) An order of mandamus be issued directing the 2nd Respondent to initiate prompt, thorough, and impartial investigations into the circumstances under which the Petitioners' kin died at the hands of the police, and report progress to the court within such periods that the court may direct.

d) A further order directing the 1st Respondent be at liberty to advise the President to establish a judicial commission of inquiry to conduct thorough, independent, impartial and effective investigation into the documented cases of extrajudicial killings and the use of excessive lethal force by police officers.

e) Such other, further, additional, incidental and/or alternative reliefs or remedies as Court shall deem just and expedient.

The Petitioners' Case

6. The 24th Petitioner alleges that it has documented and recorded several cases of killings carried out by the police force within Nairobi which remain unsolved. It states that the outcome of investigations, if any, into these killings are unknown and the families of the victims and the public at large are yet to be informed of the findings. Some of those killed are related to the 1st to 15th petitioners and the 17th to 23rd petitioners.

7. The petitioners assert that the 2nd Respondent has not discharged his constitutional and legal obligation by failing to thoroughly, promptly and impartially investigate the killings of the kin of the affected petitioners. This, they aver, violates Article 244(c) of the Constitution and paragraph 6 of the Sixth Schedule of the National Police Service Act, 2012. The 2nd Respondent is further accused of failing to put in place adequate measures to protect life, and that he has breached his duties to observe, respect, protect, promote and fulfil the petitioners' fundamental rights and freedoms as required under Article 21 of the Constitution.

8. The 2nd Respondent is further accused of having violated the 9th to 15th petitioners' rights to access justice and information thus violating Articles 48, 35, 19(2) of the Constitution, by failing to inform them of the existence of inquest proceedings regarding their deceased kin, and requiring their participation in the proceedings. The petitioners further claim that they are owed the truth on their deceased family members' deaths, and the 2nd Respondent as the head of the Kenya Police Service is accused of violating their rights as envisaged under international treaties and conventions including the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989), and the UN Minnesota Protocol on the Investigation of Potentially Unlawful Deaths (2016).

9. The petitioners filed further affidavits sworn by the 3rd, 4th, 6th, 15th and 23rd petitioners on 23rd October, 2019 attesting to the fact that they were not informed of the existence of an inquest into their relatives' deaths and only came to know of the said inquests upon reading the respondents' response to this petition. It is further alleged that the only party aware of the inquests was the 2nd Respondent despite the fact that inquests are within the purview of the 3rd Interested Party. The petitioners therefore contend that the magisterial inquests were being conducted secretly and without transparency or intimation to the family members of the deceased persons.

10. The 24th Petitioner filed a further affidavit sworn by Harriet Mwendwa on 23rd October, 2019 in response to the replying affidavit of the 2nd Interested Party. It is deposed that although the 2nd Interested Party is in the process of investigating the complaints cited in the petition, it has not indicated the steps it has taken and measures utilized in the cases and why more time is required to conclude the investigations. The 24th Petitioner asserts that the 2nd Interested Party must strive to carry out speedy investigations as the same cannot be done in perpetuity.

11. Furthermore, Ms Mwenda avers that a proper interpretation of the Sixth Schedule of the National Police Service Act relieves judicial officers from the burden of conducting inquests into unlawful killings perpetuated by the police. She additionally states that according to rules 5 and 6 of Part B of the Conditions as to the Use of Firearms in the National Police Service Act, the role of investigating police killings is bestowed upon IPOA and 2nd Respondent. It is therefore her testimony that police killings are not envisaged as a subject area for inquests under sections 395 and 386 of the Criminal Procedure Code as the cause of death and perpetrators are usually known.

12. According to Ms Mwenda, the 2nd Respondent has not refuted that his officers were involved in the killings, and is therefore deliberately absconding his duty of carrying out thorough, prompt and effective investigations into the killings by referring the same to the courts for inquests. Moreover, it is claimed that the respondents and the DPP have failed to justify why inquests were necessary in the cases in which they have initiated inquest proceedings.

13. In response to the DPP's grounds of opposition, Ms Mwenda deposes that the 3rd Interested Party has failed to appreciate that he has an identifiable stake or legal interest or duty in the proceedings though he may not be directly involved in the litigation as espoused in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. She avers that the 3rd Interested Party's stake regards the institution of public inquest proceedings and the files forwarded to him as indicated in the 2nd Respondent's replying affidavit. Ms Mwenda avers that the DPP has failed to provide concrete reasons as to why he initiated a public inquest in the Mukuru case while the matter was under investigation by the 2nd Respondent.

The 1st, 4th and 5th Interested Parties' Cases

14. The 1st, 4th and 5th interested parties supported the petition. The 1st Interested Party filed a replying affidavit sworn on 29th November, 2019 by its Chief Executive Officer ('CEO'), Dr Benard Mogesa. The CEO avers that the 1st Interested Party has conducted investigations

relevant to this petition. His evidence is that an investigation conducted in May 2008 concerned complaints of alleged torture, killings and disappearances of persons attributed to the Kenya Defence Force.

15. It is the 1st Interested Party's deposition that in July 2007 it documented at least 300 cases that implicated the police in extra-judicial killings and forced disappearances.

16. The 1st Interested Party alleges that despite the public outcry over the highlighted and documented incidences by itself and the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Government has in blatant disregard of its obligations under both national and international law, failed to meaningfully investigate the said incidences to ensure perpetrator accountability and justice for the victims.

17. George Kegoro who is the Executive Director of the 4th Interested Party swore an affidavit on 28th March, 2019 describing the state of police killings in Kenya. He avers that the 4th Interested Party supports the petition because arbitrary killing of suspects is an infringement of the right to life. Further, that prompt and impartial investigations have to be conducted to bring perpetrators of extra-judicial killings to face murder charges; that families of victims have to be given all the information concerning the deaths of their beloved ones and be allowed to participate in inquest proceedings; and, that there is need to establish a judicial commission of inquiry to probe into the reported deaths attributed to extra-judicial killings and make recommendations to the President.

18. The 5th Interested Party filed a replying affidavit sworn by its Executive Director, Peter Kiama on 28th June, 2019, generally highlighting its work in the fight against extra-judicial killings and asserting its support of the petition.

The Respondents' Case

19. The 1st and 2nd respondents filed a replying affidavit sworn on 23rd July, 2019 by Bernard Nyakwaka, a Commissioner of Police. The respondents deny the allegation that they have abdicated their duties and assert that the cases which are the subject of this petition have been investigated with some pending inquest and others awaiting the advice of the DPP. The respondents claim that in some cases members of the public have failed to cooperate thus complicating investigations; perusal of records at some police stations revealed no information of the deaths; or witnesses have failed to cooperate. The respondents aver that the fact that a murder has not been resolved or a suspect has not been charged is not an indication of the culpability of the police or that they have failed to investigate.

20. The respondents further depose that this Court has no jurisdiction to direct the President on how to discharge his mandate under Section 3 of the Commissions of Inquiry Act or otherwise since the Constitution has clear provisions on separation of powers. Moreover, it is avowed that the Court cannot supervise the police in the performance of their duties as Article 245(2)(b) of the Constitution confers independence to the 2nd Respondent in the discharge of his mandate.

21. It is additionally averred that the allegations set out in the petition have not met the legal threshold to warrant grant of the orders sought. The respondents depose that the highlighted cases were brought to the attention of the police and have been handled in line with the mandate outlined by the National Police Service Act. Further, that the conduct of inquest proceedings before the courts is beyond their control.

22. The respondents urge the Court to exercise caution when reviewing and referencing the reports submitted by the petitioners alleging that the same are biased and lack probative value.

The 2nd and 3rd Interested Parties' Cases

23. The 2nd and 3rd interested parties joined the respondents in opposing the petition. The 2nd Interested Party filed a replying affidavit sworn on 14th March, 2019 by Jeremiah Arodi, the Director-in-Charge of Investigations. It is the IPOA's averment that the incidences which are the subject of the petition were taken up for investigation and are currently in advanced stages of investigations. It is deposed that in compliance with Article 35 of the Constitution, the 2nd Interested Party informs and updates complainants on the progress of their cases, the dates when their cases are coming up in court, as well as other integral information.

24. It is asserted that there are several challenges faced in the course of investigations so that they cannot be conducted promptly. It is deposed that the delays can be due to key witnesses who delay or refuse to record statements with the 2nd Interested Party; lack of cooperation from the National Police Service; or reliance on other agencies in the conduct of investigations.

25. The 2nd Interested Party contends that the decision to set up a commission of inquiry pursuant to Section 3 of the Commissions of Inquiry Act solely rests with the President and is discretionary. Therefore the petitioners cannot require the Court to compel the 1st Respondent to advise the President to do so, as the President is not bound by the advice of the 1st Respondent. The 2nd Interested Party is of the view that the petitioners should exercise the powers conferred upon them by Article 1(1) and (2) and 131(2) of the Constitution and petition the President directly to set up a judicial inquiry into the complaints.

26. The 3rd Interested Party filed grounds of opposition and opposed the petition on the grounds that the petition discloses no cause of action against the DPP; that the DPP has instituted a public inquest in respect of the killing of eight persons at Mukuru; that the DPP has not obtained the outcome of investigations of the other incidents mentioned in the petition; and that the DPP can only engage his prosecutorial powers where a crime has been committed.

The Analysis

27. I have considered the cases presented to the Court by the parties in their pleadings and submissions and find that the issues for determination are:

a) Whether the Court can order the 1st Respondent to advice the President to establish a judicial commission of inquiry;

b) Whether the 2nd Respondent has failed to intiate and conduct investigations into the alleged killing of the 1st to 15th and 17th to 23rd petitioners' kin by the police;

c) Whether the 2nd Respondent violated the rights of some of the petitioners to access information and justice by failing to inform them of the inquest proceedings regarding their deceased kin;

d) Whether the Court can direct the 2nd Respondent to initiate prompt investigations into the circumstances under which the 1st to 15th and the 17th to 23rd petitioners' kin died; and

e) Whether the petitioners can introduce new issues against the 2nd Interested Party.

The Power to establish a Judicial Commission of Inquiry

28. The petitioners submit in their joint submissions filed on 29th January, 2020 that they recognise the President's discretionary power under Section 3 of the Commissions of Inquiry Act, and do not seek to interfere with the exercise of that discretion. However, they assert that when Section 3 is read together with Section 6(5) of the Office of the Attorney General Act, 2012 it is clear that the 1 st Respondent as the principal legal adviser to the Government is the one to advise the President on the establishment of a commission of inquiry. Reliance is placed on the decision of of the Supreme Court **In the Matter of Interim Independent Electoral Commission [2011] eKLR** to buttress the contention that the 1st Respondent cannot claim the sanctity of independence to shut his eyes from matters which the courts may take judicial notice of.

29. The petitioners further assert that directing the Attorney General to be at liberty to advise the President does not amount to interference with the independence or discretion of the Attorney General. The petitioners further contend that in terms of public policy and public interest, a judicial commission of inquiry is a better alternative to litigation. The petitioners cite the decisions of the Supreme Court in the cases of **Herman Phillipus Steyn v Giovanni Gneechi-Ruscone [2013] eKLR** and **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR** in support of the proposition that this Court's jurisdiction cannot be limited by the text of a statute.

30. The respondents on their part filed submissions dated 2nd June, 2020 and submit that under Article 156(4) of the Constitution, the 1st Respondent does not possess the powers the petitioners are asking his office to exercise. Moreover, that Section 3 of the Commissions of Inquiry Act does not empower the 1st Respondent to advise the President to form any commission of inquiry and the interpretation by the petitioners is erroneous. It is submitted that the Court therefore lacks jurisdiction to compel the Attorney General to exercise a legal duty which his office does not have powers or jurisdiction to perform.

31. It is further submitted that the office of the Attorney General is an independent office and shall not be under the direction or control of any person or authority. According to the respondents, the petitioners are indirectly asking the Court to compel the President to form a commission of inquiry, which they submit is in violation of Article 143(2) of the Constitution which provides that no civil proceedings can be instituted against the President in respect of anything done or not done in the exercise of constitutional powers.

32. The 2nd Interested Party's submissions were filed on 25th February, 2020. Reliance is placed on the holdings in the cases of **Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** and **Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah [2015] eKLR** for the submission that the prayer sought cannot issue because the petitioners have not demonstrated that the 1st Respondent has a duty to advise the President to set up a judicial commission of inquiry. Further, that the petitioners have not demonstrated that they had asked the 1st Respondent to advise the President to set up a judicial commission of inquiry and the 1st Respondent failed to do so. It is also urged that the petitioners have not shown that they do not have any other adequate remedy other than to have the Attorney General compelled to advise the President.

33. The 2nd Interested Party asserts that even if the Court were to issue the order sought, the President is not obligated to take up the advice of the 1st Respondent as under Section 3(1) of the Commissions of Inquiry Act the power to set up a judicial commission of inquiry is discretionary. To buttress the arguments, the 2nd Respondent relies on the decision in **Apollo Mboya v the Attorney General and 3 others; Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR.**

34. The 3rd Interested Party did not file any submissions.

35. According to Section 3 of the Commissions of Inquiry Act:

(1) The President, whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.

36. The Constitution and the Commissions of Inquiry Act do not explicate as to when the President may deem it *'advisable'* to issue a commission. Nevertheless, the petitioners have interpreted this provision to mean that the President will issue a commission upon the advice

of the Attorney General who is designated the legal adviser to the Government by Article 156(4)(a) of the Constitution. However, a close reading of Article 156 of the Constitution, as well as Section 5 the Office of the Attorney-General Act, 2012, on the functions of the Attorney General, does not give any indication that this interpretation is accurate.

37. I am guided by the decision in the case of **Apollo Mboya v Attorney General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another [2019] eKLR** where it was determined that:

> **"22. From the reading of section 3(1) of the Commission of Inquiry Act; I find no provision stipulating, that the President of the Republic of Kenya can be compelled or supervised to discharge his mandate as provided under the aforesaid section 3 of the Commission of Inquiry Act. The President of the Republic of Kenya is the head of the executive and he discharges his mandate independently under the doctrine of separation of powers. Section 3 of the Commission of Inquiry Act is not couched in a mandatory form, and as such the President is at liberty to exercise his powers at his own discretion and at his time and when he deems fit so to do."**

38. The Court went on to state that:

> **"23. In Republic vs Honourable Chief Justice of Kenya & others, Ex-parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004 the Court expressed itself as follows:-**
>
> **'The court agrees that the Office of President is a special and unique office, which has immense, and numerous powers and responsibilities. In the court's view these powers and responsibilities are so vast and important that the President must always direct his undivided time and attention to his duties and responsibilities for the sake of protecting the interests of the public. It is clear that the President is always vested with certain important and unrestricted political powers and in the exercise of such powers the President is to use his own discretion. However, the President always remains accountable to his country as a political agent.'**
>
> **24. The President of the Republic of Kenya though has a duty pursuant to section 3 of the Commission of Inquiry Act to appoint Commissioner or Commissioners and authorize him or them to inquire into conduct of any public officer or of any public body or into any matter into which an inquiry would in his opinion be in the public interest, and in exercise of such powers, the President is to use his own discretion and as such he cannot be compelled to do so."**

39. On the power of the Attorney General to advise the President to set up a commission for inquiry, the Court held that:

> **"32. In the instant petition, the petitioner has not demonstrated, that there is a legal duty reposed upon the Respondents to advise the President to set up a commission of inquiry. Under section 3 of the Commission of Inquiry Act, I find neither the President nor the Attorney General is required under any statutory duty to act in a particular manner to warrant issuance of orders of mandamus to compel the performance of statutory duties. I find that it would be contrary to law, for this court to compel the 1st Respondent to advise the President of the Republic of Kenya in a particular manner, to wit, to set up a commission of inquiry. I find to do so would amount to this court arrogating itself the function of the 1st Respondent, which is contrary to Article 156 4(a) of the constitution and section 5(1) and (b) of the office of the Attorney General Act, which reposes that advisory function upon the 1st Respondent. It would further go against the fundamental constitutional tenet of separation of powers. I am further to the above alive of the fact, that the decision to set up a commission of inquiry pursuant to section 3(1) of the Commission of Inquiry Act solely vests with the President and is entirety discretionary. That means even if the court make orders compelling the 1st Respondent to advise the President of the Republic of Kenya as sought by the petitioner, the orders would be in vain since the President is not bound by the 1st Respondent's advise and cannot be compelled to set up the commission. It is a trite law that court do not act in vain, and I find that this court should not be enjoined to act in vain."**

40. I concur with the statements of the Court in the cited case. There is no legal duty imposed upon the Attorney General under the Constitution or any statute which requires him to advise the President to set up a commission of inquiry. This Court cannot compel the Attorney General to advise the President on a matter which he is not mandated to. Furthermore, the power to set up a commission of inquiry is completely vested in the President of Kenya and is exercised upon his own discretion. This Court is guided by the doctrine of separation of powers and recognises that to compel the 1st Respondent to advise the President to set up a commission of inquiry would amount to encroaching on the mandates of the Attorney General and that of the President of the Republic of Kenya.

41. The petitioners asked this Court to rely on the reports and averments of the petitioners and interested parties in reaching the conclusion that the respondents have failed in the discharge of their constitutional mandates. As was pointed out by the respondents, reports alone cannot form a basis for such a finding. However, the fact that international and national human rights agencies have identified extra-judicial killings as a deeply rooted problem in Kenya should strike at the conscience of the person who occupies the Office of the Attorney General of the Republic of Kenya. A solution needs to be quickly found otherwise the Attorney General will have failed his mandate under Section 5(2) of the Office of Attorney-General Act which provides that:

> **"In the execution of the functions conferred by the Constitution and this Act, the Attorney-General shall 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."**

42. Although the Commissions of Inquiry Act does not expressly state that the Attorney General can advise the President to issue a commission, I hold the view that where sufficient evidence has been placed before the Attorney General that killing of alleged suspects by the police is happening in unclear circumstances and without legal justification, the Attroney General has a duty to advise the Government,

the President included, that the issuance of a commission may be the best way of finding a solution for the problem. Even though commissions of inquiry are often disparaged by Kenyans, their role is important as was observed by Justice Cory in the Canadian case of **Canada (Attorney General) v Canada (Commission for Inquiry on the Blood System) [1997] 3 S.C.R. 440, 151 D.L.R.** that:

> **"30. It may be of assistance to set out what was said regarding the history and role of commissions of inquiry in *Phillips, supra,* at pp. 137?38:**
>
> **As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government. They are created as needed, although it is an unfortunate reality that their establishment is often prompted by tragedies such as industrial disasters, plane crashes, unexplained infant deaths, allegations of widespread child sexual abuse, or grave miscarriages of justice.**
>
> **At least three major studies on the topic have stressed the utility of public inquiries and recommended their retention: Law Reform Commission of Canada, Working Paper 17, *Administrative Law: Commissions of Inquiry* (1977); Ontario Law Reform Commission, *Report on Public Inquiries* (1992); and Alberta Law Reform Institute, Report No. 62, *Proposals for the Reform of the Public Inquiries Act* (1992). They have identified many benefits flowing from commissions of inquiry. Although the particular advantages of any given inquiry will depend upon the circumstances in which it is created and the powers it is given, it may be helpful to review some of the most common functions of commissions of inquiry.**
>
> **One of the primary functions of public inquiries is fact?finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide?ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament or the legislatures to take a long?term view of the problem presented. Cynics decry public inquiries as a means used by the government to postpone acting in circumstances which often call for speedy action. Yet, these inquiries can and do fulfil an important function in Canadian society. In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.**
>
> **Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society. A public inquiry before an impartial and independent commissioner which investigates the cause of tragedy and makes recommendations for change can help to prevent a recurrence of such tragedies in the future, and to restore public confidence in the industry or process being reviewed."**

43. I would think that where there is widespread failure by a State agency to properly execute its mandate, a commission of inquiry would be a viable option for finding out what the problem is and providing solutions so as to avoid future recurrences of the identified problem. The power of the Attorney General to promote human rights is central to the discharge of his mandate and such a mandate should be used to promote constitutional values. Indeed a commission of inquiry may end up exonerating the police service from the blame by the families of those allegedly killed in the hands of the police. In saying so, I am alive to the fact that some of the cases which are the subject of this petition have not been investigated to conclusion and outcomes shared with the families of the deceased. It may eventually turn out that the killings were indeed justified or were even not executed by the police service. Having said so, I nevertheless concur with the respondents that the Court cannot compel the 1st Respondent to advise the President to set up a judicial commission of inquiry.

The 2nd Respondent's failure to initiate and complete investigations

44. The petitioners claim that the history of their cases shows that investigations have been pending for inordinately long periods ranging from two years to ten years. The petitioners re-iterate the allegations as raised in their petition and their affidavits. They cite the case of **Republic v Titus Ngamau Musila Katitu [2018] eKLR** and submit that, just like in the cases of the deceased persons who are the subject of this petition, the facts and cause of the death were not disputed in that case, yet investigations were concluded in the cited case and a conviction secured. The petitioners further rely on the case of **Dilwar v The State of Hayana & another MA No. 267 of 2017 in SLP (CRL) No. 657 of 2017** and urge that there is need for clear timelines for completing investigations.

45. The petitioners cite the decisions in **IP Veronica Gitahi & another v Republic [2017] eKLR** and **Republic v Wilfred Mwiti, Nairobi High Court Criminal Case No. 61 of 2011** and submit that police officers, as provided by Section 61 of the National Police Service Act, should perform the functions and exercise the powers conferred by the Constitution and the Act by use of non-violent means. According to the petitioners, the fact that excessive force was used by the police is not in dispute and the decision by the 2nd Respondent to defer investigations into the deaths of the petitioners' kin to a judicial inquest is not supported by the law and judicial pronouncements in similar cases. Section 61 of the National Police Service Act and paragraphs 5 and 6 of the Sixth Schedule of the Act are used as the founding stones of the stated argument.

46. The petitioners submit that the delay in the investigation of the highlighted cases has impeded the right to justice for the victims and their families and violated the fundamental rights enshrined in the Constitution, particularly Articles 21(1), 26(1), 27(1) and 35. The petitioners assert that they have been denied their right to information on the progress and process of the investigations; the right to have the investigations into the killings of their kin completed in a prompt, thorough and impartial manner; and the right to equal protection and benefit of the law has been denied by the 2nd Respondent's failure to investigate the killings. The petitioners rely on international legal instruments particularly the United Nations Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions; and the UN's Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) which provide guidelines and places obligation on the State to launch thorough and prompt investigations in a transparent manner open to scrutiny from the general public and the victims' families.

47. The 1st Interested Party supports the petitioners' case and submit that despite the highlighted and other documented incidences of gross human rights violations, the Government of the Republic of Kenya has disregarded its obligations under both national and international law, failed to meaningfully investigate the said incidences to ensure perpetrator accountability and justice for the victims. It is submitted that this failure by the State has created an environment of impunity and occasioned violation of the right to life and right to remedy. Reliance is placed on the decisions in **Irene Bleier Lewenhoff & Rosa Valino de Bleier v Uruguay, U.N. Hum. Rts. Comm. No. 30/1978, 13.3, U.N. Doc. CCPR/C/OP/I (1985); Myrna Mack-Chang v Guatemala IACrtHR Ser. C No. 001, Judgement of November 25, 2003;** and **Canada (Attorney General) v Canada (Commission for Inquiry on the Blood System) [1997] 3 S.C.R. 440, 151 D.L.R.** where it was determined that the initial remedy in cases of loss of life is an effective investigation or public inquiry.

48. The respondents on the other hand submit that the petitioners have failed to demonstrate how the 2nd Respondent, in particular, has failed in discharging his duties. It is stated that the delay in the investigations does not amount to a violation of the petitioners' rights neither does it mean that the respondents have failed in discharging their duties. The respondents assert that a person can only be arraigned in court once investigations are completed as was decided in **Republic v Chief Magistrate's Court Nairobi & 4 others [2013] eKLR.**

49. The respondents additionally contend that the petitioners have failed to demonstrate that the investigations are unfair, un-procedural and unconstitutional but rely on delay which does not amount to violation of any right. The argument is supported by reference to the case of **Republic v OCS, Nairobi Central Police Station & 2 others; Ex Parte Applicant: Sixtus Gitonga Mugo [2020] eKLR** where it was held that police investigations can only be faulted if it is demonstrated that they have been undertaken without due regard to traditional considerations of candour, fairness, and justice or in a manner different from what is prescribed by the law.

50. The respondents submit that the 2nd Respondent has not failed to investigate the complaints or allegations of police brutality or extrajudicial killing and investigations are either ongoing or the matters are under judicial inquest. Therefore, it is asserted that there has been no violation of the Constitution as there has been no delay on the part of the respondents as alleged by the petitioners. Reliance is placed on the decision in **Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR** where it was postulated that proving that there has been unreasonable delay must meet a very high threshold.

51. The question is whether the alleged delay in the investigations of the circumstances leading to the deaths of the petitioners' kin has violated their constitutional rights. The petitioners assert that the delay on the part of the 2nd Respondent to complete the investigations into the deaths of their kin amounts to a failure to exercise his mandate under the law. The petitioners submit that the delay in investigating the killings of their kin range from three to more than ten years.

52. The UN's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that judicial and administrative processes should be put in place so as to avoid unnecessary delay in the disposition of cases. When discussing delay in the dispensation of criminal matters, focus is typically on the accused person and their right to a fair trial. However, it must not be forgotten that the victims and survivors of crimes are also entitled to justice through timely investigations. On the importance of prompt investigations, the Court of Appeal in **Charo Karisa Salimu v Republic [2016] eKLR** postulated as follows:

> **"We have cited the two Canadian authorities merely to illustrate the importance of timely dispensation of justice as one of the hallmarks of a free and democratic society, to draw a parallel with the provisions of Article 50 (2) (e) aforesaid and to confirm that the Article is not a mere pious aspiration on paper; that by requiring that a trial must begin and conclude without unreasonable delay, the people of Kenya through the Constitution expect the criminal justice system to bring suspects to trial expeditiously because delays in a trial have far-reaching ramifications to the accused person, the victim, the families, witnesses and even the general public. Article 50 is, therefore, an important safeguard to prevent any oppressive incarceration and to minimize anxiety on the part of the accused person. It is perhaps informed by the time-honoured chapter 40 of the 1251 Magna Carta which stipulated that;**
>
> **'to no one will we sell, to no one deny or delay right or justice.' "**

53. In the case of **Julius Kamau Mbugua v Republic [2010] eKLR** the Court of Appeal cited with approval the decision of the Supreme Court of Canada in **R v Morin [1992] 1 SCR 771** where Sopinka, J held that:

> **"The general approach to a determination as to whether the right has been denied is not by the application of mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay."**

54. The Supreme Court of Canada identified the relevant factors to be considered in determining whether there has been unreasonable delay as:

> **"1. Length of delay;**
>
> **2. Waiver of time periods;**
>
> **3. The reasons for delay including inherent time requirements of the case, action of the accused; actions of the crown; limits on institutional resources; and**
>
> **4. Prejudice to the accused."**

55. In the case before me, the issue for consideration requires determination as to the prejudice suffered by the families of the deceased

person. The 2nd Respondent has averred that every case investigated has been different and therefore timelines vary from case to case. Furthermore, it is submitted that in some cases the delay was caused by the lack of cooperation of members of the community and witnesses. The 2nd Respondent further asserts that other cases are under inquest and are therefore out of their hands.

56. There is merit in the 2nd Respondent's argument that it cannot be held culpable for delay in the matters which were referred for inquests as the same are in the hands of the courts handling those matters. Furthermore, there is little to be done by way of investigating crimes where witnesses refuse to come forward to record statements. I am, however, not convinced by the excuse that witnesses have refused to give evidence in court. The 2nd Respondent must be aware that Section 144 of the Criminal Procedure Code empowers a court to compel a witness to testify. There is no evidence that the 2nd Respondent has applied to the concerned courts for the witnesses to be compelled to testify. This is not helped by the 3rd Interested Party's lukewarm approach to this matter. The 3rd Interested Party is the office to secure attendance of witnesses in public inquests. Coupled with the fact that the inquests were commenced without the knowledge of the families of the deceased persons a bad picture is painted of the 2nd Respondent. An impression is created that there is an attempt to use the courts to close the files.

57. Although the 2nd Respondent has indeed commenced investigations into the cases raised by the petitioners, and this Court is fully aware that each case has different timelines and requires different resources, it is evident that there are no sufficient reasons placed before this Court to explain why each particular case has not been concluded. Generalised explanations will not suffice in a situation where the ultimate right in the Bill of Rights being the right to life as protected under Article 26 of the Constitution is said to have been violated. It is therefore not hard to agree with the petitioners that they have been subjected to years of anticipation waiting for justice to be done and the perpetrators to be tried, convicted and sentenced. The delay is made worse by the lack of communication on the progress of the investigations and major milestones such as the opening of public inquests. I, therefore, find that 2nd Respondent has failed to promptly conclude investigations into the deaths of the petitioners' kin.

58. Mr. Steve Ogolla for the petitioners conceded at the hearing that the IPOA ought to have been made a respondent. He was correct because any blame hoisted on the 2nd Respondent should equally fall on the shoulders of the IPOA.

Breach of right to access to justice and information

59. The 2nd Respondent denies violation of the right to information under Article 35 of the Constitution and asserts that the petitioners have not demonstrated that they requested for any information which was denied and they have therefore failed to meet the constitutional threshold required to establish their case. Furthermore, it is averred that the rights under Article 35 can be limited by the operation of the law such as where the 2nd Respondent may have determined that the information requested was sensitive and declined to grant it. The case of **Timothy Njoya v Attorney General & another [2014] eKLR** is identified as supporting this point.

60. The 1st Interested Party submits that extralegal killings entails the use of illegal force and violates the right to life and the right to freedom and security of the person under Article 26 and 29 of the Constitution. Further, that such killings amount to violation of the right to a fair hearing under Article 50(1) of the Constitution. Reliance is placed on the cases of **Sinaltrainal v Coca Cola 578 F. 3d 1252 (11th Cir. Fla. 2009)** and **Timutras v Turkey (253531/94) [2000] ECHR221 (13 June 2000).**

61. It has been determined above that the 2nd Respondent has failed in promptly concluding investigations into the extra-judicial deaths of the petitioners' kin. The delay in the investigations has meant that some of the petitioners have not seen any justice delivered on behalf of their deceased kin. The Office of the High Commissioner of the United Nations has expressly stated in its Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power that:

> **"4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."**

62. It is further declared that:

> **"5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."**

63. Additionally, paragraph 6 states as follows:

> **"6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:**
>
> **(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;**
>
> **(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;**
>
> **(c) Providing proper assistance to victims throughout the legal process;**

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

64. The provisions above demonstrate that victims of crimes have the right to prompt and expeditious justice which includes the disposal of cases without unnecessary delay. This is similarly stated in Section 9(1)(b) of the Victim Protection Act, 2014 which provides that victims have the right to have a trial begin and conclude without unreasonable delay. Any unreasonable delay in investigating the deaths of the petitioners' kin serves to delay the prosecution of the perpetrators of the killings in clear violation of the petitioners' rights under international and national laws to access to justice without delay. Delayed investigations weaken the chances of conviction as the quality of evidence deteriorates with time. The right of the families to reparations is equally delayed. Of course the investigations may disclose that the killings were justified. Such outcomes would afford the families of the deceased persons closure. Investigations can not last forever. The outcome of an investigation needs to be declared by the investigator for the benefit of the victims of the crime and the suspects.

65. On the breach of the right to information, the 2nd Respondent has expressly averred that the petitioners have been kept abreast on the progress of the investigations where such information can be released to them. It therefore falls upon the petitioners to prove the truth of their allegation. Section 107 of the Evidence Act, Cap. 80 states that where a person wishes for the court to make a judgment as to any legal right or liability dependent on the existence of the facts they assert, the person must prove that those facts exist. It is indeed appreciated that Section 19(1) of the Victims Protection Act specifically protects a victim's right to information. Sub-section (2) specifies that the information shall be such as is necessary for the realisation by the victim of their rights under the Act.

66. Apart for the 2nd Respondent's averment that the petitioners were provided with the necessary information, the 2nd Interested Party contends that it disclosed the necessary information to the victims in accordance with its policy. Without clear proof that the petitioners had attempted to obtain information from the 2nd Respondent and he failed or refused to provide them with the said information it is difficult to find that there was an infringement of the right to information. The need to provide evidence was affirmed by Makau, J in the case of **Christian Juma Wabwire v Attorney-General [2019] eKLR** when he that "**without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms."**

<u>The Prayer that the Court compels the 2nd Respondent to carry out investigations</u>

67. The petitioners aver that the Court can indeed supervise the police in the performance of their duties as it has a mutually countervailing role to provide checks and balances on actions taken by the 2nd Respondent and 2nd Interested Party. Reliance is placed on the Supreme Court opinion **In the Matter of Interim Independent Electoral Commission [2011] eKLR** on the mutually countervailing roles of the organs of government.

68. The petitioners further rely on Article 23(3) of the Constitution which they interpret as bestowing the Court with the power to direct the 2nd Respondent and the 2nd Interested Party to conduct and complete investigations on the use of lethal force. The determinations in **Centre for Rights Education and Awareness & 2 others v Speaker of the National Assembly & 6 others [2017] eKLR;** and **High Court Constitution Petition No. 371 of 2016 Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others** are relied upon to demonstrate the court's power to make directions to the 2nd Respondent.

69. The respondents contend that the prayer is untenable as the investigations are already underway and there is no basis for the High Court to order that the 2nd Respondent re-investigate the matters. The Court is urged not to interfere in the investigatory and prosecutorial powers of the police and DPP as was held in the case of **Republic v Chief Magistrate Milimani & another Ex-parte Tusker Mattress Ltd & 3 others [2013] eKLR.**

70. The 4th Interested Party filed submissions on 26th February, 2020 in support of the petitioners' case. The 4th Interested Party urge that a structural interdict in the nature of mandamus be issued against the 2nd Respondent compelling the initiation of prompt, thorough and impartial investigations into the circumstances under which the petitioners' relatives died. It is stated that such an order allows the Court to supervise acts of a person who has violated the rights of a victim, as was expounded upon by Odunga, J in **County Government of Kitui v Ethics & Anti-Corruption Commission [2019] eKLR.**

71. The 5th Interested Party filed submissions on 27th January, 2020 and submit on the doctrine of separation of powers and why the courts' countervailing powers to check the excesses complained of is unassailable. The 5th Interested Party asserts that the escalation of extra-judicial killings in the country is now a matter of judicial notice and this Court should assert its authority on the issue. It is submitted that even where the Court must respect the doctrine of separation of powers, it should not look the other way when another arm of the government violates the tenets of the Constitution. Reliance is placed on the decisions in **County Government of Kiambu & another v Senate & others [2017] eKLR; Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR;** and **Apollo Mboya v Attorney General & 3 others; and Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR.** Reliance is further placed on the United Kingdom decision in **Miller v The Prime Minister [2019] UKSC 41** where the Supreme Court invalidated the proroguing advice given to the Crown by the Prime Minister. The 5th Interested Party therefore contends that this Court should require the Attorney General to observe his legal duty.

72. On the matter of inquests, the 5th Interested Party contends that the history of police inquests have normally failed to lead to any conclusive findings on the cause of death as was established in the case of **Nisha Sapra v Republic, Nairobi High Court Misc. Criminal Application No. 39 of 2008.** The Court is therefore called upon to prefer a means that best promotes the spirit and purposes of the Constitution and the values stipulated in it. As such it is the 5th Interested Party's assertion that the promotion of the right to life would be upheld by the issuance of the orders sought in the petition.

73. I have considered the arguments of the parties and observe that the office of the Inspector-General of National Police is established under Article 245(1) of the Constitution. Article 245(2)(b) reads that the Inspector-General shall have independent command over the National Police Service, and perform any other functions prescribed by national legislation. Article 245(4) further adds that no person shall give a direction to the Inspector-General with respect to:

> **"(a) the investigation of any particular offence or offences;**
>
> **(b) the enforcement of the law against any particular person or persons; or**
>
> **(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service."**

74. The Court of Appeal in the case of **Communications Commission of Kenya v Office of the Director of Public Prosecutions & another [2018] eKLR** has interpreted these provisions to mean that:

> **"16. The import of Article 245(4) of the Constitution, counsel submitted, is to protect the independence of the Inspector-General of Police and safeguard the process of investigation of any particular offence from interference from any quarters. Furthermore, section 8(1) of the National Police Service Act provides that the service shall be under the overall and independent command of the Inspector-General. It is therefore clear that the Police Act exclusively grants the sole command over the police service, (under which the office of the Director of Criminal Investigations falls), to the Inspector-General of Police."**

75. From the foregoing, it is established that the Inspector-General has independent control over the National Police Service, and therefore no entity is enabled to direct him to carry out any investigations. However, the courts are empowered by Article 165(3)(d)(ii) to determine the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution.

76. Mativo, J in **County Government of Kiambu & another v Senate & others [2017] eKLR** cites with approval the dictum in ***Mumo Matemu v Trusted Society of Human Rights Alliance & 2 others*** *that:*

> **"[Separation of powers] must mean that the Courts must show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy, as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions…."**
>
> **"[I]n a jurisdiction such as ours in which the Constitution is supreme, the Court has jurisdiction to intervene where there has been a failure to abide by [the] Standing Orders which have been given constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case."**

77. The petitioners herein seek an order of mandamus to be issued to compel the 2nd Respondent to initiate prompt, thorough, and impartial investigations into the circumstances under which the petitioners' kin died in the hands of the police, and report progress to the Court within such periods that the Court may direct. In the case of **Shah v Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543,** as cited in the case of **Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR** at paragraph 16, Goudie, J postulated as follows:

> **"*[…] Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy… With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so… Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant… *Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…"**

78. From the above dictum, it is clear that the High Court has jurisdiction to grant an order of mandamus where it is determined that a public authority or officer is obligated to perform a specific statutory duty but fails to do so. Furthermore, in order to ensure that by granting the order the Court has not unduly interfered with the functioning of a public authority or officer, the order will only be granted if there is no

other remedy available to the person claiming for the order to be granted.

79. This Court has found that there has been a significant delay in the investigations into the cases herein. It becomes worrying that the delay is in respect of complaints where people were allegedly killed by the police. Although there is no clear evidence of malice, abuse of power or negligence by the Inspector-General in investigating these cases, the impression created is that the police could be protecting their own. However, there could be valid reasons why investigations in respect of the cases that are the subject of this petition have not been concluded. That is not to condone the slow pace at which the investigations have been moving, but rather to acknowledge that there are factors beyond the control of the 2nd Respondent which may be causing the delay.

80. The good work of the IPOA, as evidenced by the successful prosecution in **Republic v Titus Ngamau Musila Katitu [2018] eKLR,** cannot be overlooked. Nevertheless, the petitioners should not leave this court empty-handed. The duty of the Court is to provide remedy once an injury is proved. In this petition it has been established that there has been delay in the conclusion of some of the investigations. Relief must therefore be provided and an order of mandamus suitable to the circumstances of this case shall shortly issue.

Raising of issues against the 2nd Interested Party

81. The petitioners submit that the failure by the 2nd Respondent and 2nd Interested Party to conduct and complete investigations into the killings of their deceased kin years after their killings is unjustifiable in the circumstances, particularly on the grounds that the facts of their deaths are not disputed. Further, that to date the petitioners have not been informed of the outcomes of the investigations that have been carried out.

82. The 2nd Interested Party asserts that the petitioners enjoined it as an interested party and not a respondent and proceeded to accuse it of not updating the families on the progress of the investigations. According to the 2nd Interested Party, the petitioners should have amended the petition to make it a respondent. Reliance is placed on the case of **Marigat Group Ranch & 3 others v Wesley Chepkoiment & 19 others [2014] eKLR.**

83. In response to the allegation that it has denied the petitioners access to information on the progress of its investigations, the 2 nd Interested Party once again raises the issue that the petitioners' allegation has placed it in an awkward position as the petitioners are accusing it of the violation of a right but maintaining it as an interested party. The allegation that the petitioners have been denied information is nevertheless denied and the 2nd Interested Party maintains that the petitioners have a duty under the Access to Information Act to seek information on the progress of their matters, which they had not done except immediately prior to the institution of this petition.

84. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 describes an interested person as **"a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation"**

85. The petitioners in their petition and affidavits have not raised any claim against the IPOA for failing to conduct and complete its investigations and failing to keep families updated, and only raised these arguments in their written submissions. This amounts to making a claim against the 2nd Interested Party as if it were a respondent. If the petitioners had any claim against the 2nd Interested Party for infringement of their rights, they should have made the 2nd Interested Party a respondent in the case as opposed to an interested party who has a limited role to play in the proceedings. Indeed counsel for the petitioners, Mr. Steve Ogolla, conceded at the hearing that the IPOA ought to have been made a respondent.

86. Moreover, submissions cannot be used as an avenue to raise new issues which have not been raised in pleadings, and therefore the petitioners cannot put forward any new claims against the 2nd Interested Party and the same are ignored.

87. In the case of **Fibre Link Limited v Star Television Production Limited [2015] eKLR,** it was held that submissions are not an avenue to submit evidence but must only be used to clarify issues. Furthermore, in the case of **Clips Limited v Brands Imports (Africa), Limited formerly named Brand Imports Limited [2015] eKLR** Ogola J, held that:

> **"However, it is trite law that new issues cannot be raised in submissions. Korir, J in the case of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting And Training Limited & another [2014] eKLR held that:**
>
> ***'The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.'"***

The Determination

88. It is my final determination that the 2nd Respondent has not failed in investigating the instances where the use of force by police officers led to death as each case is at different stages of investigation or under inquest. However, there are delays in the conclusion of the investigations. Giving timelines to the 2nd Respondent within which to conclude the ongoing investigations may result in rushed investigations that may be detrimental to the interests of the petitioners. In the circumstances of this case, I find a declaratory order will add impetus to the ongoing investigations. An order of mandamus is therefore issued directing the 2 nd Respondent to promptly and impartially conclude the investigations into the cases still pending investigation in respect of the deaths of 1st to 15th and 17th to 23rd petitioners' kin.

89. Although the petitioners forcefully argued against the public inquests already underway, they did not ask for any particular prayer in respect of those matters. In my view, they should actively participate in those matters. Where the IPOA is still actively investigating the matters, the DPP can always be requested to withdraw the matters pending inquest from the courts in order to allow the IPOA conclude investigations. In any case, inquests can sometimes yield useful results as happened in **Kisumu Chief Magistrate's Court Inquest No. 6 of 2017, In the Matter of Baby Samantha Pendo (Deceased)** where the Magistrate recommended the prosecution of some police officers.

90. Apart from the declaratory order issued herinabove, this petition fails in all other aspects.

91. This matter is in the nature of public interest litigation. As such, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 7th day of October, 2020.

W. Korir,

Judge of the High Court