



**Independent Policing Oversight Authority v Siddique w/o Arshad Sharif & 6 others
(Civil Appeal E802 of 2024) [2025] KECA 1456 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1456 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E802 OF 2024
DK MUSINGA, M NGUGI & F TUIYOTT, JJA
JULY 31, 2025**

BETWEEN

INDEPENDENT POLICING OVERSIGHT AUTHORITY APPELLANT

AND

JAVERIA SIDDIQUE W/O ARSHAD SHARIF 1ST RESPONDENT

KENYA UNION OF JOURNALISTS 2ND RESPONDENT

KENYA CORESPONDENTS ASSOCIATION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 5TH RESPONDENT

INSPECTOR GENERAL OF POLICE 6TH RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 7TH RESPONDENT

(Being an appeal from the judgment of the High Court at Kajiado (Stella Mutuku J.) dated 8th July 2024 in Kajiado High Court Petition No. E009 of 2023)

JUDGMENT

1. Arshad Mohammed Sharif (deceased), was a Pakistani investigative journalist. He had been living in self-exile in Kenya for two months or so prior to the events forming the basis of the petition. On the night of 23rd October 2022, he was travelling as a passenger in motor vehicle registration number KDG 200M, a Toyota Landcruiser V8, at Tinga Market along Magadi Road in Kajiado County at around 9pm when he was fatally shot in the head by police officers.
2. The shooting was admitted by the 6th respondent, the Inspector General of Police (hereafter 'IG'), who, in a press statement issued on 24th October 2022, stated that the police shooting was a case of



mistaken identity; and that the police were pursuing a stolen motor vehicle, a Mercedes Benz Sprinter van registration number KDJ 700F allegedly stolen from Pangani, Nairobi. The IG expressed regret for the incident and promised that it was under investigation, and that appropriate action would be taken. A similar promise was made by the appellant, the Independent Policing Oversight Authority (hereafter 'IPOA').

3. These facts were set out in the petition dated 19th October 2023 and the affidavit in support sworn by the 1st respondent, Javeria Siddique, the widow of the deceased, on the same date. The 1st respondent averred that despite the promises to investigate the arbitrary and fatal shooting of the deceased made by the IG and IPOA, and despite requests by the 1st respondent for status updates on the investigations, none was forthcoming, and no action had been taken against the officers responsible for the unlawful killing of the deceased.
4. Accordingly, the 1st respondent, together with the 2nd and 3rd respondents, the Kenya Union of Journalists (KUJ) and the Kenya Correspondents' Association (KCA), described as organisations mandated to protect journalists in Kenya and to secure the professionalism and freedom of the media, filed the petition dated 19th October 2023 against the appellant and the 4th-7th respondent. They asserted that failure to investigate, arrest or prosecute the police officers who unlawfully shot and killed the deceased amounts to a criminal cover up; and that such failure threatens further violation of the deceased's rights. They further averred that the police used excessive and lethal force against the deceased, thereby violating his right to life guaranteed under Article 26 of the Constitution; Article 6 of the International Covenant on Civil Political Rights (ICCPR), and Article 4 of the African Charter on Human and Peoples' Rights (the Banjul Charter) which protect the right to life and guarantee protection from arbitrary deprivation of the right to life.
5. The 1st -3rd respondents further alleged violation of the deceased's rights under Article 27 of the Constitution, Article 2 of the ICCPR and Article 3 of the Banjul Charter which entitle every individual to equal protection of the law; violation of the deceased's right to a fair trial and the right to dignity under Article 50 and Article 28 of the Constitution respectively; as well as Article 29 of the Constitution guaranteeing every person the right to freedom and security of the person. They also alleged violation of the deceased's rights under Article 2 of the Convention Against Torture and other Cruel Inhuman or Degrading Treatment (CAT).
6. The petitioners asserted that the respondents before the trial court were jointly and severally liable for the acts of the police officers who were acting in the course of duty when they shot the deceased. They asked the court to allow the petition and sought orders and declarations from the court: that the use of lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary to protect life or prevent serious injury from an imminent threat, and that the use of lethal force against the deceased by shooting him on the head was arbitrary, 'unproportionate', unlawful, and unconstitutional; that it violated his right to life under Article 26 of the Constitution, right to equal benefit and protection of the law under Article 27, right to dignity under Article 28, and right to security of the person under Article 29 of the Constitution; that the petitioners are entitled to effective remedies as guaranteed by Article 23 of the Constitution; Article 2(3) of the ICCPR, Article 14 of CAT, and Article 7(1) of the Banjul Charter for the violations of the deceased's rights through the unlawful and admitted shooting of the deceased; that the failure to conduct independent, prompt, and effective investigation and to commence prosecution for the killing of the deceased violates the positive obligation to investigate and prosecute violations of the deceased's rights aforesaid; and that Articles 244(a) and 246(3) command the respondents to punish and prosecute the police officers who killed the deceased.



7. The petitioners further sought a mandatory order compelling the respondents to conclude investigations take disciplinary action, and charge the police officers who shot and killed the deceased; an order compelling the respondents to supply the petitioners with copies of, inter alia, all documents, files, reports, letters, electronic mail or evidence, in any medium, including films, photographs and videotapes in their custody or possession relating to the shooting in question; an order directing the 4th respondent, the Attorney General (AG) to issue a public apology, including an acknowledgement of the facts, and acceptance of responsibility to the family of the deceased within 7 days of the orders of the court; damages for violation of the petitioner's constitutional rights; and the costs of the suit.
8. The 4th-7th respondents and the appellant opposed the petition. The AG filed grounds of opposition and submissions dated 11th November 2023 and 28th March 2024 respectively on his own behalf and on behalf of the IG. The AG's position was that his office and that of the IG were wrongly joined to the petition as IPOA had conducted investigations and made recommendations for prosecution to the DPP as IPOA has no powers of prosecution.
9. In opposing the petition, the 5th respondent, the Director of Public Prosecutions (DPP), filed an affidavit sworn by Gikuhi Gichuhi, an Assistant Director of Public Prosecutions, on 11th December 2023. The DPP confirmed the averments by the petitioners regarding the fatal shooting of the deceased. He further confirmed that he had received reports and recommendations from IPOA; that his office held a meeting with IPOA on 24th January 2023 and a meeting with officials of the Pakistan High Commission on 26th January 2023 to update them on the progress of the investigations; that the meeting brought together officers from the DPP, IPOA, the Ministry of Foreign Affairs and the Pakistan High Commission.
10. The DPP averred that he had received a letter from IPOA and had written to IPOA on 21st February 2023 seeking clarification on the gaps that his office had identified in the IPOA report. Further, that in response to a letter from the Ministry of Foreign Affairs requiring an update on the progress of the case, his office wrote to the Ministry providing an update on the status of the investigations undertaken into the incident. The DPP stated that IPOA re-submitted its report on 16th March 2023 addressing the areas of investigation directed by the DPP; that the DPP independently reviewed the re-submitted file, noted some more areas of concern that required further investigation; that he wrote to IPOA a letter date 27th March 2023 directing that the outstanding areas be conclusively covered; and that IPOA re-submitted the file on 29th May 2023 addressing the outstanding areas that had been flagged by the DPP.
11. The DPP averred that due to the complexity of the issues raised in the matter, he was of the view that there was need for a joint comprehensive analysis of the investigation file before any decision could be made. He confirmed that he had received a status update request from the petitioners on 31st July 2023 but before he could respond, he became aware of the present petition.
12. It was the DPP's position that his office has been proactive in ensuring that effective investigations are done to facilitate effective prosecution should the need arise. Further, that he could not provide the information sought by the petitioner because the correspondence between his office, investigative and other agencies is protected by privilege and cannot be disclosed at this point to protect the integrity of the investigative outcome; that the circumstances surrounding the shooting of the deceased were quite complex and therefore the agencies involved in investigation should be allowed to perform their mandate without interference; and that the petitioners had not placed anything before the court to suggest that his office had been lax in the performance of its duty. The DPP prayed that the petition be dismissed with costs.



13. On its part, IPOA filed an affidavit sworn by Evans Kipsang, an investigator with IPOA, on 5th January 2024. Mr. Kipsang averred that on 24th October 2022, IPOA learnt about the shooting of the deceased. It therefore, on its own motion, registered a complaint with respect to the shooting under number IPOA/CMU/002815-2022. Further, that IPOA also received a letter from the DPP requesting it to investigate the matter. It commenced investigations and forwarded its duplicate file containing copies of evidence collected, investigation report and recommendations to the DPP on 21st February 2023. On the same date, it received a letter from the DPP identifying gaps he required IPOA to cover; that it did so and resubmitted the file to the DPP by its letter dated 16th March 2023; that it then received a further letter from the DPP dated 27th March 2023 seeking yet further clarifications, to which it responded by a letter dated 29th May 2023. Its case was that it had conducted thorough investigations and forwarded its report to the DPP, and it was ready to give a status report to the petitioners once it received directions from the DPP. IPOA asserted that all the matters raised in the petition were outside its mandate, and it was therefore not liable to the petitioners.
14. The 7th respondent, the National Police Service Commission (NPSC) filed Grounds of Opposition dated 15th November 2023. Its position was that while it exercises disciplinary control over members of the National Police Service (the NPS), the NPS remains under the independent command and discipline of the IG, in accordance with section 8A of the *National Police Service Act*, while exercising its police powers, and the petition relates to police in pursuit of a stolen motor vehicle; that the NPSC is barred by section 10(g)(i) of the *National Police Service Act* from conducting investigations; and that the petitioners had not demonstrated any acts or omissions, on its part, to exercise disciplinary control as there is no report or request addressed to it to summon or investigate any police officers for disciplinary infractions in relation to the facts underlying the petition.
15. Upon hearing the petition, the trial court found in favour of the 1st -3rd respondents. It granted most of the prayers sought in the petition, save for the prayer for an order compelling the respondents to supply the 1st -3rd respondents with copies of, among others, all documents, files, reports, and letters in their possession relating to the shooting of the deceased; and an order directing the AG to issue a public apology and acknowledgement of the facts to the family of the deceased within 7 days of the orders of the court.
16. With respect to the prayer for damages, the trial court granted, jointly and severally against the respondents before it, a global award of Kshs. 10,000,000 with interest thereon from the date of filing of the petition until payment in full. It also granted the 1st -3rd respondents the costs of the petition.
17. Aggrieved by the decision, IPOA filed the present appeal, raising some twelve grounds of appeal in its memorandum of appeal dated 16th October 2024, which it condensed, in its submissions, into three, namely that the learned judge erred in both law and fact by: finding that the appellant violated the constitutional rights of the 1st, 2nd and 3rd respondents; by making blanket findings and issuing blanket mandatory orders directing the appellant to undertake actions, including disciplinary action and prosecution, outside the ambit of its mandate; and by awarding the 1st respondent exaggerated and exorbitant general damages of Kshs. 10,000,000 without any factual or legal basis. It asked this Court to allow its appeal, set aside the decision of the trial court, and award it the costs of the appeal.
18. The 1st -3rd respondents filed a notice of cross-appeal dated 4th January 2025. They state that they will ask for the decision of the trial court to be varied or reversed, to a limited extent, on the grounds: that the trial court erred in awarding an inordinately low amount of Kshs 10,000,000 which was a grossly inadequate redress for the admitted unlawful shooting of the deceased; in declining the 1st respondent's request under Article 23 for additional reliefs appropriate to redress the violations,



render satisfaction, and deter future violations or address the systematic violations disclosed in the case, namely: verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; a public apology, including acknowledgement of the facts and acceptance of responsibility; and judicial and administrative sanctions against persons liable for the violations.

19. They prayed that the main appeal be dismissed; the cross- appeal be allowed; and that this Court be pleased to enhance the damages awarded to the 1st respondent. They further pray that this Court issues a declaration that Articles 244 (a) and 246(3) commands the respondents to punish and prosecute the police officers who killed the deceased; and a mandatory order does issue compelling the respondents to conclude investigating, take disciplinary action, and charge in court the two police officers who shot and killed the deceased; an order compelling the respondents to forthwith supply to the 1st respondent copies of, among others, all documents, files, reports, and letters in their custody or possession relating to the shooting in question; and finally, an order directing the AG to issue a public apology, including an acknowledgement of the facts, and acceptance of responsibility to the family of the deceased within 7 days of this Court's order.
20. The DPP filed, out of time, a notice of cross-appeal dated 10th March 2025. When the matter came up for hearing on 12th March 2025, learned counsel, Mr. Omondi, sought an adjournment in order to regularise the DPP's cross- appeal, a request that was declined. In this judgment, therefore, we address ourselves solely to the main appeal by IPOA and the cross-appeal by the 1st, 2nd and 3rd respondents.
21. IPOA's submissions dated 11th November 2024 were highlighted by its learned counsel, Mr. Kinoti. While reiterating the facts of the case and the actions it had taken following the shooting of the deceased, IPOA submitted that it carried out its mandate and that as at 29th May 2023, the investigation file was with the DPP who has the constitutional mandate to commence and continue criminal proceedings.
22. With regard to the alleged violation of the 1st -3rd respondents' constitutional rights, IPOA submitted that the trial court erred by finding that it violated the rights of the 1st respondent by failing to conduct independent, prompt and effective investigations and commence prosecutions, or to complete those investigations or in any other manner act on the outcome of the investigations. It submitted that it is trite law that a statutory body can only be held responsible with respect to conduct within its mandate, relying for this submission on the decision of the Supreme Court in *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) in which the Court held that constitutional or statutory bodies must operate strictly within the four corners of their constitutional and statutory mandates.
23. IPOA submitted that its mandate and functions are provided for in sections 5, 6, 7, 25 and 29 of the *IPOA Act*; that the petition arose from the alleged shooting of the deceased by police officers at Kajiado and consequently, the aspect of its mandate under challenge was its investigative function, provided for in sections 6 (1) (a), 7(1) (a) and 25 (1) of the *IPOA Act*. Its case was that pursuant to section 6 (1) and 29 of the Act, upon completing such investigations, its function is limited to making appropriate recommendations to the relevant bodies such as the DPP, IG and NPSC for further action.
24. The appellant submitted that in this case, its investigations, in its opinion, disclosed a criminal act by members of the National Police Service. It therefore forwarded its recommendations to the DPP, who has the exclusive mandate to commence criminal proceedings under Article 157(10) of the *Constitution* and section 4 of the *Office of the Director of Public Prosecutions Act*, No. 2 of 2013. IPOA relied on



- the case of *Fredrick Masagbwe Mukasa v Director of Public Prosecutions & 3 others* [2019] eKLR to illustrate the distinction between its mandate of making recommendations and that of the DPP in making the decision to charge.
25. It was IPOA's submission that its function was limited to investigating the alleged unlawful shooting of the deceased by police officers and making appropriate recommendations to the DPP for further action; that there was clear evidence on record that IPOA conducted and concluded the investigations expeditiously and forward the investigation file and recommendations to the DPP, a fact corroborated by the DPP in the affidavit filed in opposition to the petition; that by 24th January 2023, barely three months after the incident, it had conducted investigations and forwarded the investigation file to the DPP. Further, that it had responded to requests for clarification of various areas by the DPP, and had sent the final clarification on 29th May 2023.
 26. IPOA submitted further that while there is no statutory timeline within which it is bound to conclude investigations, the evidence showed that it conducted the investigations expeditiously, taking into account the complexity of the matter and thoroughness of the investigations required. It submitted further that no evidence was presented before the trial court to show how its investigations were not independent, prompt and effective as alleged by the 1st respondent.
 27. IPOA submitted therefore that there was no basis for the trial court to find that it had violated the rights of the 1st respondent by failing to conduct independent, prompt and effective investigations and commence prosecution, or to complete those investigations. It reiterated that it discharged its legal duties diligently and expeditiously; and that it is neither practical, just nor lawful to hold it liable for actions or omissions beyond its investigative role as clearly delineated under the *IPOA Act*.
 28. IPOA further submitted that the trial court erred in both law and fact by finding it liable for alleged violations of constitutional rights by police officers despite the officers not being under its command, control or employment. It submitted that the trial court's finding that all the respondents, including IPOA, were liable for the shooting of the deceased formed the basis of its order against all the respondents before it, jointly and severally, for payment of damages of Kshs. 10,000,000 to the 1st respondent. Relying on this Court's decision in *Teachers Service Commission v WJ & 5 others* [2020] eKLR, IPOA submitted that it is trite law that only a master can be held vicariously liable for the unlawful conduct of its servant done in the course of employment.
 29. Noting that the employer-employee link was the sine qua non for such vicarious liability to attach, IPOA submitted that under Article 245 of the *Constitution* and sections 8 and 8A of the *National Police Service Act*, the IG is vested with the independent command over the National Police Service. Further, that pursuant to Article 246 (3) (a) and (b) of the *Constitution*, the mandate to recruit and discipline members of the National Police Service is reposed in the NPSC. Its case, therefore, was that the members of the National Police Service alleged to have unlawfully shot the deceased were not employees, servants or agents of IPOA, nor were they under its command and control.
 30. Regarding its mandate vis a vis that of the IG and the NPSC, IPOA cited this Court's decision in *Attorney General & 2 others v Independent Policing Oversight Authority & another* (2015) eKLR in which its role was described as that of 'Wanjiku's watchman', to keep members of the NPS on their toes, investigate complaints and make recommendations to appropriate authorities. In its view, the trial court had no basis for finding it vicariously liable for the alleged unlawful conduct of members of the NPS, and for making an award in damages to the 1st respondent against it.
 31. IPOA further impugned the decision of the trial court for finding that it had violated the 1st respondent's rights under Article 35 of the *Constitution* and the *Access to Information Act*. It noted the



DPP's averments that updates concerning the status of investigations were provided to the Ministry of Foreign Affairs and the Pakistani High Commission; that the deceased was a Pakistani national, as is the 1st respondent; and that consequently, the proper procedure for updates on the progress of the investigation was through the Ministry of Foreign Affairs and the Pakistani High Commission, which was done. Further, that even during the pendency of the petition, both IPOA and DPP, in their affidavits in responses to the petition, clearly provided the status of the investigations, including by annexing correspondence between IPOA and the DPP, and the trial court therefore erred by finding that even at the judgment stage of the proceedings, no information had been furnished to the 1st -3rd respondents on the status of investigations.

32. IPOA further submitted that in any event, the 1st respondent had not pleaded violation of Article 35 of the Constitution in the petition. Its submission was that parties are bound by their pleadings, and courts should not go beyond the bounds of the pleadings to grant reliefs not sought by the parties. The appellant submitted that the 1st respondent had deliberately not pleaded a violation of Article 35 of the Constitution since the right to access information under the Article applies only to citizens, which the 1st respondent is not. IPOA relied for this submission on the case of Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others [2012] eKLR.
33. In any event, according to IPOA, even if Article 35 was applicable, the trial court erred in law and fact by disregarding the legal exemptions applicable to the disclosure of information sought by the 1st -3rd respondents. It submitted that section 7(1)(a)(viii) of the IPOA Act as read with section 6(1)(b) and (c) of the Access to Information - Act allows it to withhold disclosure of information for the safety of witnesses, and to enable due process of the law. It further cited section 24(15) of the IPOA Act to submit that any document or statement made or taken during an investigation remains confidential unless IPOA determines otherwise in writing. In this case, the DPP had not yet made a decision whether to charge or not, and premature disclosure of the requested information would expose witnesses to potential danger and undermine the integrity of the investigations and any subsequent legal proceedings.
34. The appellant submitted further that even if the Court were to find that Article 35 was applicable in the circumstances of this case, the 1st respondent was not entitled to the orders sought as she had not exhausted the remedies available under section 14 of the Access to Information Act prior to filing the petition. IPOA cited the decision in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR with respect to the requirement for a party to exhaust remedies provided for in legislation before invoking the jurisdiction of the constitutional court.
35. On the second of its consolidated grounds-that the trial judge erred in both law and fact by making blanket findings and issuing blanket mandatory orders directing IPOA to undertake actions outside its mandate, IPOA reiterated that a statutory body, such as itself, can only be held responsible with respect to its conduct within the mandate set out in law; and that it cannot be compelled to take action outside its mandate. IPOA placed reliance for this submission on the Supreme Court decision in Hon. Attorney General & 2 Others v David Ndii & 79 Others (*supra*). It submitted that while the learned judge set out the separate and distinct constitutional and statutory mandates of the respondents in the petition, in making her findings with regard to constitutional violations, the learned judge simply made blanket findings that IPOA and the other respondents were jointly liable; and that the learned judge simply abandoned consideration of their distinct and separate constitutional and statutory mandates. Its submission was that it was incumbent upon the learned judge to assess each respondent's role and mandate, and only hold them liable to the extent that their specific actions or omissions fell short of their statutory obligations.



36. It was its case, further, that its liability and that of the 4th -7th respondents should have been assessed separately and weighed against their respective constitutional and statutory responsibilities; and that a collective finding of wrongdoing unfairly imposed liability on IPOA for actions outside its control.
37. The final substantive ground raised by IPOA relates to the award of damages. It submitted that the learned judge erred both in law and fact by awarding the 1st respondent exaggerated and exorbitant general damages of Kshs. 10,000,000 without any factual or legal basis; and that the 1st-3rd respondents did not provide sufficient proof of any dereliction of duty on its part to warrant joint liability for such general damages. It submitted, however, that in the unlikely event that this Court finds that the learned judge properly found that there were violations by the appellant, declaratory orders would have sufficed to vindicate the rights of the 1st - 3rd respondent, citing in support the decision of this Court in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. IPOA's submission was that the award of damages against it in the circumstances was unjust and inappropriate, and ought to be set aside.
38. In opposing the cross-appeal, IPOA filed submissions dated 10th March 2025, aspects of which, including the prayer for enhancement of damages, had been addressed in the submissions on the main appeal.
39. With regard to the prayer for a declaration that Articles 244 (a) and 246(3) commanded the respondents to punish and discipline the police officers who killed the deceased, IPOA submitted that the order had essentially been granted in the judgment the subject of appeal, and could therefore not be a ground of appeal from the said judgment. It was its submission, however, that Article 244 (a) and 246 do not, in any event, command IPOA to punish and prosecute police officers; that Article 244 (a) simply sets out the objects of the National Police Service and does not provide for prosecutorial powers, which are provided for in Article 157; and that Article 246 establishes the NPSC and has no bearing whatsoever on IPOA.
40. IPOA submitted, further, that the order sought invites this Court to dictate to it what ought to be the findings of its independent investigations, contrary to section 4 (1) and (4) of the *IPOA Act*; and also invites the court to dictate to the DPP what ought to be the outcome of its independent review of evidence, contrary to Article 157 (10) of the *Constitution* .
- Further, that it would have the effect of dictating to the NPSC what action it ought to take against the alleged shooters in disregard of its constitutional independence, contrary to Article 249 (2) (a) and (b) of the *Constitution* . IPOA submitted that, as held in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021 KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)], the court cannot usurp the constitutional and statutory mandate and roles of other bodies.
41. With regard to the prayer for an order compelling the respondents to supply to the 1st respondent, inter alia, all documents, files and reports pertaining to the investigation, IPOA reiterated its submissions that the investigation file is currently under review by the DPP with a view to deciding whether to charge; and disclosure of the evidence sought would significantly undermine IPOA's and the DPP's ability to give adequate and judicious consideration of the matter before making a final decision. IPOA therefore prayed that the appeal be allowed, and the cross-appeal be dismissed with costs to it.
42. The DPP, who indicated support for IPOA's appeal, filed submissions dated 10th March 2025, highlighted by learned counsel, Mr. Omondi. We observe that a large part of these submissions related to the DPP's grievances against the trial court's findings with respect to it. Bearing in mind that there is no appeal by the DPP before us, we shall confine ourselves to those aspects of the DPP's submissions supportive of IPOA's appeal, or in opposition to the cross-appeal by the 1st -3rd respondents.



43. The DPP submitted that the decision of the trial court was lopsided and only considered the pleadings and submissions of the 1st respondent but unjustifiably disregarded the DPP's response; that the evidence before the trial court was that at the time of the decision, investigations were being carried out; and that the appellant completed investigation and forwarded the file to the DPP who reviewed it and returned it for further investigation. The DPP submitted therefore that the contention by the 1st -3rd respondents that no investigations were carried out was not true, and the trial court erred in so finding.
44. The DPP submitted further that the trial court's direction that the DPP makes a decision to charge the alleged perpetrators amounts to interference with the powers vested in the DPP under Article 157 of the Constitution as the Constitution is clear that in the exercise of prosecutorial powers, the DPP shall not be under the direction or control of any person.
45. The DPP further submitted that the 1st respondent was not entitled to compensation as there was no infringement of her rights; that a perusal of the judgment of the court would reveal that the reason why the trial court made the award of Kshs. 10 million was because there was loss of life, not because there was no independent investigation; that this was a right which should have been addressed elsewhere, under another civil jurisdiction of the court, and not by approaching the court alleging that there was breach of a fundamental right; that the 1st respondent would need to seek compensation in a civil case in which oral evidence would be taken and the 1st respondent subjected to cross-examination, and that there would need to be proof of, among others, age and dependency, which could not be proved by way of the petition. The DPP conceded that the trial court has discretionary power to grant relief but such relief, in the case of loss of life, would be nominal because there are other available remedies. The DPP urged this Court to allow the appeal, dismiss the cross-appeal and set aside the decision of the trial court.
46. The AG filed submissions dated 10th March 2025 in support of the appeal and opposition to the cross-appeal which were highlighted by learned counsel, Ms. Robi. The AG's submissions, though ostensibly in support of IPOA's appeal, addressed the AG's and IG's grievances against the trial court's decision. It was submitted that the trial court erred in holding officers of the 4th respondent liable for the shooting of the deceased as there was no evidence adduced before the trial court of their involvement; that reliance for the 1st -3rd respondents' claim and the finding of the court was placed on an admission by the 4th respondent; that there was no other evidence to support the liability for the alleged shooting of the deceased; that the only documentation produced was an admission, which the AG and IG submitted was inadmissible as it does not comply with the rules of evidence.
47. Ms. Robi submitted that the appellant and the DPP had admitted that investigations were being conducted and a decision was pending the conclusion of the investigations; that since the investigations were pending, the issue in controversy was not yet mature, and the petition as filed was against the doctrine of ripeness and ought to have waited for the conclusion of the investigations.
48. The AG and IG submitted further that the trial court erred in awarding the 1st respondent damages of Kshs. 10 million. They relied on the case of Mungai (Suing in His Capacity as the Administrator of the Estate of the Late Stephen Gichuhi Njoroge) v Attorney General & 3 others (Petition 511 of 2019) [2024] ICEHC 11243 (ICLR) (Constitutional and Human Rights) (27 September 2024) (Judgment) in which the petitioner was awarded Kshs. 3,800,000 as compensation for the loss of his son's life to submit that courts have made lower awards in similar circumstances. They prayed that the appeal be allowed and the cross-appeal dismissed.
49. The 7th respondent, NPSC, also supported the appeal and opposed the cross-appeal. Its learned counsel, Ms. Chebet, highlighted its submissions dated 2nd March 2025. Like the DPP, AG and IG,



- the NPSC made further, detailed submissions against the findings of the trial court with respect to its culpability. As with these other respondents, since there is no appeal before us by NPSC against the decision, we will not address ourselves to these submissions save in so far as they relate to the appeal and cross appeal before us.
50. The 7th respondent focused especially on the appellant's ground of appeal that the trial court issued blanket findings of constitutional violations against the respondents and did not pay attention to the separate mandates that are carried out by the respondents. Ms. Chebet submitted that what was at issue was a criminal event; that the 7th respondent is established by Article 246(1) and its mandate given by Article 246(3); that it is a human resources constitutional commission and performs the human resources functions within the National Police Service. It was submitted that the trial judge misconstrued Article 246(b) which gives to the NPSC disciplinary control, defined to mean specific actions set out in section 1 of the [National Police Service Commission Act](#); that it is given the mandate to set disciplinary standards within the National Police Service, but that the standard of discipline is to be carried out by the IG as provided under section 8A (1) and (2) of the [National Police Service Act](#).
 51. The 7th respondent agreed with the submissions of IPOA with respect to assigning vicarious responsibility for the shooting of the deceased. It submitted that vicarious liability is in the realm of an employer-employee relationship; that in the police sector in Kenya, the NPSC employs police officers and then hands them over to the IG who, under Article 245, has command and control over police officers. Ms. Chebet submitted that in determining vicarious liability, what should be considered is who has command and control over police officers. Its case was that none of the matters that the trial court found it and other respondents liable for were not matters that fell within its mandate. The NPSC further agreed with IPOA's contention that the trial court had erred in making blanket findings on constitutional violations by the respondents without specifying who exactly was to bear that liability. It prayed that the appeal be allowed, the decision of the trial court be set aside, and the cross-appeal be dismissed.
 52. In their submissions dated 4th January 2025 which were highlighted by their learned counsel, Ochiel Dudley, the 1st - 3rd respondents framed four issues for determination: whether IPOA and the other Kenyan state organs are, at international law, culpable for violating the deceased's constitutional rights; whether the High Court correctly framed its orders to IPOA and the other state organs to undertake actions consistent with the court's findings; whether the general damages of Kshs 10,000,000 in compensation were either baseless, exaggerated, or exorbitant; and whether this Court should indicate additional remedies such as requiring the AG to apologise to the victims.
 53. While reiterating the facts of their case before the trial court, the 1st -3rd respondent submitted that the trial court properly found that the appellant and the other state organs violated the deceased's and the 1st respondent's rights. They cited Article 26 of the [Constitution](#) , Article 4 of the [Banjul Charter](#) and Article 6 of the ICCPR, all of which guarantee the right to life and protection from the arbitrary taking of life; Article 21(1) of the [Constitution](#) which obligates the state to protect, respect, promote, fulfil, and observe the right; that in the context of Article 21(1), the right to life under Article 26 draws both positive and negative state obligations, which require that the state refrains from conduct resulting in arbitrary deprivation of life; while the positive obligations require the state to adopt all appropriate measures to guarantee the right to life; and further, that the state has an obligation to carry out effective official investigations when individuals are killed from the use of force by police officers.
 54. The 1st -3rd respondents submitted that the failure to investigate and prosecute the killing of the deceased or to compensate his family further violated his right to life, reliance for this submission being sought from, inter alia, para 7 of General Comment No. 3 on the [African Charter on Human and Peoples' Rights: The Right to Life](#) (Article 4); General Comment No. 3, 2012: [Convention Against](#)



- Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: Implementation of Article 14 By States Parties at para 17 and para 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, all of which require thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions.
55. The 1st-3rd respondents submitted that the failure to transparently investigate and prosecute the officers culpable for killing the deceased or to hold them accountable in itself violates the right to life. They submitted that the investigations have not been prompt or led to the prosecution of the two police officers who perpetrated the crime; that IPOA concedes that there has been no further movement since 29th May 2023 when it returned the file to the DPP; and that the investigations have not been transparent as the 1st respondent has not been given a status update despite requesting for one thrice.
56. The 1st-3rd respondents submitted that the submissions by IPOA that since the 1st respondent is a Pakistani national, the proper procedure for her to receive updates was through the Ministry of Foreign Affairs and the Pakistan High Commission was incorrect. They cited para 28 of General Comment No 36, Article 6 (Right to Life) which they submitted requires investigations into allegations of violations of Article 6 to be transparent; that transparency presumes appropriate access to information on the investigation by the victim; and that state parties disclose relevant details about the investigation to the victim's next of kin. Further reliance is placed on para 16 of General Comment No. 3, 2012: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: Implementation of Article 14 By States Parties which entitles victims to the truth.
57. The 1st-3rd respondents submitted that while victims and their representatives are entitled to seek and obtain information on, among others, the causes leading to their victimization, IPOA and the other state organs compounded the violation of the deceased's right to life by denying the family information about the investigations, and did not even bother to respond with what the 1st-3rd respondents refer to as an 'unjustified' blanket denial. They submitted therefore that IPOA is just as culpable as the other state organs for violating the deceased's right to life, and the trial court correctly found IPOA jointly and severally liable alongside the other state organs, a finding that this Court should sustain.
58. Regarding the submission by IPOA that the 1st respondent did not exhaust the remedies available under section 14 of the *Access to Information Act* before moving the High Court, it was submitted that she had written to the CAJ on 30th June 2023; that there was no 'decision' for recourse to section 14, which is cast in the optional term 'may'; and that exhaustion is, at any rate, inconsistent with the 1st respondent's claim. They urged this Court to find that on the whole, the investigations have been opaque, dilatory, perfunctory, and superficial; and did not constitute a serious attempt to discover what happened to the deceased.
59. To the question whether the trial court was correct in finding that IPOA and the other state organs failed to take disciplinary action against the two police officers who killed the deceased, the 1st-3rd respondents submitted that the omission by IPOA, NPSC, or the IG to initiate disciplinary action against the police officers violates Article 244(a) of the *Constitution* requiring the National Police Service to meet the highest standards of professionalism and discipline among its members; and Article 246(3) of the *Constitution* giving NPSC disciplinary control over and power to remove persons holding or acting in offices within the Service.
60. The 1st-3rd respondents cited para 7 of General Comment No 3 on the *African Charter on Human and Peoples' Rights*: The Right to Life (Article 4) to submit that the IPOA and the 4th-7th respondents are responsible for violations of this right by all their and other public or governmental authorities at all levels; that the two police officers have retained their jobs, living, working, and earning; and that none



of the respondents, to the extent of their mandates, initiated or undertook any disciplinary proceedings against them.

61. They submitted that while IPOA contends that it has no disciplinary power over police officers generally and specifically over the police officers implicated in the deceased's killing, the contention is at odds with the constitutional and legislative intent of IPOA's establishment; that it is established under the *IPOA Act*, a normative derivative of Article 239(5), which subordinates the national security organs to civilian authority; that its objectives under section 5 of the *IPOA Act* are to hold the police accountable to the public; that under section 6, it has power to investigate and make recommendations for, among others, prosecution or disciplinary action; and that under section 29(1)(b) it has power to 'recommend disciplinary action' where inquiries disclose negligence by a police officer.
62. With regard to the question of damages and whether, considering the compounded violations, the general damages of Kshs 10,000,000 in compensation were baseless, exaggerated, or exorbitant, the 1st -3rd respondents cited the decision in *Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* [2021] KESC 50 (KLR) (citing *Kemro Africa Limited t/a "Meru Express Service (1976)" & Another v Lubia & Another* [1985] eKLR) for the proposition that an appellate court could justifiably interfere with damages awarded by the trial court only if the trial court applied the wrong principles or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. They submitted that in the present case, the court found that the respondents had violated the deceased's rights on many fronts, and in their view, the award of Kshs. 10,000,000 in damages was inordinately low, and they asked this Court to enhance the compensation.
63. The 1st -3rd respondents submitted further that under General Comment No 36 Article 6 (Right to Life), Article 14 of the CAT and General Comment No. 3, 2012: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*: Implementation of Article 14 By States Parties with respect to the obligation of state parties to provide adequate remedies, including compensation, to victims and families of victims of rights violations, a civil proceeding and the victim's claim for reparation should not depend on the conclusion of a criminal proceeding; that compensation should not be unduly delayed until criminal liability has been established; and that civil liability should be available independently of criminal proceedings. The 1st -3rd respondents cited Article 23 of the *Constitution* which they submitted confers on victims the right to appropriate relief, including compensation.
64. The 1st -3rd respondents submitted that while life lost cannot be restored, an award of damages can provide acknowledgement, closure, and a measure of solace. They relied for this submission on the case of *Tobiko (Suing as the Administrator of the Estate of Allan Amugune Tobiko) v Ministry of Interior & Co-ordination of National Government & 4 others* [2023] KECA 904 (KLR). With respect to the computation of damages for violation of human rights, the 1st -3rd respondents relied on the case of *Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uburu Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others* [2024] KESC 75 (KLR) for the factors to be considered in such computation.
65. The 1st -3rd respondents invited this Court to consider the rising yet dangerous reputation of Kenya as a country that refouls asylum seekers and abducts both foreign nationals and her own citizens; the gross violation of human rights in this case; evaluate the impact on the victim (a Pakistani widow chasing justice in a foreign land where her late husband had sought refuge); weigh the broader implications of this case, including the need to deter future violations, uphold the rule of law, and stamp out extrajudicial executions in Kenya, and enhance the damages awarded to the 1st respondent.



66. They further cited the decision in *Imanyara & 2 others v Attorney General* [2022] KESC 78 (KLR) in which the Supreme Court awarded the three petitioners, victims of torture and related violations by the state, general damages of Kshs 25,000,000; Kshs 20,000,000; and Kshs 15,000,000 respectively. Also cited was the case of *Peter M. Kariuki v Attorney General* [2014] eKLR in which this Court made an award of Kshs 15,000,000 as general damages for violation of constitutional rights; and *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR where the High Court awarded the petitioners Kshs 20 000,000, Kshs 20,000,000 and Kshs 6,000,000 respectively. They submitted that although all the victims in the cases cited above were tortured and held in detention without trial, their awards did not include violation of the right to life in a foreign country where they had self-exiled. They prayed that the damages awarded to the 1st respondent be enhanced to Kshs. 250,000,000 to vindicate the rights violated and deter future violations.
67. Finally, the 1st-3rd respondents asked the Court to indicate additional remedies in their favour. They submitted that the High Court erred by declining other appropriate reliefs pleaded, despite Article 23. Regarding the dismissal of the prayer for information, they cited para 28 of General Comment No 36 Article 6 (Right to Life) which they submitted entitles victims to information and requires state parties to, among other things, disclose relevant details about the investigation to the victim's next of kin; make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation, subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals.
68. In support of the prayer for an apology from the AG, they submitted that para 28 of General Comment No 36 Article 6 (Right to Life) requires states to aim to prevent extra- legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation; that if a violation is found, states parties must prevent the occurrence of similar violations in the future; and that a public apology would force the state to begin seriously thinking about measures to deter a recurrence. They prayed that IPOA's appeal be dismissed and the cross-appeal allowed as prayed.
69. In submissions in reply, Mr. Kinoti contended that under section 6(a) of the *IPOA Act*, IPOA's mandate is limited to recommending, not taking, disciplinary action; that in this case, IPOA found wilful misconduct and recommended criminal prosecution. While conceding that IPOA also had the power, under section 6 of the Act, to recommend disciplinary action, Mr. Kinoti submitted that it was very difficult to run both a criminal prosecution and disciplinary action; and for this reason, IPOA recommended criminal prosecution and, if that takes place, it commences disciplinary action thereafter.
70. Mr. Kinoti maintained that the 1st respondent, not being in Kenya, was provided information through state channels, namely, the Pakistani High Commission and the Ministry of Foreign Affairs; that the information was also filed in court, and the trial court erred in finding otherwise. He further maintained that there had been no delay in carrying out investigations, noting that IPOA's investigations were concluded within a year and the file forwarded to the DPP in May 2023.
71. To the claim that the 1st respondent was a widow and therefore a vulnerable person as defined under Article 21(3) of the *Constitution*, Mr. Kinoti submitted that the Article only applies to vulnerable groups within Kenyan society, and does not extend to the 1st respondent, a foreign national. He submitted, finally, that IPOA had no role in the actual shooting of the deceased and cannot be held liable for the unlawful killing, having fulfilled its investigative mandate.



72. As this is a first appeal, our mandate, as provided under rule 29(1)(a) of the Rules of this Court, is to re-evaluate the evidence on record and draw our own conclusions. See also *Selle v. Associated Motor Boat Co.* [1968] EA 123. We have considered the record of appeal, the averments of the parties before the trial court, and the submissions of the parties, both on the appeal and the cross appeal. Having done so, we take the view that the following issues arise for determination:
- i. Whether the trial court erred in finding that IPOA and the other state organs violated the constitutional rights of the deceased and the 1st respondent;
 - ii. Whether the trial court erred in issuing blanket orders against IPOA and the other state organs, and in holding them jointly and severally liable for violation of the deceased's and 1st -3rd respondents' rights;
 - iii. Whether the trial court erred in issuing mandatory orders against IPOA and the other state organs;
 - iv. Whether the 1st respondent was entitled to an award in damages for violation of her constitutional rights and if so, whether the award of a global sum of Kshs 10,000,000 in general damages was excessive or inadequate in the circumstances;
 - v. Whether this Court should grant additional reliefs to the 1st -3rd respondent as sought in the cross-appeal.
73. We consider first whether the trial court erred in finding that IPOA and the other state organs violated the deceased's and the 1st -3rd respondents' constitutional rights. As a preliminary consideration, we observe that the pleadings and submissions of the parties before the trial court proceeded on the basis that it was undisputed that the deceased met his death at the hands of police officers. The affidavits sworn by Mr. Kipsang for IPOA and Ms. Gichuhi for the DPP confirm this. The AG, IG and NPSC did not file affidavits in response, so the factual basis regarding the death of the deceased was unchallenged. The submissions before us by Ms. Robi, seeming to raise doubt about the responsibility for the shooting of the deceased have, therefore, no foundation in light of the evidential material before the trial court. It cannot, therefore, be disputed that the deceased's right to life, guaranteed under Article 26 of the Constitution, Article 6 of the ICCPR and Article 4 of the Banjul Charter was violated.
74. The question is whether IPOA can be held, with the other state organs, jointly and severally vicariously liable for the actions of the police officers who shot the deceased. As submitted by IPOA on the authority of *Teachers Service Commission v WJ & 5 others* (supra), IPOA is not the employer of police officers, nor does it have command and control over them. The IG, under Article 245 of the Constitution and sections 8 and 8A of the National Police Service Act, is vested with the independent command and control of the National Police Service. Section 8 provides that:
- (1) The Service shall be under the overall and independent command of the Inspector-General appointed in accordance with Article 245 of the Constitution and the provisions of this Act.
75. Section 8A (1) and (2) provides that:
1. Notwithstanding the provisions of any written law, independent command of the Inspector-General in relation to the Service envisioned in Article 245(2)(b) and section 8 of the Act, means that the Inspector-General shall be responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission.
 2. The Inspector-General shall exercise Command over the National Police Service and lawfully administer, control and manage the National Police Service as a disciplined Service.



76. Additionally, Article 246 (3) (a) and (b) of the *Constitution* vests the mandate to recruit and discipline members of the National Police service in the NPSC. Nowhere in these provisions is there a role vested in the appellant with respect to the command and control of members of the National Police Service. We find, therefore, that the violation of the deceased's right to life through the fatal shooting by police officers cannot be blamed, directly or vicariously, on IPOA.
77. The 1st-3rd respondents also alleged violation of the deceased's right to equal benefit of the law under Article 27; dignity under Article 28 and the right to freedom and security of the person under Article 29 of the *Constitution*. They further argued that the state organs violated the deceased's right to protection from torture and other cruel and degrading treatment under CAT. It was their case, additionally, that the state organs violated the deceased's and 1st respondent's rights by failing to investigate the shooting of the deceased, to prosecute those responsible for the killing, or to commence disciplinary actions against them.
78. In the impugned judgment, the trial court found IPOA and the other state organs jointly and severally liable for violation of all the rights of the deceased and the 1st-3rd respondents as a result of the shooting, failure to investigate, prosecute or institute disciplinary proceedings against the policers officers involved. It stated as follows:
- “95. Failure to conduct independent, prompt and effective investigations and commence prosecution or to complete those investigations or in any other manner act on the outcome of those investigations by the Respondents violated the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21 (1) of the *Constitution*, Articles 6 and 7 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and Article 2 and 7 of the ICCPR.”
79. In finding that the deceased was subjected to torture, inhuman and degrading treatment, the trial court cited the definition of torture in Article 1 of CAT, which states that:
- “Torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” (Emphasis added).
80. We make two observations arising from the above findings.
- First, as submitted by IPOA and supported by the AG, the DPP and the NPSC, the trial court, having set out the respective mandates of the respondents before it, should have interrogated the alleged rights violations against the respective mandates of the respondents. Secondly, we note that the trial court found that the deceased had been subjected to torture, cruel, inhuman and degrading treatment. The averments by the 1st respondent, which were not much in dispute, were that the deceased was shot to death at a road block in Kajjado, allegedly as a result of mistaken identity.
81. That the shooting was done by police officers is not in dispute, but there was no evidence before the trial court to show that the deceased had “...severe pain or suffering, whether physical or mental...”



intentionally inflicted on him for the purpose of, inter alia, obtaining information from him or another person. While we agree that the fatal shooting of the deceased was reprehensible and amounted to a violation of his right to life, we are not satisfied that it amounted to a violation of the protection against torture. Indeed, other than citing the provisions of CAT in the petition, the 1st -3rd respondents did not place anything before the trial court to demonstrate how the shooting of the deceased reached the level of torture as defined in CAT.

82. The 1st 3rd respondents contended, and the trial court agreed, that there was a failure to investigate the shooting of the deceased, despite the admission by the IG that he had been shot by police officers. IPOA disputes this. It averred that it commenced investigations immediately after it learnt of the incident; it prepared a duplicate file and forwarded it to the DPP; it responded to queries raised by the DPP; and the trial court therefore erred in finding that it had failed to carry out investigations or prosecutions. In dealing with this issue, we consider, first, the respective mandates of the state organs respondents in this matter. IPOA, a statutory body, is established under the [Independent Policing Oversight Authority Act](#), No. 35 of 2011. Section 6 of the IPOA Act sets out its functions, so far as is relevant for the purposes of the matter before us, as follows:

The functions of the Authority shall be to—

- a. investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;
- b. ...;
- c. monitor and investigate policing operations affecting members of the public;
...
- (f) co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;
- h. take all reasonable steps to facilitate access to the Authority's services for the public;
- i. subject to the [Constitution](#) and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media; make recommendations to the Service or any State organ;... (Emphasis added.)

83. The powers of IPOA are set out under section 7 of the IPOA Act as follows:

1. The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—
 - a. to investigate the Service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by;
...
 - ix. recommending to the Director of Public Prosecutions the prosecution of any person for any offence;



- x. investigating any death or serious injury occurring or suspected of having occurred as a result of police action.
- b. ...
- c. where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income;
- d. require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body;...

84. Section 29 of the Act sets out the steps that IPOA is empowered to take after investigations. It provides that:

1. The Authority may after completing an investigation into a complaint under this Act—
 - a. where the inquiry, in the Authority’s opinion, discloses a criminal act by a member of the Service, recommend the prosecution of that member to the Director of Public Prosecutions;
 - b. where the inquiry, in the Authority’s opinion, discloses negligence in the performance of duty by a member of the Service, recommend disciplinary action be taken against such member;
 - c. ...;
 - d. recommend that the complainant take any other course of action suitable in the circumstances;
 - e. assist the complainant or any other victim with action contemplated in section 7(1)(i); ...

85. We have considered the statutory provisions set out above against the facts on record. We note that IPOA did, on its own motion, carry out its mandate under section 6 of the *IPOA Act*. It investigated the killing of the deceased and forwarded its file to the DPP by 26th January 2023, about three months after the fatal shooting of the deceased. Upon receipt of the letter from the DPP dated 21st February 2023 requiring that it fills some gaps identified by the DPP, IPOA responded by a letter dated 16th March 2023. It then received a request for further clarification from the DPP, to which it responded by its letter dated 29th May 2023.

86. It is our finding, in light of the above facts, that IPOA having investigated the matter and made a recommendation for prosecution to the DPP, it had exercised its statutory mandate. We therefore find that the trial court erred by finding that IPOA had, with the other state organs, failed to carry out prompt and independent investigations into the shooting of the deceased, and was therefore jointly and severally liable for violation of the rights of the deceased and the 1st -3rd respondents with respect to the investigations.

87. A related question is whether IPOA could be held liable for the failure to prosecute those police officers it had deemed responsible for the shooting of the deceased, and had recommended their prosecution to the DPP. We have set out above the provisions of section 29 of the Act which provides that where IPOA’s inquiry discloses a criminal act by a member of the police service, it may recommend the prosecution of that member to the DPP.



88. IPOA's mandate, however, in light of Article 157 of the *Constitution*, is limited to recommendation: it cannot direct or compel the DPP to act. Under Article 157, state powers of prosecution are vested exclusively in the DPP. Article 157(10) specifically states that in exercising these powers, the DPP 'shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.'
89. It may be argued that under section 7(1)(d) of the *IPOA Act*, IPOA has power to 'require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body'.
90. However, given the constitutional mandate of the DPP with respect to prosecutions, this seems to us a problematic provision in the *IPOA Act*, especially with its use of the word 'require'. That, however, is not an issue for consideration before us in this appeal. In our view, having made its recommendations on 29th May 2023 to the DPP, IPOA had fulfilled its investigative mandate; the ball now lay in the DPP'S court; and IPOA had no means of eliciting or compelling action from the DPP.
91. Consequently, the failure to prosecute as recommended by IPOA lay on the DPP and cannot be attributed to IPOA or the other respondents before the trial court. We therefore resolve this issue in favour of the appellant and hold that the trial court erred in finding that the respondents were jointly and severally liable for the failure to prosecute the persons found responsible for the shooting of the deceased.
92. The trial court also found that the state organs before it jointly and severally violated the 1st -3rd respondents' rights by failing to take disciplinary action against the officers alleged to have shot the deceased. Under section 29 of the *IPOA Act* which we have set out earlier in this judgment, IPOA has the power to recommend either prosecution or disciplinary action against the concerned officers.
93. What IPOA will recommend will depend on what its inquiry discloses: in this case, from the averments by IPOA, it formed the opinion that what the facts of the case disclosed was a criminal act, not 'negligence in the performance of duty' by the police officers. In our view, IPOA properly exercised its mandate in recommending criminal prosecution. Our reading of the Act does not indicate that such a recommendation precludes the taking of disciplinary action by the NPSC under Article 246(3)(b) of the *Constitution* which states that the Commission shall:
- (b) observing due process exercise disciplinary control over and remove persons holding or acting in offices within the service.
94. We are unable to find, therefore, that IPOA violated the 1st- 3rd respondents' rights by not recommending disciplinary action against the officers it found responsible for the killing of the deceased.
95. The 1st-3rd respondents argued, and the trial court found, that IPOA, jointly and severally with the other state organs, violated the 1st respondent's right to information and to fair administrative action by failing to give her an update on the status of investigations into the shooting of the deceased. We note from the record that on 2nd May 2023, the 1st to 3rd respondents, through their Advocate on record, wrote to IPOA requesting a status update on the matter; that they wrote to the DPP on 30th June 2023, again seeking an update; and that on 31st July 2023, they wrote to the CAJ seeking an update, but had not received an update from any of these entities by the time they filed their petition on 19th October 2023. We observe that, interestingly, the 1st -3rd respondents wrote a single letter, without follow-up,



to IPOA, the DPP and CAJ, the latter of which was not a party to the petition. Be that as it may, the 1st -3rd respondents did not receive a response from any of these state organs.

96. IPOA contended that it could not have given the update requested as the DPP had yet to make a decision on whether to prosecute or not. It contended further that they sought copies of documents, files, reports, and video tapes which contained information on 3rd parties, including witnesses, police officers and suspects, and releasing such information would have been a violation of its constitutional mandate. IPOA cited section 6 of the [Access to Information Act](#) and Articles 24 and 35 of the [Constitution](#) to submit that releasing the information would lead to invasion of privacy. It was also its case, on the authority of [Famy Care Limited v Public Procurement Administrative Review Board & another & 4 others](#) (*supra*) that the 1st respondent, not being a citizen of Kenya, is not entitled to the right to information under Article 35.
97. Article 35(1) of the [Constitution](#) provides that:
1. Every citizen has the right of access to—
 - a. information held by the State; and
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
98. The 1st -3rd respondents do not dispute the limitation in Article 35 of access to information to citizens as expounded in the Famy Care Limited case. Indeed, they tacitly acknowledge this, seeking refuge, instead, in Article 21(3) which provides that ‘All State organs and all public offices have the duty to address the needs of vulnerable groups within society, including women, older members of society persons with disabilities,...’ In our view, however, Article 21(3) must be read within the context of the Bill of Rights, and cannot be read to extend the right in Article 35, limited to citizens, to a vulnerable foreign citizen.
99. This, however, in our view, does not absolve IPOA of the duty to give the 1st respondent information relating to the investigation into the death of her spouse. Section 6 (j) of the [IPOA Act](#) requires IPOA, ‘subject to the [Constitution](#) and the laws related to freedom of information’, to publish findings of its investigations, monitoring, reviews and audits as it sees fit. Section 7 (1)(c) gives it power, ‘where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income.’ These provisions, we believe, are in accord with the objects of IPOA set out at section 5 of the Act as being to:
- a. hold the Police accountable to the public in the performance of their functions;
 - b. give effect to the provision of Article 244 of the [Constitution](#) that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and
 - c. ensure independent oversight of the handling of complaints by the Service.
100. In this case, the 1st respondent, as the widow of a victim of unlawful police killing, was entitled to information about the investigations into the incident; she was entitled to know whether the police officers responsible for the shooting had been identified, who they were, and what action the state organs responsible for prosecution intended to take. IPOA had a duty to assist the 1st respondent, if need be, with ‘relevant information’ to enable her take civil action with regard to the death of the deceased. IPOA, therefore, in our view, was liable, with the other state respondents, for failure to



give information to the 1st respondent. As was stated by this Court in *Attorney General & 2 others v Independent Policing Oversight Authority & another*, IPOA's mandate was to be 'Wanjiku's watchman' with regard to the conduct of the National Police Service:

"IPOA is nonetheless mandated by the statute that creates it to keep the 3rd respondent on its toes. It is charged with the duty to hold the 3rd appellant accountable to the public in the performance of its functions. It is the equivalent of an ombudsperson who is supposed to receive complaints related to the 3rd respondent, from members of public, investigate them, and then make recommendations to the relevant authorities for necessary action. It is Wanjiku's watchman to ensure that the third respondent lives up to its motto of "service to all". (Emphasis added).

101. As 'Wanjiku's watchman', IPOA cannot sit on the side-lines, fold its hands, and proclaim that it has carried out its investigations and cannot release information unless the DPP authorises it to. We say this for two reasons. First, it has a duty to make public the response it receives with respect to its recommendations, either for prosecution or disciplinary action: section 6(a) of the IPOA Act provides that IPOA shall 'make public the response received to these recommendations.' Secondly, as provided in section 4 of the *IPOA Act* titled 'Independence of the Authority':

1. In the performance of its functions the Authority shall subject to section 34, not be subject to any person, office or authority.
2. The Authority shall observe the principle of impartiality and rules of natural justice in the exercise of its powers and the performance of its functions.

102. We therefore agree with the trial court that IPOA was liable for failure to give information to the 1st respondent. We do not, however, find this to be in breach of the right to information under Article 35, as the trial court found, but rather, in breach of its statutory mandate under the *IPOA Act*.

103. IPOA impugns the decision of the trial court on the basis that it made blanket findings and orders without considering the respective mandates of the respondents before it. We have addressed various elements of this issue in the analysis above. We have found that IPOA carried out investigations; made recommendations for prosecution; did not have power to prosecute or carry out disciplinary action against the involved police officers; but that it failed in its statutory duty to give a status update to the 1st respondent. The analysis of the different roles and responsibilities of IPOA as against those of the other state entities was important as it has a bearing on the issue of damages awarded by the trial court.

104. In assessing the damages to be awarded, the trial court stated:

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

...

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

105. The award was made on the basis of the findings that the respondents, jointly and severally, had violated the deceased's right to life, right to dignity and protection from torture and cruel and degrading



treatment, and right to information and had violated his right to equal protection of the law. Upon consideration of the facts before the trial court, we have found that they disclose violation of the deceased's right to life, dignity and equal protection of the law, but not to torture, cruel and degrading treatment. We have also found that the failure on the part of IPOA to give the 1st respondent an update on the status of the investigations was in breach of its statutory mandate.

106. In light of its statutory mandate, however, it cannot be held vicariously liable for the actions of the police officers involved that led to the death of the deceased, given that it has no command or control powers over the said police officers, which falls within the mandate of the IG under Article 245(2)(b). IPOA discharged its investigative role and forwarded its findings and recommendations to the DPP, and cannot be faulted for the failure on the part of the DPP to prosecute. Its dereliction of duty lay in failing to accord the 1st respondent fair administrative action by responding to her inquiries, which were within its mandate.
107. That being the case, did the trial court err in holding it jointly and severally liable with the other respondents for payment of damages to the 1st respondent? We find the contentions by IPOA that the trial court erred in making blanket findings and orders to have considerable merit. In our view, the trial court ought to have considered the respective mandates of the state entities before it, isolated their respective responsibilities, and made appropriate orders, including by apportioning such damages as it found due and payable to the 1st respondent between them.
108. Which brings us to the question of damages awarded to the 1st respondent. IPOA argued that the award is inordinately high and excessive, while the 1st-3rd respondents ask this Court to enhance the damages to Kshs. 250,000,000. In awarding damages of Kshs. 10,000,000 to the 1st respondent, the trial court was involved in an exercise of discretion. In its decision in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & Anor. (No 2)* [1985] eKLR this Court pronounced itself on the principles to be considered when determining whether or not to interfere with an award of damages in the following terms:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

109. We note that in reaching its decision, the trial court noted the difficulties in assessing damages in matters such as this as encapsulated in the case of *MWK & another v Attorney General & 4 others; Independent Medical Laga Unit IMLU (Interested Party); the Redress Trust (Aminus Curiae)* (Constitutional Petition No. 347 of 2015) (2017) KEHC 1496(KLR) (Constitutional and Human Rights) (18th December, 2017) (Judgement).
110. We further note that the 1st – 3rd respondents had not indicated to the trial court the amount in damages that they were seeking. They had referred, in their pleadings, to the fact that the deceased was an investigative journalist on self-exile in Kenya, with a mother, two wives and five children dependent on him. They had not indicated his employment or income, or that they were filing the suit on behalf of his estate. All in all, the trial court had limited material on which to base an award in damages, and in the circumstances, we find the award the court made neither too low nor too high in the circumstances as to merit interference by this Court.



111. In light of the above matters, we set aside the finding of the trial court and the resulting orders that IPOA was jointly and severally liable with the other state organs for violation of the 1st -3rd respondents' rights, and in damages to the 1st respondent in the sum of Kshs 10,000,000. We decline to interfere with the amount of damages awarded to the 1st respondent as we are not satisfied that on the material before it, the trial court exercised its discretion improperly.
112. With respect to the 1st 3rd respondents' prayer that we indicate additional reliefs to the 1st respondent, we make an order that IPOA does, in accordance with its mandate under the *IPOA Act*, give an update to the 1st -3rd respondents within 30 days hereof on its investigations into the death of the deceased, the recommendations it made to the DPP, and the response received from the DPP.
113. Given the constitutional mandate of the DPP, we are not satisfied that the trial court erred in declining to issue an order compelling the respondents to prosecute the police officers, nor are we satisfied that we can, in the circumstances, issue a mandatory order compelling the respondents to conclude investigations, take disciplinary action or charge in court the two police officers who shot and killed the deceased. As we have found, IPOA has concluded investigations and made recommendations to the DPP. The onus lies on the DPP to exercise its mandate under Article 157 to make a determination on whether or not to prefer charges.
114. The 1st -3rd respondents have also prayed that we issue an order directing the AG to issue a public apology, including an acknowledgement of the facts and acceptance of responsibility, to the 1st respondent in respect of the fatal shooting of the deceased, and for violation of the deceased's rights. From the evidence before us, IPOA concluded its investigations and made its recommendations for prosecution to the DPP, who is yet to act on the recommendations; and the facts of the fatal shooting that the 1st -3rd respondents seek acknowledgment of are yet to be established. Accordingly, having considered the matter before us and the respective mandates of the parties, we are not satisfied that this is an order that this Court should issue at this stage.
115. Ultimately, we find that the appeal and cross appeal partially succeed. We accordingly direct that each party bears its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

