

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

10 FEB 2013

CONSTITUTIONAL PETITION No. 122 OF 2013

IN THE MATTER OF: ALLEGED DENIAL, VIOLATION, INFRINGEMENT OF AND/OR THREAT TO THE RIGHT TO LIFE; THE PROHIBITION OF TORTURE, INHUMAN AND DEGRADING TREATMENT; THE RIGHT TO SECURITY OF THE PERSON; THE PROTECTION OF THE LAW; THE RIGHT TO EQUALITY BEFORE THE LAW AND FREEDOM FROM DISCRIMINATION; THE RIGHT TO INFORMATION; AND THE RIGHT TO EFFECTIVE REMEDY AFFORDED BY SECTIONS 70, 71, AND 74 OF THE REPEALED CONSTITUTION OF KENYA AS READ WITH ARTICLES 19, 20, 21, 22, 23, 24, 25, 26, 27(1), 28, 29, 262, 263 AND 264 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010 AND SECTIONS 6, 7 AND 19 OF THE SIXTH SCHEDULE THEREOF

IN THE MATTER OF: RULES 11, 12, 13, 14 AND 15 OF THE [REPEALED] CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE & PROCEDURE RULES 2006 AS READ WITH SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

IN THE MATTER OF: THE (REPEALED) POLICE ACT, CHAPTER 84; (REPEALED) ADMINISTRATION POLICE ACT, CHAPTER 85; PENAL CODE, CHAPTER 63; CRIMINAL PROCEDURE CODE, CHAPTER 75; SEXUAL OFFENCES ACT (ACT NO. 3 OF 2006); INTERNATIONAL CRIMES ACT (ACT NO. 16 OF 2008); NATIONAL POLICE SERVICE ACT (ACT NO.

IIA OF 2011); NATIONAL POLICE SERVICE COMMISSION ACT (ACT NO. 30 OF 2011); INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT (ACT NO. 35 OF 2011); OFFICES OF THE ATTORNEY-GENERAL ACT (ACT NO. 40 OF 2012);

IN THE MATTER OF: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS; THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT; TREATY OF THE EAST AFRICAN COMMUNITY

-BETWEEN-

1. **COALITION ON VIOLENCE AGAINST WOMEN**
2. **INDEPENDENT MEDICO-LEGAL UNIT**
3. **THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS**
4. **PHYSICIANS FOR HUMAN RIGHTS**
5. **JWM**, a female victim of Sexual and Gender Based Violence
6. **PKK**, a female victim of Sexual and Gender Based Violence
7. **SMM**, a female victim of Sexual and Gender Based Violence
8. **CNR**, a female victim of Sexual and Gender Based Violence
9. **LGS**, a female victim of Sexual and Gender Based Violence
10. **SKO**, a female victim of Sexual and Gender Based Violence
11. **DOJ**, a male victim of Sexual and Gender Based Violence
12. **FOO**, a male victim of Sexual and Gender Based Violence.....**PETITIONERS**

-AND-

1. **THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA**
2. **THE DIRECTOR OF PUBLIC PROSECUTIONS OF THE REPUBLIC OF KENYA**
3. **THE INDEPENDENT POLICING OVERSIGHT AUTHORITY**
4. **THE INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE OF THE REPUBLIC OF KENYA**
5. **THE MINISTER FOR MEDICAL SERVICES OF THE REPUBLIC OF KENYA**
6. **THE MINISTER FOR PUBLIC HEALTH AND SANITATION OF THE REPUBLIC OF KENYARESPONDENTS**

PETITION

To:
The Constitutional and Human Rights Division
High Court of Kenya
Milimani Law Courts
NAIROBI

PETITIONERS

1. The 1st petitioner is a national women's human rights organization established in 1995 to strengthen the networking capacities of women's organizations in Kenya. It is a non-profit, non-governmental organization registered under the NGO Coordination Act committed to eradicating violence against women whether perpetrated in the private, public or political domain in Kenya.
2. The 2nd Petitioner is a non-governmental organization registered in Nairobi whose mandate is the promotion of the rights of torture victims and survivors, and the protection of all Kenyans from all forms of State-perpetrated torture by advocating for policy reforms, the monitoring of government adherence to human rights standards, rehabilitation of victims of torture and capacity building for key stakeholders.
3. The 3rd Petitioner is an international non-governmental organization that has been working in Kenya and around Africa since 1959 and whose mandate is to work on the promotion of human rights, the rule of law and democracy. It executes its mandate through the application of legal expertise and international best practices such as inter alia, public interest litigation as a means of advancing access to justice in Kenya and the region.
4. The 4th Petitioner is an independent international organization, registered in Kenya in 2008 that uses medicine and science to stop mass atrocities and severe human rights violations against individuals. It advocates for the prevention of individual or small scale acts of violence from becoming mass atrocities, protection of internationally-guaranteed rights of individuals and civilian populations and the prosecution of those who violate human rights.
5. The 1st, 2nd, 3rd, and 4th Petitioners have brought this Petition on their own behalf, on behalf of the victims petitioning herein, and in the public interest of other victims and relatives of other victims of Sexual and Gender Based Violence committed during the post-election violence in Kenya from December 2007 – March 2008 (hereinafter referred to as "PEV").
6. The 5th Petitioner is an adult female of sound mind residing in Kibera, Nairobi. She brings this petition as a victim of Sexual and Gender-Based Violence committed in Kibera on or about 28th or 29th January 2008, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.
7. The 6th Petitioner is an adult female of sound mind residing in Kibera, Nairobi. She brings this petition as a victim of Sexual and Gender-Based Violence committed in

Kibera, Nairobi on or about 12th January 2008, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.

8. The 7th Petitioner is an adult female of sound mind residing in Kibera, Nairobi. She brings this petition as a victim of Sexual and Gender-Based Violence committed in Kibera, Nairobi on or about 31st December 2007, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.
9. The 8th Petitioner is an adult female of sound mind residing in Kibera, Nairobi. She brings this petition as a victim of Sexual and Gender-Based Violence committed in Kibera, Nairobi on or about 31st December 2007, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.
10. The 9th Petitioner is an adult female of sound mind residing in Kibera, Nairobi. She brings this petition as a victim of Sexual and Gender-Based Violence committed in Kibera, Nairobi on or about 30th January 2008, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.
11. The 10th Petitioner is an adult female of sound mind residing in Kericho. She brings this petition as a victim of Sexual and Gender-Based Violence committed in Kericho on or about 30th January 2008, to obtain remedies for pain, loss, and suffering arising out of serious personal injuries and violation of her fundamental rights occasioned by the Sexual and Gender-Based Violence.
12. The 11th Petitioner is an adult male of sound mind residing in Kisumu. He brings this petition as a victim of Sexual and Gender-Based Violence committed in Naivasha on or about 2nd January 2008, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of his fundamental rights occasioned by the Sexual and Gender-Based Violence.
13. The 12th Petitioner is an adult male of sound mind residing in Kisumu. He brings this petition as a victim of Sexual and Gender-Based Violence committed in Naivasha on or about 2nd February 2008, to obtain remedies for pain, loss and suffering arising out of serious personal injuries and violation of his fundamental rights occasioned by the Sexual and Gender-Based Violence.
14. The 5th to 12th Petitioners (both inclusive) are adults of sound mind residing within the Republic of Kenya. They bring this Petition under Article 22 of the Constitution of the Republic of Kenya on their own behalf for damages for pain and suffering as a result of personal injuries, psychological trauma, and the violation of their fundamental rights which were sustained during and as a direct result of the SGBV which occurred during PEV. They also bring this Petition in the interest of other victims of Sexual and Gender-Based Violence during the PEV and their dependents.
15. The address of service of the 1st to 12th Petitioners shall be care of Messrs Kilonzo & Company Advocates, Kay Group Center, Ngong Road, Opposite Nairobi Baptist Church, P.O. Bo 59839 00200 GPO Nairobi.

RESPONDENTS

16. The 1st Respondent is the Attorney General of the Republic of Kenya and the principal legal adviser to the Government of Kenya and is constitutionally charged with the duty of representing the national government in court in proceedings of this nature. The 1st Respondent is also liable for violations of the law committed by the Police during the PEV.
17. The 1st Respondent is responsible for violations of the law committed by the Kenya Police Service, Administration Police Service and the General Service Unit (hereinafter collectively and singularly referred to as "the Police") during the PEV.
18. The 2nd Respondent is the Director of Public Prosecutions of the Republic of Kenya, with power under Article 157 of the Constitution to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct.
19. The 3rd Respondent is the Independent Policing Oversight Authority and is a statutory body established under the Independent Policing Oversight Authority Act whose objectives are inter alia to hold the Police accountable to the public in the performance of their functions, and to ensure independent oversight of the handling of complaints against the Kenya Police Service.
20. The 4th Respondent is the Inspector-General of the National Police Service and he is charged with the duty to investigate any particular offence or offences and to enforce the law against any particular person or persons under the Constitution and the National Police Service Act. The 4th Respondent is also responsible for violations of the law committed by the Police during the PEV and for the liabilities of the Commissioner of Police for violations of the law resulting from the inadequate supervision of Police under Clause 6 and 31 of the Sixth Schedule of the Constitution.
21. The 5th Respondent is the minister responsible for the Ministry of Medical Services in the current cabinet, whose mandate is to provide health services, create an enabling environment, regulate, set standards and policy for health service delivery in Kenya.
22. The 6th Respondent is the minister responsible for the Ministry of Public Health and Sanitation in the current cabinet, whose mandate is to support the attainment of the health goals of the people of Kenya by implementing priority interventions in public health.

CLAIMS

Sexual and Gender-Based Violence during the Post-Election Period

23. Immediately following the announcement of election results of Kenya's national elections on 30 December 2007, large areas of the country erupted into demonstrations and violence. Widespread violence continued from late December 2007 until March 2008, and eventually affected up to 136 constituencies in six of Kenya's eight provinces.

24. Women and children were often targeted for attack. They were assaulted in their homes and while seeking refuge in informal camps, schools, and other public sites.
25. The forms of violence committed against them included rape, attempted rape, defilement, attempted defilement, gang rape, forced pregnancy, deliberate transmission of HIV or any other life threatening sexually transmitted disease, sexual assault, indecent acts, and other gender-based physical violence.
26. While women were the main victims of sexual violence, men also experienced terrible forms of sexual violence during PEV. These included sodomy, forced circumcision, and mutilation or forced amputation of their penises. Acts of forced circumcision were generally targeted toward men from the Luo community.
27. These forms of violence, against women, men and children during PEV are collectively and disjunctively herein referred to as "Sexual and Gender Based Violence" or "SGBV".
28. Victims of sexual violence frequently did not report the crimes committed against them because they feared that nothing would be done to assist them or that the Police would protect state-actor perpetrators. When victims sought to report the attacks, the police often refused to document their complaint and failed to initiate investigations.
29. Many victims of sexual violence were also unable to access medical services after their attack. This was due in part to the general breakdown of law and order during the PEV, but also in part because the victims were sometimes turned away by hospitals and medical facilities including instances in which the medical facilities refused to assist victims of government perpetrated violence.
30. The full scope and scale of sexual and gender based violence during PEV is not fully known, but significant information has been collected and reported from governmental and non-governmental sources.
31. The Report of the Commission of Inquiry into Post-Election Violence ("the Waki Report") describes more than six hundred (600) victims of SGBV during PEV who were treated at Nairobi Women's Hospital within 72 hours of their rape, receiving Post Exposure Prophylaxis ("PEP") medication that reduces the likelihood that the victim will become infected with HIV/AIDS and other sexually transmitted diseases.
32. Records from additional hospitals in other parts of Kenya indicate that a total of more than nine hundred (900) rape victims were treated within the first 72 hours of their attack during PEV. These figures, however, represent only "the tip of the iceberg", as the Waki Report observed. It is widely understood that the available figures substantially underrepresent the total number of victims of sexual and gender based violence committed during PEV.
33. According to the Waki Report, of SGBV victims who were treated at Nairobi Women's Hospital alone, 80% were raped during PEV, while 10% were victims of domestic violence and another 10% were victims of other forms of physical and sexual assault.

34. Nearly 40% of these rape victims knew their attackers and could have identified them to the police if the crimes against them had been investigated.
35. Perpetrators of SGBV included members of the Kenya Police Service, Administrative Police, General Service Unit and other state security agents (herein collectively referred to as "Police"). Evidence examined by the Waki Commission suggests that at least 26% of women raped during PEV were raped by Police officers. Other perpetrators of SGBV included ordinary citizens and members of organized and/or outlawed groups.

Rights Violated by SGBV

36. The failure to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, the failure to investigate and prosecute the perpetrators, and the failure to provide effective remedies to the victims of SGBV violate the fundamental rights of the 5th to 12th Petitioners inclusive and other victims, including:-
 - i. The Right to Life, as protected by, inter alia, Section 71 of the repealed Constitution, Article 26 of the Constitution, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, and the Rome Statute of the International Criminal Court;
 - ii. The Prohibition of Torture, Inhuman and Degrading Treatment as protected by, inter alia, Section 74 of the repealed Constitution, Article 25 of the Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, and the Rome Statute of the International Criminal Court;
 - iii. The Right to Security of the Person as protected by, inter alia, Section 70 of the repealed Constitution, Article 29 of the Constitution, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights;
 - iv. The Right to Protection of the Law as protected by, inter alia, Section 70 of the repealed Constitution, Articles 10 & 19 of the Constitution, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights;
 - v. The Right to Equality Before the Law and Freedom from Discrimination as protected by, inter alia, Section 82 of the repealed Constitution, Article 27 of the Constitution, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, and the International Convention on the Elimination of All Forms of Racial Discrimination;

- vi. The Right to Information as protected by, inter alia, Article 35 of the Constitution and the International Covenant on Civil and Political Rights; and
 - vii. The Right to Remedy and Rehabilitation as protected by, inter alia, Section 84 of the repealed Constitution, Article 23 of the Constitution, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of all Forms of Racial Discrimination, and the Rome Statute of the International Criminal Court.
37. The Petitioners allege that the following caused or contributed to the SGBV committed against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV:-
- i. Failures to train Police in acting as a disciplined force and failure to control Police by ensuring that the Police were commanded and limited to acting in lawful methods while conducting law enforcement operations during civil unrest so as to prevent sexual crimes committed by Police while under uniform and bearing firearms;
 - ii. Failures to take adequate security measures, particularly the failure to plan and prepare lawful and proper policing policy and operational control and command structures during PEV so as to protect citizens of Kenya from becoming victims of SGBV;
 - iii. Failures to supervise and discipline Police to prevent and punish crimes committed by Police;
 - iv. Failures to train Police to protect persons from becoming victims of sexual offenses, whether committed by Police or third parties;
 - v. Failures to plan and prepare policing operations during PEV to safeguard persons from SGBV;
 - vi. Failures of the Police to intervene to protect victims when the Police were aware of the threat or commission of SGBV against the victims.

Liability for SGBV Committed by State Actors

- 38. With respect to SGBV perpetrated by the Police, the Petitioners bring this action against the 1st and 4th Respondents for the failure to train Police in lawful methods of conducting law enforcement operations to prevent the commission of crimes by Police, including SGBV. These acts and/or omissions by the 1st and 4th Respondents caused the SGBV committed against Petitioners 5 to 12 inclusive and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.
- 39. The Petitioners bring this action against the 1st and 4th Respondents for the failure to take adequate security measures, particularly the failure to plan and prepare law enforcement operations conducting during PEV to protect victims from SGBV. These acts and/or omissions by the 1st and 4th Respondents caused the SGBV committed

against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.

40. The Petitioners bring this action against the 1st and 4th Respondents for the failure to supervise Police to prevent and punish crimes committed by Police. These acts and/or omissions by the 1st and 4th Respondents caused the SGBV committed against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.

Liability for SGBV Committed by Non-State Actors

41. With respect to SGBV perpetrated by non-state actors, the Petitioners aver that the Government of Kenya was obligated to protect the rights of Petitioners 5 to 12 and other victims of SGBV by taking all necessary measures to safeguard victims from violations committed by third parties.
42. The Petitioners bring this action against the 1st and 4th Respondents for the failure to adequately train Police to protect persons from sexual offenses, and the failure to plan and prepare policing operations during the PEV in order to safeguard persons from SGBV. These acts and/or omissions by the 1st and 4th Respondents caused the SGBV committed against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.
43. The Commissioner of Police and Commandant of Administration Police, for whose conduct the 1st and/or 4th Respondent are now liable, were aware or ought reasonably to have been aware and were therefore forewarned that adequate security measures (including training in crisis intervention and sufficient deployment of Police personnel) were required to prevent the occurrence of SGBV during the PEV. Further and/or in the alternative, the Petitioners claim that SGBV committed against Petitioners 5 to 12 (both inclusive) were contributed to by actions of Police who were **not** prepared, trained, disciplined, or supervised to appropriately conduct law enforcement activities during civil unrest. The Petitioners aver that this called for, and placed the officials for whom the 4th Respondent and the National Police Service Commission are now responsible on notice of the need for more effective and specialized training of Police officers to deal with PEV and SGBV, and that these acts and/or omissions by the 1st and/or 4th Respondents caused the SGBV committed against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.
44. The Petitioners further bring this action against the 1st and 4th Respondents for the failure of Police to intervene to protect victims of SGBV when they were aware of the commission or threat of acts of violence including SGBV against the victims. These acts and/or omissions by the 1st and 4th Respondents caused the SGBV committed against Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV in violation of the rights listed in paragraph 36 above.
45. The Petitioners contend that subordinates, staff and/or employees of the 5th and 6th Respondents failed to provide emergency medical services to persons with emergency medical conditions, including victims of SGBV, and that this imperiled the life and health of the victims. The Petitioners contend that this failure constitutes an independent violation of the victim's fundamental rights. The harm of this unlawful

conduct is aggravated when the denial of emergency medical services is associated with the claim of the victim that the perpetrator is a government official, such as a Police officer. These acts and/or omissions by the 5th and 6th Respondents caused violations of the rights of Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV, as listed in paragraph 36 above.

46. The Petitioners contend that the systemic failure of subordinates of the Commissioner of Police to document claims of SGBV by victims and witnesses, including when victims and witnesses sought to make a complaint to Police personnel, constitutes an obstruction of justice. The harm of this unlawful conduct is aggravated when failure to take a complaint and/or document an allegation is associated with the claim of the victim or witness that the perpetrator is a government official, such as a Police officer. These acts and/or omissions, for which the 1st and/or 4th Respondent are liable, caused violations of the rights of Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV, as listed in paragraph 36 above.

Liability for Failure to Investigate and Prosecute

47. The Petitioners aver that the SGBV committed against Petitioners 5 to 12 and other Victims of SGBV during the post election violence have not been investigated at all or, in the alternative, if there have been any investigations, they have not been prompt, independent, impartial, effective, subject to public scrutiny, and capable of leading to prosecutions of the material and intellectual perpetrators. The Petitioners and other Victims of SGBV have therefore not obtained justice in connection with the investigation and prosecution of those responsible for the said unlawful acts.
48. The Petitioners aver that information from the Ministry of Health and/or Ministry of Medical Services and/or Ministry of Public Health and Sanitation indicated the extent of SGBV committed during PEV, and that this information was disseminated to, amongst others, the President and the Prime Minister, and to institutions of Government through various reports, including the Report of the Commission of Inquiry into Post-Election Violence ("the Waki Report") and the Report of the Kenya National Commission on Human Rights, amongst others. Despite such dissemination, the Government of Kenya, including, inter alia, the 1st, 2nd, 3rd and 4th Respondents, have failed to take any meaningful steps towards ensuring the redressing of gross human rights violations perpetrated through the SGBV in question.
49. The Petitioners contend that the 1st and/or 2nd Respondents failed to exercise their powers to direct the Commissioner of Police and/or the Inspector-General of the National Police Service to independently investigate information or allegations of criminal conduct by members of the Police, nor instituted or undertaken criminal proceedings against persons before any court in respect of offences committed against the 5th, 6th, and 9th Petitioners and other victims of SGBV committed by the Police during the PEV.
50. The Petitioners contend that, from 18th November 2011, the 3rd Respondent has failed to exercise its powers to independently investigate information or allegations of criminal conduct by members of the Police and make recommendations for disciplinary actions and the institution of criminal proceedings against Police

suspected of involvement in the commission of SGBV against the 5th, 6th, and 9th Petitioners and other victims of SGBV committed by the Police during the PEV.

51. The Petitioners further contend that the 1st and/or 2nd Respondents failed to exercise their powers to direct the Commissioner of Police and/or the Inspector-General of the National Police Service to effectively investigate information or allegations of SGBV committed by persons other than the police, nor instituted or undertaken criminal proceedings against persons before any court in respect of offences committed against 7th, 8th, 10th, 11th, and 12th Petitioners.
52. The Petitioners contend that the failure of the 1st, 2nd, 3rd, and/or 4th Respondents to effectively investigate the SGBV results in part from systemic failures in the treatment of SGBV victims and the crimes committed against them. These systemic failures include deficiencies in the training of relevant subordinates of the 1st, 2nd, 3rd, and 4th Respondents, the policies and practices of recording acts of SGBV, the collection of evidence of SGBV, and the provision of technical, forensic and medical analysis of evidence of SGBV. The Petitioners aver that these systemic failures for which the 1st, 2nd, 3rd, and/or 4th Respondents are liable caused or contributed to the violation of the rights of Petitioners 5 to 12 (both inclusive) and other victims of SGBV during PEV, as listed in paragraph 36 above.
53. The Petitioners further contend that the SGBV in question amounted to crimes against humanity, which the Government of Kenya is obligated to investigate and prosecute as such under, inter alia, the Constitution read together with the Rome Statute of the International Criminal Court and other international law. The SGBV amounted to crimes against humanity as a result of the following factors, amongst others, taken disjunctively or conjunctively:-
 - i. The fact that the SGBV entails the most serious crimes resulting in significant suffering;
 - ii. The fact that the victims of SGBV are civilians;
 - iii. The fact that the SGBV were committed as part of PEV which comprised an attack directed against civilians;
 - iv. The fact that some SGBV attacks were perpetrated by the Police and other state actors;
 - v. The fact that the Government of Kenya was aware of the SGBV being committed during the PEV and did not protect the victims;
 - vi. The number of victims involved;
 - vii. The geographic scope and widespread and systematic nature of the SGBV across many locations in Kenya; and
 - viii. The long time frame within which the SGBV occurred.

Liability for Failure to Provide Reparations

54. The Petitioners bring this action against the 1st Respondent for the failure to provide for the rehabilitation of the Petitioners and other victims of SGBV during the PEV, including restitution, compensation for general damages, medical and psychosocial care and legal and social services, access to the relevant information concerning the violations and reparations mechanisms, and a Public apology that acknowledges the facts of Police shootings during post-election violence and accepts responsibility on behalf of the Government of Kenya for the harms and suffering of the victims. The Petitioners aver that the lack of reparations violates the Right to Remedy.
55. The Petitioners bring this action against the 1st, 5th, and 6th Respondents for the failure to provide rehabilitation including medical and psychological care and social services to Petitioners 5 to 12 (both inclusive) and other victims of SGBV committed during PEV. These acts and/or omissions, for which the 1st, 5th and/or 6th Respondent are liable, caused violations of the rights of Petitioners 5 to 12 (both inclusive), as listed in paragraph 36 above.
56. The Petitioners brings this action against the 1st Respondent for the failure to publicly recognize the nature of SGBV-related violations committed during PEV, including by state actors, and the suffering caused to the victims, and to make a public apology for those harms. These acts and/or omissions, for which the 1st Respondent is liable, violated the rights of Petitioners 5 to 12 (both inclusive) and other victims of SGBV committed during PEV, as listed in paragraph 36 above.

RELIEF SOUGHT

57. By reason of the matters aforesaid, the Petitioners, as well as other persons for whose benefit these proceedings have been instituted, suffered and continue to suffer grave loss and damage, and accordingly they pray for:
 - i. A declaratory order to the effect that the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Protection of the Law, the Right to Equality and Freedom from Discrimination, the Right to Information, and the Right to Remedy were violated in relation to the Petitioners 5 to 12 (both inclusive) and other victims of SGBV during the post-election violence, as a result of the failure of the Government of Kenya to protect those rights;
 - ii. A further declaratory order to the effect that the failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence is a violation of the positive obligation to investigate and prosecute violations of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, and/or the Right to Security of the Person;
 - iii. A further declaratory order to the effect that the failure to classify the SGBV-related crimes committed during the post-election violence as Crimes against Humanity is a violation of Kenya's obligations under the Constitution read together with the Rome Statute of the International Criminal Court, international human rights law and statutory law which requires the

investigation and prosecution of Crimes against Humanity of rape, torture, persecution, other sexual violence, and other inhumane acts;

- iv. A further declaratory order to the effect that the failure to establish an independent and effective investigations and prosecutions of SGBV related crimes committed during the post-election violence is a violation of Kenya's obligations under the Statute of the International Criminal Court, international human rights law and statutory law which requires the investigation and prosecution of Crimes against Humanity of torture, persecution, other sexual violence and other inhuman acts (mutilations);
- v. A further declaratory order to the effect that the failure to provide emergency medical care and ongoing access to medical services to victims of SGBV during the post-election violence is a violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, and/or the Right to Remedy;
- vi. A further declaratory order to the effect that the failure of the Minister for Medical Services to provide documentation of medical services to victims of SGBV is a violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, the Right to Information, and/or the Right to Remedy;
- vii. A further declaratory order that failure to provide emergency medical services and documentation, in particular by Mbagathi District Hospital, to victims of SGBV perpetrated by state actors amount to a grave violation of the Right to Life, the Prohibition of Torture, Inhuman and Degrading Treatment, the Right to Security of the Person, the Right to Equality and Freedom from Discrimination, the Right to Information, and/or the Right to Remedy and an intentional obstruction of justice;
- viii. A further declaratory order to the effect that the failure to provide compensation, rehabilitation, medical and psychological care as well as legal and social services, and the failure to publicly acknowledge the scope and nature of SGBV committed during the post-election violence and to publicly apologize the harms suffered by the victims, is a violation of the Right to Remedy;
- ix. A conservatory order for the preservation of all files, reports, books, papers, letters, copies of letters, electronic mail (email) and other writings and documents and any other form of evidence, in any medium, including but not limited to films, photographs, videotapes, radio and television broadcasts or any other recording in the custody, possession or power of the Ministry of Medical Services, Ministry of Public Health and Sanitation, National Police Service, National Intelligence Service, Office of the Director of Public Prosecutions; Office of the Attorney General; Ministry of Gender, Children and Social Development; and/or their assigns or successors in title, relating to the SGBV in question, and for the detention of the same by or subject to the direction of this Honourable Court;

- x. An order compelling the 1st, 2nd, 3rd, and 4th Respondents to produce before this Honourable Court and publicly release a full report on all instances of SGBV during the post-election violence and the internal inquiries, if any, conducted into Police conduct during the post-election violence;
- xi. A further order compelling the 1st and 2nd Respondents and the Government Task Force on Post-Election Violence to produce before this Honourable Court and publicly release the results of its categorization of crimes with a view to further investigations and possible prosecution;
- xii. A further order compelling the 1st, 2nd, 3rd and 4th Respondents to collaborate in the taking of such appropriate steps within their respective mandates as shall be necessary for the establishment of an internationalized Special Division within the Office of the 2nd Respondent for the investigation and prosecution of the SGBV during PEV, including the investigation and prosecution of incidents of SGBV as crimes against humanity;
- xiii. A further order compelling the 1st, 2nd, 3rd, and 4th Respondents to collaborate in the creation of a database of all victims of SGBV committed during PEV and to ensure such victims are provided appropriate, ongoing medical and psychosocial care and legal and social services;
- xiv. A further order compelling the 1st Respondent to establish an independent body specifically responsible for monitoring the provision of reparations to victims of SGBV during PEV, analysing and reporting on systemic deficiencies in the provision of effective remedies for SGBV victims, including investigations and prosecutions of the crimes committed against said victims, and periodically reporting to this Honourable Court on the implementation of the Honourable Court's judgment in this case;
- xv. A further order that the identities, affidavits, statutory declarations, medical records and any evidence given by and on behalf of the 5th to 12th Petitioners inclusive be protected and sealed by this Honourable Court.
- xvi. A further order for punitive damages against the 5th and 6th Respondents for the deliberate obstruction of justice by the failure to provide emergency medical services and documentation to victims of SGBV;
- xvii. A further order compelling the 1st Respondent to report periodically to this Honourable Court on the implementation of the Honourable Court's judgment in this case until its full implementation;
- xviii. An inquiry on damages;
- xix. General damages;
- xx. Order for exemplary damages for acts of SGBV committed by Police;
- xxi. Such other or further Orders as this Honourable Court may deem fit to grant; and


KILONZO & COMPANY
ADVOCATES FOR THE PETITIONERS

DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2013

DRAWN & FILED BY:

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NAIROBI



TO BE SERVED UPON:

- 1. ATTORNEY GENERAL, NAIROBI**
- 2. DIRECTOR OF PUBLIC PROSECUTIONS, NAIROBI**
- 3. INDEPENDENT POLICING OVERSIGHT AUTHORITY, NAIROBI**
- 4. INSPECTOR GENERAL, KENYA POLICE SERVICE, NAIROBI**
- 5. MINISTER, MEDICAL SERVICES, NAIROBI**
- 6. MINISTER, PUBLIC HEALTH, NAIROBI**