

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA (P), TUIYOTT & ODUNGA, JJ.A.)

CIVIL APPEAL NO. E645 OF 2021

BETWEEN

COALITION ON VIOLENCE AGAINST WOMEN 1ST APPELLANT
INDEPENDENT MEDICO-LEGAL UNIT 2ND APPELLANT
THE KENYAN SECTION OF THE
INTERNATIONAL COMMISSION OF JURISTS 3RD APPELLANT
PHYSICIANS FOR HUMAN RIGHTS 4TH APPELLANT
JWM (a female victim of sexual and
gender-based violence) 5TH APPELLANT
PKK, (a female victim of sexual and
gender-based violence) 6TH APPELLANT
SSM, (a female victim of sexual and
gender-based violence) 7TH APPELLANT
CNR, (a female victim of sexual and
gender-based violence) 8TH APPELLANT
LGS, (a female victim of sexual and
gender-based violence) 9TH APPELLANT
SKO, (a female victim of sexual and
gender-based violence) 10TH APPELLANT
DOJ, (a male victim of sexual and
gender-based violence) 11TH APPELLANT
FOO, a male victim of sexual and
gender-based violence 12TH APPELLANT

AND

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

*(Being an appeal from part of the judgment of the High Court of Kenya
(Korir, J.) (as he then was) dated 10th December 2020*

in

Petition No. 122 of 2013)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Nairobi (**W. Korir, J.**) (as he then was), delivered on the 10th December 2020 in **Petition No. 122 of 2013.**
2. The crux of the petition before the High Court was the violation of human rights of the petitioners who were survivors of Sexual and Gender-Based Violence (**SGBV**) committed during the period 2007–2008 after Kenya’s 2007 general election.
3. The petition was brought by a coalition of twelve petitioners comprising both institutional and individual parties. The 1st to 4th petitioners (1st to 4th appellants herein) were public interest organizations namely, the **Coalition on Violence Against Women (COVAW)** (1st petitioner); the **Independent Medico-Legal Unit** (2nd petitioner); **the Kenyan Section of the International Commission of Jurists** (3rd petitioner); and **Physicians for Human Rights** (4th petitioner). The 5th to 12th petitioners (5th to 12th respondents herein) were individual female and male survivors of SGBV committed during the 2007–2008 post-election violence (**PEV**). Their names were anonymized to protect their personal identities.

4. The main respondents in the petition were key government officials and institutions namely, the **Hon. Attorney General of the Republic of Kenya** (1st respondent); the **Director of Public Prosecutions** (2nd respondent); the **Independent Policing Oversight Authority (IPOA)** (3rd respondent); the **Inspector General of the National Police Service** (4th respondent); the **Minister for Medical Services of the Republic of Kenya** (5th respondent); and the **Minister of Public Health and Sanitation of the Republic of Kenya** (6th respondent).
5. The **Kenya Human Rights Commission** appeared in the petition as an Interested Party, while the **Kenya National Commission on Human Rights, Katiba Institute, the Constitution & Reform Education Consortium**, and **The Redress Trust** appeared in the proceedings as *Amici curiae*.
6. As mentioned hereinabove, the petition centered on the severe human rights violations and injustices that occurred during the post-election violence (**PEV**) following Kenya's December 2007 general election. The unrest, which lasted from late December 2007 to March 2008, was marked by widespread demonstrations and violence, during which many women, men, and children were subjected to horrific acts of SGBV. The forms of violence included rape, gang rape, sodomy, defilement, forced circumcision, sodomy, genital mutilation or amputation.

7. The petitioners accused the respondents of failing to anticipate and implement lawful and adequate policing responses despite the foreseeable nature of the unrest. They alleged that this failure directly contributed to the occurrence of SGBV and the subsequent lack of effective remedies for the victims. The petitioners further claimed that the State's inaction violated a wide range of fundamental rights under both the repealed and current Constitutions of Kenya. These included the right to life, protection from torture and degrading treatment, personal security, equality before the law, access to information, and the right to remedy and rehabilitation.
8. The petitioners also asserted that these rights were safeguarded under international instruments such as the International Covenant on Civil and Political Rights (**ICCPR**), the Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the International Convention on the Elimination of All Forms of Racial Discrimination, and the Rome Statute of the International Criminal Court.
9. It was contended the police (who includes the Kenya Police Service, the Administrative Police, the General Service Unit (GSU), and other State security agents) were among the perpetrators of SGBV. The petitioners held the 1st and 4th respondents responsible for failing to train police officers in lawful enforcement methods, failing to plan and prepare for the anticipated violence, and failing to supervise and punish police officers

who committed crimes. Additionally, they accused the police of neglecting their duty to intervene and protect victims from known threats of SGBV perpetrated by non-State actors.

10. According to the petitioners, police officers were neither prepared nor adequately supervised to perform their duties during the crisis, which directly contributed to the commission of SGBV against the 5th to 12th petitioners and other victims. Furthermore, they alleged that police failed to document victims' claims, thereby obstructing justice.
11. On their part, the 5th and 6th respondents were accused of failing to provide emergency medical services to victims, particularly in cases involving public officials such as police officers. This omission was said to have endangered victims' lives and health, further violating their rights.
12. It was further contended that despite receiving reports and information about the extent of SGBV during the PEV, the 1st to 4th respondents allegedly failed to initiate investigations or take meaningful steps toward holding perpetrators accountable. It was stated that the 1st and 2nd respondents failed to direct the Commissioner of Police (now the Inspector-General) to independently investigate police and non-police offenders. The 3rd respondent was similarly accused of failing to exercise its oversight powers to investigate police involvement in SGBV crimes.
13. In addition, the petitioners claimed that the 1st, 5th, and 6th respondents failed to provide comprehensive rehabilitation measures, including

medical and psychosocial care, legal and social services, and compensation. The 2nd respondent was also faulted for failing to publicly recognize the nature and impact of the SGBV violations and to issue a public apology, which the petitioners argued was essential for accountability and healing.

14. The 5th to 12th petitioners gave written witness statements in support of the petition. In addition, the petition was supported by expert witness statements from Betty Kaari Murungi, an Advocate of the High Court of Kenya with extensive background in International Human Rights law, transitional justice issues and women's human rights, and Maxine Marcus, International Criminal Law and Gender Justice Expert. The petition was also supported by witness testimonies from Rashida Manjoo, Professor and former convenor of the Human Rights Program in the Department of Public Law at the University of Cape Town, Elizabeth Mukhisa, Administrator at Kayole Hospital Limited, Teresa Wambui Njore, a medical social worker and trauma counselor, and Dr. Margaret Mak'anyengo, the Chief Psychiatrist at the Kenyatta National Hospital. The testimonies from the said witnesses were used to substantiate the claims of systemic failures by the State and the enduring harm caused to victims of SGBV during the PEV.
15. The petitioners sought a series of declaratory and mandatory orders from the court, primarily aimed at acknowledging the violations suffered by

victims of Sexual and Gender-Based Violence (SGBV) during the 2007–2008 post-election violence (PEV) and holding the responsible State institutions accountable. They prayed for a declaration that the State had violated various constitutional rights of the 5th to 12th petitioners and other SGBV victims, including the rights to life, dignity, security of the person, protection of the law, equality, freedom from discrimination, information, and access to remedy, due to the Government's failure to prevent the violations and protect its citizens.

16. The petitioners also sought a declaration that the failure to conduct independent and effective investigations and prosecutions of SGBV crimes during PEV amounted to a breach of Kenya's obligations under the Constitution and international law, including the Rome Statute. Additionally, they asked the trial court to declare that the Government's failure to classify the PEV-related SGBV as crimes against humanity was unlawful, as was its failure to provide emergency medical care and related documentation to victims, particularly where State actors were the perpetrators.
17. The petitioners further sought an order compelling the relevant State bodies to preserve all records and evidence related to SGBV during the PEV, including electronic and audiovisual materials. They also sought orders requiring the respondents to produce and publicly release reports on SGBV incidents and police conduct during PEV, as well as the findings

of any internal inquiries. The petitioners also asked the court to mandate the establishment of an international special division within the Office of the Director of Public Prosecutions to investigate and prosecute SGBV cases as crimes against humanity. They also requested the creation of a comprehensive database of SGBV victims and the provision of ongoing medical, psychosocial, legal, and social services to them.

18. Moreover, they sought orders compelling the establishment of an independent body to monitor the provision of reparations to victims and to report on systemic failures in ensuring justice and remedies for SGBV survivors. The petitioners also asked for the protection and sealing of their personal information and evidence by the court. They prayed for punitive damages against the 5th and 6th respondents for obstructing justice by failing to provide emergency medical services and documentation, as well as for exemplary and general damages for the harm caused by acts of SGBV, particularly those committed by the police. Lastly, they sought an inquiry into damages, costs of the petition, and any other relief the court deemed appropriate.
19. The 1st, 4th, 5th, and 6th respondents challenged the petition through affidavits sworn by **Dawson K. Gatwanjeru**, in charge of Kenya Police Operations and **Maurice Ogosso**, an Advocate of the High Court of Kenya practicing in the office of the Attorney General. They contended that the petition was based on general and speculative claims lacking specific

details of the alleged incidents. They also contended that the attacks during the 2007–2008 post-election violence were indiscriminate and not exclusively targeted at women and children as alleged. They maintained that victims had access to medical care in both public and private hospitals and denied any reports of victims being turned away. They also disputed the claim that police officers perpetrated acts of violence, arguing that such assertions were hearsay and thus inadmissible. Furthermore, they emphasized that many victims were treated within 72 hours of their assaults and claimed that the failure of victims and witnesses to report SGBV cases to the Police, the 3rd respondent, or other oversight bodies hindered proper investigations and accountability. They also noted that similar issues had already been litigated in a previous case, Nairobi H.C. Petition No. 273 of 2011, which involved some of the same parties.

20. The 2nd respondent, through an affidavit sworn by **David Ndege**, Prosecution Counsel, maintained that the 5th to 12th petitioners had not made any formal reports to police stations and that their names were absent from the 381 reported and investigated sexual offence cases. He further contended that no complaints were submitted to his office beyond the current petition, and therefore, his office could not be held responsible. The 2nd respondent emphasized his commitment to prosecuting reported cases with actionable evidence and highlighted the formation of a Multi-Agency Task Force to review post-election violence cases. He also noted

that civil society organizations, including some of the petitioners, failed to respond to his call for collaboration with the Task Force. Furthermore, he pointed out efforts made by his office to enhance the prosecution of SGBV cases, including the establishment of a dedicated SGBV section, the appointment of specially trained prosecutors, and collaboration with development partners to create training manuals and prosecution guidelines for SGBV cases.

21. Vide their written submissions dated 16th April 2018, the petitioners contended that the State was liable for the SGBV committed during the 2007/2008 post-election violence by both State and non-State actors. They argued that police officers, acting as State agents, perpetrated acts of sexual violence, and that these violations were attributable to the State under international law, including **Velásquez Rodríguez v Honduras, Resolution No. 22/86, Case 7920, April 18, 1986**. They further contended that the State bore responsibility for failing to prevent, investigate, or punish SGBV by non-State actors, thereby breaching its duty of due diligence under international human rights standards.
22. They further contended that despite prior intelligence warnings as documented in the **Report of the Commission of Inquiry into Post Election Violence** (the Waki Report), the State failed to prevent the violence or protect victims. It also failed to investigate or prosecute SGBV crimes, and did not provide medical care, psychosocial support, or

compensation, thereby violating both domestic and international obligations.

23. They asserted that their rights to life, dignity, security, equality before the law, and access to information and justice had been violated. The State's inaction and discriminatory treatment, they argued, exacerbated their suffering and denied them effective redress and rehabilitation. In this connection, they sought general, aggravated, and exemplary damages for pain, suffering, medical costs, and socio-economic losses, relying on various case law, and urged adjustments for inflation in light of the severity of the violations.
24. On their part, the 1st, 4th, 5th, and 6th respondents vide written submissions dated 22nd October 2018, contended that the petition was premised on the repealed Constitution, not the 2010 Constitution, and that the petitioners therefore lacked *locus standi*. They maintained that under section 84 of the repealed Constitution, standing was limited to detainees, and that Article 22 of the 2010 Constitution could not apply retrospectively. They relied on **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** for the said argument. The respondents also contended that international law could not form the basis of a constitutional claim, as it did not raise

constitutional issues. They argued that the petition was neither genuine public interest litigation nor constitutionally grounded, and was *res judicata* due to prior litigation on similar grounds.

25. The respondents also submitted that the petitioners should have pursued civil claims for negligence, as the allegations related to omissions rather than direct State action. Relying on the U.S Supreme Court decision in **Deshaney v Winnebago County Department of Social Services 109 S. Ct. 998 (1989)**, they argued that the State could not be held liable for injuries and damages occasioned to an individual by another individual who is not a State operative. They further asserted that under section 4 of the Government Proceedings Act, the State's duty was to the public, not individuals, and that extending liability to operational policing decisions would be contrary to public interest and impractical under existing resource constraints.
26. They challenged the evidentiary value of the Waki Report, claiming it was inconsistent with testimony, lacked annexures, and was biased due to civil society involvement. They submitted that evidence sourced from civil society lacked probative value as it was hearsay and was not subjected to cross-examination. They cited various decisions in support of that submission, among them **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. They also claimed that police provided adequate protection during the violence and that victims received necessary medical care. They asserted that police could not be held liable where crimes were unreported, and disputed allegations of denial of treatment at public facilities, referencing multiple witness testimonies.

27. Regarding allegations of rape by security officers, the respondents argued that no medical evidence had been provided, and that the State could not be vicariously liable for such criminal acts. They also contested the admissibility of Lydia Munyiva Muthiani's affidavit as hearsay. Finally, they opposed the claim for damages, asserting that the petitioners had not proved any loss warranting compensation and cited various authorities to support their position.
28. In its submissions dated 18th October 2018, the 3rd respondent identified the central issue as being whether it had failed to investigate allegations of SGBV by police officers. It argued that it could not be held accountable, as it was established under the IPOA Act, which came into force on 18th November 2011, with its Board inaugurated in June 2012, several years after the 2007/2008 PEV. It emphasized that it was not operational at the time of the alleged violations and that no formal complaints had been filed with it by the petitioners, a fact supported by witness testimonies. As such, it maintained that it could not initiate investigations without any formal

complaint, and that the petitioners had failed to prove any inaction on its part.

29. The 3rd respondent further submitted that although the Waki Report referenced SGBV, it could not act on the report due to the anonymity of victims and the legal restriction under section 26 of the IPOA Act, which barred it from investigating matters already before court. It rejected claims of systemic failure, stating that no evidence had been presented, and that the Waki Report was irrelevant, having predated its establishment.
30. In response to the reliefs sought in the petition, the 3rd respondent argued that a declaratory order was unwarranted, as the petitioners had not shown any breach of duty. It opposed the request for mandamus compelling disclosure of internal reports, citing concerns over independence, ongoing investigations, and confidentiality under section 24(15) of the IPOA Act. It also resisted any order to collaborate with the Inspector General or the DPP, asserting its institutional independence, and noting that the DPP lacked investigative powers.
31. On the issue of medical and psychosocial support, it argued that such services fell outside its statutory mandate. Finally, it contended that it could not be held liable for damages arising from acts committed by the police prior to its establishment. It also argued that the petitioners were not entitled to exemplary damages in any event, citing **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 (HCC No. 1184 of 2003), and Said Fondo Kalume v Attorney-General [2013] eKLR, where courts declined to award exemplary damages.

32. After a full hearing, the court rendered its judgment on 10th December 2020. It identified four issues for determination, namely, whether the petitioners had *locus standi* to bring the petition; whether the petition was *res judicata*; 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; and whether the petitioners were entitled to the reliefs sought.
33. Regarding the issue of the petitioner's *locus standi*, the court reviewed previous case law, including the decision in **Charles Murigu Murithii & 2 others v Attorney-General [2015] eKLR**, where it was determined that the new Constitution could not be applied retrospectively unless the rights it established were already protected under the previous Constitution. The court agreed with this interpretation, noting that rights under the 2010 Constitution could not be enforced for events that occurred prior to its promulgation.
34. The court further referenced the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where it was held that while a constitution may

contain retrospective provisions, those provisions must be carefully considered in relation to their language, particularly where applying retrospectivity could affect an individual's rights. In this case, the court found that the petitioners could not rely on the 2010 Constitution's public interest litigation provisions, as they were not part of the legal framework under the repealed Constitution. The court concluded that the petitioners could only pursue claims under the rights and obligations of the repealed Constitution, as the current Constitution's provisions did not apply retrospectively.

35. On the issue of the petition being *res judicata* in view of Nairobi Petition No. 273 of 2011 where similar respondents were sued for actions related to the 2007-2008 PEV, the court referred to the elements of *res judicata* as outlined in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited** [2017] eKLR and **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others** [2017] eKLR, which include determining whether the same issue was directly and substantially in dispute in the prior case; whether the parties were the same; and whether the issue had been conclusively decided by a competent court.
36. Upon reviewing the pleadings from the previous case, the court found notable differences in the parties involved. In the prior case, the International Commission of Jurists-Kenya Chapter, was a petitioner, while in this case, the KHRC was an interested party, not a petitioner.

Furthermore, the petitioners in the current case did not focus exclusively on internally displaced persons (IDPs), whereas the earlier case specifically dealt with the rights of IDPs and the human rights abuses they suffered, including SGBV within the camps. The current petition, however, centered on SGBV during the post-election violence, and the issues in the previous case were not primarily concerned with SGBV.

37. The court thus concluded that, although some parties overlapped, the issues in the current petition were distinct from those in the earlier petition. As a result, the court found that this matter was not *res judicata*.
38. Regarding the issue 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, the court delineated several issues for determination under this head, which included the right to life, prohibition of torture, inhuman and degrading treatment or punishment, and right to security of the person; the right to equality, right to remedy, and the right to protection of the Law; and the right to freedom from discrimination.
39. On the right to life, prohibition of torture, inhuman and degrading treatment or punishment, and right to security of the person; the court held that the State violated the rights of the 5th, 6th, 8th and 9th petitioners, who were victims of sexual violence committed by State actors, specifically GSU officers. The court found that these petitioners suffered violations of

their right to life, protection from torture, inhuman and degrading treatment, and security of the person. The actions of the State agents were deemed to have directly infringed upon their rights, and the State was held accountable for the violations. This conclusion was consistent with the obligations of the State under the **International Covenant on Civil and Political Rights (ICCPR)** Articles 6, 7, and 9) and the **African Charter on Human and Peoples' Rights (ACHPR)** (Articles 4, 5, and 6). In addition, the court referenced the **Maputo Protocol** (Article 4) which recognizes that sexual violence constitutes a violation of the right to life and security of the person.

40. Regarding the 8th petitioner who was assaulted by non-State actors, the court found that her rights were violated due to the State's failure to effectively investigate the crime and pursue all the perpetrators. The petitioner had reported the assault to the police and provided substantial leads, but the police failed to follow through on the investigation. This failure was seen as a violation of her rights, including the right to life and security of the person.
41. However, the court did not find in favor of the 7th, 10th, 11th, and 12th petitioners, who were assaulted by non-state actors. The court found that they had failed to provide sufficient evidence that the State had neglected its duty to protect them or prevent the violations. The **Human Rights Committee's General Comment No. 31** was referenced to highlight the

State's obligation to protect citizens from violations of their rights by both State and non-State actors. The court acknowledged that the police cannot be expected to be present at all times and in every location, especially in cases of widespread and unanticipated violence, as outlined in **Charles Murigu Muriithi v Attorney-General [2015] eKLR** and reaffirmed on appeal in **Charles Murigu Muriithi & 2 others v Attorney-General [2019] eKLR**. The court reiterated that the police are not expected to provide protection in every circumstance, but should act when they have prior knowledge of imminent harm. The 7th, 10th, 11th, and 12th petitioners did not meet the burden of proving that the State failed in its duty of care, and their claims were therefore not upheld.

42. Regarding the petitioner's right to equality, right to remedy, and right to protection of the law, the petitioners had contended that they were entitled to access proper complaint mechanisms, monetary compensation, medical and psychological rehabilitation, and proper investigation and prosecution of the sexual violence they suffered. They argued that the State continued to violate their rights by failing to provide effective remedies and reparations for the sexual violence they experienced. The court emphasized that the **Universal Declaration of Human Rights (UDHR)** and **International Covenant on Civil and Political Rights (ICCPR)** enshrine the right to legal protection, as do **Article 25 of the Maputo Protocol** and **section 84 of the repealed Constitution**, all of which

obligate State parties to ensure access to remedies through competent judicial or other authorities.

43. However, the court found that the petitioners did not provide sufficient evidence that they were denied medical or psychological services. According to the court, the 5th to 10th petitioners testified that they received medical treatment and psychological counseling at no cost, and that even when one of the petitioners claimed that treatment was denied at Mbagathi District Hospital, she was later treated at Kenyatta National Hospital, indicating that appropriate services were available.
44. On the issue of access to justice, the court found that the 5th, 6th, and 9th petitioners, who were assaulted by police officers, were entitled to remedies, as no investigations or prosecutions had been initiated. Therefore, the State was liable for failing to provide appropriate remedies, including compensation. Similarly, the 8th petitioner, who was violated by non-state actors, was entitled to reparations, as the State had failed to investigate her case despite her identification of the perpetrators. However, the 7th, 10th, 11th, and 12th petitioners, who were assaulted by civilians and did not report their assaults to the police, could not be assisted by the court, as the police had no knowledge of these cases and could not be faulted for not investigating or prosecuting them.
45. Regarding the petitioner's right to freedom from discrimination, the court made reference to the decision in **Florence Amunga Omukanda &**

another v Attorney General & 2 others [2016] eKLR, which emphasized that when individuals claim entitlement to reparations, the State is obligated to investigate those claims and make determinations accordingly. The court noted that in **Florence Amunga Omukanda** (supra), it was held that if the 1st petitioner in the said case had proven her claim of not receiving compensation as a victim of the 2007-2008 post-election violence (PEV), it would have found discrimination. According to the court, although the petitioners in this case were not internally displaced persons, they were still victims of the same violence. The court acknowledged that the State had met its obligations to some victims by investigating claims and compensating them as a result of the PEV, but for the 5th, 6th, 8th, and 9th petitioners, their claims were not thoroughly investigated, and no prosecutions were pursued despite the existence of evidence. As a result, the court concluded that these petitioners had been discriminated against, as the State failed to uphold its duty to investigate their cases, prosecute the perpetrators, and provide appropriate reparations.

46. On the petitioner's right to information which was premised on the 1st, 5th, and 6th respondent's failure to provide access to critical medical records from Mbagathi District Hospital, which would have facilitated treatment at other facilities, the court found no evidence that the petitioners had formally requested such information or that their requests were denied.

The right to information, as guaranteed by **Article 35** of the Constitution of Kenya, was examined in light of prior rulings, such as **International Centre for Policy and Conflict v. Attorney General & another [2012] eKLR** and **Kenya Society for the Mentally Handicapped v. Attorney General & 5 others [2011] eKLR**, which emphasized the need for a formal request and subsequent denial to establish a violation. Since no formal request for information was made or refused, the court concluded there was no infringement of the petitioners' right to information.

47. Lastly, on whether the petitioners were entitled to the reliefs sought, the court ruled that the 3rd respondent was not liable, as it was not established during the 2007-2008 PEV, and the victims/petitioners did not file any complaints with it, thus preventing it from investigating the alleged violations. The court also noted that the 3rd respondent had only a brief period to conduct investigations before these proceedings began.
48. Regarding damages, the court disagreed with the 1st, 4th, 5th, and 6th respondents' claim that no loss had been demonstrated, recognizing the physical and psychological harm caused by sexual violence. Citing **W. J. & another v Astarikoh Henry Amkoah & 9 others [2015] eKLR**, the court awarded Kshs.4,000,000 to the 5th, 6th, 8th and 9th petitioners as damages for violation of their constitutional rights. The court declined to grant exemplary damages, aligning with its reasoning in **Michael Rubia v**

Attorney-General [2020] eKLR, where it declined to award punitive damages in public law claims.

49. On costs, the court awarded the 5th, 6th, 8th, and 9th petitioners costs against the 1st and 4th respondents as the other respondents had been absolved of any blame. The other parties were directed to bear their own costs, given the public interest nature of the case.
50. The dispositive orders issued by the court were: **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; 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; the 5th, 6th, 8th and 9th petitioners are each awarded Kshs.4 million as general damages for the violation of their**

constitutional rights; and 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.

51. Being dissatisfied with the decision of the High Court, the petitioners (now appellants) preferred this appeal. Vide their grounds of appeal contained in the Memorandum of Appeal dated 2nd November 2021, they contend that the learned judge erred in law and in fact: by focusing solely on the State's obligation to investigate, while failing to consider the broader range of State obligations related to SGBV, including prevention, protection, and reparation. As a result, he wrongly concluded that the State could only be obligated to the 7th, 8th, 10th, 11th, and 12th petitioners if their violations were committed with the instigation, consent, or acquiescence of a public official; neglecting to consider the structural barriers survivors of sexual and gender-based violence (SGBV) face when attempting to report such incidents in conflict situations. By restricting his decision to those who had formally reported to the police, he failed to recognize the concept of constructive notice as a means of triggering State investigations and prosecutions of perpetrators in cases of SGBV during conflict; when he failed to make a determination on the State's obligations to investigate and prosecute SGBV committed by non-State actors. The learned judge only found a direct State obligation in cases where the sexual violence was committed by police officers, even when survivors did not report and failed

to apply a similar test for survivors who were forcefully circumcised by ethnic militia and raped by civilians.

52. The appellants further fault the learned judge for: failing to consider the State's due diligence obligation to implement reasonable measures to protect individuals from SGBV by third parties, and to initiate prompt, thorough, and credible investigations while providing reparations to victims. They argued that the learned judge overlooked the State's failure to initiate investigations into violations against survivors, despite being aware of their occurrence; failing to consider the broader context in which acts of sexual violence occurred during the 2007/2008 post-election violence, which were widespread and systematic. As a result, thousands of other victims were denied the benefit of court-ordered structural measures sought by the appellants, including the establishment of a database for post-election violence victims to facilitate broader reparations; failing to give effect to Article 35(3) of the Constitution, which mandates the State to publish and publicize important national information. They further contended that the learned judge misdirected himself by overlooking the State's positive obligation to proactively disseminate such information, without the need for prompting from any party; and misdirecting himself on the role of the Independent Policing Oversight Authority in investigating human rights violations by police officers committed in the period 2007/2008. The learned judge failed to

consider that to date, IPOA has not carried out any investigations on sexual and gender-based violence violations by Police officers in the 2007/2008 PEV.

53. At the hearing hereof, learned counsel **Mr. Willis Otieno** appeared for the appellants. Learned counsel **Mr. Emmanuel Bitta** appeared for the 1st, 4th, 5th and 6th respondents, while learned counsel **Ms. Nzwii** was present for the 3rd respondent. Learned counsel **Ms. Kimana** appeared together with **Ms. Osinde** for Katiba Institute, an *amicus curiae*. Counsel made brief oral highlights of their respective clients' written submissions.
54. Highlighting the appellant's written submissions, Mr. Otieno contended that the High Court erred by failing to consider the State's obligations related to prevention, protection, investigation, prosecution, and reparation for violations committed by non-State actors. It was contended that the learned Judge overlooked the comprehensive duty owed by the State to victims, irrespective of whether they were petitioners. The appellants maintained that the State had a broad responsibility to prevent, protect, investigate, prosecute, and provide reparations to all victims of the 2007–2008 post-election violence, regardless of whether the perpetrators were State or non-State actors. This duty, they asserted, extended beyond the named appellants to include victims identified in reports such as the TJRC Report, the Waki Commission Report, and those supported by institutions like Kenyatta National Hospital and the Kenya Red Cross

Society. The appellants further argued that the State possessed sufficient information on these victims and could not limit its obligations solely to those who had formally reported to the police.

55. The appellants further contended that the learned judge erred in limiting the State's liability to violations committed by State agents, excluding those perpetrated by non-State actors. They argued that the occurrence of non-State violence in itself demonstrated the State's failure to fulfill its due diligence obligations, particularly given prior intelligence reports warning of imminent violence. They asserted that the State's duty encompassed not only prevention but also response and support for all victims, regardless of the identity of the perpetrators. They maintained that the High Court's decision was inconsistent with the State's due diligence obligations and overlooked the fact that violations by non-State actors indicated the State's failure to prevent and respond to foreseeable harm.
56. Counsel further contended that, armed with intelligence such as that in the Waki Report, the State was in a position to take preemptive and remedial measures to mitigate harm, investigate abuses, and support victims, irrespective of the perpetrators. The appellants made reference to international instruments, including the **Committee on Elimination of All Forms of Discrimination Against Women (CEDAW) General Recommendation No. 19 on Violence Against Women and the African Commission** to support the position that States can be held accountable

for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence. The appellants further emphasized that the State's obligations are not suspended during periods of unrest or conflict.

57. Regarding the question whether the High Court failed to consider structural barriers to reporting and that the High Court failed to take constructive notice of the occurrence of SGBV in conflict situations and the PEV, it was submitted that the High Court failed to consider the structural barriers that hindered victims of SGBV from accessing traditional reporting mechanisms, particularly in the context of the PEV. It was contended that the learned judge erred by limiting compensation and reparations to victims who had formally reported to police stations, neglecting the broader realities of the conflict. Counsel emphasized that, given the conflict's circumstances which were widely acknowledged by all parties, it was unreasonable to expect victims, whose primary concern was survival, to follow conventional reporting procedures, such as obtaining an OB number at a police station. Furthermore, many victims sought assistance from State institutions like the Kenya Red Cross Society or were treated at facilities like Kenyatta National Hospital, with their experiences documented in reports such as the Waki Commission Report. The appellants contended that the existence of such documentation ought to have triggered the State's duty to investigate, follow up, and provide

restorative support. In this context, the learned judge was criticized for failing to recognize the State's broader due diligence obligations and its duty to support all victims, particularly in light of the barriers to reporting created by the conflict.

58. As to whether the High Court failed to consider the State's obligations to provide broader and structural remedies for all victims, it was submitted that the learned judge erred by overlooking the State's duty to offer remedies beyond mere monetary compensation. Counsel emphasized that the State's obligations are not suspended in times of emergency and argued that the learned judge should have carefully assessed the extent to which the State had fulfilled its due diligence obligations to prevent, protect, investigate, prosecute, and provide reparation for SGBV committed during the PEV by both State and non-State actors.
59. Counsel contended that the State's obligations extended beyond financial compensation to encompass rehabilitation, medical and psychosocial support, public acknowledgment of the violations, and formal apologies to the victims. These broader remedies, it was submitted, were essential not only to redress the harm suffered by the petitioners, but also to recognize and support victims who had not pursued legal recourse. It was contended that the failure to provide such measures perpetuated institutional attitudes that marginalized survivors of sexual violence and treated them as unworthy of justice. According to counsel, a public acknowledgment

and formal apology would have served as a powerful affirmation of the State's recognition of the gravity of the violations and would play a critical role in the victims' healing process. Furthermore, it was submitted that such actions would inform future policy, promote the reintegration of victims into society, and reinforce the obligation of State institutions to deliver meaningful and restorative justice.

60. On whether the High Court failed to give effect to Article 35(3) of the Constitution, counsel submitted that the learned judge overlooked the State's obligation to proactively publish and disseminate information, specifically through the maintenance of a comprehensive database of victims. He contended that such a database is a critical tool for advancing both retributive and restorative justice, not only for the appellants but also for other victims who have not yet accessed courts. The failure to recognize this obligation, counsel contended, undermined the State's capacity to identify those eligible for reparations and to deliver the care and support necessary for their reintegration into society.
61. Lastly, regarding IPOA's mandate, it was submitted that the learned judge erred in exempting IPOA from responsibility on the basis that it did not exist at the time the violations occurred. Counsel argued that IPOA's mandate was not limited to incidents occurring after its establishment, that it retained authority to investigate historical cases of police misconduct, provided the officers involved remained in service. It was

further submitted that IPOA, as established by statute and the Constitution, was created in response to a painful history of conflict and police abuse, and therefore must be empowered to address misconduct predating its formation. It was contended that the failure to recognize this continuing mandate undermined the pursuit of accountability and justice for victims of past abuses.

62. In conclusion, counsel urged this Court to allow the partial appeal, set aside the impugned findings of the lower court, and issue orders not only for the compensation of all the appellants, but also for the provision of broader restorative justice measures which include psychosocial support, post-rape care, and reintegration services, in recognition of the systemic violations suffered by victims of the 2007–2008 PEV.
63. Opposing the appeal, **Mr. Bitta** submitted that the learned judge properly acknowledged the State’s obligations, but appropriately confined them to the petitioners who had personally appeared before the Court. He pointed to paragraph 96 of the judgment, where the learned judge found that the Constitution could not be applied retrospectively to permit the form of public interest litigation advanced by the petitioners, as the alleged violations occurred before the promulgation of the 2010 Constitution. As such, the learned judge correctly limited the petition to the individual claims of those who had formally brought the matter before the court.

64. Counsel further submitted that the learned judge was properly guided by binding precedent, specifically referencing paragraph 121 of the judgment, which cited the decision of this Court in **Charles Murigu Muriithi & 2 Others v. Attorney General [2019] eKLR**, where this Court clarified the limits of State liability in instances involving violations committed by private actors. The learned judge also relied on the decision of this Court in **Agricultural Development Corporation v. Harjit Pandhal Singh & Another [2019] eKLR**, which affirmed the principle that the police cannot be held liable for harm caused by private individuals unless there was prior knowledge of a specific and imminent threat. Counsel submitted that in the absence of such particular circumstances in the present case, the learned judge had no basis to depart from the settled legal position.
65. With respect to the right to information under Article 35, it was submitted that this right came into force with the promulgation of the 2010 Constitution and could not be applied retroactively. Counsel emphasized that the learned judge correctly observed, in line with established jurisprudence, that a petitioner must first show that a request for information was made and subsequently denied before invoking the protection afforded by Article 35. In the present case, there was neither an allegation nor any evidence to suggest that such a request had been made and denied.

66. In conclusion, counsel submitted that the findings of the High Court were sound, in law and fact, and that there was no basis for setting aside the partial judgment under appeal.
67. **Ms. Nzwii**, representing IPOA (the 3rd respondent), contended that the High Court correctly exonerated her client from responsibility for investigating the events in question. She contended that the court had thoroughly examined all the evidence presented by the parties. She particularly made reference to paragraphs 155 to 158 of the impugned judgment where the court noted that the 3rd respondent had not been in existence at the time the incidents occurred, as it was established by Statute in November 2011, with its first board being inaugurated in June 2012. Consequently, IPOA could not have conducted investigations prior to its formation.
68. Furthermore, the petition was filed in February 2013, meaning IPOA had been operational for only six months at the time. It was submitted that this brief period was insufficient to substantiate a claim that IPOA had failed to investigate. The High Court also noted that no formal complaint had been lodged with IPOA. Additionally, the appellants themselves conceded under cross-examination that IPOA could not rely on the Waki Commission Report, given the anonymity of the victims.
69. Counsel further emphasized that under section 26 of IPOA's constitutive Act, the Authority is prohibited from investigating matters that are the

subject of ongoing court proceedings. Since the case had been before the courts since 2013, IPOA was legally barred from conducting any investigations. However, it was clarified that the court did not fully absolve IPOA from investigating matters arising from the 2007–2008 period, but rather from liability for failing to do so in the past. Counsel maintained that IPOA had always been willing to investigate, provided victims came forward with formal complaints.

70. Ultimately, it was submitted that the appellants had not provided a valid basis for setting aside the impugned decision, and counsel therefore prayed that the appeal, in so far as it concerned IPOA, be dismissed with costs.
71. **Ms. Kimana**, on behalf of Kituo Cha Sheria, emphasized the State's constitutional and international obligations to protect individuals, particularly women, from human rights violations perpetrated by non-state actors. Citing Article 21(1) of the Constitution, she argued that the State bears a positive duty to protect rights holders, not only through legislation, but also by ensuring effective remedies when violations occur. This obligation was further reinforced by the African Commission's decision in **Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria**, which clarified the duty to protect individuals from harm caused by third parties.

72. She cited other authorities supporting this interpretation, including the Supreme Court decision in **Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021)**, which affirmed the use of general comments and international guidelines in interpreting constitutional obligations. They specifically referenced **General Recommendation No. 19** from CEDAW, which outlines the State's due diligence obligations regarding violations by non-state actors, and **General Recommendation No. 30**, which emphasized that the duty to protect women in conflict situations remains in force even during periods of unrest. This principle was also echoed in **Velásquez Rodríguez v. Honduras** (supra), where the Inter-American Court held that a State could be held liable for violations by unknown perpetrators if it failed in its duty of due diligence.
73. Counsel also referred to two leading African Commission on Human and Peoples' Rights cases, namely, **Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Federal Republic of Ethiopia, Communication 341/2007** and **Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt (Communication 323/2006)**. In both cases, the Commission found that the respective States had violated their obligations to protect women from sexual and gender-based violence, establishing that even in instances involving third parties, States

could be held accountable for failing to prevent or adequately respond to such violations.

74. In addressing the ongoing impact of conflict-related sexual violence, counsel invoked the **NEA May Guidelines** of the African Commission, which detail how States must prevent, investigate, and provide reparations for acts of sexual violence, especially in conflict contexts.
75. On the issue of access to information, she emphasized that the State had a proactive obligation to disclose key public interest information under Article 35(3) of the Constitution. Citing the Supreme Court decision in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (supra)**, they contended that constitutional interpretation must be both retrospective and prospective. Even prior to the enactment of the Access to Information Act in 2016, access to such information, especially about the extent of sexual violence during conflict, was essential to ensuring public accountability and justice.
76. Lastly, counsel referred to the cases of **Trusted Society of Human Rights Alliance and 3 Others vs Judicial Service Commission & Another [2016] eKLR** and **Nairobi Law Monthly Ltd Vs Kenya Electricity Generating Company & 2 Others [2013] eKLR** to illustrate that courts have consistently affirmed the public's right to know, especially in relation to important national matters.

77. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. It was put more appropriately in Selle -vs- Associated Motor Boat Co. [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

78. We have considered the record of appeal, the submissions filed and the law. This appeal, in our view, crystallizes on the following issues:

- i. Whether the High Court erred by limiting the State’s obligation to violations committed by state actors only;**
- ii. Whether the High Court erred by limiting compensation and reparations to only the victims who reported to the police;**
- iii. Whether the High Court erred by failing to recognize the State’s obligation to offer broader remedies to the victims, other than monetary compensation;**
- iv. Whether the High Court erred in its findings on the right to information as envisaged under Article 35 of the Constitution; and**
- v. Whether the High Court erred by absolving IPOA from any liability in as far as investigations into the 2007/2008 PEV was concerned.**

79. The 2007/2008 post-election violence was characterized not only by widespread ethnic and political unrest, but also by severe human rights violations, including killings, forced displacement, destruction of property, and rampant sexual and gender-based violence (SGBV). The Waki Report identifies a broad range of perpetrators, including State security forces, members of organized gangs (such as Mungiki and Kalenjin warriors), as well as neighbours, relatives, supposed friends, and individuals involved in the management of Internally Displaced Persons (IDP) camps. In essence, the perpetrators of PEV violence were both State and non-State actors. Notably, the 5th to 12th appellants' testimony before the High Court indicated that they were sexually assaulted, either by police officers or by civilians.
80. We fully align ourselves with the submissions by the appellants before the High Court that SGBV, including rape, constitutes torture or other inhuman acts of a similar character when it is intentionally inflicted to cause severe physical or mental suffering. Under **Article 1** of the **United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, torture was defined as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’’

81. Similarly, **Article 7 (1) (g)** of the of the **International Criminal Court's Rome Statute** recognizes rape and torture as crimes against humanity. Indeed, such acts are a grave violation of human rights and are expressly prohibited under national, regional and international law.

82. The repealed Constitution of Kenya did not include explicit provisions similar to Article 21(1) of the 2010 Constitution, which imposes a positive duty on the State to respect, protect, promote, and fulfill the rights and fundamental freedoms enshrined in the Bill of Rights. Article 21(1) of the 2010 Constitution requires the State to ensure the full enjoyment of the rights in the Bill of Rights. It states as follows:

“It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”

83. Although the repealed Constitution did not include explicit provisions imposing a positive obligation on the State to respect, protect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights, we fully align ourselves with the learned judge’s view that the right to life, protection from torture, and security of the person were nonetheless guaranteed under sections 70, 71, and 74 of that Constitution. These

rights are further affirmed in various international and regional human rights instruments, including 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 Peoples' Rights (Banjul Charter); and Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

84. The State therefore bears a positive obligation not only to protect life, but also to safeguard against torture and ensure the security of its citizens.

General Recommendation No. 19 (Violence Against Women) of the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** mandates States to take proactive measures to prevent and address violence, including sexual violence, perpetrated by non-State actors. States are also required to ensure the investigation, prosecution, and punishment of such acts of violence. In addition, **Article 18(3)** of the **African (Banjul) Charter on Human and Peoples' Rights** provides as follows:

“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

85. **Article 4** of the **UN Declaration on the Elimination of Violence against Women** (1993) places an obligation on States to take all appropriate

measures, including legislative, to prevent, investigate, and eliminate violence against women by both State and non-State actors.

86. The State therefore has a duty to safeguard its citizens from violations of their fundamental rights. This responsibility was affirmed by the High Court in its judgment as pertains to the 5th, 6th, and 9th appellants. The High Court stated, in part, as follows:

“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.”

87. Regarding the 8th appellant, who was raped by civilians and reported the incident to the police, the High Court held that the police failed to fulfil their duty to thoroughly investigate her report and apprehend the three men responsible for the assault. The court found that this case exemplified how the State could be held liable for rights violations committed by third parties. Once the appellant reported the rape, the police had a clear duty to investigate her claim and protect her from further harm.
88. With regard to the 7th, 8th, 10th, 11th, and 12th appellants, who were assaulted by members of the public, the court noted that they had not provided evidence demonstrating that the individuals responsible for the

assaults acted with the instigation, consent, or acquiescence of a public official or anyone acting in an official capacity. Relying on precedents from this Court, including Charles Murigu Muriithi & 2 others v Attorney-General (supra) and Agricultural Development Corporation v Harjit Pandhal Singh & another (supra), the court concluded that these appellants failed to prove that the police had not exercised reasonable diligence in handling the circumstances of their respective cases.

89. The question to be addressed, therefore, is whether, having acknowledged that the 7th, 10th, 11th and 12th appellants were victims of SGBV from the PEV perpetrated by non-State actors, was the court justified in limiting the State's obligations as envisaged in national, regional, and international law and instruments to only the 5th, 6th, 8th, and 9th appellants whose rights were violated by State actors?
90. The answer to this question, in our view, lies in both national law and the international treaties and conventions to which Kenya is a party. For example, **CEDAW General Recommendation No. 19 on Violence Against Women** underscores the State's responsibility to prevent violence by private actors. It mandates that States take all appropriate measures to prevent violence, investigate complaints, and ensure accountability, even for acts committed by non-State actors. This recommendation establishes the due diligence standard, requiring States to act proactively in safeguarding women from violence and ensuring access to remedies,

including legal, medical, and psychological support for survivors. Under General Recommendation No. 19, the State may also be held accountable for private acts if it fails to exercise due diligence in preventing violations of rights, investigating and punishing acts of violence, or providing compensation to victims.

91. Similarly, **CEDAW General Recommendation No. 35 (2017)**, which builds upon General Recommendation No. 19, reinforces the State's responsibility to prevent, investigate, and punish all forms of gender-based violence, regardless of whether the perpetrators are State or non-State actors. It emphasizes that States must take all appropriate measures to prevent violence, including enacting laws, providing services for survivors, and ensuring accountability for perpetrators.
92. The recommendation underscores the due diligence obligation, which requires States to act with care to protect women from violence and create an environment where victims can access justice and remedies. Crucially, it highlights that the State's duty extends to addressing violence by non-State actors. This means that even when acts of gender-based violence are committed by private individuals or organizations, the State must ensure accountability from the perpetrators and ensure that survivors have access to legal recourse, support services, and protection. This solidifies the State's broader responsibility to establish a legal and institutional

framework that prevents violence and upholds women's rights, regardless of the identity of the perpetrators.

93. **Article 4** of the **Maputo Protocol** emphasizes the right of every woman to life, personal security, and bodily integrity, placing a positive obligation on State Parties to prevent, punish, and eliminate all forms of violence against women, including physical, sexual, and psychological violence. This obligation extends to violence perpetrated by both State and non-State actors. The Protocol mandates that States not only protect women from violence but also ensure effective remedies, including thorough investigations and accountability for any violations.
94. It is clear to us beyond any peradventure that the State may be held liable for the actions and omissions of both State and non-State actors when it fails to fulfill its due diligence obligations, including the duty to investigate, prosecute, punish, and provide reparations for acts and omissions resulting in gender-based violence against women. The question, therefore, is whether the State met its due diligence obligations with regard to the 7th, 10th, 11th, and 12th appellants.
95. In addressing this question, we refer to the Waki Report, which highlighted that prior to the 2007/2008 PEV, the State received multiple intelligence warnings about the potential for widespread violence. These reports indicated significant risks of ethnic conflict and unrest following the disputed election results. According to the appellants, despite having this

intelligence, the police and other security agencies failed to take preventive measures or respond effectively when violence erupted. The report emphasized a lack of coordination and preparedness within the police, which were ill-equipped to manage the crisis. The Commission also noted, as supported by evidence before the High Court, that some police officers were either complicit in the violence, or failed to intervene to prevent it, and there was a notable absence of accountability for the security personnel involved.

96. Whereas the Waki Report highlighted that prior intelligence on potential violence was available, it also acknowledged that the violence during the 2007/2008 post-election crisis was sporadic and difficult to contain. The reports received by the government and police indicated the likelihood of ethnic clashes and unrest, but the violence quickly spread across the country, often in unpredictable ways, which made it challenging to prevent or control. The nature of the violence ranging from organized attacks to spontaneous eruptions in various regions posed significant logistical and operational challenges for the police and security forces, who were unable to respond swiftly or effectively in all affected areas. Despite the intelligence, the lack of preparedness, coordination, and resources left the security forces struggling to contain the violence once it began. This made it difficult to address the widespread and often chaotic nature of the

violence, highlighting the challenges of responding to such crises even with prior warning.

97. Therefore, while we acknowledge that the State had intelligence reports regarding the potential for PEV, the sporadic nature of the violence, its rapid spread across various regions, and the coordination challenges among security forces made it difficult for the State to effectively contain or prevent the crisis. Nevertheless, despite these challenges, we take note of the appellants' personal accounts of police presence on the ground. The 6th, 8th, and 9th appellants observed a significant police presence in their areas but stated that the police were unable to control the situation once it escalated. The 5th appellant acknowledged the police's inability to contain the violence, but testified that they helped her children escape from Nairobi. The 10th appellant stated that she was protected by the police in both Kericho and Ekerenyo. In contrast, the 7th appellant reported having not seen any police officers as the violence intensified. The 11th appellant initially claimed not to have observed any police presence, but later acknowledged that he was provided protection by the police at Naivasha Police Station and later at Naivasha Maximum GK Prison.

98. Given the above, we have no hesitation in agreeing with the learned judge's assessment that, due to the true scale of the 2007-2008 PEV and its spontaneous nature, it was impossible for the police to be present at every corner of the country. This holding of this Court as regards the State's

duty to ensure the security of its citizens in **Agricultural Development**

Corporation v. Harjit Pandhal Singh & Another [2019] eKLR merits

reiteration thus:

“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.”

99. In the peculiar circumstances of the PEV, and acknowledging the recognition in various international instruments that the State can be held accountable for violence committed by non-State actors, we are of the view that while the 7th, 10th, 11th, and 12th appellants were victims of the 2007/2008 PEV perpetrated by non-State actors, they did not prove that the police either negligently or deliberately failed to provide them with

protection, or that they breached a specific duty of care. In our view, they did not demonstrate how the State and/or the police failed to exercise reasonable diligence in the context of their individual cases.

100. That notwithstanding, we must point out that the State's obligations to the citizenry are not suspended during periods of civil unrest or conflict, which in this country is not uncommon shortly before and/or immediately after a general election. The patterns of violence that have been witnessed in the past around such periods are sufficient to cause the State to be on high alert in order to protect its people.

101. The ACHPR in **ACHPR Comm. No. 74/92 Decision** of 11th October 1995 affirmed the State's obligation to uphold and to protect rights of citizens even during emergencies. It held that: *"The African Charter, unlike other human rights instruments, does not allow for State parties to derogate from their treaty obligation during emergency situations."*

102. Likewise, in **Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan**, AfCommHPR, Comm. 279/03-296/05, 27 May 2009, para. 165 the ACHPR held that:

"State Parties to the African Charter [are obliged] to respect human and peoples' rights at all times including in times of armed conflict."

103. Similarly, the ACHPR in **Zimbabwe Human Rights NGO Forum V Zimbabwe**, ACHPR, Comm. 245/02 Decision of May 2005 held:

“A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to State responsibility.”

104. Turning to the second issue whether the High Court erred in limiting compensation and reparations to appellants who had made reports to the police, it is the appellants' position that the Court failed to recognize the structural barriers to reporting. They argue that it was unreasonable to expect victims, whose primary concern was survival, to adhere to conventional reporting procedures, such as obtaining an OB number at a police station. Furthermore, the appellants contend that many survivors of SGBV sought assistance from State institutions like the Kenya Red Cross Society or received treatment at facilities like Kenyatta National Hospital, with their experiences documented in reports such as the Waki Commission Report. They argue that the existence of such documentation should have triggered the State's obligation to investigate, follow up, and provide restorative support.

105. In Kenya, as in many other jurisdictions, it is generally expected that victims of crimes, including SGBV, report incidents to the police so that investigations can be initiated and perpetrators held accountable. The Kenyan Police Service is entrusted with upholding the law, ensuring justice through thorough investigations and gathering evidence geared at prosecution of offenders.

106. The above notwithstanding, we take judicial notice that victims of sexual based offences often face trauma and societal stigma which could prevent them from reporting the abuse to the police. The Maputo Protocol acknowledges the societal and legal barriers that prevent women from reporting violence. The barriers include social stigma, victim blaming, the fear of retaliation and lack of trust in law enforcement system.

107. The circumstances in this case reveal that while some of the appellants reported the SGBV to the police, others did not. For example, the 9th appellant, in her witness statement, stated that she was raped by police officers. She stated as follows regarding reporting to the police:

“I did not report this incident to the police for two reasons. First, I did not know who to report it to. Secondly, I did not believe that I could make a complaint against the government to the government. How can I complain against the government officials who raped me to the same government? ...I still feel that the police are not humans. I think that they are dogs. The things they did were very wrong. Instead of coming to protect us, they raped me and destroyed my emotions.”

108. It is evident from the above witness account that there was a clear lack of trust in the law enforcement system. When law enforcement officers become perpetrators themselves, it erodes the trust and confidence of victims in reporting sexual abuse to the police. While some appellants who were raped by state actors did report the incidents to the police, we cannot fault those who did not formally report to the authorities. These individuals, in our view, were victims who should have been protected by

the very people who violated their most personal rights. Given these barriers, it would be unreasonable to place the full burden of accountability on the victims for failing to report such incidents.

109. It is a fact that the Kenya Red Cross Society was at the forefront in rescuing and offering support to the victims of SGBV. Some of the victims were treated at various health facilities including Mbagathi Hospital and the Kenyatta National Hospital. Their experiences were documented in reports such as the Waki Commission Report and reports maintained by various Non-Governmental Organizations. Therefore, the State, in our view, had constructive knowledge of the SGBV. The presence of widespread violence, coupled with official documentation such as the Waki Commission Report, provided sufficient grounds for the State to initiate investigations and provide justice for victims. The State's failure to act on this constructive notice amounted to a breach of its due diligence obligations under both local and international law.

110. Having noted the above, we must clarify that compensation and reparations for SGBV victims in these circumstances could only be applicable to the petitioners before the High Court, and not on an omnibus basis. In other words, compensation and reparations could not be extended to individuals who were not parties to the petition. Furthermore, it is our view that compensation was contingent upon the petitioners demonstrating that the State and/or the Police failed to exercise

reasonable diligence in the specific circumstances of their individual cases. Given that we have already found that the 7th, 10th, 11th, and 12th appellants did not prove a breach on the part of the State, we find no grounds upon which to interfere with the High Court's decision on this issue.

111. Regarding the issue of whether the High Court erred by limiting the State's obligations to SGBV victims to monetary compensation, the appellants argue that the State has a broader duty to provide remedies, including psychosocial support, public acknowledgment of the violations, and formal apologies. These measures, they contend, are essential for the healing of victims and for the systemic recognition of the violations.
112. The court in this case awarded the 5th, 6th, 8th and 9th appellants Kshs.4 million each as general damages for the violation of their constitutional rights. It did not award them any other reparations to them.
113. Beyond monetary compensation, international human rights law obligates states to provide a wide range of remedies for survivors of SGBV, aimed at addressing both immediate and long-term needs. **CEDAW General Recommendation No. 35** stresses that States must offer effective reparations to victims of gender-based violence. These reparations should encompass not only financial compensation but also access to legal, social, and health services including sexual, reproductive, and mental health care to facilitate comprehensive recovery. Additionally, they should include

measures for satisfaction and guarantees of non-repetition, in accordance with **General Recommendations No. 28, No. 30, and No. 33**. Reparations must be adequate, timely, holistic, and proportional to the severity of the harm endured.

114. The State is also obligated to ensure that victims receive adequate reparation, which includes restitution, rehabilitation, satisfaction, and guarantees of non-repetition. Restitution involves restoring the victim's situation as closely as possible to what it was before the violation, such as providing secure housing or reinstating employment. Rehabilitation includes access to free or affordable health care, including psychological and psychiatric services, along with legal and social support. **The UN Declaration on the Elimination of Violence Against Women (1993)** similarly mandates that states ensure victims have access to appropriate medical care, counseling, and support services, emphasizing that remedies extend beyond monetary compensation.

115. The **Maputo Protocol** on the other hand specifically **Article 4(2)(f)** obligates African states to establish mechanisms and accessible services for effective information, rehabilitation, and reparation for victims of violence against women. Additionally, Articles 25 and 26 require states to provide appropriate remedies for any woman whose rights or freedoms, as recognized in the Protocol, have been violated, and to ensure the

availability of sufficient budgetary and institutional resources to implement these protections.

116. Additionally, under the **UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law**, survivors are entitled to truth-telling processes and public acknowledgment of harm, often referred to as satisfaction. This may involve formal apologies, memorials, or public inquiries, all of which validate survivors' experiences and contribute to their healing. Finally, states have an obligation to implement guarantees of non-repetition, which could include legal reforms, police and judicial training, and institutional changes to prevent the recurrence of similar violations.
117. It is evident that under international law, the remedies available to SGBV victims are not limited to monetary compensation. Indeed, looking at the petition filed before the High Court, the appellants, save for asking for general damages and exemplary damages, sought the following; **“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 for the harms suffered by the victims, is a violation of the Right to Remedy.”**

We believe this further declaratory order was merited and ought to have been granted.

118. Looking at the impugned judgment, it appears that the High Court did not fully consider the broader range of reparations available to the appellants beyond monetary compensation and the declaratory orders made. The court held as follows:

“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...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...”

119. In our view, the High Court adopted a narrow interpretation of the reparations available to the appellants, which did not fully reflect the State's broader obligations under international human rights law. A comprehensive approach to reparations, encompassing not only financial compensation but also rehabilitation, public acknowledgment of harm, and guarantees of non-repetition, as mandated by various international instruments, was necessary. By failing to consider these critical elements of restorative justice, the court overlooked fundamental aspects of the victims' right to an effective remedy. Consequently, it is our view that the learned judge erred in limiting the State’s obligations to the SGBV victims

of the PEV in respect of the 5th, 6th, 8th and 9th appellants to monetary compensation alone.

120. Having looked at the Petition and a raft of the prayers that were sought, and taking into account the State's obligations under the various international instruments that we have alluded to, we are satisfied that the High Court ought to have granted prayers (iii), (iv), (v) and (viii) of the petition, and we hereby grant them in addition to the dispositive orders and reliefs that were granted.
121. Regarding the appellant's right to information as envisaged under Article 35 of the Constitution, we associate ourselves fully with the findings of the High Court that a claim alleging a violation of the constitutional right to access information under Article 35 of the Constitution must generally be preceded by a demonstrable request for the information and a subsequent denial, refusal, or failure to provide such information by the relevant authority.
122. Under the Access to Information Act, an Act of Parliament enacted to give effect to Article 35 of the Constitution, a person seeking access to information held by the State or a private entity must first direct their request to the designated officer as outlined in section 7 of the Act. The request is made through an application under section 8(1), which requires the applicant to provide sufficient details and particulars to enable the public officer to understand the nature and scope of the information being

sought. Pursuant to section 9 of the Act, the public officer processes the application and makes a decision as soon as possible. If the applicant does not receive a response within the time frame specified in subsection (1), the application is deemed to have been rejected, as per section 9(6) of the Act.

123. This Court in **Chita v District Land Registrar – Kilifi & 2 others; Patel (Interested Party); Muita (Third party) (Civil Appeal E007 of 2021) [2023] KECA 1521 (KLR) (8 December 2023) (Judgment)** held thus:

“In this case the appellant admitted that he never made any written request for the information he was seeking. He however, contended that he visited the offices of the Kilifi Land Registry several times to obtain the said information but was not furnished with it. Subsection (2) of section 8 of the Access to Information Act clearly provides for situations where an applicant for information is unable to make a written request. In this case, there was no evidence that the appellant was unable to make a written request. He simply did not make one. Since the respondents denied that such a written request was made, it was upon the appellant to prove, that he was unable to do so and that he made such a request formally to the respondents or, that he was unable to formally do so. The appellant failed to demonstrate taking any such action and therefore, his petition seeking to compel the respondents to provide him with the said information was, in our respectful view, rightly dismissed by the learned judge.

A provision of law that prescribes the manner in which to approach certain institutions cannot, in our view, be termed as mere technicality as submitted by the appellant. In this case, and as expressly stated in section 8(1) above, the need for a written request either in English or in Kiswahili providing details and sufficient particulars for the public officer or any other official is meant to enable the officer or department concerned to understand what information is being requested. It is an enabling provision and not a mere

technicality. In this case, the appellant claimed he was denied access to “the original adjudication records, the Registry Index Map as in 1984 and other land registry records relating to the suit property”. It is clear that the law sought to pre-empt precisely such requests when it expressly stated that the request be in writing. How else is an officer supposed to know what “other land registry records” entail without the same being precisely set out? It is our considered view, without proof that the information was properly requested, the petition was prematurely brought.”

124. In the circumstances obtaining herein, the appellants failed to provide evidence showing that they had requested the government to release any information or reports related to SGBV during the PEV, which request was subsequently denied or rejected. As a result, they did not demonstrate that their right to information was violated by any actions or omissions of the respondents.
125. Lastly, on whether the High Court by absolving IPOA from any liability as a result of its failure to investigate cases related to SGBV from the PEV, it is a fact that the IPOA Act was assented to on 11th November 2011 and commenced on 18th November 2011. It is also a fact that IPOA’s first board was inaugurated in June 2012, meaning it could not have conducted any investigations prior to its formation. The petition giving rise to the impugned decision having being filed in February 2013, only six months after IPOA became operational, IPOA certainly did not have sufficient time to investigate the incidents in questions.

126. In addition, none of the appellants provided evidence that they had filed a complaint with IPOA that would have warranted an investigation. Moreover, section 26 of the IPOA Act restricts IPOA from investigating any matter that is already the subject of proceedings before a court of law or judicial tribunal.

127. In the circumstances, we do not find any basis upon which the High Court could have held IPOA liable for failing to investigate allegations of violations by both State and non-State actors during the PEV. Consequently, this ground of appeal is without any merit.

128. In the end, this appeal is partially successful. To sum it up, the additional dispositive orders to the ones made by the High Court that we hereby make are as follows:

- (a) 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;**
- (b) 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);

- (c) 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;**
- (d) 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.**

129. Regarding costs, we direct that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 8th day of August 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.