THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 122 OF 2013

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

-VERSUS-

THE ATTORNEY GENERAL
OF THE REPUBLIC OF KENYA……1ST RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS
OF THE REPUBLIC OF KENYA……2ND RESPONDENT
THE INDEPENDENT POLICING
OVERSIGHT AUTHORITY……3RD RESPONDENT
THE INSPECTOR GENERAL OF THE NATIONAL
POLICE SERVICE OF THE REPUBLIC OF KENYA……4TH RESPONDENT
THE MINISTER FOR MEDICAL SERVICES
OF THE REPUBLIC OF KENYA……5TH RESPONDENT
THE MINISTER OF PUBLIC HEALTH AND SANITATION
OF THE REPUBLIC OF KENYA……6TH RESPONDENT

-AND-

KENYA HUMAN RIGHTS COMMISSION……INTERESTED PARTY

-AND-

KENYA NATIONAL COMMISSION
ON HUMAN RIGHTS……..1ST AMICUS CURIAE
KATIBA INSTITUTE……2ND AMICUS CURIAE
THE CONSTITUTION &
REFORM EDUCATION CONSORTIUM…..……..3RD AMICUS CURIAE
THE REDRESS TRUST……4TH AMICUS CURIAE

JUDGMENT

The Parties

1. The 1st Petitioner, Coalition on Violence Against Women ('COVAW'), is a non-profit, non-governmental organisation committed to eradicating violence against women in Kenya.
2. The 2nd Petitioner, Independent Medico-Legal Unit ('IMLU'), is also a non-governmental organisation whose mandate includes the promotion of the rights of torture victims and survivors.
3. The 3rd Petitioner, The Kenyan Section of the International Commission of Jurists ('ICJ-Kenya Section'), is also a non-governmental organisation whose mandate is to work on the promotion of the rule of law and democracy.
4. The 4th Petitioner, Physicians for Human Rights ('PHR'), is an international organisation registered in Kenya in 2008. It uses medicine and science to stop mass atrocities and severe human rights violations against individuals.

5. JWM, PKK, SMM, CNR, LGS, SKO, DOJ, and FOO who are the respective 5th to 12th petitioners are alleged female and male adult victims of the sexual violence that occurred during the Post-Election Violence ('PEV') that took place in Kenya in late 2007 and early 2008.
6. The Attorney General of the Republic of Kenya ('AG') who is the 1st Respondent is the principal legal adviser of the national government and is constitutionally charged with representing the national government in court or in any other legal proceedings to which the national government is a party other than criminal proceedings.
7. The 2nd Respondent, the Director of Public Prosecutions of the Republic of Kenya ('DPP'), exercises prosecutorial authority in Kenya by virtue of Article 157 of the Constitution. Clause (4) of the said Article specifically empowers him to direct the 4th Respondent, the Inspector General of the National Police Service ('I.G.') to investigate any information or allegation of criminal conduct and the I.G. shall comply with any such directions.
8. The 3rd Respondent, the Independent Policing Oversight Authority ('IPOA') is a statutory body established under the Independent

Policing Oversight Authority Act, 2011 ('IPOA Act') with the objective of holding the police accountable to the public; giving effect to Article 244 of the Constitution that police officers shall strive for professionalism and discipline and shall promote transparency and accountability; and ensuring independent oversight of the handling of complaints against the National Police Service.

9. The 4th Respondent, the Inspector-General of the National Police Service of the Republic of Kenya is an office established under Article 245(1) of the Constitution with the duty to investigate any particular offence or offences and to enforce the law against any particular person or persons.

10. The 5th Respondent, the Minister for Medical Services of the Republic of Kenya, was at the time of the filing of the petition mandated to provide health services, create an enabling environment, regulate, and set standards and policy for health service delivery in Kenya. The 6th Respondent, the Minister for Public Health and Sanitation of the Republic of Kenya, has since been merged with the 5th Respondent and placed under the office currently known as the Cabinet Secretary for Health.

11. After the petition was filed other parties were granted leave to join the petition. The Kenya Human Rights Commission ('KHRC') joined the proceedings as an Interested Party. The Kenya National Commission on Human Rights ('KNCHR') was admitted as the 1st Amicus Curiae. Katiba Institute, the Constitution & Reform Education Consortium ('CRECO') and the Redress Trust came on board as the respective 2nd Amicus Curiae, 3rd Amicus Curiae and 4th Amicus Curiae.

The Prayers in the Petition

12. Through their petition dated 20th February, 2013, the petitioners seek the following reliefs:

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 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 inhumane 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, 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 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 the 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 on 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 judgement 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**

xxii. **Costs of this Petition.**

The Petitioners' Case

13. The crux of this petition, as supported by the averments in the affidavit of Lydia Munyiva Muthiani, is that following the announcement of results of Kenya's general election held in December 2007, widespread violence and demonstrations ensued and continued from late December 2007 until March 2008. During this period of unrest several women, men and children were targeted for attack and were subjected to forms of Sexual and Gender Based Violence ('SGBV') including rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation or forced amputation of their penises.

14. The petitioners bring this petition against the respondents for their failure to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and the failure to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th petitioners and other victims. The rights alleged to have been violated include the right to life protected by Section 71 of the repealed Constitution and Article 26 of the current Constitution; the prohibition of torture, inhuman and degrading treatment as

provided by Section 74 of the repealed Constitution and Article 25 of the current Constitution; the right to security of the person as protected by Section 70 of the repealed Constitution and Article 29 of the current Constitution; the right to protection of the law as protected by Section 70 of repealed Constitution and Articles 10 & 19 of the current Constitution; the right to equality before the law and freedom from discrimination under Section 83 of the repealed Constitution and Article 27 of the current Constitution; the right to information as protected by Article 35 of the Constitution; and the right to remedy and rehabilitation as protected by Section 84 of the repealed Constitution and Article 23 of the current Constitution.

15. The petitioners' case is that these rights are also guaranteed under the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on 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.

16. Regarding the cases of SGBV perpetrated by the Kenya Police Service, Administrative Police, General Service Unit and other

State security agents (herein collectively referred to as 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; failure to take adequate security measures, particularly the failure to plan and prepare law enforcement operations during PEV to protect victims from SGBV; and failure to supervise Police and to prevent and punish crimes committed by Police.

17. With respect to the SGBV perpetrated by non-State actors, the petitioners bring this action against the 1st and 4th respondents for failure to adequately train Police to protect persons from sexual offences; failure to plan and prepare policing operations during the PEV to safeguard persons from SGBV; and failure of the 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.

18. The petitioners allege that the SGBV committed against the 5th to 12th petitioners were contributed to by actions of Police who were not prepared, trained, disciplined or supervised to

appropriately conduct law enforcement activities during civil unrest. Furthermore, the petitioners aver that the systematic failure of subordinates of the Commissioner of Police to document claims of SGBV by victims and witnesses constitutes an obstruction of justice.

19. In respect of the 5th and 6th respondents, it is claimed that their staff and or employees failed to provide emergency medical services, particularly where the perpetrators were public officials such as police officers, to the victims of SGBV thereby imperilling their lives and health and violating their fundamental rights.

20. The petitioners contend that despite the dissemination of information on the extent of the SGBV committed during PEV amongst the 1st, 2nd, 3rd and 4th respondents, they have failed to investigate or take meaningful steps towards ensuring the redressing of gross human rights violations perpetrated against the victims. It is averred that the 1st and 2nd respondents failed to exercise their power to direct the Commissioner of Police, now the Inspector-General of National Police Service, to independently investigate allegations of criminal conduct by members of the Police and persons other than the Police, and failed to undertake

criminal proceedings against them. Furthermore, the 3rd Respondent is alleged to have failed to exercise its powers including the power to independently investigate information or allegations of criminal conduct by members of the Police in the commission of SGBV during the PEV period.

21. The petitioners further allege that the 1st, 5th and 6th respondents are liable for the failure to provide rehabilitation of the petitioners and other victims of SGBV such as restitution, compensation for general damages, and medical and psychosocial care and legal and social services. The petitioners aver that the lack of reparations violated the right to remedy.

22. It is further asserted that the 2nd Respondent is liable for failure to publicly recognise the nature of SGBV-related violations committed during PEV, and the suffering caused to the victims and to make a public apology for those crimes. According to the petitioners, these acts and omissions for which the respondents are liable violated the rights of the 5th to 12th petitioners and other victims of SGBV committed during PEV.

23. The petition is supported by the expert witness statement of Betty Kaari Murungi filed on 1st September, 2016 and the expert

witness statement of Maxine Marcus filed on 15th May, 2016. The petition is also supported by the witness statements of Rashida Manjoo filed on 23rd May, 2016; Elizabeth Mukhisa, Teresa Njore and Dr Mak'anyengo all filed on 11th April, 2016; the statements of the 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th petitioners, as well those of the 6th and 7th petitioners' supporting witnesses, filed on 22nd August, 2014; and the 6th Petitioner's second statement filed on 16th March, 2015.

The 1st, 4th, 5th & 6th Respondents' Case

24. The 1st Respondent filed a relying affidavit sworn by Dawson K. Gatwanjeru on 22nd September, 2014 in response to the petition. It is asserted that the petition is premised on general assertions and lacks the specificity of factual happenings as attacks were indiscriminate and not only targeted at women and children as alleged. Furthermore, it is alleged that some allegations are speculative and inadmissible.

25. It is averred that many victims of violence were provided with protection in police stations within available resources, and those who needed medical attention were attended to in both public and private hospitals. Moreover, it is stated that contrary to the

petitioners' averments, there are no reports of persons being turned away from hospitals.

26. It is further deposed that the allegation of violence being perpetrated by police officers in the petition and supporting affidavit of Lydia Munyiva Muthiani is hearsay evidence and inadmissible. Moreover, it is stated that the petitioners have acknowledged in various paragraphs of the petition and supporting affidavits that many victims were treated in various hospitals within 72 hours of being attacked.

27. It is averred that the victims and witnesses failed to report the perpetrators of SGBV to the Police, the 3rd Respondent, the Ombudsman or other independent commissions and this had hindered the Police and other State organs from investigating the alleged crimes or taking remedial and disciplinary action against any police officer who may have been involved in commission of crime.

28. The 1st Respondent filed an additional replying affidavit sworn by Maurice Ogosso on 21st February, 2017, in which it is deposed that this petition raises similar issues to those in **Nairobi H.C. Petition No. 273 of 2011, FIDA Kenya & 27 others v the Attorney General.** It is

averred that the 1st and 3rd petitioners, as well as the Interested Party, were also enjoined to the proceedings in the said case, which had been concluded and was awaiting highlighting of submissions before Chacha Mwita, J.

The 2nd Respondent's Case

29. The 2nd Respondent filed a replying affidavit sworn by David Ndege on 21st January, 2014 who deposes that upon correspondence with the 4th Respondent it was revealed to the 2nd Respondent that the 5th to 12th petitioners had never made any report to any police station and that their names did not appear amongst the 381 reports made of sexual offences and investigated by the 4th Respondent.

30. It is further averred that besides the current petition, there were no complaints made to the 2nd Respondent by the petitioners, and there is nowhere in the petition where it is stated that the petitioners had made complaints to the 2nd Respondent. The 2nd Respondent asserts that no blame can be apportioned to his office as he has always prosecuted the cases reported to them and investigated by the 4th Respondent, where actionable evidence is disclosed.

31. The 2nd Respondent further contends that he established a Multi-Agency Task Force ('Task Force') to review, re-evaluate and re-examine files relating to post-election violence and wrote to ICJ Kenya, COVAW, LSK, IJM and FIDA to collaborate with and assist the Task Force, and received no response from the organisations.

32. The 2nd Respondent asserts that he takes SGBV cases seriously as demonstrated by the establishment of a specialised thematic section in his office to deal with such cases, and that he has gazetted special prosecutors specially trained by his office and nominated by FIDA, IJM and other civil society organisations to deal with SGBV cases.

33. Further, that the 2nd Respondent has collaborated with GIZ and UNDOC to develop and publish a trainer's manual for the prosecution of SGBV and developed guidelines with GIZ for the investigation and prosecution of SGBV cases.

The Petitioners' Submissions

34. The petitioners filed written submissions dated 16th April, 2018 and submit that the issues for determination are:

a) **Whether Kenya is liable for the impugned actions of State actors involved in committing SGBV during the PEV**

35. The petitioners submit that the conduct of the Police, as an arm of the government empowered by the Kenyan Government to maintain law and order, would be considered to be an act of the Kenyan Government. The Police are accused of exceeding their authority by committing sexual violence and violating the human rights of the 5th, 6th and 9th petitioners. It is the petitioners' case that the Government is responsible for any act of sexual violence perpetrated by a member of the security forces. Reliance is placed on the **International Law Commission's Draft Articles on State Responsibility** and the case of **Velásquez Rodriguez v Honduras, Resolution No. 22/86, Case 7920, April 18, 1986** where it was held that the violation of rights carried out by an act of public authority is imputable to the State. Also relied on are the statements of Rashida Manjoo, the former United Nations Special Rapporteur on violence against women, and Maxine Marcus, an international crimes and investigations expert.

b) Whether Kenya is liable for the impugned actions of non-State actors involved in commission of SGBV during the PEV

36. It is submitted that States, and in this case Kenya, bears responsibility for the actions of non-State actors for failing to act with

due diligence to prevent the commission of crime, which in this case was sexual violence. It is asserted that States bear responsibility for non-State actors' acts of sexual violence where the authorities knew, ought to have known, or had reasonable grounds to believe, that there was real and immediate risk of sexual violence being committed and failed to comply with attendant due diligence obligations to prevent such violence.

37. The petitioners further contend that the individuals who committed the sexual violence were not apprehended and the cases were not investigated, and none of the petitioners has received reparations for the pain and suffering as a result of the sexual violence. According to the petitioners, it is the duty of the State as per Article 4(2) of the **Declaration on the Elimination of Violence Against Women ('DEVAW')** to "*exercise due diligence to prevent, investigate and, in accordance with the national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.*"

38. The petitioners support their argument by relying on a number of authorities including the **UN Committee against Torture, General Comment No. 2**, the decisions in **Velásquez Rodriguez (supra);**

Zimbabwe Human Rights NGO Forum v Zimbabwe Comm. No. 245/02 (2006); and **Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan, ACHPR, Comm. 279/03-296/05.**

c) Whether Kenya is liable for her failure to prevent PEV and protect the 5th to 12th petitioners and other victims from SGBV

39. The petitioners assert that there existed a positive obligation on the State which could only be discharged if it produced tangible results geared at preventing the infringement of human rights. Further, that according to the **Waki Report** generated by the **Commission of Inquiry into Post-Election Violence (CIPEV)**, prior to the commencement of PEV in 2007, the State received information from the National Security Intelligence Service ('NSIS') on impending violence following the general election but the State failed to prevent the sexual violence or to protect the citizens affected once the violence commenced.

40. It is submitted that the State failed to meet its due diligence obligations to prevent violence and protect Kenyans therefrom and it is therefore liable for the same. The petitioners rely on Section 24 of the National Police Service Act, 2012; Section 14(1) of the

repealed Police Act, Cap. 84; and Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Reliance is also placed on the decisions in, among other cases, **Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR; Velásquez Rodriguez (supra); Charles Murigu Murithii & 2 others v Attorney General, Petition 113 of 2009 (Consolidated with Petition 44 of 2009 and Petition 48 of 2012); Mahamut Kaya Case Application No. 22535/93; Osman v The United Kingdom 87/1997/871/1083;** and **Fatima Yildirim (deceased) v Austria (Communication No. 6/2005).**

d) Whether Kenya is liable for her failure to investigate and prosecute SGBV committed during the PEV

41. The petitioners submit that Kenya has an obligation to investigate crimes and ensure that perpetrators are arrested. According to the petitioners, the Government of Kenya did not conduct effective investigations into post-election SGBV, and ten years later very few cases had been conclusively investigated. Furthermore, it is contended that investigators had failed to identify and prosecute the persons who violated the rights of the 5th to 12th petitioners. The petitioners assert that this is demonstrative of the

Government's failure to fulfil its obligation to conduct genuine and effective investigations into SGBV committed against the 5th to 12th petitioners and other victims during PEV despite the easily obtainable information on widespread SGBV.

42. It is further submitted that contrary to the Government's contention that the victims and civil society organisations have a duty to report crime, the Government cannot transfer its obligation to investigate to civil society organisations or other persons. The petitioners add that as recorded in the Waki Report, even where victims attempted to report instances of sexual violence, the Police did not act, particularly where the perpetrators were State security agents.

43. The petitioners rely on an array of documents, statutory provisions and decided cases, including **Section 24 of the National Police Service Act; Section 14(1) of the repealed Police Act; Section 7 of the IPOA Act; the Principles of Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'); Florence Omukanda (supra); Valasquez Rodriguez (supra); R v Commissioner of Police & 3 others ex-parte Phylis Temwai Kipteyo [2011] eKLR; Zimbabwe**

Human Right NGO Forum (supra); Cas Romania (Cas Romania, European Court of Human Rights), Application No. 26692/05, Judgement of 20th March, 2012; and **Sudan Human Rights Organisation & COHRE v Sudan (supra).**

44. It is submitted that since the State has failed to meet its due diligence obligation to investigate the reports of SGBV, it follows that it has also failed to meet its due diligence obligation to prosecute as prosecution is dependent on investigation. The petitioners assert that the 2nd Respondent cannot rely on alleged lack of medical evidence as a reason not to prosecute as the same contradicts the Evidence Act, Cap. 80, as well as the practice of international criminal courts where rape has been determined as a crime against humanity. It is urged that the 2nd Respondent therefore fails to fulfil his obligation to investigate and prosecute the crimes effectively where he declines to pursue cases for lack medical or forensic evidence. The cases of **Prosecutor v Kunarac et al Case No. IT-96-23-T & IT-96-23/1-T 22 February, 2001; Prosecutor v Charles Ghankay Taylor SCSL-03-1-T; Prosecutor v Jean Paul Akayesu ICTR-96-4-A; Prosecutor v Jean-Pierre Bemba Gombo ICC-01/05-01/08;** and **Prosecutor v Kaing Guek Eav alias Duch**

Case No. 001/18-07-2007/ECCC/TC, 3 February 2012 are relied upon by the petitioners to buttress their argument.

e) Whether Kenya is liable for the failure to provide remedies and reparations to victims of SGBV committed during the PEV

45. The petitioners submit that Article 23 of the Constitution empowers the Court to grant appropriate reliefs for violation of constitutional rights. This obligation is also provided for under the International Covenant on Civil and Political Rights; the Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparations; the UN Committee against Torture's General Comment No. 3; and the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

46. It is contended that the State has a due diligence obligation to ensure that women and girls who are victims of SGBV have access to justice, health care and support services, and the State must protect them against further harm. It is stated that due to the Government's failure to effectively investigate and prosecute the cases of SGBV, there has been no redress for these wrongs.

Additionally, that the Government has failed to discharge the mandate to provide remedies and reparations for the victims of the PEV. In support of the assertions, reliance is placed on several decisions including **M.S.S. v Belgium & Greece Application No. 30696/09; McFarlane v Ireland (Application No. 31333/06);** and **Fatima Mehalli v Algeria, Communication No. 1900/2009, U.N. Doc. CCPR/C/110/D/1900/2009 (2014).**

f) Whether the 5th to 12th petitioners' right to life was violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

47. The petitioners assert that rape and sexual violence amount to infringement of the right to life as was decided in **Bodhisattwa Guatam v Miss Subhra Chakraborty 1996 AIR 922.** Furthermore, it is contended that the right to life can be impacted by the lack of protection by the State as was decided in **Mahmut Kaya v Turkey [2000] ECHR 129, 28th March 2000;** and by the lack of investigation and prosecution of acts of violence as was held in **McCann & Others v United Kingdom (21 ECHR 97 GC); Osman v United Kingdom Case No. 87/1997/871/1083;** and **Kolevi v Bulgaria (Application No. 1108/02), 5 November, 2009.** It is also submitted

that the right to life may be impacted by the lack of access to medical care as decided in the case of **Paschim Banga Khet Mazdoor Samity v State of West Bengal & another 1996 SOL Case No. 169 (Supreme Court of India).**

48. It is stated that the lives of the 5th to 12th petitioners have been changed as a result of the violations, including through the loss of livelihood, psychological trauma, stigmatisation by family and their husbands, for the female petitioners, and medical difficulties including HIV infections and PTSD.

g) Whether the 5th to 12th petitioners' right to protection against torture, inhuman and degrading treatment was violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

49. The petitioners submit that SGBV constitutes torture or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or mental or physical health. The decisions in **Irene Wangari Gacheru & 6 others v Attorney General [2017] eKLR; the Celebici Case CC/PIU/364-E, 16 November 1998; C.T. & K.M. v Sweden CAT/279/2005, 22 January 2007; Prosecutor v Jean Paul Akayesu (supra);** and **Prosecutor v**

Uhuru Muigai Kenyatta No. ICC-01/09-02/11 are quoted to buttress the contention that rape and forced circumcision are categorised as torture or other cruel or inhuman acts.

50. It is further asserted that where the State withholds emergency medical care to the victims of violence, this amounts to ill-treatment or even torture. The petitioners aver that the 5th to 12th petitioners suffered severe and intense physical and mental anguish and pain intentionally inflicted on them based on discrimination on sex and ethnicity with the acquiescence of public officials and other persons under whose control they were. It is contended that the acts of torture were intended to control, intimidate and degrade the 5th to 12th petitioners. It is therefore asserted that they all suffered torture and their right to be protected from the same was infringed upon.

h) Whether the 5th to 12th petitioners' right to security of the person was violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

51. It is submitted that the right to security of the person places an obligation on the State to take measures to protect persons from foreseeable threats to life or integrity of the body from State or

private actors. This principle, they state, is confirmed in the **Human Rights Committee's General Comment No. 35** and the cases of **Van Eeden v Minister of Safety and Security Case No. 176/2001; C.K. (A Child) (through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2013] eKLR; Rodger Chongwe v Zambia CCPR/C/70/D/821/1998, 9 November 2000;** and **Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR.** The petitioners contend that the State did not take measures to protect the victim-petitioners resulting in injuries to their bodies, psychological integrity and their dignity which resulted in violation of their right to freedom and security of the person.

i) Whether the 5th to 12th petitioners' right to protection of the law was violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

52. It is asserted that the State failed to protect the petitioners based on discrimination and also failed to provide them with legal and social protection such as shelter and transport facilitation after the sexual violations occurred to assist them with accessing justice.

The failure of the State to investigate and identify the perpetrators is also argued to have amounted to a denial of the petitioners' right to justice. Reliance is placed on decisions in **C.K. (A Child) (supra),** and **Jessica Lenahan (Gonzales) et al v United States (2011).**

j) Whether the 5th to 12th petitioners' right to equality before the law was violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

53. The petitioners submit that they were victims of sexual violence based on gender and ethnicity and additionally were not protected from SGBV and were unable to access justice on the same basis. The petitioners assert that the State compensated victims of PEV who lost their homes, however, victims of SGBV have not received any form of reparations or compensation and there has been no explanation offered for the discrimination. In support of their arguments, the petitioners rely on the cases of **Zimbabwe Lawyers for Human Rights & the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe, 294/2004, 26th ACHPR AAR Annex (Dec 2008-May 2009); Peter K. Waweru v Republic [2006] eKLR; Federation of Women**

Lawyers in Kenya (FIDA-Kenya) & 5 others v Attorney General & another [2011] eKLR; and **CK (A Child) (supra).**

k) Whether the 5th to 12th petitioners' right to information was violated/threatened/infringed upon/denied by virtue of the SGBV committed against them and by the State's failures

54. The petitioners assert that their right to information was infringed upon by the 1st, 5th, and 6th respondents who failed to provide them with access to information being essential medical records from Mbagathi District Hospital. They assert that the 5th, 7th and 9th petitioners were denied access to documents which would have facilitated access to treatment at other health facilities. Furthermore, it is alleged that since 2008 the 1st, 2nd, and 3rd respondents have not provided the petitioners with access to information about the investigation and prosecution of the perpetrators of SGBV during PEV. The 2nd Respondent is alleged to have failed to release to the public the final report of the Task Force or any findings concerning crimes committed during PEV.

55. The Court is urged to begin to remedy this and facilitate accountability by ordering the preservation of documents for future

investigations, the release of PEV investigation reports, and the release of information on the classification of crimes by the State.

l) Whether the 5th to 12th petitioners' right to remedy and rehabilitation was violated by the impugned actions by virtue of the SGBV committed against them and by the State's failures

56. It is submitted that the petitioners herein are entitled to access proper complaint mechanisms, monetary compensation, medical and psychological rehabilitation, and proper investigation and prosecution in respect of the sexual violence they suffered. This is supported by reference to the cases of **Kituo Cha Sheria & 8 others v Attorney-General [2013] eKLR; Blanco v Nicaragua, Communication No. 328/1988, U. N. Doc. CCPR/C/51/D/328/1988 (1994);** and **Aydin v Turkey 57/1996/676/866, Council of Europe; European Court of Human Rights, 25 September 1997.**

m) The appropriate damages

57. The 5th to 12th petitioners submit that they are each entitled to general damages and compensation of Kshs. 5 million for physical and mental pain and suffering, as well as Kshs. 5 million aggravated damages for the gross manner in which the violations were

committed and the general context of violence which exacerbated their situation and made it difficult for them to access protection and timely medical and psychological care and treatment. Reliance is placed on the cases of **Mwaura Muiruri v Suera Flowers Limited [2014] eKLR; David Gachira v M. W. M. [2006] eKLR; Njuguna Githiru v Attorney-General [2016] eKLR; Liza Catherine Wangari Mwangi v Attorney General [2010] eKLR** to support the argument that the petitioners are entitled to damages for the sexual violence suffered.

58. It is further submitted that each of the 5th to 12th petitioners should be awarded Kshs. 1.2 million as compensation for future medical expenses to cater for a minimum period of ten years. They rely on the decisions in **Kenya Bus Services Ltd v Gituma [2004] EA 91**; and **Mbaka Nguru & another v James George Rakwar Civil Appeal No. 133 of 1998.**

59. The petitioners submit that the 5th to 12th petitioners should each be awarded compensation of Kshs. 500,000 for significant socio-economic losses and lost economic opportunities they have suffered particularly the loss of livelihood by the 5th to 10th petitioners and the disruption of schooling of the 11th and 12th petitioners. The

petitioners rely on the cases of **Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR; Jacob Ayiga Maruja & another v Simeon Obayo Civil Appeal No. 167 of 2002;** and **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR.**

60. It is additionally averred that 5th to 12th petitioners should each be awarded Kshs. 5 million in damages owing to the State's failure to investigate and prosecute the sexual violence against them. They rely on the decisions in **Interights v Egypt, Comm. 312/2005, 21st ACHPR AAR Annex II (2006-2007); DSD & NBV v Commissioner for Police Metropolis [2014] EWHC 436 (QB);** and **Korau v Chief Constable of Greater Manchester Police [2015] EWCA Civ 646.**

61. The petitioners rely on the decision in **Ol Pejeta Ranching Limited v David Wanjau Muhoro, Civil Appeal No. 42 of 2015** to urge the Court to take into account the rate of about 10% inflation in Kenya since 2005 and adjust the amounts prayed for appropriately.

62. The petitioners also seek exemplary damages of Kshs. 4 million to be shared between them. The prayer for exemplary damages is supported by several decisions including **Obongo Orude & Stanley Mwangi v Municipal County of Kisumu [1971] EA 91; Rookes v Barnard & 2 others [1964] AC 1129; Kenya Fluorspar Company**

Limited v William Mutua Maseve & another, Civil Appeal No. 188 of 2010; and **Gitati Cyrus Muraguri v Attorney General, Misc. Case No. 1185 of 2003.**

n) The Costs

63. On the issue of costs, the petitioners argue that this matter concerns vindication of rights that were violated at the instance of the State's action and inaction, and that the matter has been brought before this Court due to the State's neglect and breach of duty to provide remedies for the violation of the rights in question. They therefore urge that the petitioners should be awarded costs. It is additionally submitted that in the event the petition is unsuccessful, the Court should not order costs against the petitioners as to do so would hinder the advancement of constitutional justice.

The 1st, 4th, 5th, and 6th Respondents' Submissions

64. The 1st, 4th, 5th and 6th respondents filed written submissions dated 22nd October, 2018. These respondents submit that the applicable law herein is the repealed Constitution, and the provisions of the current Constitution are not applicable. They submit that the petitioners herein have no *locus standi* as Section

84 of the repealed Constitution only provided *locus standi* to institute proceedings on behalf of a person or persons in detention. It is asserted that Article 22 of the current Constitution cannot be applied retrospectively, and therefore the provisions of Article 2(5) and (6) are not applicable on claims preceding the promulgation of the 2010 Constitution. This argument is supported by reference to several decisions, including **Mary Rono v Jane Rono & another, Eldoret C.A. Civil Appeal 66 of 2002; Charles Murigu Murithii & 2 others v Attorney General [2015] eKLR;** and **Beatrice Wanjiku & another v Attorney General & others, Petition No. 190 of 2011.** The four respondents further submit that international law cannot be the basis for invocation of the High Court's jurisdiction as matters of international law do not constitute constitutional questions that would merit the invocation of the jurisdiction of the High Court.

65. The respondents submit that there are several litigations over the 2007-2008 PEV allegedly instituted in the public interest and this petition cannot purportedly be claimed to be a public interest suit. The replying affidavit of Maurice Ogosso is cited as confirming this assertion. The respondents consequently contend that the petition is *res judicata* and that the defence of estoppel is applicable in

respect of the issue of the liability of the Police. Reliance is placed on the determination in **Silas Make Otuke v Attorney General & 3 others [2014] eKLR.**

66. Turning to the substantive issues raised by the petitioners, the respondents contend that the State cannot be held liable for the injuries and damages occasioned to an individual by another individual who is not a State operative. Reliance is placed on the case of **Deshaney v Winnebago County Department of Social Services 109 S. Ct. 998 (1989),** where the U.S. Supreme Court interpreted the 'due process clause' as imposing a limitation on the State's power to act rather than a guarantee of minimum levels of safety and security. The respondents state that Section 75 of the retired Constitution bears a striking similarity to this rule and should be interpreted similarly. The respondents assert that the position they have adopted is affirmed by the decisions in **Republic v El Mann [1969] EA 357 (K); Republic v Ministry of Interior and Coordination of National Government Ex-parte ZTE Corporation & another [2014] eKLR;** and **Maisha Nishike Limited v the Permanent Secretary, Ministry of Lands & 5 others [2013] eKLR.**

67. The respondents aver that the claims of the petitioners are premised on allegations of negligence by Police rather than an active infringement of constitutional rights through positive action. They assert that the petitioners ought to have sought recourse through a civil claim for negligence rather than a constitutional petition. This assertion is supported by reference to the holdings in **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR; N. M. & others v Smith & others (Freedom of Expression Institute as Amicus Curiae) (CCT 69/05) [2007] ZACC 6**; and **G. M. V. v Bank of Africa Kenya Limited [2013] eKLR.**

68. The 1st, 4th, 5th and 6th respondents in reference to Section 4 of the Government Proceedings Act, Cap. 40 contend that the State does not owe a specific duty to the petitioners individually, and the duty owed is a general duty of provision of protection of the public at large. They refer to the decisions in **Johnson v City of Seattle 474 F. 3d 643, 639 (9th Cir. 2007); Westminister Investing Corp. v G. C. Murphy Co. 434 F.2d 521,526; Daubenspeck, et al v Commonwealth of Pennsylvania, 894 A.2d 867 (Pa. Cmnwlth.2006); Ancell v McDermott [1993] 4 All ER 355; Alexandrou v Oxford [1993] 4 All ER**

328; and **Attorney General of Jamaica & others v Dacres (Sheryl) Resident Magistrate's Civil Appeal No. 2 of 2009.**

69. It is further submitted that it is in the public interest and public policy that Police should not be influenced in operational matters by litigation. Additionally, it is claimed that the ambit of protection contemplated by the petitioners would be impossible to sustain within the limits of Kenya's resources and would impose and attract liability to the government. The Court is urged to be guided by the decisions in **Swimney v Chief Constable of Northumbra Police Force [1997] QB 464; Anna v Merton LBC [1978] AC 728; Charles Murigu Muriithi & 2 others v Attorney-General [2015] eKLR;** and **Jenniffer Wanjira Ng'ang'a & another v Attorney-General [2017] eKLR.**

70. The four respondents assert that they should not be held liable for the actions of private citizens against other private citizens and therefore the 1st, 2nd, 3rd, 4th, 7th, 8th, 10th, 11th and 12th petitioners have no valid legal claim against them. Additionally, it is averred that the petitioners bear a legal and evidential burden of proof which has not been discharged in the present proceedings. They support their argument by referring to the cases of **Raila Odinga v IEBC & 3 others, Supreme Court of Kenya Election Petition No. 5 of**

2013; and **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR.**

71. It is the 1st, 4th, 5th and 6th respondents' submission that the Waki Report, upon which the petitioners base their claim, should not be relied upon by the Court on the grounds that it has been contradicted by the oral testimony of some of the petitioners; that the petitioners neglected and or refused to produce the annexures to the Report; that the Report does not speak specifically to the claims by the individual petitioners; and, that the Waki Commission relied on civil society to avail and coach witnesses. It is therefore urged that the Waki Report was tailored by the civil society for ulterior ends.

72. Additionally, the four respondents contend that the evidence procured by civil society cannot form the basis for the determination of this petition for the reasons that the evidence was not given under oath; that the respondents were not given an opportunity to rebut the evidence or cross-examine the deponents; and that it contains hearsay evidence. The 1st, 4th, 5th and 6th respondents rely on the decisions in **Mahira Housing Co. Ltd v Mama Ngina Kenyatta & another (Suing as Trustees of Waunyomu Ngeke**

Ranch) [2008] KLR 31; Patrick Chege Kinuthia & 2 others v Attorney-General [2015] eKLR; and **Mahon v Air New Zealand Ltd & others [1984] 3 All E.R.**

73. The 1st, 4th, 5th and 6th respondents assert that during the 2007-2008 PEV, the Police provided protection in Police stations and many victims were able to attend hospitals for medical attention under the protection of the Police. They support their submission by reference to the replying affidavit of Danson Gatwanjeru, and the testimonies of Purity Kawira Kubai, Josephine Wairimu Mwangi and Stella Kwamboka Ogega. It is further contended that security is not an exclusive duty of the government but entails responsibilities on the citizenry to report crimes and suspicious activities, and the Police cannot be held liable where victims fail to make reports.

74. The four respondents assert that there is ample evidence that contradicts the allegation that the petitioners were turned away or did not receive medical treatment from government facilities. In this regard, the Court is urged to consider the testimonies of Consolata Rikanya, Purity Kawira Kubai, Dr Margaret Makanyego and other witnesses who gave testimony.

75. The 1st, 4th, 5th and 6th respondents submit that the supporting affidavit of Lydia Munyiva Muthiani is inadmissible being largely based on hearsay. The assertion that evidence based on hearsay is inadmissible is supported by the decisions in **Dominic Waweru v Occidental Insurance Company Ltd [2015] eKLR; Salim Awadh Salim & 10 others v Commissioner of Police & 3 others, Nairobi High Court Petition No.822 of 2008;** and **Kenya Power and Lighting v Fridah Kageni Julius [2014] eKLR.**

76. On the 5th, 6th and 9th petitioners' averments that they were raped by security officers, it is submitted that the petitioners never adduced any medical report before this Court to prove the fact of rape and that the State cannot be vicariously liable for criminal acts allegedly committed by security officers as a public officer has no ostensible authority of the State to commit rape.

77. On the claim for damages, it is submitted that there is no basis for the award of damages as there is no evidence of loss suffered by any of the petitioners. In support of this statement the respondents rely on the pronouncements in **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR; Mbaka**

Nguru & another v James George Rakwar [1998] eKLR; Mawenzi Investments Ltd v Top Finance Co. Ltd & another HCCS No 02 of 2013; Zacharia Waweru Thumbi v Samuel Njoroge Civil Appeal No 445 of 2003; Jephtar & Sons Construction & Engineering Works Ltd v The Attorney General HCT-00-CV-CS-0699-2006; Justo Ngoka & 225 others v Rai Plywood (K) Ltd & 2 others [2012] eKLR; Ransa Company Ltd v Hatibu Abdalla Juma & 9 others [2014] eKLR; and **National Bank of Kenya v Lawrence Otweyo Gumbe [2006] eKLR.**

<u>The 3rd Respondent's Submissions</u>

78. The 3rd Respondent filed written submissions on 18th October, 2018 and submit that the issues for determination are:

i. **Did the 3rd Respondent from 18th November, 2011 fail 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?**

79. The 3rd Respondent contends that it was established under the IPOA Act which came into force on 18th November, 2011 and

therefore was not existent or operational at the time that the petitioners' complaints were raised and could not have acted on the same. Furthermore, it is asserted that the 3rd Respondent's Board was inaugurated in June 2012 and therefore investigations only commenced after that date. The 3rd Respondent asserts that it is premature for the petitioners to allege failure to investigate their case considering that the petition was filed in 2013 which was one year after its establishment.

80. It is further asserted that none of the petitioners lodged a complaint of Police misconduct with the 3rd Respondent and this is confirmed by the evidence of PW3 PKK, PW4 JWM and PW6 LGS. It is urged that the 3rd Respondent, without a complaint being made by the 5th, 6th, and 9th petitioners, could not initiate investigations on its own motion. Moreover, it is alleged that there is no claim made in the petition and the supporting affidavit or evidence exhibited that the 3rd Respondent failed to investigate cases of post-election SGBV. It is therefore submitted that the petitioners have failed to discharge their burden of proof to show the failure of the 3rd Respondent to investigate.

81. The Court is urged to consider that despite the cases of confirmed SGBV during PEV which have been highlighted in the Waki Report, the 3rd Respondent cannot, on its own motion, initiate investigations based on the Report as the identities of the victims have been concealed. The 3rd Respondent additionally submits that it has been unable to investigate the reports of SGBV herein as it is precluded under Section 26 of the IPOA Act from investigating matters which are subject to proceedings before a court of law. It is pointed out that because these proceedings have been ongoing since 20th February, 2013, the 3rd Respondent has been unable to investigate the claims and can only do so once the matter is withdrawn or finalised.

ii. Did or does the 3rd Respondent have any systemic failures including deficiencies in the training of subordinates of the 3rd Respondent and the other respondents on the practices of recording acts of SGBV, the collection of evidence of SGBV, and the provision of technical, forensic and medical analysis of the evidence of SGBV that may have led to the failure of the 3rd Respondent to effectively investigate the SGBV? Did the alleged systemic failures cause or contribute to the violation

of the rights of the 5th to 12th petitioners and other victims of SGBV during PEV?

82. It is submitted that the petitioners have failed to prove through evidence any systemic failures within the 3rd Respondent. Further, that no claim was made nor any evidence attached to the supporting affidavit to the petition to prove the existence of any such systemic failures. The Court is urged not to rely on the Waki Report to show systemic failures on the part of the 3rd Respondent as it was not yet in existence at the time the Report was generated and the Report does not therefore address it.

iii. Should the reliefs sought against the 3rd Respondent be granted?

83. On the 2nd prayer for the issuance of a 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 the right to security of the person, it is submitted that the petitioners

have not established failure by the 3rd Respondent to carry out investigations into SGBV committed during PEV.

84. Concerning the 10th prayer for an order of mandamus for the production of reports of internal inquiries conducted by the 1st, 2nd, 3rd and 4th respondents into SGBV during PEV, the 3rd Respondent submits that it has not been proven that it failed to carry out its investigative mandate and it cannot therefore be compelled to publicly release reports of any investigations being carried out relating to SGBV cases during PEV. Additionally, that compelling it to release such information would interfere with its independence and discretion in the manner in which it discharges certain obligations, and could jeopardize the efficacy of investigations. Reliance is placed on the decision in **Republic v Kenya National Examinations Council ex parte Gathenji & others, Civil Appeal No. 266 of 1996** as outlining the circumstances under which an order of mandamus can issue.

85. The 3rd Respondent asserts that it cannot be compelled to release a full report of all instances of SGBV during PEV as the same would amount to a breach of confidentiality under Section 24(15) of the IPOA Act.

86. As for the 7th prayer, the 3rd Respondent avers that pursuant to Section 4 of the IPOA Act it is independent and not subject to any person, office, or authority in the exercise of its functions and therefore cannot be compelled to collaborate with the Inspector-General in investigations. The 3rd Respondent further submits that in accordance with Article 157 of the Constitution, the DPP's mandate is to carry out prosecutions not investigations and therefore to compel the 3rd Respondent to collaborate with the DPP in investigations would be unconstitutional.

87. On the prayer for an order for provision of medical, psychosocial care, legal and social services, the 3rd Respondent asserts that such an order cannot issue against it as the services fall outside its mandate. This argument is supported by the case of **Shah v Attorney-General (No. 3) Kampala HCMC No. 31 of 1969; [1970] EA 543.**

88. Concerning prayers 8th, 19th, 20th and 21st, the 3rd Respondent submits that the petitioners have failed to show violations of their constitutional rights by the 3rd Respondent to warrant award of damages. Furthermore, the 3rd Respondent asserts that it cannot be held liable to pay damages for acts committed by the Police when

it was not in existence. The 3rd Respondent additionally contend that the petitioners are not deserving of exemplary damages in any event and cite the cases of **David Gitau Njau & 9 others v Attorney-General [2013] eKLR; James Odemba Akong'o v Attorney General & 3 others [2013] eKLR; Bernard Wachira Waheire v Attorney General Nairobi HCC No. 1184 of 2003;** and **Said Fondo Kalume v Attorney-General [2013] eKLR** where the courts refused to grant exemplary damages.

The Interested Party's Submissions

89. The Court will consider the written submissions of KHRC dated 22nd October; 2018 in which the Interested Party adopted the position of the petitioners.

The Amici Curiae Submissions

90. The Court is guided by the written submissions of the 1st *Amicus Curiae* dated 23rd October, 2018; 2nd *Amicus Curiae* dated 9th November; 2018; 3rd *Amicus Curiae* dated 15th March, 2020; and the 4th *Amicus Curiae* dated 19th October, 2018.

The Analysis and Determination

91. I have perused the pleadings and submissions of the parties herein and in my view the issues for determination are:

I. Whether the Petitioners have *locus standi*

92. The 1st, 4th, 5th, and 6th respondents argue that the petitioners do not have *locus standi* to file this suit as the applicable law, the repealed Constitution, only provided *locus standi* to institute proceedings on behalf of persons in detention. They assert that Article 22 of the Constitution cannot be applied retrospectively.

93. The question to be answered therefore is whether the Court can retrospectively apply the provisions of the current Constitution to guarantee the rights violated prior its promulgation. The Court in the case of **Charles Murigu Murithii & 2 others v Attorney-General [2015] eKLR** answered the question as follows:

"73. Our answer to that question is that this Court cannot enforce new rights created under the new Constitution unless those rights were recognized and protected under the previous Constitution. We make this finding because, in our view, the Constitution 2010 does not have retrospective effect. In this regard, we are in agreement with Majanja J when he stated the following in Duncan Otieno Waga vs Attorney General Petition No 94 of 2012;

"I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly section 82 which prohibits discrimination. Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violation of the constitution but they do not empower the court to apply the constitution retrospectively."

74. We shall therefore proceed to determine the Petition on the basis of the rights and obligations of the parties as enshrined in the Repealed Constitution since it was the law in force at the time the

alleged violations forming the subject matter of the Petitions now before us allegedly occurred."

94. The Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** while addressing the same subject declared as follows:

"(62) …At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect

of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."

95. The issue to be determined herein is whether the petitioners can institute public interest litigation under Article 22 of the Constitution on behalf of a group of persons. There was no equivalent of this provision under the repealed Constitution and according to Section 84 of that Constitution, proceedings could only be instituted for the violation of rights on behalf of a detained person. Moreover, in application of the Supreme Court decision above, the words used in Article 22(1) of the Constitution do not contain suggestions of retrospectivity. It is expressly stated that:

"Every person has the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

96. My interpretation of the above provision is that the right to institute public interest litigation only exists in the context of the Bill of Rights of the 2010 Constitution. Therefore, this provision and the right to institute proceedings on behalf of all victims of SGBV cannot apply retrospectively. I shall consequently make my determination

in relation to the petitioners before me who claim that their rights and freedoms under the repealed Constitution were violated.

II. Whether this petition is *res judicata*

97. The respondents argue that there are several cases which have been brought before the High Court in which the respondents herein have been sued under the same title. Additionally, that in the said suits the respondents are being pursued for acts and omissions which occurred during the 2007-2008 post-election violence. The 1st Respondent identify the case of **Nairobi Petition No. 273 of 2011, FIDA Kenya & 27 others v Attorney General** as proof of this.

98. In the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR,** the Court of Appeal highlighted the elements required to prove that a case is *res judicata* as:

"(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

99. The Court of Appeal was also faced with the question of what constitutes *res judicata* in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**, and it expounded on the principle by stating as follows:

"The issue is not meant to be *related*, (whatever that may mean) to issues in a previous suit. The requirement is that the issue *be directly and substantially in issue*. It behoved the appellant to demonstrate each of those elements in Section 7 of the Civil Procedure Act, which we have enumerated herein."

100. I have perused the pleadings in **Petition No. 273 of 2011** attached to the replying affidavit of Maurice Ogosso, and I observe that the International Commission of Jurists-Kenya Chapter was a petitioner in the matter and the 1st Respondent herein was the 1st respondent therein. The KHRC was also the petitioner in that matter

unlike in this case where it is the Interested Party, hence it is not litigating under the same title.

101. The 1st Respondent asserts that COVAW was enjoined to the previous proceedings but the annexed document does not provide proof of this, and none of the other parties in the previous suit is pursued in the current suit. It is therefore clear to me that there is no similarity of parties in the previous suit and the current suit. I am, nevertheless, alive to the principle that parties cannot evade the application of the doctrine of *res judicata* to their case by litigating under different names.

102. Beyond the issue of parties, *res judicata* is concerned with direct and substantive issues. According to the pleadings in the previous suit, the petitioners were pursuing the rights of internally displaced persons and in particular the mismanagement of the IDP camps which allegedly resulted in a number of human rights abuses including SGBV. It is my understanding from the provided petition that the petitioners were pursuing the rights of persons who were specifically residing in camps for internally displaced persons and whose rights had not only been violated due to the loss of their homes but also within the camps in which they had taken refuge.

103. In the petition before me, the petitioners are pursuing the rights of persons who were subjected to sexual violence during the 2007-2008 PEV with no specification of whether they are IDPs or otherwise. Although the issue of SGBV is also pursued in the previous matter, it does not form the crux of the petition as it does in this petition. Furthermore, the subject matters of the two petitions differ since the previous petition was exclusively concerned with persons living in IDP camps, whereas this matter concerns persons who are generally victims of SGBV which occurred during PEV. It is additionally noted that the respondents have not averred nor proved that the claims specific to the 5th to 12th petitioners have been previously addressed by a court of competent jurisdiction.

104. It is therefore my finding that this matter is not *res judicata* and even though two of the parties are litigating under the same title, the issues in the current petition were not directly or substantively in issue in the previous petition.

III. Whether the 5th to 12th Petitioners' rights were violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State's failures

(a) Right to life, prohibition of torture, inhuman and degrading treatment or punishment, and right to security of the person

105. The petitioners submit that the 5th to 12th petitioners suffered severe impacts to their lives including the loss of livelihood, psychological trauma, stigmatisation by family and their husbands (for those who were married), and medical difficulties including HIV infections and post-traumatic stress disorder (PTSD) due to the State's failure to take steps to protect their lives, carry out investigations, and secure effective implementation of the national laws to protect the right to life.

106. The petitioners further claim that SGBV including rape constitutes torture or other inhuman acts of a similar character intentionally causing great suffering, or serious injury to the body or mental or physical health. It is further asserted that where SGBV occurs, if the State withholds emergency medical care this amounts to ill-treatment or even torture. They aver that the 5th to 12th petitioners suffered severe and intense physical and mental anguish and pain intentionally inflicted on them based on

discrimination on sex and ethnicity with the acquiescence of public officials and other persons under the control of public officials.

107. The petitioners contend that the State did not take measures to protect them resulting in injuries to their bodies, psychological integrity and their dignity which were a violation of their right to freedom and security of the person.

108. The petitioners have raised allegations that the State is liable for its failure to prevent the PEV and sexual violence occurring therein and to protect the eight victim petitioners. I must, therefore, determine whether the State owes any obligation to the citizenry to prevent any harm which may violate their rights.

109. The right to life, the right to protection from torture and right to security of the person were guaranteed under sections 70, 71 and 74 of the retired Constitution, and are also protected by Articles 3 and 5 of the Universal Declaration of Human Rights (UDHR); Articles 6, 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR); Articles 4, 5 and 6 of the African Charter on Human and People's Rights (Banjul Charter); and Article 4 of the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa (Maputo Protocol).

110. According to the Human Rights Committee's General Comment No. 31 on the ICCPR at paragraph 8:

"The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-

State actors. In other words, the State must protect citizens from threats to their rights. I therefore find myself in agreement with the holding in **Florence Amunga Omukanda & another v Attorney General & 2 others [2016] eKLR** that:

"60… the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order..."

112. The Human Rights Committee has expounded on the right to life in its General Comment No. 36 on Article 6 of the ICCPR. In paragraph 6 the Committee states that the deprivation of the right to life includes the "*intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.*" Therefore, the State must respect the right to life by refraining to engage in conduct which would arbitrarily deprive the right, and as determined above it must also protect the citizens from the deprivation of the rights by non-State actors.

113. Sexual violence is recognised as an infringement on the right to life under Article 4 of the **Maputo Protocol** as it expressly states that States, in protecting and realising the right of women to life,

and the integrity and security of their person, should "*enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex...*" This was affirmed in the decision in **Shri Bodhisattwa Gautam v Miss Subhra Chakraborty 1996 AIR 922** where the Court determined that rape violates the right to life.

114. On the issue of rape as a form of torture, the International Criminal Tribunal for the Former Yugoslavia decided in the case of **Prosecutor v Kunarac [2001] IT-96-23-T & IT-96-23/1-T** that rape and torture were synonymous:

"557. Applying the approach adopted by the Appeals Chamber in the Delali case, convictions for rape and torture under either Article 3 or Article 5 based on the same conduct would be permissible. Comparing the elements of rape and torture under either Article 3 or Article 5, a materially distinct element of rape vis-à-vis torture is the sexual penetration element. A materially distinct element of torture vis-à-vis rape is the severe infliction of pain or suffering aimed at obtaining information or a confession, punishing, intimidating, coercing or discriminating against the victim or a third person."

115. What can be understood by the above decision is that rape has elements of torture which are: the severe infliction of pain or suffering for a number of purposes including intimidation or discrimination. However, what makes torture unique is that it is perpetrated by State actors or with their acquiescence, consent or instigation. The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in its General Recommendation No. 19 acknowledges that gender-based violence violates the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person.

116. I do not see any reason why the definition of torture should not be extended to cases of forced circumcision. The elements of inhuman and degrading treatment or punishment described in Article 16 of the Convention of Torture are present in such a case. Indeed, this was the position taken by the International Criminal Court in the case of **The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali No. ICC-01/09-02/11** where it was determined that forcible circumcision is a crime against humanity categorised as '*other inhumane act*' as it is

motivated by ethnic prejudice and intended to cause great suffering and serious injury to the body or mental or physical health.

117. Finally, on the right to security of the person, the Human Rights Committee determined in **Rodger Chongwe v Zambia, Communication No. 821/1998, U.N Doc. CC** that Article 9 of the ICCPR places an obligation on the State to protect the right to security of the person of non-detained persons. Furthermore, in the case of **P. O. v Board of Trustees, A F & 2 others [2014] eKLR** it was held that:

"30. The International Labour Organization [ILO] in Working Paper 3/2011 titled 'Gender-Based Violence in the World of Work: Overview and Annotated Bibliography' by Adrienne Cruz and Sabine Klinger characterizes Gender-based violence as ''*the most prevalent human rights violation in the world. Of the varied ways in which sex discrimination manifest itself across the globe, such violence is exceptionally dehumanizing, pervasive and oppressive. No other form of sex discrimination violates so many fundamental human rights as articulated in the 1948 United Nations Universal Declaration of Human Rights. These include Article 1 [All Human beings are born free and equal in dignity and rights]; Article 3*

[Everyone has the right to life, liberty and Security of the Person] ; and Article 5 [No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment].'' **The Authors state that gender-based violence reflects and reinforces inequalities between men and women. At least one in three women in the world, according to this Paper, is estimated to have been coerced into sex, physically beaten and/or otherwise abused in her lifetime. This form of violence not only causes pain and suffering, but also devastates families, undermines workplace productivity, diminishes national competiveness and stalls development."**

118. The 6th, 5th and 9th petitioners testified to having been raped by GSU officers. The 5th and 9th petitioners did not report the incidents to the Police. However, they are certain that they identified their violators as GSU officers due to their uniform. Their testimonies demonstrate that State actors were involved in acts of sexual violence against the citizenry, and were directly responsible for the violations of their rights. The State cannot escape liability and I find that there was a violation of the right to life, protection from torture, inhuman and degrading treatment and right to security of the person of the 5th, 6th and 9th petitioners.

119. On the other hand, the 7th, 8th, 10th, 11thand 12th petitioners who were assaulted by members of the public have unfortunately not provided evidence to the effect that the persons who assaulted them did so with the instigation, consent or acquiescence of a public official or other person acting in an official capacity.

120. The 8th Petitioner, however, reported her assault to the Kilimani Police Station. She alleges, without any rebuttal from the respondents, that the Police failed to follow up and arrest all the perpetrators. Her testimony was that she had identified her attackers by name and even provided the Police with leads as to where they could be found. It was her evidence that although one of her rapists was arrested and died in custody, the two other suspects were never pursued.

121. From the evidence placed before this Court by the 8th Petitioner, it is apparent that the Police relinquished their responsibility to investigate her report fully and arrest all the three men who had raped her. This is a prime example of how the State can be liable for the violation of right by third parties as once the Petitioner reported the rape, the Police had a duty to investigate her claim and protect her from further harm. There was no

averment by any of the respondents that the DPP made a determination that the evidence provided to the Police by the 8th Petitioner was insufficient to mount a prosecution against the two suspects who were not arrested by the Police. In my view, the 8th Petitioner's case finds support in the holding by the Court of Appeal in **Charles Murigu Muriithi & 2 others v Attorney-General [2019] eKLR** that:

"The State has a duty to maintain law and order including the protection of life and property. However, as a general rule, this duty is owed generally to the public at large and not specifically to any particular person within Kenya. For a person to succeed in a claim for alleged violation of constitutional rights as a result of damage to property, it must be demonstrated that there existed a special relationship between the victim and the police on the basis of which there was assurance of police protection, or where, for instance the police have prior information or warning of the likelihood of violence taking place in a particular area or against specific homes but fail to offer the required protection. In such cases, therefore the State may be held liable where violations of the rights protected and guaranteed in the Bill of Rights are proved even when those

violations are occasioned by non-State actors provided that the duty of care is properly activated."

[Emphasis added]

122. To establish whether the State discharged the duty of care owed to the 7th, 10th, 11th and 12th petitioners, it must be determined whether it did all it could, to prevent the violations of their rights by non-State actors. The 6th, 8th, and 9th petitioners testified before the Court that there was a significant police presence in the areas where they resided, however, the police officers were unable to control the situation once it turned violent. The 5th Petitioner testified that although the police officers were not able to effectively contain the violence, they did help her children to escape Nairobi. The 10th Petitioner testified that she was assisted and protected by the Police in Kericho and Ekerenyo. The 7th and 11th petitioners testified that they did not see any police officer when the violence escalated. Nevertheless, the 11th Petitioner admitted to being protected by the Police in Naivasha Police Station and later at Naivasha Maximum GK Prison.

123. The High Court decision in **Charles Murigu Muriithi v Attorney-General [2015] eKLR** serves as an important reference point for my

decision in this case as the Court in that case was also presented with the question of whether the State abdicated its responsibility to protect and prevent the violation of rights. The High Court held as follows:

"58. We make this finding conscious of the fact that due to the poor ratio of police officers against the population in Kenya (a matter we take judicial notice of given its common notoriety), the police cannot be expected to be everywhere at all times or to be guarding individual person's homes or property on a 24 hour basis. The police can only be reasonably expected to offer protection if they have prior information that acts of violence are expected to be perpetrated in a certain area or against specific persons, homes or property so that they can organize to offer the required protection."

124. When the matter went on appeal as **Charles Murigu Muriithi & 2 others v Attorney-General [2019] eKLR**, the Court of Appeal reaffirmed the position by holding that:

"In the circumstances of this case and bearing in mind the ratio of the police to the population in this country, it would be unreasonable and unrealistic to expect the police to be in every

corner and in every home, providing security and protection to everyone and their properties on a 24-hour basis. That can only exist in Sir Thomas More's Utopian idealistic and fictional island society. No nation, the world over has been able to achieve this. That is why, for the Government to be liable for civil disorder the victim must prove that the Government owed him a specific duty of care; that the police ignored impeccable information of an impending attack against specific person(s); that the police negligently or deliberately failed to offer protection to the victims and their property; that the police or other Government agencies played a part in the creation of state of insecurity or did some acts that rendered the victims more vulnerable or increased their danger."

125. In reaching its decision, the Court of Appeal cited with approval its decision in **Agricultural Development Corporation v Harjit Pandhal Singh & another [2019] eKLR** that:

"[23] The general constitutional and statutory duty of the Government or police to provide security to an individual citizen or his property only crystalizes in special individualized circumstances such as where a citizen has made an individual arrangement with

the police, or some form of privity exists or where from the known individual circumstances, it is reasonable for police to provide protection for the person or his property. Otherwise, imposing a limitless legal duty to the Government to provide security to every citizen and his property in every circumstance would not only open floodgates of litigation against the Government, but would also be detrimental to public interest and impracticable in the context of this country. There was no evidence that the 1st respondent or the police anticipated that post-election violence would erupt. There was no evidence that the 1st respondent had reported to police that there was likelihood of his farm being invaded by riotous mob or that he sought police protection. On the contrary, there was evidence that the violence was widespread, spontaneous and unplanned and that the police did all what was reasonably practicable to restore peace. In the circumstances, the 1st respondent did not prove liability in tort against the Government and the judgment of the trial court fixing the Government with liability was erroneous."

126. I am guided by the holding of the Court of Appeal in the cited authorities, and I find no distinguishing circumstances in the cases

of the petitioners before me. As evidenced by the statements of the victim-petitioners, the State did indeed take into account any intelligence that it may have received on impending violence and put in place police officers to maintain peace. I cannot bring myself to believe that the true magnitude of the 2007-2008 post-election violence could have been foreseen or avoided, due to its sudden and drawn-out nature. As remarked in the cited decisions, it is impossible to have a police officer protect every citizen of Kenya from harm, particularly due to the low ratio of police officers to the population of this country. As such, I believe that the State and the Police did what they could to protect the population at large, even if the petitioners themselves did not benefit from this protection.

127. Regarding the 5th, 6th, and 9th petitioners who were assaulted by State actors, I find that their rights to life, the security of the person, and protection from torture were infringed by the actions of the State actors which, in line with national, regional and international law, are regarded as actions by the State itself. Additionally, the 8th Petitioner who was assaulted by non-State actors was owed a duty of care by the Police to investigate her report and make arrests, and when they failed to do so they in

effect violated her rights to life; security of the person; and protection from torture, inhuman and degrading treatment or punishment.

128. As for the 7th, 10th, 11th, and 12th petitioners who were assaulted by non-State actors, I regrettably cannot find in their favour as they have failed to show that the Police failed to exercise reasonable diligence in the circumstances of their individual cases.

(b) Right to Equality, Right to Remedy, and the Right to Protection of the Law

129. The petitioners submit that the State continues to violate their rights as they are yet to be provided with effective remedies and reparations. It is submitted that the petitioners herein are entitled to access proper complaint mechanisms, monetary compensation, medical and psychological rehabilitation, and proper investigation and prosecution of the sexual violence they suffered.

130. The UDHR and ICCPR provide for the right to protection of the law in Articles 6 and 16 respectively. The right to remedy from the High Court was guaranteed under Section 84 of the repealed Constitution. This right is also protected under Article 8 of the UDHR,

Article 3 of the ICCPR, and Article 25 of the Maputo Protocol which places an obligation on State Parties to:

a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated;

b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

131. On the allegation that the petitioners were unable to access medical and psychological rehabilitation, it is my opinion that the petitioners have failed to put forward any evidence to the effect that they were denied or precluded from accessing and benefiting from medical and psychological rehabilitative services provided by the respondents. On the contrary, the 5th to 10th petitioners all attested to receiving some form of medical treatment at a public hospital or medical facility. Furthermore, all the victim-petitioners except the 11th and 12th petitioners, have attested to seeking and receiving psychological counselling for several years and at no cost, and only ceased to continue with their therapy when they believed that they were healed. I am therefore unconvinced that the Government failed to provide the appropriate medical and

psychological services to the petitioners. Indeed, where there was alleged denial of treatment by one public institution, the same was quickly availed by another public facility. Here, I am referring to the claim by one of the petitioners that she was denied treatment at Mbagathi District Hospital. The same Petitioner, nevertheless, confirmed receiving treatment at Kenyatta National Hospital.

132. As for the right of access to justice, the Committee on Elimination of Discrimination against Women expounded on the State's responsibility to provide remedies for human rights violations in its **General Recommendation No. 35 on Gender-Based Violence against Women**. The Committee recognises that the State may be liable for the acts and omissions of both State-actors and non-State actors where the State fails to abide by its due diligence obligations including the obligation to investigate, prosecute, punish and provide reparations for acts and omissions which result in gender-based violence against women.

133. The Court of Appeal in **Charles Murigu Muriithi (supra)** took a position similar to that of the Committee, when it stated that:

"Because there is no common law right of recovery for damages caused by mob violence, the Government will be liable only where

it is demonstrated that the resulting damage could have been prevented through exercise of reasonable diligence by the police or where it is shown that there was implicit official acquiescence in the volatility of the situation, or where there is, like in some jurisdictions, statutory basis for holding the Government liable, or where the police are altogether indifferent. In some situations the Government may also consider gratis payment to victims out of benevolence."

134. To determine whether the petitioners' right to remedy was violated, one must look at their individual cases. Because the 5th, 6th and 9th petitioners were violated by police officers and no investigations, arrests or prosecutions have been initiated, the State is liable for violating their right to appropriate remedy which in such cases would include compensation.

135. It has also been determined that the State is liable for the violation of the rights of the 8th Petitioner who was violated by non-State actors, and the State failed to investigate her claim even though she identified her assailants. Therefore, the 8th Petitioner is entitled to appropriate reparations from the State including compensation.

136. It is not lost upon this Court that other victims of post-election violence were compensated without necessarily seeking court orders. For instance, those who lost their homes were resettled. I do not see why those who suffered sexual violence and could establish that they were indeed violated could not as well be compensated.

137. Unfortunately, the 7th, 10th, 11th and 12th petitioners were assaulted by civilians and did not report their assaults to the police, who cannot be faulted for failing to investigate and prosecute cases of violence which they did not know of. Therefore, I cannot find in their favour on this issue.

(c) The Right to Freedom from Discrimination

138. On the issue of discrimination, I turn once again to the decision in **Florence Amunga Omukanda (supra)** where it was pronounced as follows:

"86. […] Where a person claims that he or she falls within the class of persons that ought to be entitled to reparation of damages it behoves the State to investigate the said claims and make a decision thereon. In other words where an allegation of violation of

constitutional rights and fundamental freedoms are alleged particularly against State actors, the State is enjoined to investigate the same. This was the position adopted by the Inter-American Court of Human Rights in Velasquez Rodriguez vs Honduras, in which the Court stated that:

> **'The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention'."**

139. In the above case, the Court held that if the 1st petitioner had proved her claim that she was not duly compensated as a victim of PEV, it would have found that there was discrimination. Although the victim-petitioners before me were not internally displaced persons like those in the cited case, they are nonetheless all victims of the 2007-2008 PEV.

140. As already established, the State owes a duty to the victims of 2007-2008 PEV to investigate the violations of their rights, prosecute the perpetrators, and provide appropriate remedies to the victims. The State fulfilled its obligations to some victims of PEV by investigating their claims and compensating them for their losses. However, for some of the victim-petitioners who are equally victims of PEV, their claims were not investigated fully and no prosecutions (where there was evidence) were carried out. It is for this reason that I find that there has been discrimination towards the 5th, 6th, 8th and 9th petitioners as they were owed a duty of care by the State to not only refrain from causing harm to them but also to pursue those whose acts or omissions caused them harm, and to compensate them appropriately.

(d) Right to Information

141. The petitioners assert that their right to information was infringed upon by the 1st, 5th and 6th respondents who failed to provide them with access to information being essential medical records from Mbagathi District Hospital. The 5th, 7th and 9th petitioners were allegedly denied access to documents which would have facilitated access to treatment at other health

facilities. In their written submissions they allude that all victim-petitioners (5th to 12th) had attempted and failed to access and retrieve documents from the government medical facility.

142. It is important to note that the right to information, although protected under the 2010 Constitution and international human rights law, was not guaranteed under the repealed Constitution. As already determined in this judgment, the events of the 2007-2008 PEV pre-date the promulgation of the 2010 Constitution and therefore its provisions cannot be applied retrospectively. My decision will not, however, rest on that statement because requests for information, if any, may have occurred after the coming into force of the current Constitution hence making its provisions applicable.

143. I have reviewed the witness testimonies and particularly the testimonies of the 5th to 12th petitioners, and find that none of them has raised any complaints against the State or Mbagathi District Hospital regarding the alleged denial of treatment records. The individual witnesses have not made any claim that they attempted to access information or medical documents from Mbagathi District Hospital and were not provided with their documents.

144. I must also note that according to the witnesses' statements, with the exception of the 10th Petitioner, the victim-petitioners were not prevented from receiving treatment and counselling from Kenyatta National Hospital. PW10 Teresa Njore, an employee of Kenyatta National Hospital (KNH), confirmed before this Court that the hospital treats all cases of SGBV including walk-ins. In the absence of any proof that any government medical facility withheld medical records from the 5th to 12th petitioners, I cannot find that there has been a violation of the right to information.

145. There is a further allegation that since 2008 the 1st, 2nd and 3rd respondents have not allowed the petitioners to access information about the investigation and prosecution of the perpetrators of SGBV during PEV. The 2nd Respondent is alleged to have not released to the public the final report of the Task Force or any findings concerning crimes committed during PEV.

146. The 2nd Respondent in its replying affidavit relies on his press briefing marked as 'DN9' as evidence of the Task Force's findings concerning the SGBV that occurred during PEV. According to DW1 Jacinta Nyaboke Nyamosi who heads the sexual and gender violence division of the DPP, the press release was provided to the

DPP as a trial report and the Task Force has concluded its work. The 2nd Respondent has not directly responded to the petitioners' allegation that a final report has not been submitted to the relevant stakeholders or the public at large.

147. Article 35 (1) & (3) of the Constitution of Kenya provides for the right to information as follows:

> **(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.**
>
> **(2) ….**
>
> **(3) The State shall publish and publicise any important information affecting the nation.**

148. Additionally, Article 232(1) (f) of the Constitution lists transparency and provision to the public of timely and accurate information as part of the values and principles of public service.

149. From the foregoing, it is clear that there exists a right to information which is protected under the Constitution of Kenya and

regarded as an integral principle and value of public service. The question therefore is; when can it be said that there has been a violation of the right to information? In the case of **International Centre for Policy and Conflict v Attorney General & another [2012] eKLR**, Majanja, J opined that:

"21. A reading of Article 35 shows that the right of access contains three key elements. The first element is in Article 35(1) which is a guarantee of the right of access to information from the state or to information held by another person required for exercise or protection of a fundamental right and freedom. The question that arises is whether the petitioner's right of access to information has been violated, breached or threatened by the respondents. The breach or threat of violation is the threshold requirement for an action under Article 22(1)."

150. He went on to state:

"23. I have considered the petition and the supporting affidavit and it does not demonstrate that the petitioner sought for any information of the kind which is alleged to be necessary for voters to make an informed choice from the respondents. Since no

information has been sought, how can it be said that the right is violated, breached or threatened.

24. Since no information has been sought, or such a request rejected, it is unnecessary for me to consider whether in fact there is an obligation for the State to positively collect information it does not have when a request has been made by a citizen. It is also not necessary for me to determine whether there is a responsibility on the IEBC to develop rules and regulations to gather information sought by the citizens."

151. Similarly, Majanja, J in the case of **Kenya Society for the Mentally Handicapped v Attorney General & 5 others [2011] eKLR** determined as follows:

"43. I am not inclined to grant prayers 8 and 9 of the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then

the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request."

[Emphasis added]

152. The petitioners have not claimed or produced evidence to the effect that they requested the government to release any information or reports on the cases of SGBV during PEV. In line with the decisions above, for this claim to succeed it would have been necessary for the petitioners to have made a request to the respondents for such information, and that the request was ignored or refused. The decisions of Majanja, J are in agreement with international jurisprudence on the issue, as the Inter-American Court stated in the case of **Claude-Reyes et al. v Chile, Judgement of September 19, 2006** that:

"77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the

Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."

153. It is interesting to note that according to the **Joint Declaration on Access to Information by the UN Special Rapporteur on Freedom of Opinion and Expression**, the OSCE Representative on Freedom

of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), States are required to pro-actively publish a range of information which is in the public's interest in the absence of a request. Additionally, according to paragraph 4 of the **Intern-American Juridical Committee's Principles on the Right of Access to Information**, public bodies are required to proactively and routinely disseminate information on their functions and activities including on activities which would affect the public. These instruments provide an interesting perspective on the matter. In my view, they appear to breathe life into the provisions of Article 232(1)(f) of the Constitution. However, since no arguments were advanced in that direction, I will terminate the jurisprudential exploration at this point.

154. It is therefore my humble finding that the petitioners have failed to provide proof that they sought the information from the respondents and that their requests were denied or ignored. Therefore, they have not proven that their right to information was infringed by the acts or omissions of the respondents.

IV. Whether the Petitioners are entitled to the reliefs sought

155. The 3rd Respondent argues that because it was not established at the time of the 2007-2008 PEV it cannot be liable

under these proceedings. The petitioners have pursued the 3rd Respondent for its failure to investigate the allegation of violations by State actors during the PEV and to release any information on the same.

156. The 3rd Respondent also submits that it received no complaints from members of the public and therefore could not investigate any claims on its own motion as provided under sections 6 and 7 of the IPOA Act. All the victim-petitioners have attested that they have never made any complaint to the 3rd Respondent, and neither did the 1st to 4th petitioners.

157. Further, the 3rd Respondent argues that under Section 26 of the IPOA Act it is prevented from investigating any claim which is subject to proceedings before a court of law or a judicial tribunal. Additionally, that as it was established in 2011 and its Board inaugurated in June 2012, it had only had about seven months to conduct and complete investigations into claims against the Police before these proceedings were initiated in February 2013.

158. In the absence of any complaints made to the 3rd Respondent by the victim-petitioners, and given the short period the 3rd Respondent had to investigate these violations before these

proceedings precluded it from doing so, I cannot find that the 3rd Respondent failed to undertake investigations into claims of violation of human rights by police officers during the 2007-2008 PEV.

159. The 1st, 4th, 5th, and 6th respondents have submitted that there is no basis for the award of damages in this case as there is no evidence of loss by the petitioners. On the contrary, I am guided by the decision in **W. J. & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR**, where Mumbi Ngugi, J in awarding damages to the petitioners against their rapist, as well as the State, declared that:

"161. However, in the present circumstances, damages are the only remedy that the Court can offer. In view of my finding above in respect of the vicarious liability of the 3rd and 4th respondents, such damages should not only be borne by the 1st respondent, as the perpetrator, but also by his employer, the State through the TSC, which has failed to adequately exercise its duty of care to the petitioners.

164. With respect to the State through the TSC, it must up its game with respect to protection of minors. It cannot shuffle paedophiles from one school to another, and finally, content itself with dismissals.

It has to put in place an effective mechanism, whether through an inspectorate department within TSC or the Quality Assurance Department within the Ministry, to ensure that no-one with the propensity to abuse children is ever given the opportunity to do so. Dismissal, and even prosecution, while important, can never restore the children's lost innocence."

160. I must emphasize that sexual violation just like any other violation of human rights and freedoms should be compensated. Sexual violence carries with it both physical and mental pain and I am surprised that the 1st, 4th, 5th and 6th respondents can causally assert that the petitioners have not established any injury.

161. There are several other cases in which the courts have granted damages and compensation for the violations of human rights including: **P. O. O. (a Minor) v Director of Public Prosecutions & another [2017] eKLR; Koigi Wamwere v Attorney General [2015] eKLR** and **Peter M. Kariuki v Attorney General [2014] eKLR.**

162. I have already determined in the analysis above that the 5th, 6th, 8th and 9th petitioners' rights to life; the prohibition of torture, inhuman and degrading treatment; the security of the person; protection of the law; equality and freedom from discrimination;

and remedy were violated by the State. By virtue of the violation of their rights and the failure of the State to arrest and prosecute the perpetrators, where evidence was available, the victim-petitioners shall be entitled to damages whose quantum shall shortly be determined.

163. Finally, the petitioners ask the Court to compel the 1st to 4th respondents to produce and release a full report on all instances of SGBV during PEV, collaborate to establish an international special division for the investigation and prosecution of SGBV, and to create a database of all victims of SGBV committed during PEV. The Court is further urged to compel the 1st Respondent to establish an independent body for monitoring the provision of reparations to victims of SGBV during PEV and report periodically to this Court on the implementation of its judgment.

164. What I will say about this request is that the 1st and 2nd respondents are independent offices respectively established under Articles 156 and 157 of the Constitution, and are not subject to the direction or control of any other person or authority. The 4th Respondent herein is only subject to the instructions of the Director of Public Prosecutions. Although this Court is granted jurisdiction

under Article 23 to enforce and uphold the Bill of Rights through the issuance of appropriate remedies, that jurisdiction should be exercised in compliance with the other provisions of the Constitution. I am also alive to the jurisdiction of this Court under Article 165 of the Constitution.

165. I must, however, observe that it has not been established that the named respondents have failed to discharge their constitutional and statutory mandates to the other SGBV victims of PEV who are not before this Court to warrant issuance of orders directing the stated respondents to perform their duties in a given manner. I am of the view that the remedies that will be provided to the successful victim-petitioners will be sufficient in the circumstances of this case.

166. As I have expressed above, where it has been determined that an individual's rights have been violated, they are entitled to damages and compensation as per the Court's estimation. The determination as to what to award is, among other factors, guided by decided authorities. In the case of **W. J. & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR**, the two victims were awarded Kshs. 2 million and Kshs. 3 million respectively as damages

for the violation of their rights. In the case of **Peter M. Kariuki v Attorney-General [2014] eKLR** the Court awarded the petitioner a global sum of Kshs. 15 million in damages for violation of various rights under the repealed Constitution. The petitioners herein each seek to be awarded Kshs. 5 million for the violation of rights and Kshs. 500, 000 for significant social-economic losses and lost economic opportunities. They also ask for Kshs. 4 million in exemplary damages to be shared amongst themselves. Some of the petitioners also seek damages for future medical treatment.

167. On the issue of the compensation for economic losses, the petitioners have failed to explain to this Court how they arrived at the figure presented, or any proof of their earnings before the PEV. Without any reference to how the petitioners have computed this amount, I find this claim cannot succeed. The same position applies to the prayer for future medical treatment. No evidence was adduced to support the claim.

168. In the circumstances of this case I find that the case of **W. J. & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR** should serve as an appropriate guide on the appropriate award considering that it concerned sexual violation. The decision was

made in 2015. In my view therefore an award of Kshs. 4,000,000/- would serve as adequate recompense.

169. As for the claim for exemplary damages, I rely on my decision in the case of **Michael Rubia v Attorney-General [2020] eKLR** where I determined that:

"170. I need not cite any other authority to show that the general trend in this jurisdiction is to avoid award of exemplary or punitive damages in public law claims. This principle is grounded on two reasons namely that the State has improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. I therefore decline to award the estate of the deceased exemplary or aggravated damages. In my view, general damages and special damages shall suffice to right the wrongs suffered by the deceased."

170. I see no reason to depart from the decision and do not wish to burden the taxpayer with paying exemplary damages and I shall decline to award the same. I believe that the award of general damages herein shall suffice to vindicate the petitioners and compensate them for the injuries suffered.

171. As for costs, I find that this litigation has not been in vain. Although not all the petitioners have succeeded, some of them have established cases against some of the respondents. In the circumstances, the 5th, 6th, 8th and 9th petitioners are awarded costs against the 1st and 4th respondents as the other respondents have been absolved of any blame. In regard to the costs for the other parties, I note that this is a public interest matter and the appropriate order on costs is to ask each party to meet own costs for the proceedings.

The Disposition and Orders

172. In light of the above analysis and determination, I enter judgment as follows:

a) A declaratory order is hereby issued 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 on the Kenyan State to investigate and prosecute violations of the rights to life; the prohibition of torture, inhuman and degrading treatment; and the security of the person of the 5th, 6th, 8th and 9th petitioners;

b) A declaratory order is hereby issued 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; and the right to remedy were violated in relation to the 5th, 6th, 8th and 9th petitioners during the 2007-2008 post-election violence, as a result of the failure of the Government of Kenya to protect those rights;

c) The 5th, 6th, 8th and 9th petitioners are each awarded Kshs. 4 million as general damages for the violation of their constitutional rights; and

d) The 5th, 6th, 8th and 9th petitioners are awarded costs of this suit against the 1st and 4th respondents. The other parties shall meet their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 10th day of December, 2020.

W. Korir,
Judge of the High Court