



**Sharma v Attorney General & 3 others (Civil Appeal E065 of 2023)  
[2025] KECA 1470 (KLR) (12 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1470 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E065 OF 2023  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
SEPTEMBER 12, 2025**

**BETWEEN**

**ANJLEE PARVEEN KUMAR SHARMA ..... APPELLANT**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Ong’udi, J.) delivered on 18th November 2022 in Constitutional Petition No. 248 of 2018)*

**JUDGMENT**

1. This is an appeal from the decision of the High Court at Nairobi (Ong’udi, J.) delivered on 18<sup>th</sup> November 2022 in Constitutional Petition No. 248 of 2018.
2. The background to this appeal is that the appellant, Anjlee Parveen Kumar Sharma, filed a constitutional tort claim in her personal capacity as the administrator of the estate of her late husband, Mr. Bunty Bharat Kumar Shah, pursuant to a limited grant of letters of administration issued to her on 26<sup>th</sup> April 2018 in Nairobi High Court Succession Cause No. 498 of 2018. She also brought the petition as the next friend of their minor son, anonymized as YBS. The petition arose from the fatal shooting of Mr. Bunty Bharat Kumar Shah (hereinafter referred to as "the deceased") by police officers on the morning of 21<sup>st</sup> October 2017 at their home in Westlands, Nairobi. The deceased, who was 32 years old at the time of his death, served as a director of the Bobmil Group of Companies and earned a monthly salary of Kshs.600,000 in addition to an annual bonus of Kshs.500,000.



3. In the petition, the appellant alleged that at around 2:49 a.m., a convoy of police vehicles, including an armored personnel carrier, entered their compound by forcefully ramming open the gate and taking up positions inside the compound. Alarmed by the commotion, the deceased opened a bedroom window to assess the situation and was immediately shot in the heart by a police marksman. He died shortly thereafter from the gunshot wound. The appellant further alleged that she called for an ambulance but police officers blocked it from accessing the compound. She also alleged that the police disabled some of the CCTV cameras on the property before leaving the scene. According to the appellant, the police later publicly admitted through media statements that the shooting was the result of faulty intelligence on their part.
4. The appellant further contended that despite promptly reporting the incident to both the Parklands Police Station and the Independent Policing Oversight Authority (IPOA), no meaningful updates or action followed. Through her advocates, she wrote to the Director of Public Prosecutions (DPP), who subsequently directed the Directorate of Criminal Investigations (DCI) to investigate and submit a report. The appellant considered this an implicit admission of wrongdoing. In the petition, she alleged violations of several constitutional rights, including the right to life under Article 26, the right to dignity under Article 28, freedom and security of the person under Article 29, the right to family under Article 45, and the child's right to parental care under Article 53.
5. Her prayers included: a declaration that the actions on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the deceased was unlawful, illegal and contrary to *the Constitution*; a declaration that the actions on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the deceased were contrary to the provisions of *the Constitution* which provides for the right to life and right to parental care and guidance; the sum of Ksh.100,000,000 to be paid by the respondents for the unlawful execution of the deceased; the sum of Ksh.18,000,000 to be paid by the respondents as damages for unlawfully and cruelly denying YBS the right to parental care and guidance pursuant to Article 53(1) of *the Constitution*; the sum of Ksh.292,000,000 to be paid by the respondents as damages/compensation being the loss of earnings; the sum of Ksh.20,000,000 to be paid by the respondents as damages/compensation for moral damages, emotional harm and psychological suffering; the sum of Ksh.200,000,000 to be paid by the respondents as damages/compensation for loss of a life plan; the sum of Ksh.100,000,000 to be paid by the respondents as exemplary and punitive damages; an order directed towards the 4<sup>th</sup> respondent to arrest, charge and prosecute those officials and/or persons responsible for the death of the deceased; and any other relief this Court deems fit to grant; as well as costs of the petition.
6. The 1<sup>st</sup> to 3<sup>rd</sup> respondents opposed the petition through grounds of opposition dated 17<sup>th</sup> December 2018. They contended that the petition did not raise any constitutional issues warranting determination under the cited Articles and was therefore misconceived. They maintained that the issues raised by the appellant were matters of tortious liability which ought to be addressed in the Civil Division of the High Court under the *Law Reform Act*, Cap 26, and the *Fatal Accidents Act*, Cap 32, rather than before a constitutional court. They further contended that the remedies sought were not rooted in the Constitution but in statutory causes of action under the *Law Reform Act* and the *Fatal Accidents Act* as per the court's holding in Hon. Uhuru Kenyatta v The National Star Limited, High Court Petition No. 187 of 2012, and Stephen Saitoti Kapaiku v Coca-Cola Sabco Nairobi Bottlers Limited & another [2013] eKLR.
7. The 1<sup>st</sup> to 3<sup>rd</sup> respondents further contended that the petition failed to meet the threshold for constitutional claims set out in Mumo Matemu v Trusted Society of Human Rights Alliance & 5



Others [2013] eKLR, which requires specificity in pleading alleged violations. They also challenged the admissibility of the CCTV footage claiming it did not comply with sections 106A and 106B of the *Evidence Act*. According to the 1<sup>st</sup> to 3<sup>rd</sup> respondents, the footage had been compressed into a single file thereby compromising its integrity. In addition, it was their position that there was no conclusive evidence directly linking the police to the fatal shooting and emphasized that investigations were still ongoing, thus rendering the matter premature for judicial determination.

8. In a replying affidavit sworn by Maurice Chemesis, Chief Inspector of Police based at the DCI Headquarters, the 1<sup>st</sup> to 3<sup>rd</sup> respondents averred, inter alia, that the shooting incident was still pending under inquiry, and the circumstances regarding the shooting incident were therefore unknown; that the justice of the matter required a proper and conclusive inquiry be done to establish the circumstances surrounding the shooting incident; and that it would be premature and prejudicial for the court to grant the reliefs sought in the petition without the benefit of a full inquest report.
9. The DPP opposed the petition through grounds of opposition dated 26<sup>th</sup> November 2018. The gist of the response was that vide a letter dated 27<sup>th</sup> February 2018, he instructed the DCI to investigate the incident and submit the inquiry file for his review; that neither *the Constitution* nor any law sets a specific timeline for completing investigations and as of the date of filing of the petition, his office had not yet received the investigation file; that upon completion of the investigations, he would issue directions on whether or not to charge any suspect in accordance with Article 157(6) of *the Constitution* and sections 5 and 6 of the ODPP Act; and that the appellant's request for an order compelling him to arrest, charge, and prosecute those responsible for the death of the deceased was premature on account of the ongoing investigations.
10. The matter proceeded to full hearing, with the appellant giving oral testimony. She recounted the events of the night in question and stated that the police blocked an ambulance for over 45 minutes as her husband lay critically injured. She testified that the deceased earned a substantial income and held shares in several companies; and that the incident was captured on footage from 13 CCTV cameras, some of which were later disabled by the police. She detailed how she preserved the footage and said her efforts to obtain accountability from IPOA, the police, and the DPP were unsuccessful, leading to the filing of the petition.
11. Chief Inspector Maurice Chemesis, an investigating officer from DCI Headquarters, testified as DW1. He adopted his statement, affidavit, and investigation report as part of his evidence. He confirmed that the deceased died on 22<sup>nd</sup> October 2017 and explained that investigations into his death remained incomplete after five years due to lack of cooperation from the concerned entities. His testimony was that he recovered a Steyr MA-91 firearm, spent cartridges and an expended bullet at the scene of the incident. He also stated that all individuals present were uniformed police officers, including personnel from the Anti-Terrorism Police Unit (ATPU), who were in unmarked vehicles. He further acknowledged that several key officers had not recorded statements, which had delayed the completion of the investigation.
12. After a full hearing, the trial court (Ong'udi, J.) delivered its judgment on 18<sup>th</sup> November 2022. The court framed four issues for determination: whether it had jurisdiction to entertain the petition; whether the petition was properly before the constitutional court; whether the petitioner's constitutional rights had been violated by the respondents; and whether the petitioner was entitled to the reliefs sought.
13. Central to the trial court's reasoning was the doctrine of justiciability and ripeness. Citing authorities such as In the Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011, and *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others* [2013] eKLR, the court



emphasized that jurisdiction is not presumed but must be grounded in *the Constitution*, statute or both. It also referred to County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR), and Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), where courts reaffirmed the principle that jurisdiction must be determined at the outset, and that courts should not engage in hypothetical or premature matters.

14. The trial court found that the investigation into the shooting was still ongoing, and the DPP had not received the final inquiry file and as such, no charging decision had been made. On that basis, it concluded that the petition was premature and therefore not ripe for determination. The court held that it could not make findings on criminal culpability or award constitutional damages without a completed investigation and established facts. At paragraphs 68 and 69 of the impugned judgment, the learned judge specifically held as follows:

“It is my considered view that the dispute in this petition although existent has not yet matured to a real controversy in need of judicial intervention by way of a Constitutional Petition. I say so because this Court cannot determine whether the respondents are actually responsible and guilty of the alleged heinous act or whether there are other existing positions in the incident. This inability to make a determination is pegged on the fact that the investigations are yet to be concluded and criminal proceedings instigated. This Court is therefore incapable of entertaining the petition until such a time that the respondents if at all are found culpable in the matter.

For this reason, the petition is not yet ripe for determination hence not justiciable. This is since the pronouncement of this Court is pegged on the outcome of the 2<sup>nd</sup> respondent’s investigations and the 4<sup>th</sup> respondent’s decision to charge or not to charge and instigate criminal proceedings against the responsible persons and a conclusive verdict made by the trial Court. It is my take therefore that it would not be prudent for this Court to assume such jurisdiction and entertain the matter without being informed of all the relevant matters at stake.”

15. The trial court agreed with the respondents that while the petition raised serious issues, it had been filed prematurely. It observed that although constitutional remedies are available for violations of rights, they must be grounded in clearly established facts. The trial court emphasized that constitutional courts should not encroach upon the mandates of investigative and prosecutorial agencies.
16. In the end, the trial court struck out the petition on grounds of non-justiciability and prematurity. It nonetheless urged the relevant state agencies to expedite the investigations, noting that five years had passed since the incident, without any accountability or closure for the family.
17. Being aggrieved and dissatisfied with the entire decision of the trial court, the appellant preferred this appeal. In the Memorandum of Appeal dated 3<sup>rd</sup> February 2023, the appellant contends that the learned judge erred in law and in fact by refusing to adjudicate over the case before her and totally and willfully abdicated her duties as a Judge of the High Court of Kenya in failing to determine the constitutional petition before her; holding that the constitutional petition before her had not yet matured to a real controversy in need of judicial intervention; holding that a court’s authority to answer questions of controversy in a purported crime only commences once the complaint of the offence is lodged in court and full trial conducted which was the case before her; confusing herself and seeking refuge in irrelevant legal principles like the doctrine of ripeness and justiciability with the sole intention of abdicating her duty to adjudicate over the dispute; and in holding that the 2<sup>nd</sup> and 4<sup>th</sup> respondents



must conduct investigations on the cause of the death of the deceased before the court can assume jurisdiction.

18. At the hearing of the appeal, Mr. Ahmednasir Abdullahi, Senior Counsel, appeared for the appellant. Ms. Opiyo represented the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, while Mr. Yamina appeared for the 4<sup>th</sup> respondent. All counsel made brief oral highlights of their respective client's written submissions.
19. In her submissions dated 13<sup>th</sup> March 2025, the appellant contended that the trial court fundamentally misunderstood both the legal and factual context of the case before it. She maintained that the petition was not an ordinary civil dispute but a grave constitutional matter touching on the right to life and other fundamental rights protected under *the Constitution*. She faulted the trial court for holding that its jurisdiction could only be invoked once a complaint was lodged in a criminal court and a full trial conducted. To address this point, she began by defining jurisdiction as per Words and Phrases Legally Defined Vol. 3 by John Beecroft Saunders, which states that jurisdiction is the authority a court has to decide matters before it or take cognisance of matters formally presented for its decision, and where a court assumes jurisdiction it does not possess, its decision amounts to nothing because jurisdiction must be acquired before judgment is given.
20. The appellant relied on the decision of this Court in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR, where the Court held thus:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over- arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”
21. She contended that the High Court had jurisdiction under Article 165(3)(d)(ii) of *the Constitution* to determine whether anything said to be done under the authority of *the Constitution* was in contravention of it. She also cited Article 23(3), arguing that the trial court had the power to issue appropriate reliefs, including directing the 2<sup>nd</sup> and 4<sup>th</sup> respondents to conduct and complete investigations and if necessary, prosecutions concerning the execution and killing of the deceased. To buttress this argument, the appellant cited *County Government of Kiambu & another v Senate & others* [2017] eKLR, which referenced the decision of this Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 2 Others* [2013] eKLR, where the court held that:

“While separation of powers requires courts to respect the independence of the legislature and give the executive room to implement the law, courts still have the final say on the constitutionality of all government actions. Further, in a system where *the Constitution* is supreme, courts may intervene where constitutional procedures, such as Standing Orders, are violated but must do so with restraint and only in appropriate cases, considering the specific facts.”
22. She further placed reliance on the decision of *Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* [2020] eKLR, where the Court held that although the Inspector General of Police has independent command over the National Police Service and cannot be directed by any entity to conduct investigations, courts under



Article 165(3)(d)(ii) retain the power to determine whether actions taken under *the Constitution* or any law are inconsistent with *the Constitution*.

23. On the question of whether constitutional and civil proceedings can run concurrently, the appellant relied on section 193A of the Criminal Procedure Code which provides that the existence of a civil suit is not a bar to criminal proceedings. She cited *James Mutisya & 5 Others v Alphayo Chimwanga Munala & 2 Others* [2021] eKLR, *Republic v Inspector General of Police & 3 others; Ahsa Limited & 4 others (Interested Parties); Korir & another (Exparte Applicants) (Judicial Review Miscellaneous Application E112 of 2023)* [2024] KEHC 3270 (KLR), and *Alfred Lumiti Lusiba v Pethad Pank Shantilal & 2 Others* [2016] eKLR, to emphasize that the existence of civil proceedings from the same facts does not bar the institution or continuation of criminal proceedings.
24. On the justiciability and ripeness of the petition, she contended that the trial court erred in finding the petition was hypothetical, premature, and not justiciable merely because investigations by the DCI were ongoing and the DPP had not yet made a decision on prosecution. She relied on *Kiroti Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR, where the Court explained the ripeness doctrine as concerning disputes where the facts have sufficiently developed to allow for a meaningful judicial decision and that courts should avoid disputes that are purely hypothetical or academic.
25. She also cited *Okoti v Judicial Service Commission & 2 others; Katiba Institute (Interested Party) (Petition 197 of 2018)* [2021] KEHC 461 (KLR), where the Court observed that although the High Court is generally barred from intervening in matters falling within the constitutional mandates of other arms of government under the doctrines of non-justiciability and separation of powers, exceptions exist where there is an actual or threatened violation of rights or clear breaches of constitutional provisions.
26. To demonstrate the factual basis of the petition, she pointed to the CCTV footage, autopsy report, death certificate, and official statements from the 2<sup>nd</sup> respondent acknowledging the killing, as well as payslips and personal documents of the deceased. She argued that State inaction and the failure to complete investigations for over six years violated the constitutional rights of the deceased and his family. She also invoked the United Nation’s Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, emphasizing that judicial and administrative processes must be structured to prevent unnecessary delays which undermine the right to justice. She relied on the decision of this Court in *Charo Karisa Salimu v Republic* [2016] eKLR, where it was held that:

“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.’”

27. On whether the learned judge erred in holding that the court’s jurisdiction could only be invoked after the 2<sup>nd</sup> and 4<sup>th</sup> respondents completed investigations, the appellant contended that while the police have the statutory mandate to investigate crime, that power exists to serve the public interest by bringing suspects to account. She contended that in this case, investigations had stalled for an unreasonably long



period, thereby justifying judicial intervention. In her view, timely investigations form part of the right to fair legal process and prolonged inaction by state authorities necessitates court orders to compel completion of investigations and initiation of prosecutions.

28. To support this argument, the appellant relied on *Julius Kamau Mbugua v Republic* [2010] eKLR, where this Court, citing the Supreme Court of Canada in *R v Morin* [1992] 1 SCR 771, held that determining whether delay has breached a constitutional right requires a judicial balancing of the interests protected by the right against the reasons for delay. The appellant contended that the prolonged state inaction in this case despite clear evidence and police admissions of fault amounted to a violation of the right to life and dignity, and that the court's intervention was not only justified but constitutionally necessary.
29. On the question of whether she was entitled to the reliefs sought, the appellant submitted that her husband's life was taken arbitrarily by the actions of the 2<sup>nd</sup> respondent in clear violation of his right to life under Article 26 and the right to human dignity under Article 28 of *the Constitution*. She contended that the conduct of the police in unlawfully executing the deceased in a cruel, inhuman, and degrading manner contravened the protections guaranteed under Articles 25 and 29(1). She further contended that the killing also violated the rights of their minor son, YBS, under Article 53, by depriving him of the fundamental right to parental care and guidance.
30. She maintained that the 2<sup>nd</sup> respondent's actions were inconsistent with the constitutional values and obligations imposed on the National Police Service under Articles 238 and 244 which require adherence to the rule of law, respect for human rights, and the promotion of a positive relationship with the public. In support of this position, she cited *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2014] eKLR, where the Court held that the use of lethal force by police officers against innocent civilians is incompatible with the principles enshrined in Articles 238 and 244, and undermines the constitutional standards expected of law enforcement.
31. Regarding damages, she cited *Zeitun Juma Hassan (on behalf of the Estate of Abdul Rahman Biringe (deceased)) v The Attorney General* Petition No. 57 of 2011, arguing that compensation was warranted given the proven violations, particularly the loss of life caused by the State's unlawful actions.
32. Senior Counsel emphasized that the evidence on record, including public admissions by senior police officials was unchallenged. He noted that the investigating officer had confirmed the inquiry had stalled because officers from the Anti-Terrorism Police Unit refused to record statements. He also reiterated that the trial court misunderstood the nature of the petition by insisting that the matter could only proceed after a criminal trial. In his view, this position ignored the fact that constitutional petitions are intended to enforce fundamental rights rather than establish criminal guilt.
33. He added that allowing such judgment to stand would create a dangerous precedent where victims of State violence would be denied constitutional remedies indefinitely under the pretext of ongoing investigations. He urged us to find that the petition was properly before the trial court, to make a determination on liability based on the existing record, and to remit only the issue of damages to the trial court for assessment due to the emotional toll a retrial would impose on the appellant.
34. On their part, the 1<sup>st</sup> to 3<sup>rd</sup> respondents through their written submissions dated 4<sup>th</sup> March 2025 supported the trial court's conclusion that the petition was not ripe for judicial determination. They contended that the judge correctly refrained from interfering with the ongoing investigations being conducted by the police and the DPP, noting that it was not within the court's mandate to investigate or prosecute individuals suspected of committing criminal offences.



35. In support of their position, they relied on the decision of this Court in *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] KECA 304 (KLR), where the Court affirmed the High Court’s decision to decline jurisdiction in a matter it found premature, emphasizing that courts should only intervene once available internal or procedural mechanisms have been fully exhausted. On this basis, the respondents submitted that the trial judge acted lawfully in concluding that while the dispute raised serious issues, it had not yet developed into a controversy warranting constitutional or judicial intervention.
36. On the question whether the learned judge erred in holding that a court’s authority to address a controversy arising from a purported crime begins only after a complaint is formally lodged and a full trial conducted, the 1<sup>st</sup> to 3<sup>rd</sup> respondents submitted that courts should not ordinarily interfere with the functioning of constitutionally established offices such as the DPP and the Inspector General of the National Police Service, established under Articles 157 and 245 of *the Constitution* respectively. They asserted that as long as these offices operate within their constitutional and statutory mandates, judicial intervention is unwarranted. To support this position, they cited the decision of this Court in *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR, where the Court affirmed that the authority to investigate criminal offences lies with the police, and that courts should refrain from interference unless it is demonstrated that the investigative agencies have acted beyond their legal authority. In this regard, the respondents maintained that courts should only intervene in cases where there is clear evidence of abuse of power or undue delay in the investigative process.
37. On the issue of whether the learned judge erred in law and fact by holding that the 2<sup>nd</sup> and 4<sup>th</sup> respondents must first investigate the cause of the deceased’s death before the court can assume jurisdiction, the respondents maintained that the judge was correct in declining jurisdiction at that stage. They contended that accepting the appellant’s invitation to make factual findings on whether the State unlawfully killed the deceased would effectively turn the constitutional court into an investigative body and a criminal court. In their view, this would improperly encroach on the distinct constitutional mandates of investigation, prosecution, and adjudication, which are assigned to separate arms and agencies under *the Constitution*.
38. Regarding the applicability of the doctrines of ripeness and justiciability to the petition, the respondents emphasized that these principles were central to the court’s reasoning and were properly applied. They relied on *Anthony Miano & Others v Attorney General & Others* [2021] eKLR and *Kiro wa Ngugi & 19 Others v Attorney General & 2 Others* (supra), where the High Court explained that justiciability includes the doctrines of ripeness, the political question, and constitutional avoidance. They submitted that in *Kiro wa Ngugi*, the Court observed that ripeness addresses whether the facts have sufficiently developed to allow for a meaningful legal determination. Based on this, the respondents contended that the appellant’s petition was speculative and premature as it sought judicial findings before investigations were concluded or any criminal prosecution initiated.
39. In sum, the 1<sup>st</sup> to 3<sup>rd</sup> respondents submitted that the appeal lacked merit and urged this Court to dismiss it with costs.
40. At the hearing, the court posed a question to the counsel for the 1<sup>st</sup> to 3<sup>rd</sup> respondents, viz, whether the trial court was correct in holding that a court’s authority to determine issues arising from an alleged crime only arises once a complaint is formally lodged in court and a full trial conducted, particularly in light of precedents involving human rights violations such as the Nyayo House torture cases. In response, counsel reiterated that Articles 157 and 245 of *the Constitution* safeguard the independence



of the DPP and the Inspector General, and maintained that so long as these institutions act within their constitutional mandates, their decisions and processes should be respected.

41. On whether it was the respondents' position that the court should indefinitely refrain from intervention so long as an investigating officer claimed that the file remained open, Ms. Opiyo stated that while investigations may take time, *the Constitution* does not prescribe a specific limit on their duration. However, she acknowledged that a litigant should not be expected to wait indefinitely. She added that once an investigation report is available, it provides the minimum basis upon which proceedings, whether civil or criminal, can be initiated. When asked what would constitute a reasonable duration for investigations, she did not provide a specific timeline but stated that investigations in this case were nearing completion.
42. The DPP opposed the appeal vide written submissions dated 12<sup>th</sup> February 2025. The DPP submitted that whereas the petition primarily sought reliefs against the 1<sup>st</sup> to 3<sup>rd</sup> respondents, it included a single specific prayer directed at the 4<sup>th</sup> respondent, which was to direct him to arrest, charge, and prosecute those responsible for the death of the deceased. The DPP contended that granting this prayer or any reliefs with a bearing on criminal culpability would adversely affect the fairness of any ongoing or future criminal proceedings which may be undertaken by the DPP pursuant to the criminal complaint and incident report regarding the alleged fatal shooting.
43. According to the DPP, the appellant had identified officers from the ATPU, Recce Squad, Military Police, and other State agencies as responsible for the shooting and had invited the High Court to make findings of fact to that effect. The DPP contended that such a judicial approach would present serious practical and constitutional concerns. First, it would effectively compel the DPP to adopt evidentiary positions before receiving and reviewing the results of police investigations. Second, it would erode the constitutional independence, impartiality, and discretion of the DPP by subjecting prosecutorial decisions to judicial direction. Third, it could lead to court orders mandating prosecution of specific individuals such as Recce Squad and ATPU officers, which would undermine the DPP's authority under Article 157(10) of *the Constitution*.
44. The DPP further submitted that if a constitutional court were to make factual findings about criminal liability, those findings could bind trial courts under sections 43 and 44 of the *Evidence Act*, potentially rendering the trial process meaningless. This, in the DPP's view, would result in a miscarriage of justice by foreclosing an independent assessment of evidence in a future criminal trial.
45. The DPP maintained that he, at all times, acted in accordance with Article 157(11) of *the Constitution* which requires consideration of the public interest, the interests of justice, and the need to prevent abuse of legal process. He argued that the trial court rightly found the petition premature, and warned that granting the reliefs sought could jeopardize pending or future prosecutions.
46. As regards damages, the DPP also contended that the appellant was not barred from seeking damages at a later stage, but stressed that prosecutorial decisions must remain independent. He urged us to dismiss the appeal in its entirety.
47. Responding to a question from the Court as to whether victims were expected to wait indefinitely, counsel for the DPP stated that the question of delay depended on the circumstances of each case. He maintained that at the time the petition in question was filed, it was premature. He acknowledged that the investigating officer had reported that he had reached a dead end because certain officers refused to record statements, and conceded that IPOA might have been better placed to conduct the investigation given the conflict of interest involved.



48. Counsel also acknowledged that the DPP had a responsibility to pursue justice, but stated that while the office had followed up with the police, it could not compel the release of the investigation file. As regards the provisions of section 25C of the *Victim Protection Act* which allow civil claims regardless of prosecution or conviction, counsel contended that his concern lay not with civil liability but with the risk of the court making premature findings of criminal culpability and directing the DPP to prosecute. He emphasized that criminal responsibility should be established through a full trial and not through a constitutional petition.
49. We have considered the issues raised in this appeal. This being a first appeal, the Court's mandate is to re-evaluate, re-assess and re-analyze the evidence on the record and determine whether the conclusions reached by the learned judge should stand, and give reasons either way. See Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates [2013] eKLR, Kiruga vs. Kiruga & Another [1988] KLR 348 and Peters vs. Sunday Post Ltd [1958] EA 424.
50. Having re-evaluated the record of appeal as well as the submissions by parties to the appeal, this appeal, in our view, turns on two related issues which are:
- whether the trial court erred in law in holding that the petition was not justiciable; and whether the existence of ongoing investigations into the deceased's death or prospective criminal proceedings barred the trial court as a constitutional court from determining alleged violations of fundamental rights. Our determination on these twin issues will lead us to the question of the appropriate remedies, if any.
51. As regards the related issues, the trial court dismissed the petition on the grounds that it was premature. Relying on the doctrines of ripeness and justiciability, it held that because investigations into the deceased's death were still ongoing and the DPP had not yet filed any charges, there was no live controversy that required the court's intervention. At paragraph 67 of the impugned judgment, the learned judge stated that a court's authority to address disputes arising from an alleged crime begins only when a formal complaint is filed in court and the matter proceeds to a full trial. Since that had not happened in this case, the court held that it had no basis to assume jurisdiction to hear and determine the matter.
52. The appellant challenges the trial court's position, contending that the petition raised immediate and real constitutional issues, despite the ongoing investigations. She maintains that the fatal shooting of her husband by State agents was a completed act. His death had already taken place and had triggered alleged violations of fundamental rights under *the Constitution*. In her view, those violations occurred at the moment of the shooting and did not depend on any future criminal charges or prosecution.
53. She maintains that the pending police investigations or the DPP's indecision about whether to prosecute should not be used to sideline or delay consideration of the real constitutional issues. According to the appellant, the petition was not about trying the officers for a crime, but about holding the State accountable for a constitutional tort and seeking redress for the violation of rights. She emphasizes that her right to approach the court under Article 22 of *the Constitution* cannot be put on hold while waiting for the respondents to act.
54. The appellant further contends that nothing in *the Constitution* requires a victim's family to wait for a criminal trial before seeking remedies for an alleged extrajudicial killing. On the contrary, she points to Article 23 which gives the court power to grant appropriate relief for violation of rights as soon as those violations are established. In her view, courts are not barred from stepping in simply because the criminal process is incomplete, especially where the delay or inaction by the State may itself be a continuing violation of constitutional rights.



55. At the heart of this appeal is the question whether the trial court correctly applied the doctrines of ripeness and justiciability to the petition. Put differently, can a constitutional court intervene where investigations are still ongoing? In answering this question, the starting point, in our view, lies in understanding the purpose and the applicability of the two doctrines.

56. On the doctrine of ripeness, the Supreme Court in *Attorney- General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* [2022] KESC 8 (KLR) stated as follows:

“61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized.”

57. *Mativo, J. (as he then was) in Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited* [2018] eKLR held as follows regarding the doctrine of ripeness:

“45. This brings into focus the principle of ripeness which prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by Kriegler J in the following words:-

“The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.”

46. Lord Bridge of Harwich put it more succinctly when he stated:- “It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.” It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed. The requirement of a



dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function. On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.

47. Ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action."

58. As regards justiciability, the court stated as follows in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR:

"

26. By justiciability it is meant a matter "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision": see Black's Law Dictionary 9<sup>th</sup> Ed, pp 943-944. In other words, courts should only decide matters that require to be decided. Thus, in *Ashwander –v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy"

27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of *the Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments."

59. From the above decisions, it is clear that the ripeness doctrine is one aspect of the broader principle of non-justiciability. It raises a jurisdictional bar where a dispute has not yet developed enough to justify the court's involvement. The doctrine rests on the idea that there may be other forums better suited to address the matter before it reaches the stage of requiring judicial resolution. Courts are therefore expected to avoid disputes that are hypothetical, premature, or purely academic and have not yet matured into clear, justiciable controversies.

60. In the circumstances herein, the petitioner pleaded with specificity several claims of constitutional violations, including the right to life under Article 26, the right to dignity under Article 28, the right to freedom and security of the person under Article 29, the right to family under Article 45, and the child's right to parental care under Article 53. The trial court in the impugned judgment appeared to take the view that the existence of a pending criminal investigations or potential prosecution removed



the constitutional court's jurisdiction to determine whether the State had violated the petitioner's fundamental rights.

61. With respect, we disagree with that view. The petitioner clearly stated and demonstrated with evidence that the deceased lost his life at the hands of agents of the 2<sup>nd</sup> respondent. The respondents did not dispute that fact. On the contrary, the 2<sup>nd</sup> respondent, in several media statements, acknowledged responsibility for the fatal shooting, attributing it to faulty intelligence. Therefore, while we agree with the trial court's recognition that the 2<sup>nd</sup> respondent bears the constitutional and/or the statutory responsibility to investigate crimes and that the decision to prosecute lies with the 4<sup>th</sup> respondent, we are of the view that the court erred in declining jurisdiction. The existence of an ongoing investigation does not, in our view, preclude the constitutional court from examining credible allegations of rights violations, especially where the facts giving rise to those allegations are not in dispute. In this regard, we fully associate ourselves with the holding of the court in *Rose Owira & 23 others v Attorney-General & another; Kenya National Commission on Human Rights & 4 others (Interested Parties)* [2020] eKLR, that while 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, 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*.
62. By declining to hear and determine the petition on its merits and by concluding that a court's authority to address a controversy arising from an alleged crime only begins once a formal complaint is filed and a full trial is held, the trial court, with respect, appeared to treat the existence of a possible or ongoing criminal process as a reason to avoid invoking its powers under Article 165 (3) (b) of *the Constitution*.
63. While it is correct that constitutional courts are not meant to conduct criminal trials or determine individual guilt, this does not, in our view, excuse a refusal to consider whether the State has breached its constitutional obligations through its acts or omissions. In our view, claims alleging violations of the right to life and related rights are not dependent on the outcome of a criminal trial. Indeed, section 193A of the Criminal Procedure Code makes it clear that the existence of overlapping issues in criminal and civil proceedings is not a valid reason to stay, delay, or prohibit either process.
64. In *Alfred Lumiti Lusiba v Pethad Ranik Shantilal & 2 others* [2016] eKLR, the Court was categorical that:

“An injured party is entitled to institute a civil suit against a tortfeasor for a claim in damages and, subject to proof, a civil court will award him the damages in compensation for the injuries he may have suffered or the loss he has incurred as a result of the tortious act or omission of the tortfeasor regardless of whether the latter has been convicted or even charged in a criminal court where the tort complained of would also constitute a criminal offence. As long as there is a cause of action, the prosecution or the outcome of such prosecution cannot stand in the way of a civil action for a remedy.

Section 193A of the Criminal Procedure Code contemplates the two processes running concurrently where facts which give rise to a cause of action are the same facts that constitute the particulars of an offence. It states:

193A. Concurrent criminal and civil proceedings Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.



The law is clear that the pendency of a civil suit is not a bar to criminal proceedings; it acknowledges the fact that the trial of the tortfeasor in a criminal prosecution need not be affected by the pending civil action against him. It is implied, therefore, that a civil suit cannot be stayed because of the prosecution of the tortfeasor for the obvious reason that the cause of action is neither rooted in the prosecution of the tortfeasor nor in his subsequent conviction.”

65. The law permits victims or their families to pursue multiple avenues at the same time, including tort claims for wrongful death and criminal prosecution of those responsible. Each of these serves a different purpose and addresses a different aspect of the harm suffered. This distinction was clearly illustrated in *Muslim for Human Rights (MUHURI) & another v Inspector General of the National Police Service & 2 others* [2024] KEHC 3233 (KLR) where the High Court considered a petition following the fatal police shooting of Omar Faraj.
66. At the time the case in *Muhuri* was heard, no officer had been charged. That notwithstanding, the court did not treat the matter as non-justiciable. It found that Mr. Faraj’s rights to life, dignity and security had been violated and held the State accountable for his unlawful killing. The court awarded damages and addressed the issues before it, including the failure to investigate and the loss of life. Rather than decline jurisdiction, the court ensured that the victims were not left without a remedy simply because prosecution had not yet taken place.
67. The 4<sup>th</sup> respondent has invited us to apply the doctrine of exhaustion to the circumstances herein. This Court, while considering that doctrine in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR) held thus:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

68. While it is generally prudent for litigants to first pursue the statutory dispute-resolution mechanisms, this rule is not, in our view, absolute, especially in the context of constitutional violations. In *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR), the Supreme Court had occasion to consider the doctrine of exhaustion. It stated thus:

“

104. ...That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020]



eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

“In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.” [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.
106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:
  - “44. ... we are conscious that the powers conferred upon the High Court under article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of *the Constitution*.
  45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision,



etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]

69. The Supreme Court went on to state as follows at paragraph 107:

“Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR)(Const. and JR) (17 February 2023) (Judgment).”

70. In the circumstances of this appeal, by the time the petition was filed, investigations into the fatal shooting of the deceased were still incomplete. The investigating officer testified during the hearing that the inquiry had reached a dead end, partly because several key officers suspected of involvement had refused to provide statements. Even at the time of hearing this appeal, the investigations were still incomplete, although the 1<sup>st</sup> to 3<sup>rd</sup> respondents intimated that they were at an advanced stage.

71. International law, treaties, and conventions form part of the laws of Kenya by virtue of Article 2(5) and (6) of *the Constitution*. Under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), the State has an obligation to uphold the right to life. This includes a positive duty to investigate suspicious deaths and to pursue accountability, including prosecution where appropriate. That obligation, in our view, is triggered as soon as the State becomes aware of the death. It is not dependent on a criminal conviction.

72. Accordingly, prolonged delays or failure to act on such deaths may not be regarded as a neutral or harmless oversight. It can amount to a continuing denial of justice and a breach of the State’s obligations under Article 26, which guarantees the right to life, and Article 48, which protects the right of access to justice.

73. In light of the foregoing, the argument by the 2<sup>nd</sup> and 4<sup>th</sup> respondents that the petition ought to have awaited the outcome of the investigation amounts, in our respectful view, to a distortion of the constitutional obligations imposed upon those very offices. It also disregards the anguish and suffering endured by the petitioner and her family. While we acknowledge that courts should not ordinarily interfere with the operations of constitutionally established offices such as the DPP and the Inspector General of Police, which are established under Articles 157 and 245 of *the Constitution* respectively, we are not persuaded that the principle of separation of powers was ever intended to shield inaction or allow courts to remain passive in the face of alleged and ongoing violations of constitutional rights.

74. With due respect to the independence enjoyed by the two offices under *the Constitution*, judicial deference to their independence, in our view, does not extend to situations where the enforcement of fundamental rights is at stake, and where alternative remedies are either unavailable, ineffective, or illusory. In such instances, *the Constitution* permits direct recourse to the High Court by way of a constitutional petition. Therefore, to insist on the doctrine of exhaustion in the present circumstances



- would, in our view, frustrate rather than promote constitutional accountability and would work an injustice against the appellant and her family. The breach of fundamental rights under *the Constitution* entitles individuals to legal remedies when the said rights are violated. It would be contrary to the letter and spirit of *the Constitution* if inaction by investigative bodies could also bind the hands of the courts.
75. In light of the foregoing, it is evident that the trial court erred in finding the petition non-justiciable and in holding that its authority to determine questions arising from an alleged crime only begins once a formal complaint is filed and a full trial conducted. At the time the petition was filed and certainly by the time it was heard, the death of the deceased was not a hypothetical matter but a confirmed fact that had remained unaddressed for several years. The issues before the court were whether State agents were responsible for the unlawful killing and whether the State failed in its constitutional duties in the aftermath. These were not abstract concerns but actual and pressing questions grounded in events that had already occurred or were ongoing.
  76. The existence of an open police file or a pending internal investigation did not, in our view, strip the trial court of jurisdiction. On the contrary, the prolonged delay in pursuing accountability formed part of the grievance, highlighting a continuing denial of justice. The trial court erred in law in equating the function of a criminal trial, which is to determine individual criminal liability, with that of a constitutional petition, which is to determine whether there has been violation of constitutional rights, and if so, to grant appropriate reliefs. In doing so, the court failed to discharge its constitutional mandate under Article 165(3)(b) to determine alleged violations of rights as well as its duty under Article 21(1) to protect and promote those rights. By deeming the petition as premature, the trial court effectively required the appellant to wait indefinitely for investigative authorities to act. In light of the fact that four years had passed without any meaningful progress, this position resulted in a denial of justice.
  77. Turning to the issue of the applicable remedies, the appellant urged this Court to find that constitutional violations had occurred and to remit the matter to the trial court solely for assessment of damages. At the hearing hereof, Senior Counsel Ahmednasir emphasized that liability was already established through uncontested evidence, including official police admissions, and contended that a full re-hearing would cause undue emotional harm to his client, who had already endured significant distress during the initial proceedings before the trial court.
  78. In contrast, the 1<sup>st</sup> to 3<sup>rd</sup> respondents maintained that no remedies should be granted until investigations were complete, stressing the constitutional independence of the police and the DPP. Similarly, counsel for the DPP argued that awarding remedies such as compensation or findings of liability before a criminal trial would interfere with the DPP's discretion, asserting that constitutional claims should only proceed once investigations are concluded and charges, if any, have been filed.
  79. It is undisputed that the deceased was shot dead by officers of the 2<sup>nd</sup> respondent. Evidence adduced before the trial court included CCTV footage, an autopsy report, death certificate, and official statements from the 2<sup>nd</sup> respondent acknowledging the killing. In the various media reports produced before the trial court, the 2<sup>nd</sup> respondent acknowledged that the deceased's death was a result of faulty intelligence.
  80. In addressing the question of remedies, we emphasize that the role of a constitutional court is to determine State responsibility for violations of fundamental rights, whereas a criminal court is tasked with establishing individual criminal liability. Therefore, the respondents' argument that no remedies should be granted until investigations are complete or that awarding remedies such as compensation or findings of liability before a criminal trial would undermine the DPP's discretion conflates these two distinct functions. In our respectful view, there is no legal or practical barrier preventing the police



from completing their investigations or the DPP from prosecuting any individual found responsible for the deceased's death. We reiterate that the law allows victims or their families to pursue multiple legal avenues concurrently, including tort actions for wrongful death; criminal proceedings against those responsible; and constitutional petitions for breaches of fundamental rights. Each of these avenues serve a distinct role and addresses different aspects of the harm caused.

81. In the circumstances herein, we take the view that the trial court, in light of the clear evidence before it, ought to have issued a declaration that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions, in executing and killing the deceased, were unlawful, illegal and contrary to *the Constitution*; and a declaration that the actions on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the deceased was contrary to the provisions of *the Constitution*, which guarantees the right to life and right to parental care and guidance and should have, upon issuance of the said declarations, proceeded to assess and award appropriate damages.
82. We fully align ourselves with the views expressed by counsel for the appellant that a re-hearing would cause unnecessary emotional distress to the appellant and her family. In the circumstances, the appropriate order is to remit the matter to the trial court solely for the assessment of damages to which the appellant is entitled.
83. In the end, this appeal is successful in the manner set out hereinabove. It is accordingly allowed. For avoidance of doubt, the orders which we make are as follows:
  - i. This appeal is hereby allowed.
  - ii. The judgment of Ong'udi, J. dated 18<sup>th</sup> November 2022 is hereby set aside.
  - iii. A declaration is hereby made that the action on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the late Mr. Bunty Bharat Kumar Shah was unlawful, illegal and contrary to *the Constitution*.
  - iv. A declaration is hereby made that the action on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their agents, servants, officials and persons working under their direction and/or instructions in executing and killing the late Mr. Bunty Bharat Kumar Shah was contrary to the provisions of *the Constitution* which provides for the right to life, and right to parental care and guidance in respect of the deceased's minor son, YBS.
  - v. The matter be and is hereby remitted to the High Court for assessment of damages before any judge other than Ong'undi, J.
84. The respondents shall bear the costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**D. K. MUSINGA (PRESIDENT)**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....



**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

