REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E166 OF 2021

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA……
1ST PETITIONER
GEORGE NGIGI S. NJOROGE……2ND PETITIONER
EVANSON NDUNGU GITU……3RD PETITIONER
FLORA WAMUKOWA……4TH PETITIONER
ESTHER NJERI GITHAGUI……5TH PETITIONER
DOUGLAS SIDIAL0……6TH PETITIONER

(Suing on Behalf of the Their Deceased Family Members, Their. Own Behalf and on Behalf of About 337- 1998 Bomblast Terrorism Attack Victims)

VERSUS

MINISTRY OF INTERIOR SECURITY AND COORDINATION OF NATIONAL GOVERMENT. …… 1ST RESPONDENT
INSPECT0R-GENERAL, NATIONAL POLICE SERVICE …… 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF DEFENCE ..... 3RD RESPONDENT
NATIONAL INTELLIGENCE SERVICE ..... 4TH RESPONDENT
ATTORNEY GENERAL..... 5TH RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated *29th April 2021* is supported by the 1st Petitioner's Affidavit by *Dr. Annette Mbogoh* and the *2nd Petitioner's affidavit in support* and *further affidavits dated 29th April 2021, 5th May 2022, 10th September 2022* and *8th September 2024.*

2. The Petition is founded on the Petitioners' assertion that the 1998 U.S. Embassy bomb attack by Al Quada terrorists was caused by Government of Kenya's manifest neglect in to heeding repeated early warnings, thereby failed to detect, prevent and stop the terrorist attack. The Petitioners thus contend that the Kenyan Government failed to discharge its domestic and international obligation of protecting Kenyan citizens and thus violated their constitutional rights considering that 201 Kenyans lost their lives, while many others were maimed, and others suffered serious psychological trauma a result of the said terrorist act. The Petitioners aver that despite the loss and damage; the

Government did not give the victims and their families adequate compensation. This situation, they aver, has worsened the after-effects of the tragedy.

3. Accordingly, the Petitioners seek the following reliefs against the Respondents:

a) A declaration that the Kenya Government failed to take the necessary steps to detect, prevent and stop the 1998 U.S. Embassy Bombing terrorist attack as the entire planning and execution of the attack or likelihood of an attack was known by the State and if not, the attack should have reasonably come to the knowledge of the State.

b) A declaration that with the general information and sufficient intelligence on a possible attack the 2nd Respondent and officers working under him were in complete dereliction of their duties and obligations under Section 14 (1) of the repealed Police Act, Cap. 84.

c) A declaration that the Respondents compromised or violated the rights to life, security of Person and the legitimate expectation of the of the Petitioners and the estates in whose behalf they bring this suit under Section 70 (a), 71 (1), 74 (1) of the repealed Constitution, Article 26 and 29 of the Constitution of Kenya, Article 4 and 6 of the African Charter on Human and People's Rights and Article 3 of the Universal Declaration of Human Rights.

d) A declaratory order directed at the Attorney General to advise the President to set up a commission of inquiry to inquire on: the security failures leading to the 1998 U.S embassy terrorist attack, culpability of state institutions and state officers in the attack and recommendations for their prosecutions.

e) A declaration that the state bears an obligation to provide adequate, effective and prompt compensation/ reparations to all victims of the 1998 U.S Bomb last victims for various forms of harm suffered.

f) An order directed at the Attorney General to within 6 months of the Court judgment present a report to the Court on the steps taken by the government to:

i. File an international jurisdiction case for compensation of all victims and their families against the Republics of Sudan and Iran and or steps taken to obtain reparations from the countries.

ii. Obtain compensation for victims from Al-Qaeda assets and BNP Paribas S.A. (BNPP), a global financial institution headquartered in Paris

iii. Seek an acknowledgment of responsibility from the Republics of Sudan and Iran.

g) A declaration that as a result of the breach of rights enumerated above, the Petitioners have suffered damages, pain and suffering.

h) A declaration that each of the Petitioners are therefore entitled to special, general and

exemplary damages against the Respondents herein jointly and/or severally.

i) An order for compensation as enshrined and provided for under Article 23(e) of the Constitution made up of special damages for the expenses incurred and the damages for loss of lives, general damages and exemplary damages pursuant to the declaration prayed above for each of the petitioners.

j) Costs of the Petition be provided for.

Petitioners' Case

4. The Petitioners rely on various reports on U.S. Embassy bombing in Kenya and Tanzania as well as proceedings of Court cases that took place in the United States in urging that the Kenya Government has adequate early warnings to thwart the attack. These Reports and cases are detailed in the affidavit of Dr. Annette Mbogoh, the 1st Petitioner's Executive Director. The cases are*: US Supreme Court case of Caroline Setla Opati (suing as the Executrix of the Estate of Caroline Setla Opati v Republic of Sudan; Ministry of External Affairs and Ministry of Interior of the Republic of Sudan; United States District of Columbia, Civil Action No. 99 125 (JMF) Odilla Mutaka Mwani, et al, v Al Qaeda, victims of 1998 US bomb blast tragedy; Mary onsonga v Republic of Sudan; Unites States of America v Ahmed Khalfan Ghailan, Defendant, 761 F Supp. 2d 167 (United States District Court, S.D New York).* The Reports relied upon include *9/11*

Commission Report; Unheeded Warnings: A Special Report, before bombings, Omens and fears; Report of the accountability Review Boards, Bombings of the US Embassies in Nairobi, Kenya and Dares-salam, Tanzania; Anatomy of a Terrorist Attack: An indepth investigation into 1998 Bombings of US Embassies in Kenya and Tanzania.

5. Relying on these reports, the 1st Petitioner's director swore that from what can be discerned in the reports, the initial plans to attack the U.S. embassy in Nairobi by Al Qaeda began in 1993. That it is documented that Al Qaeda operative in charge of the matter lived in an apartment in Nairobi where the leaders held their meetings and further set up a makeshift laboratory for developing their surveillance photographs.

6. She stated it is further documented that in August 1997, the Federal Bureau of Investigations (FBI) raided the house of **Wadih El Hage** in Nairobi, one of the terrorist managers. It is alleged that the FBI found a letter in his computer's hard drive informing that there was a Bin Laden cell in Nairobi and his call was to kill Americans. That around May 1998, the terrorists were residing in Runda estate.

7. Soon thereafter on 7th August 1998, the bombing occurred at the American Embassy in Nairobi, killing over 213 people. Among the persons were 44 American Embassy employees out of which 12 were Americans. In addition, 10 Americans

and 11 Foreign Service National Employees were seriously injured. Among these was U.S. Ambassador, Prudence Bushnell and the Kenyan Minister of Commerce.

8. Further to this, over 200 Kenyans were killed and 4000 were injured from the bomb blast. The U.S. Embassy building was as well devastatingly damaged. It is noted that much of death and injury was caused by the secondary fragmentation caused by the bomb blast.

9. The Petitioners depone that following the bombing attack, they lost their loved ones while others were seriously injured. They aver that their lives were never the same again. Moreover, the life that followed was one of pain, sadness, anger, stress and trauma. It is noted that some of the injured persons later on succumbed to their injuries while others still suffer illness related to the bomb last including cancer. Most continue to be on medication support which in most instances is beyond their reach.

10. Some of the sufferings and ailments are outlined as: *deep cut wounds, spinal injuries, eye injuries that led to partial and total loss of vision, nasal blockage, sneezing and loss of smell, hearing loss, mental health problems, stroke, peptic ulcers and loss of limbs and mobility*. Accordingly, it is argued that the 1998 U.S. Embassy bombing left a grave impact on the Petitioners.

11. The Petitioners claim that the families of the United States government employees who were killed and injured, filed cases seeking compensatory and punitive damages from Sudan and Iran owing to their critical support of Al Qaeda. In the cases, these parties were awarded 4.3 billion dollars. It is noted that the Petitioners herein were not included in these suits as were neither American citizens, employees or contractors as guided by the American Foreign Sovereign Immunity Act (FSIA).

12. The Petitioners are aggrieved that while America sought compensation for its people, the Kenyan government has failed and is unwilling to pursue compensation for the Kenyan victims of the bombast attack. They assert that the State has a national and international obligation to ensure the realization of an effective right to reparation including compensation for all victims of the 1998 bombing attack.

13. That in the *Report (AM 3)*- '***the 9/11 Commission Report'*** it is documented there was substantial planning of the attack which had commenced as early as December, 1993. That it is recorded that by then, Al Qaeda operatives had began casing targets in Nairobi and had set up a makeshift laboratory in an apartment in Nairobi for developing surveillance photographs and the Al Qaeda leaders based in Kenya or traveling to Kenya would meet there.

14. That in the *Report (AM 4)* , **Anatomy of a Terrorist Attack: An in-depth Investigation into 1998 Bombings of U.S Embassies in Kenya and Tanzania**, it is recorded that in 1997, under the Kenyan Police accompanied by CIA and FBI disguised as searching for stolen goods raided the House of **EL Hage** in Nairobi, two days after he returned from Afghanistan, in which they found a computer and downloaded files and also seized correspondences. That the Report details contents of a disturbing letter believed to have been authored by Fazul Abdullah aka Harun Fazul, who was later found to have been one of the masterminds of Nairobi bombing. The letter had contained details of the East African terrorist cell.

15. That in the said report, it was also recorded that that 9 months before the attack, an Egyptian named ***Mustafa Mahmoud Said Ahmed*** who was tried and deported by Tanzania, had walked into the Embassy and told the **Central Intelligence Agency (CIA)** officers that there was a plan to detonate a bomb in the underground diplomatic parking lot. The informant was subsequently turned over to the Kenyan authorities but they negligently failed to act on the information that was availed to them.

16. In *the Report (AM 5)* ***'Unheeded Warnings: A Special Report, before bombings, Omens and fears'***, it is reported that the former U.S. Ambassador, Prudence

Bushnell had warned incessantly of an imminent terrorist attack. That this Report further details the fact that the Central Intelligence Agency (CIA) had repeatedly informed State Department Officials in Washington and Kenya Embassy there was an active terrorist cell in Kenya connected to Osama Bin Laden who was masterminding the attack. That likewise, the report reckons that Kenyan Police accompanied by CIA and FBI raided the House of **Wadih El Hage** in August 1997 and found a computer from which they downloaded files and discovered a letter indicating the existence of a an 'East African cell' of Osama Bin Laden group.

17. That in the *Report (AM 6)*- ***Report of the Accountability of the Review Boards, Bombings of U.S. Embassies in Nairobi, Kenya and Dares-Salaam, Tanzania-*** it documents the security concerns the American Ambassador had over the vulnerability of the Embassy to the attack one of which was the failure by the Embassy to have a radio frequency dedicated to security communications because this request had repeatedly been rejected by the Kenyan Government.

18. That in ***the Criminal Case (AM 7)-*** *United States v Ahmed Khalfah Ghailan, Defendant, 761 F. SUPP 2d 167 United States District Court, S.D. New York,* the provided crucial facts on the presence of a terrorist cell and the well

deliberated planning of US Embassy terrorist attack starting 1990s.

19. Consequently, the Petitioners argue that the government was negligent and ignored intelligence or information at its disposal to protect the people of Kenya.

20. Equally, the Petitioners argue that the government failed to increase security at the Kenyan borders and vet all persons coming into the Country thus making it easier and country vulnerable to the attack. The government is also accused of allowing or being complacent in failing to stop the smuggling of money into the Al Qaeda cells in the country.

21. In a further affidavit, the 2nd Petitioner quoting the book by the *Prudence Bushnell*, ***Terrorism, my story of the 1998 Betrayal*** **and** ***U.S Embassy bombings Resilience, 2018*****,** states that it is evident that the law enforcement and intelligence knew about Al Qaeda since 1996.

22. Additionally, the 6th Petitioner a survivor of the 1998 bombing attack acknowledges his awareness of the publication, ***Beyond the scars: A Medical History of the 1998 Nairobi Bombing of the American Embassy*** in a further affidavit. He avers that it is a comprehensive report on the management of bomb blast injuries and effects that resulted following the attack. He as such, adduced this Report so that this Court can appreciate the devastating

medical effects of the bomb blast and be guided in determination of the issue of damages.

23. That unlike in United States where Courts have ordered compensation of victims who are US citizens and contractors to be paid by Republic of Sudan and Islamic Republic of Iran for their complicity in Al Qaeda attacks, The Petitioners contend the Respondents herein have not only failed to compensate their victims but have also neglected to demand for compensation or reparations from Iran, Sudan and BNP Paribas S.A. (BNPP), the States or institutions that provided material support to the terrorists and have thus violated their national and international obligation to provide adequate, effective and prompt compensation to all victims.

24. Furthermore, despite the Respondents-through the Principal Secretary Ministry of Interior, expressly pledging in writing to pay compensation on **19th June, 2015**; they have failed and refused implement this assurance.

25. The Petitioners in addition point out that constitutional petitions are not time barred and that one can neither acquiesce or waive a fundamental right and freedom as protected in the Constitution. The Petitioners contend that the government's continued failure to pay reparation is a continuing violation. For this reason, it is argued that the doctrine of inordinate delay is not applicable in this matter.

26. The Petitioners aver that the medical and life situations of many families and victims have incapacitated them financially hence the extensive period taken in filing this suit.

Respondents' Case

27. The Respondents responded to the Petition through the Replying affidavit of the 1st Respondent's Principal Secretary, Dr. (Eng.) Karanja Kibicho, CBS, sworn on **12th April 2022**. (*the only affidavit on behalf of the Respondents)*.

28. On the onset, he contends that the Petition lacks both a factual and legal basis especially the assertion by the Petitioners that the government knew about the attack yet failed to take the necessary steps to prevent the attack. He avers these allegations are inaccurate and without any basis.

29. First, he depones that the government did not know about the bombing attack or its likelihood as alleged. He avers that in the period leading up to the attack, there was no specific or actionable intelligence or warning of the attack. He states that the only information the government had was the heightened terrorist activities in the region.

30. He depones that this fact is discernable from annextures marked *AM 3*, *AM 4*, *AM 5* and *AM 6*. This aspect was also highlighted in the case of **Monica Ombati v Republic of Sudan** (*AM 2*), **James Owen v Republic of Sudan** (*AM 2*) and **US V Ahmed Khalfan Ghailani** (*AM 7*). In view of this,

he argues that the Petitioners reliance of the said reports and court cases to prove existence of this intelligence has no basis.

31. He states that prior to the bombing attack, when Kenyan authorities were alerted about persons suspected to be terrorists, swift action was taken as is evident in the Wadil el Hage case. Actually, he informs that this capture was a result of the concerted effort of the Kenyan police with the CIA and FBI (*AM 4*). Equally, in 1997 when the Nairobi Branch of Islamic Charity, Al Haraain Foundation was suspected of plotting terrorist attacks against Americans, the police moved swiftly and arrested 9 of their members (*AM 5*). Correspondingly, when the Egyptian, Mustafa Mahmoud Said Ahmed walked in the U.S. Embassy and reported a suspected terrorist attack, the police interrogated him and later deported him.

32. Further to this, he contends that the Petitioners did not adduce any evidence to demonstrate that the Kenyan borders were not well guarded and persons entering not properly vetted. In the same breath, he argues that the allegation of smuggled money under the government's nose, was also not proved just like the other claims against the government.

33. In fact, he states that the government was absolved from liability for the attack in **Otolo Margaret Kanini and**

others v Attorney General and others (2022) eKLR. Considering this, he contends that the pronouncement in this case, renders the instant Petition baseless.

34. He depones that as soon as the bombing attack happened, the government coordinated the initial rescue efforts and later efforts by local and international NGOs. The government as well coordinated the emergency assistance from Israel Defense Forces, the United Kingdom, France, Denmark, Japan and United Nations.

35. The then President, H.E. Daniel Arap Moi further set up the National Disaster Emergency Fund known as Njonjo Fund. This fund received and disbursed funds to victims or their families so as to cater for funeral expenses and also compensation. As such, he stresses that the government expended every effort to ameliorate the conditions of the victims and their families. Additionally, suspects associated with the attack were also apprehended, charged, convicted, sentenced and imprisoned in the U.S. (*AM 7* and hereto *KK 3* and *KK 4*).

36. Furthermore, he points out that Sudan and Iran being sovereign states, the government cannot pursue them in the manner sought by the Petitioners owing to the doctrine of sovereign immunity. He as well notes that while other Kenyans have successfully sued Sudan and Al Qaeda in US

courts, Kenya lacks locus standi under the US Foreign Sovereign Immunity Act to do so.

37. Nonetheless, he argues that there are no provisions in the Government Proceedings Act or other Act that would allow the government to institute such claims on behalf of the victims. He on the flipside argues that the victims are not without remedy as the victims can sue the terrorist in Kenyan Courts.

Petitioners' Submissions

38. On 8th September 2024, the Petitioners through Khaminwa and Khaminwa Advocates filed submissions and listed the issues for determination as: *whether the Petition was filed within a reasonable time frame, whether the Petition meets the requirements of a constitutional petition, whether the Respondents have a responsibility to prevent and combat terrorism, whether the Kenyan government had prior intelligence over the U.S. Embassy bombing terrorist attack, whether the reports, publications and judgements relied upon by the Petitioners are admissible, whether state has an obligation to pay compensation/ reparation to all victims of the 1998 U.S Bomb Blast victims, whether the state violated the rights of the Petitioners and their children, and whether a Commission of Inquiry should be formed.*

39. On the first issue, Counsel submitted that the Petitioners have been on a long quest to access justice and reparations as outlined in the Petitioners' affidavits. Counsel noted that the 23-year delay is not inordinate. This is because, the bomb blast had severe effects on the health of the victims which included death and so most victims suffered lifelong incapacity and others disabled. Counsel submitted that owing to the gravity of these effects the Petitioners first attended to their health concerns before seeking justice. Counsel added that this caused a financial strain which impacted on the Petitioners ability to file a suit promptly, being that their financial resource was being utilized for their treatment. Counsel noted that this was the reason, the Petitioners approached the 1st Petitioner for legal assistance.

40. Counsel further added that the government had promised the Petitioners that it would compensate the victims and their families however this legitimate expectation was violated. This in addition increased in the delay in filing this suit.

41. That said, Counsel stressed that constitutional petitions do not have timelines. Reliance was placed in **Eliud Wefwafwa Luucho and 3 others v Attorney General [2017] eKLR** where it was held that:

> *" The question of limitation of time in regard to allegations of breach of fundamental rights has in many cases been raised by the State and our courts have*

consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights with a section of our judiciary holding that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defense and further the state cannot shut its eyes on its past failings nor can the court ignore the dictates of transitional justice discussed below."

42. Like dependence was placed in **Nairobi Pct. 104 of 2018 Legal advice Centre T /A Kituo Cha Sheria V A.G and Others** and **Wamwere & 5 others v Attorney General Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR)**.

43. Turning to the second issue, Counsel submitted that the Petition calls the Court to interpret and apply the provisions of the former Constitution and current Constitution. Counsel submitted that the Petitioners rights under Section 70 (a), 71(1) and 74 (1) of the repealed Constitution and Articles 26(1) and Article 29 of the Constitution had been violated by the Respondents. In light of this and relying in the opine in **Mumo Matemu v Tmsted Society of Human Rights Alliance & 5 others [2013] eKLR** upholding the threshold in the Anarita Karimi case, Counsel submitted that the Petition meets this threshold.

44. On the third issue, Counsel submitted that the obligation placed on the State to protect the lives and property of its people stems from a holistic interpretation of Article 1 of the

Constitution. As such, Counsel argued that there is a negative obligation on the part of the government in general and the police not to violate the rights and fundamental freedoms, but the law imposes a positive obligation on the part of the government to protect its people as guided in **Association of Victims of Post Electoral Violence and Interights vs Cameroon (272/2003)**.

45. Like dependence was placed in **Mahmut Kaya vs. Turkey Application No. 22535/93** and **Charles Murigu Murithii & 2 others v Attorney General [2015] eKLR**.

46. Counsel on the fourth issue submitted that to succeed in this issue, it must be demonstrated that the State had prior information of an action to be held liable as held in **Charles Murigu Muriithi** (supra). Counsel emphasized that as clearly evidenced in the Petitioners affidavits, publications and reports relied upon and decided cases, the State had prior knowledge of the imminent attack set for 7th August 1998 and so the Petitioners were entitled to protection against this attack.

47. Considering this, Counsel submitted that the police failed to diligently execute their function of preventing and detecting crime, apprehending the offenders and protecting human life. Counsel added that the Petitioners had an expectation that the action of the police would be efficient in preventing

and detecting the terrorist attack however this expectation was violated.

48. To buttress this point reliance was placed in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** where it was noted that:

> *"For an expectation to be legitimate, it must be founded upon a promise or practice by tl1e public authority, that is said to be bound to fulfil the expectation."*

49. In addition, Counsel submitted that the government ought to be held liable for its action and non-action in this matter. Counsel stressed that the government should not invoke the defence of global terrorism as a scapegoat to abdicate its responsibility to prevent the 1998 bomb blast attack. Reliance was placed in **Cameroonian case of 272/03: Association of Victims of Post Electoral Violence· & Interights/ Cameroon** where the African Commission held as follows:

> *"Consequently, in having failed to prevent the 1992 post electoral violence even though there were early warning signs (evidently) of the events in question and not having obtained the intended results mentioned above, the State of Cameroon has failed in its obligation of Result imposed on it by Article 1 of the African Charter, and that in consequence the Respondent State is hardly in a position to invoke the circumstances of force majeure."*

50. Comparable reliance was placed in **Mahmut Kaya** (supra) and **Osman v the United Kingdom (87/1997/871/1083)**.

51. Turning to the next issue, Counsel highlighted that the Respondents had not challenged the contents of the Reports and Judgments. In this matter, Counsel, relied in Section 60(2) of the Evidence Act which provides that *on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference*. Counsel submitted that the reports, publications and judgments relied on by the Petitioners are relevant books and documents made from reliable credible U.S institutions and a distinguished U.S diplomat. Equally, Counsel submitted that Section 82(f) of the Evidence Act allows parties to rely on judgments of a commonwealth countries or foreign countries as public documents.

52. On the sixth issue, Counsel submitted that the victims and families of the 1998 bomb blast attack are yet to be compensated in comparison to the American citizens, Kenyan employees and contractors working in the U.S. embassy. As deponed by the Petitioners, Counsel submitted that the government had not taken any action to ensure that the Republic of Sudan and Iran are accountable and in addition compensate the affected victims and their families.

53. Counsel stressed that reparation is an international law obligation provided under the *UN Basic Principles and*

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law which were adopted and proclaimed by the United Nations General Assembly Resolution 60/147 on 16th December 2005 and the general principle '*Responsibility of States for Internationally Wrongful Acts'* .Equally, Counsel submitted that this is a domestic legal obligation on the government. Counsel submitted that the Petitioners having proved their allegations against the government, they were entitled to reparation.

54. Reliance was placed in **Judgment No. 8 in the Case Concerning the Factory at Chorz6w (Claim for Indemnity) Jurisdiction) (the Chorzow Factory)** where it was held that:

> *"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."*

55. Comparable dependence was placed in **Belgium v, Spain - Barcelona Traction, Light and Power Company, Limited (New Application: 1962) -Judgment of 5 February 1970 - Second Phase, the Matter of African**

Commission on Human and Peoples' Rights v. Republic of Kenya Application No. 006/2012 and **245/02: Zimbabwe Human Rights NGO Forum v Zimhabwe**.

56. Counsel on the seventh issue, submitted that the government by their actions and inaction had indeed violated the Petitioners rights to life and security of person as enshrined under Section 70 (a), 71(1) and 74 (1) of the repealed Constitution and Articles 26(1) and Article 29 of the Constitution, as such the Petitioners are entitled to compensation.

57. Counsel submitted that the Petitioners in their affidavits had outlined the various health and economic issues that they had endured as a result of the bombast. Counsel emphasized as already submitted that the Petitioners are entitled to be paid compensation by the government. Reliance was placed in **Association of Victims of Post Electoral Violence and interights/Cameroon** (Supra) where it was held that:

> *"It therefore follows that the government should pay compensation for the prejudices suffered. Despite the fact that the government is denying it, it understood that it could not remain insensitive to its obligation to pay fair compensation to the victims, for this reason it set up a Committee to assess the damages suffered by the complainants."*

58. On the appropriate amount for compensation, Counsel submitted that Courts have awarded substantial compensation for victims involved in similar violations. Counsel highlighted that the Court in **Nairobi HCCC No.337 of 2008: Peter Otieno Ouma vs Attorney General** awarded Ksh.4,000,00 while in **Nairobi HCC No.196 of 2008; Peter Omari Ogenche vs Attorney General** an award of Ksh.3,500,000. In all Counsel pointed out that the injuries were not as severe as the present case. Counsel as such urged the Court to be guided by these decisions in making this determination.

59. Equal dependence in terms of quantum of compensation was placed in inter alia **Civil Case Bo.197 of 2012; George Efedha Madora v Attorney General** and **Khalid Salim Ahmed v Attorney General and another (2018)eKLR**.

60. On the final issue, Counsel submitted that where there is an allegation of violation of constitutional rights against state actors, the State is enjoined to investigate the same as discussed in the **Inter-Ammercian Court of Human Rights in Velasquez Rodriguez vs Honduras, Judgment of 27th July 1985**.Equally, Counsel submitted that the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law is also clear that the State

has an obligation to investigate violations efficiently, promptly and impartially and thereafter take action in accordance with domestic and international law.

Respondents' Submissions

61. The Respondents through Senior State Counsel, Dan Weche filed submissions dated 7th May 2024.The issues for determination were highlighted as: *whether the Petition was filed within a reasonable time frame, whether the Respondents were in dereliction of their duties ad obligations, whether the Kenyan government had prior intelligence over the U.S. Embassy bombing terrorist attack, whether there was violation of the Petitioner's rightful expectation of prompt, effective police action, whether the sate violated the rights of the Petitioners and their children, whether the Court should take judicial notice of the information in newspapers and media reports, whether a Commission of Inquiry should be formed* and *whether the Petitioners are entitled to damages.*

62. On the first issue, Counsel submitted that the Petitioners had filed the Petition 23 years later and failed to justify the manifest delay. Counsel stressed that the delay was unreasonable and prejudicial to the Respondents. In light of this, Counsel argued that the Petitioners had gone against the doctrine of laches.

63. Counsel relied in the Supreme Court guidance in **Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR)** where the Superior Court guided that the equity doctrine '*Vigiliantibus Non Dormientibus Jura Subveniunt*', states that the law only protects those who are vigilant and not those who ignore their rights, as such this serves as the foundation for the precedence of limited proceedings.

64. Equal dependence was placed in **Wellington Nzioka Kioko v Attorney General (2018) eKLR**.

65. Turning to the second issue, Counsel stated that in answering this question, the Court should be guided by two principles, first the principle of due diligence and second, the principle of positive obligation. Counsel submitted that the State is required under Article 21(1) of the Constitution to uphold, respect, preserve, advance and ensure the rights and fundamental freedoms outlined in the Bill of Rights. This positive obligation was expounded on by the European Court in **Mahmutkava v. Turkey (Application no. 22535/93)** relied upon by Counsel. The Court noted as follows:

> *"For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a Third Party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk...."*

66. Comparable reliance was placed in **Otolo Margaret Kanini and 16 others (supra)**.

67. Counsel reiterating the Respondents' averments, submitted that while it was clear that terrorist attacks had been brought to their knowledge and a global issue at the time, none specifically referred to the U.S. Embassy bombing. Counsel noted nonetheless that the Respondents appreciating this intelligence, deployed security personnel in all potential attack areas and stepped up patrols and surveillance. Accordingly, Counsel stressed that the Respondents did not in any way neglect their responsibilities as claimed by the Petitioners but rather took the appropriate action.

68. On due diligence, Counsel submitted that the Respondents deed of taking the appropriate action prior to, during and following the U.S. Embassy bombing, they acted in like with the principle of due diligence. Reliance was placed in **Zimbabwe Human Rights NGO vs Zimbabwe (Communication No. 245/2002) (2006)** where it was held that:

> *"The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuse of their rights."*

69. On the next issue, Counsel reiterated that the Kenyan government did not have any prior intelligence about the

U.S. Embassy bombing. The only intelligence that was available was on terrorists' attacks in general and no specific targets or locations were shared. On this premise, Counsel submitted that the Petitioners allegation otherwise was false. Moreover, Counsel contended that the Petitioners' allegations were supported by reports that fail to meet the threshold of admission as documentary evidence, thus are irrelevant and inadmissible.

70. Dependence was placed in **Republic v. Mark Lloyd Steveson (2016) eKLR** where it was held that:

> *"To avoid confusion, it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps:*
>
> *a. First, the Court determines if the proposed evidence is relevant. Here, the Court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the Relevancy Test, it proceeds to the second step.*
>
> *b. Second, in the case of tangible exhibits (like the two documents in this case), the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The court only proceeds to the third step if the proposed evidence passes muster under the*

Authentication Test. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact. what is meant by ''authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. I do not, at all, mean that the exhibit must now be accepted and believed. The Trial Court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid."

71. On the following issue, Counsel submitted that the Petitioners expectations ought to be interpreted in light of the timely manner in which the Respondent responded to the terror attack with the resources at hand. Counsel stressed that a legitimate expectation must be reasonable as held by the Supreme Court in India in **Madras City Wine Merchants' Asson and another v State of Tamil Nadu and another 1994 AIR SCW 3915**.

72. Like dependence was placed in **National Director of Public Prosecutions v Phillips (2002)4 SA 60(W)** and **Charles Murigu Muriithi (supra)**.

73. Counsel stressed that as per the Respondents averments, protection for the general public was provided as mandated. Counsel further argued that the Petitioners had not demonstrated that they are security experts to show whether or not the attack response was not coordinated. For

this reason, Counsel rejected the allegation that the Respondents failed to fulfill their obligation in light of the attack, in a timely manner.

74. Moving on, Counsel relying in Section 107 and 109 of the Evidence Act, submitted that the Petitioners bear the burden of proving the accusations of infringement of rights and fundamental freedoms. Counsel noted that this element was further emphasized in the case of **Anarita Karimi Njeru v Republic (1979) KLR 154** where the importance of precision and specificity in constitutional petitions was emphasized.

75. Counsel furthermore in the next issue opposed this Court taking judicial notice of the information in the newspapers and media reports. This is since the burden of proof needs to shift. Secondly, the accuracy of what the media reported cannot be ascertained with accuracy and optimally as conclusive proof as to the liability on the Respondents' part. Considering this, Counsel stressed that in order for this burden to be discharged the Petitioners must adduce proof that the information they say is in the public domain actually represents the true accounts of events of the day which they have failed to do.

76. Reliance was placed in **Jeneby Mawira v Annwhiller Mwende Rugendo and others [2017] eKLR** where it was held that:

> *"It is true that courts of law can be called upon to take judicial notice of certain facts that have attained some notoriety does not need to be proved. However, evidence must be tendered to prove that the fact has gained sufficient notoriety for the Court to take judicial notice of the same."*

77. Like dependence was placed in **Isaac Aluoch Polo Aluochier v National Alliance and 542 others [2016] eKLR**.

78. The Respondents having acted as they were required to by the law, Counsel submitted in the next issue that a Commission of Inquiry should not be formed as advanced by the Petitioners. Reliance was placed in **Republic v the Commission of Police and the Director of Public Prosecutions ex parte Michael Monari and another (2012)eKLR** where it was held that:

> *"...As long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner, the High Court would be reluctant to intervene."*

79. Finally, Counsel submitted that in view of the foregoing, the Petitioners were not entitled to relief sought as they had not demonstrated violation of the purported human rights. Reliance was placed in **Charles Murigu Muriithi** (supra) where the Court declined to grant the Petitioners therein damages as they were unable to present any proof of constitutional violations. For this reason, Counsel urged that the Petition be dismissed.

80. Equal reliance was placed in **Gitobu Imanyara and 2 others v Attorney General (2016) eKLR**.

Analysis and Determination

81. In my humble view, the key issues for determination in this matter are as follows:

i. Whether there was inordinate delay in filing Petition.

ii. Whether in the light of the evidence relied upon by the Petitioners (reports, publications and judgment by Courts in United States) and the totality of the circumstances of this case, the Petitioners have established, on a balance of probabilities, that the Government of Kenya failed to discharge its positive obligation to protect Kenyans against the Al-Qaeda attack that targeted the United States Embassy in Nairobi in 1998.

iii. Depending on the answer to issue number (ii) above, if the Respondents' violated the Petitioners' constitutional rights under Section 70 (a), 71(1) and 74 (1) of the repealed Constitution and Articles 26(1) and Article 29 of the Constitution and whether they have an obligation to pay compensation to all victims and their families.

iv. Whether a Commission of Inquiry should be formed.

v. Whether the Petitioners are entitled to the reliefs sought.

Whether there was inordinate delay in filing Petition.

82. In their submissions, the Respondents contend that the Petition was filed after an unreasonably long period of time that the Petitioners never bothered to explain or justify. Counsel for the Respondents argued that the Petitioners filed the Petition 23 years after the incident and this has caused prejudice to the Respondents. Relying on the Supreme Court case of **Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR)** he submitted that the law only protects those who are vigilant and not those who sit on their rights hence the Petition should be dismissed. He likewise relied on the case of **Wellington Nzioka Kioko v Attorney General (2018) eKLR** to buttress this point.

83. The Petitioners opposed the Respondents contending that the Petitioners have had a long history of seeking justice and reparations for the incident in question as detailed in their affidavits. They stated that they have been engaging the Respondents on the matter all along, and in fact, the Respondents had at one time promised to compensate them. Further, that the bomb blast caused severe and long-lasting effects on the health of the victims including death and lifelong incapacity, hence, considering the gravity of the impact, the Petitioners prioritized their health prior to seeking justice. This caused them massive financial strain

that impacted on their ability to file this suit promptly. That this fact is what informed the Petitioners decision to approach the 1st Petitioner for legal assistance.

84. Moreover, they argued that in the case of **Eliud Wefwafwa Luucho and 3 others v Attorney General [2017] eKLR** and **Nairobi Pct. 104 of 2018 Legal advice Centre T /A Kituo Cha Sheria V A.G and Others** and **Wamwere & 5 others v Attorney General Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR)**, it was held that limitation of time does not apply in respect of matters alleging breach of fundamental rights.

85. Judicial precedents have now firmly established that in cases involving violation in respect of the Bill of Rights, they are not affected by the limitation of time so long as the delay in instituting the case has been satisfactorily explained to the Court.

86. In **Ndambuki v Nungu & 6 others [2024] KEHC 4008 (KLR),** after review of various authorities, the Court explained thus:

> ***"36. Although it is now settled that Constitutional violations have no limitation period, it has been held that prolonged delays before seeking enforcement of a right must be explained. The Court of Appeal in Wellington Nzioka Kioko Vs. Attorney***

***General (2018) eKLR** was on point in asserting this position when it held thus:*

"…Whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be a plausible explanation for the delay…"

37. Further, the Court in James Kanyita Nderitu vs AG & Anor (2019) eKLR held as follows:

"… We have considered the appellant's submission and the learned judge's finding that there was inordinate delay in the filing of the petition. In this context, the learned judge invoked the principle of laches. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379). We are alive to the decision of this Court in Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR where it was noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding

those proceedings may have his claim denied as an abuse of the court process. (See Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341….”

38. Sluggishness on the part of the person asserting his or her rights is frowned upon by law and equity, particularly if there is no reasonable explanation for the delay hence the maxim equity aids the vigilant not the indolent.”

87. In **Lt. Col. Peter Ngari Karume & Others vs. Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR,** cited by the Court of Appeal in **James Kanyiita Nderitu v Attorney General & Director of Public Prosecutions (2019) KECA 1006 (KLR**) Nyamu J, held:

“The petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view, the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process…In view of the specified time limitation in other jurisdictions, the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame, but in my mind, there can be no justification for the petitioner’s delay for 24 years….”

88. In the instant case, the Petitioners have given reasons why they delayed in taking legal action. One, is that they had been constant engagement with the Respondents over the years with the Respondent giving them hope that their matter was under consideration. The Respondents did not deny that they had engaged in some discussions with the Petitioners on the issue for years with a view to finding a solution. Further, the Petitioners cited the fact that they had been experiencing financial challenges as there were demands on them in terms of health expenses. As a result, they had to approach the 1st Petitioner for legal assistance to pursue this matter on their behalf.

89. Despite the Respondents claiming they have suffered prejudice as a result of delay in filing this Petition by the Petitioners, they did not contest the fact that they have been engaging a conversation around this issue with the Petitioners for several years. They cannot thus feign surprise of the issues at hand. Further, they did not particulate the exact nature of prejudice that they have suffered in defending the Petition other than making the general statement. I find the explanation given by the Petitioners for the delay in filing the Petition satisfactory and is thus valid and excusable.

Whether in the light of the evidence relied upon by the Petitioners (reports, publications and judgment by Courts in United States) and the totality of the circumstances of this case, the Petitioners have established, on a balance of probabilities, that the Government of Kenya failed to discharge its positive obligation to protect Kenyans against the Al Qaeda attack that targeted the United States Embassy in Nairobi in 1998.

90. This is the foundational issue upon which the Petition rests. The resolution of this issue will determine whether the Court can consider the other issues in this Petition as settles the question of liability in respect of the actions complained of. The question thus becomes, does the evidence presented demonstrate the Respondents failure to take reasonable steps to prevent the occurrence of the US Embassy terrorist attack in August 1998?

91. The Petitioners' case is that the 1998 U.S. Embassy bomb attack by Al Quada terrorists happened because the Government of Kenya neglect to act on repeated early warnings to prevent and stop the terrorist attack. Further, that there were known border and immigration failures that allowed infiltration by dangerous elements without detection yet no official was held accountable for the breaches. The Petitioners case rests on the breach of the Government's domestic and international obligation to protect Kenyan citizens hence they posit is a violation of their constitutional rights considering that 201 Kenyans lost their lives and many

others were maimed while others suffered serious psychological trauma as a result of the attack. It is the Petitioners' case that the terrorist attack was known by the State, or ought to have been reasonably been known to the State yet it failed to stop it. The Petitioners urge the Court to find that on evidence, the Respondents by their conduct breached Section 14 (1) of the repealed Police Act, Cap 84; Sections 70 (a), 71 (1), 74 of the repealed Constitution and also international obligations enshrined in Article 4 and 6 of the African Charter and Article 3 of the Universal Declaration of Rights.

92. The Respondents strongly opposed the contention by the Petitioners that the government knew about the attack but failed to take the necessary steps to prevent the attack terming the allegations as inaccurate and made without any sound or demonstrable basis. The Respondents asserted that the government did not have prior information about the bombing attack or its likelihood as alleged as there was no specific actionable intelligence and that the only information available to the government was the heightened terrorist activities in the region, a fact the Respondent confirmed by the annextures marked *AM 3*, *AM 4*, *AM 5* and *AM 6* that the Petitioners rely on. This, the Respondent averred is also apparent in the case of **Monica Ombati v Republic of Sudan** (*AM 2*), **James Owen v Republic of Sudan** (*AM 2*)

and **US V Ahmed Khalfan Ghailani** (*AM 7*). As such, the Respondents contended that the the Petitioners reliance of the said reports and court cases as proof of the existence of early warnings through intelligence has no basis. The Respondents further stated that when Kenyan authorities were alerted about persons suspected to be terrorists, swift action was taken as evidenced by the manner it dealt with Wadil el Hage case who was captured as a result of the concerted effort of the Kenyan police with the CIA and FBI (*AM 4*). Equally, in 1997 when the Nairobi Branch of Islamic Charity, Al Haraain Foundation was suspected of plotting terrorist attacks against Americans, the police moved swiftly and arrested 9 of their members (*AM 5*). Correspondingly, when the Egyptian, Mustafa Mahmoud Said Ahmed walked in the U.S. Embassy and reported a suspected terrorist attack, the police interrogated him and was later deported. It was also the Respondents position that the Petitioners did not adduce any evidence to the effect that the Kenyan borders were not well guarded and that the persons entering were not being properly vetted. This also applies to the allegation of smuggled money under the government's nose.

93. Further, the Respondents informed this Court that the government was absolved from liability for this attack in earlier case of **Otolo Margaret Kanini and others v Attorney General and others (2022) eKLR**. Furthermore, it was the Respondents case that after the bomb attack

happened, the government coordinated the initial rescue efforts and later efforts by local and international NGOs. The government as well coordinated the emergency assistance from Israel Defense Forces, the United Kingdom, France, Denmark, Japan and United Nations. That the then President, H.E. Daniel Arap Moi set up the National Disaster Emergency Fund known as **Njonjo Fund**. This fund received and disbursed funds to victims and their families so as to cater for funeral expenses and also compensation. As such, the Respondents argued that the government expended every effort to ameliorate the conditions of the victims and their families. Additionally, suspects associated with the attack were also apprehended, charged, convicted, sentenced and imprisoned in the U.S. (*AM 7* and hereto *KK 3* and *KK 4*).

94. It is important from the out-set that I lay bare, domestic and international obligations of the State, then proceed to assess if the Petitioner has established the threshold of liability against the Respondents. The finding of liability is important because if established, it will inform the next action by the Court.

95. Under the **Repealed Police Act, Cap 84**; the functions of the police were prescribed to be as follows:

> "***Section 14.***

(1) The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, <u>the protection of life and property, the prevention and detection of crime</u>, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged."

96. The relevant sections of the repealed Constitution of Kenya provided as follows:

> ***Section 70.*** *Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –*
> *(a) life, liberty, security of the person and the protection of the law;*
>
> ***Section 71 (1)*** *No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.*
>
> ***Section 74 (1)*** *No person shall be subject to torture or to inhuman or degrading punishment or other treatment.*
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.*

97. The **African Charter on Human and Peoples Rights** provides at Article 4 and 6 as follows:

> ***Article 4***
> *Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*
>
> ***Article 6***
>
> *Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and*
>
> *conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained*

98. **In the Universal Declaration of Human Rights, Article 3 proclaims thus:**

> ***Article 3***
>
> ***'Everyone has the right to life, liberty and security of person.'***

99. The issue of holding the State liable for the failure to take realistic steps to stop violation of rights was discussed in the case of **Otolo Margaret Kanini and others v Attorney General and others (2022) eKLR** where citing **Petitions No. 132 of 2011 & 197 of 2012** (Consolidated), the Court addressed itself on the scope of liability of Police under Section 14 of the Police Act where the failure to protect the citizens is alleged. It observed;

"47. It is our view that section 14 of the Police Service Act and now section 24 of the National Police Service Act impose a negative obligation on the part of the Government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the said agencies to protect the people from threat of violation of the said rights and fundamental freedoms. To this extent and as to whether the state is liable for violations of fundamental rights and freedoms by private and or third parties, we are guided by the decision in Association of Victims of Post Electoral Violence and Interights vs. Cameroon where it was held that:

The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a state to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the charter which would be attributable to this state even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals….According to the permanent jurisprudence of the commission, Article 1, imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the

state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims"

100. Under the present constitutional dispensation, the obligation placed on the State is more direct and clear. **Article 21 (1)** of the Constitution provides as follows:

> ***"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights"***

101. This constitutional obligation underscores the fact that the State is not only required to desist from violating the fundamental rights and obligations but must also take positive steps to prevent violations by others and also, facilitate the realization of social economic rights. This a constitutional command.

102. The question thus becomes, have the Petitioners demonstrated by way of evidence, that on a balance of probabilities, the Government of Kenya knew, or ought to have reasonably known, of the risk of occurrence of the 1998 bombing of US Embassy, and being so aware, failed to take reasonable steps to prevent its citizens from being attacked?

103. **Under Section 107 (1)** of the **Evidence Act, Cap 80**, the burden of proof lies on the person who asserts the existence of a fact. It states:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?"***

104. The Supreme Court in **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** elaborated and affirmed the principle thus:

> ***"[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."

105. Have the Petitioners discharged this burden of proof through credible and admissible evidence? To discharge that burden, it is my humble view that the Petitioners had an obligation to satisfy this Court on a balance probability that:

i) There was specific credible intelligence at the Government's disposal.

ii) The Government had the opportunity to act on it.

iii) That it failed to take reasonable steps to prevent the occurrence of the act complained of

iv) The failure caused or materially contributed to the terrorist attack

106. Is there sufficient evidence on record to establish the above elements?

107. I have to examine the Petitioners' evidence on record vis-vis the rebuttal by the Respondents. It is apparent that what the Petitioners solely rely on are statements in publications and

reports to establish negligence on the part of the State to prevent the attack. The authors of these reports and publications were neither called to testify nor did they file affidavits authenticating the contents of those reports. The facts they relied on to arrive at the conclusions in those reports cannot be verified in either. Basically, it is all hearsay evidence. The publications and reports presented in this manner cannot constitute credible and substantive evidence of the disputed fact of liability. Moreover, the Petitioners relied on the contents of judgements from the United States. This Court does acknowledge the existence of the said judgments but the findings of fact by another Court cannot be taken as proof in any other subsequent judicial proceeding. In any event, I have gone through the said judgments carefully and I do not find anywhere where the American courts made findings faulting the Government of Kenya for negligence or complicity in the US Embassy terrorist attack by Al Qaeda terrorists. Indeed, despite annexing the said judgments, the Petitioners did not point any such finding against the Government of Kenya in any of the American court judgments. All that was clear was that the American Courts squarely placed responsibility for the attack on the Republic of Sudan.

108. In my view, the hearsay statements in the Reports cannot be relied upon as substantive evidence to prove disputed

evidential facts that the Government of Kenya failed to act on prior intelligence. This is more so when the State has vehemently contested this assertion and has stated that it was not in possession of any specific actionable intelligence, only generic information of heightened terrorism activities in the region and that it acted on it in the best way possible under the circumstances. There is thus no demonstrable credible evidence that Kenya received prior multiple specific actionable intelligence report about the impeding US Embassy Bombing but neglected to act on it. The evidence relied upon by the Petitioners as proof of that fact turns out to be hearsay statements in reports and publications. The sources of facts that made the authors come to the conclusions contained in the reports cannot be verified as not even the authors of those reports swore affidavits to authenticate the reports and publications relied by the Petitioners. On a balance of probabilities, I would not regard this as credible evidence to be used as a basis of finding liability.

109. Without evidence that establishes the Respondents failure to take reasonable steps to stop the US Embassy terrorist attack in August 1998, the substratum upon which the Petition is founded cannot hold. The violations of the constitutional rights against the State depended on proof of this primary fact.

110. A similar scenario played out in the case of **Otolo Margaret Kanini and 16 others v Attorney General and others (2022) eKLR** which was also a constitutional Petition based on the 1998 bomb blast terrorist attack. The factual foundation was also similar, that the Petitioners were spouses and children of the victims of the 1998 US Embassy terrorist attack. They accused the Respondents failing to forestall any and all preparatory activities that led to the egregious attack and as a result, Petitioners kins lost their lives leading to violation of Petitioners' rights and fundamental freedoms. The Court held as follows:

> ***"99. A candid look at the Petition reveals that it was based on hearsay. But, even by taking into account the fact that the Respondents accepted the alleged intelligence reports, the Petitioners did not adduce any evidence to dispel the Respondents position that the reports were of general nature and could not be relied upon to prevent the attack. The Petitioners' averments remain hollow.***
>
> ***100. This Court now finds and hold that the Petitioners failed to prove that the Respondents acted in a manner so as to endanger lives of the persons who died out of the bomb attack.***
>
> ***101. There being no liability on the part of the Respondents as discussed above, the issue as to whether the rights and fundamental freedoms of the Petitioners, as pleaded in***

the Petition subject of this judgment, were infringed as a result of the persons who died during the bomb attack does not arise.

102. This Court returns the verdict that the Petitioners failed to prove that their rights under Articles 26, 27, 28, 29 and 43 of the Constitution were variously infringed. The issue is hereby answered in the negative."

111. Besides seeking alleging violation of fundamental rights and freedoms, the Petitioners have prayed for a declaration in the following terms:

'A declaratory order directed at the Attorney General to advise the President to set up a commission of inquiry to inquire on: the security failures leading to the 1998 U.S embassy terrorist attack, culpability of state institutions and state officers in the attack and recommendations for their prosecution.'

112. Under the Commission of Inquiry Act, Cap 2, the President is granted the power to establish a Commission of Inquiry as follows:

Section 3: Issue of commissions of inquiry

(1) The President, <u>whenever he considers it advisable so to do</u>, 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.

113. From the introductory wording of Section 3 (1), it is crystal clear that the matter of establishing a Commission of Inquiry lies with the President exclusively. The Act does not mention that this shall be on advice or recommendation of anyone, let alone the Attorney General. It is exclusively Executive discretion. Further, an examination of the functions of the Attorney General under Article 156 (4) a, b & c, 5 & 6 including under the Attorney General's Act, none confers such express mandate on the Attorney General.

114. Were this Court to assume the task of telling the Attorney General to give specific legal advice, that would be akin to meddling with the independence of that office. Further, as already found, that is a matter clearly not expressly covered under the statutory or constitutional duties of the Attorney General. The prayer as framed is thus legally incapable of being granted. Neither the Attorney General can be compelled to advise the President in the absence of any explicit statutory or constitutional provision assigning him any advisory role to the President in establishing commissions of inquiry nor would the President be so compelled as the Act gives the President the discretionary mandate to decide whether to establish or not. I am fortified in this regard by the decision of **Apollo Mboya v Attorney**

General & 3 others; Kenya National Commission On Human Rights (Interested Party) & another [2019] KEHC 4768 (KLR) where the Court stated:

> ***"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.***

115. Lastly, there were prayers that:

> ***An order directed at the Attorney General to within 6 months of the Court judgment present a report to the Court on the steps taken by the government to:***
>
> ***i) File an international jurisdiction case for compensation of all victims and their families against the Republics of Sudan and Iran and or steps taken to obtain reparations from the countries.***
>
> ***ii) Obtain compensation for victims from Al-Qaeda assets and BNP Paribas S.A. (BNPP), a global financial institution headquartered in Paris***

iii) Seek an acknowledgment of responsibility from the Republics of Sudan and Iran.

116. The prayers are not aligned to the mandate of the Attorney General under the Constitution or the Statute. The Attorney General's roles do not extend to singularly suing foreign states to seek compensation on behalf of individual complainants or with a view to seizing their assets. Such a move would involve very high-level policy decision-making in the Executive as it could have massive foreign relations implications between Kenya and affected states.

117. A 3- Judge bench in **Kiriro Wa Ngugi & 19 others v Attorney General & 2 others (2020) eKLR** sounded a word of caution while reviewing the actions and/or inactions of other arms of government by stating thus:

> ***"97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine… 98. We shall commence with the political question doctrine. Black's Law Dictionary, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:***
>
> ***The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government.***

99. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government….”

118. Consequently, the Court concluded as follows in this respect:

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government.

119. In the United States, case of **Heckler vs Chaney 470 US 821** death row inmates challenged the Food and Drugs Administration refusal to initiate the enforcement action to block the use of certain drugs in lethal injection. The Supreme Court did not agree with the case of the inmates on the grounds that the Drug Agencies decision was dependent on complicated balancing of many factors that were peculiarly within its expertise and was thus better endowed to evaluate those variables than the Court would hence was a matter within its discretion. The Supreme Court however went and made a decision on the guiding standards that

may be applied against the presumption of judicial review of an administrative non-enforcement decision based on discretional deference. The Supreme Cour identified specific situations where the statute has provided guidelines for the agency to follow in exercising its enforcement powers stating that in such cases, the Court will have been supplied with the law to apply in reviewing the decision. The other would be when the administrative agency has adopted a general policy that is so extreme as to amount to abdication of statutory responsibilities.

120. In my humble view, whether the Government of Kenya should take legal action against governments of Sudan, Iran or the French Bank BNP Paribus for their suspected involvement in the US Embassy bomb blast terrorist attack of August 1998 requires delicate weighing of many factors that include high level political consequences that comes with taking such an action which this Court feels restrained to take as it requires balancing various interests which include political and diplomatic consequences. I find that the political *question doctrine* thus applies on all fours in relation to the aforementioned prayers.

121. For reasons aforesaid, I find that this Petition lacks merit and I hereby dismiss the same in its entirety.

122. Each Party shall bear its own costs.

Dated, signed and delivered in Open Court at Nairobi this 28th January, 2026.

……

L N MUGAMBI

JUDGE