



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E042 of 2025

–BETWEEN–

JAVERIA SIDDIQUE W/O

ARSHAD SHARIF..... 1st APPELLANT

KENYA UNION OF JOURNALISTS.....2ND APPELLANT

KENYA CORRESPONDENTS ASSOCIATION..... 3RD APPELLANT

–AND–

ATTORNEY GENERAL1ST RESPONDENT

INDEPENDENT POLICING OVERSIGHT

AUTHORITY.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION..... 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE4TH RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....5TH RESPONDENT

*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi (**Musinga (P)**, **M. Ngugi & Tuiyott JJ.A.**) delivered in Civil Appeal No. E802 of 2024 on 31st July 2025)*

Representation:

Mr Ochiel Dudley, appearing with Mr. Daniel Oduor and Mr. Miracle Mudeyi for the Appellants
(*Bond Advocates LLP*)

Mr Thande Kuria for the 1st and 4th Respondents
(*Office of the Attorney General*)

Mr Festus Kinoti for the 2nd Respondent
(*Independent Policing Oversight Authority*)

Ms Angela Fuchaka, appearing with Ms. Becky Arunga for the 3rd Respondent
(*Office of the Director of Public Prosecutions*)

Ms Rwenji Wairimu, appearing with Ms Chebet Koech for the 5th Respondent
(*National Police Service Commission*)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is the appeal dated 11th September 2025 and filed on 12th September 2025. It is brought pursuant to Articles 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act, and Rules 9(1) and 33(2) of the Supreme Court Rules, challenging the Judgment of the Court of Appeal at Nairobi (*Musinga (P), M. Ngugi & Tuiyott JJ. A*) in *Civil Appeal No. E802 of 2024* delivered on 31st July 2025, wherein the Court of Appeal partially allowed the appeal and dismissed the cross appeals before it.

B. FACTUAL BACKGROUND

[2] Arshad Mohammed Sharif (***the deceased***) was a Pakistani investigative journalist who had been living in Kenya in self-exile for nearly two months. On 23rd October 2022, he was fatally shot while travelling as a passenger in a motor vehicle, Toyota Land Cruiser registration No. KDG 200M. In a press statement issued on 24th October 2022, the Inspector General of Police admitted that the Kenya Police Officers fatally shot the deceased at Tinga Market along Magadi Road in Kajiado County, while pursuing a Mercedes-Benz Sprinter Van, Registration No. KDJ

700F, which had been stolen in Pangani, Nairobi. He termed the shooting a case of mistaken identity. The Inspector General also stated that the matter was under investigation and that appropriate action would be taken once the investigation was concluded. However, a year later and after several unanswered requests for a status report, the appellants moved to the High Court.

C. LITIGATION HISTORY

i. Proceedings before the High Court

[3] The appellants filed a petition at the ***Kajiado High Court (Constitutional Petition No. E009 of 2023)*** contending that after the fatal shooting and press statement, no prompt, independent, impartial, effective and accountable investigations had commenced. Further, that no prosecution of those responsible had been instituted, and the deceased's family had not obtained justice. It was their case that, the failure to investigate, arrest or prosecute the police officers involved for the unlawful shooting and killing of the deceased amounted to a criminal cover-up. It was also their case that the 2nd to 4th respondents' failure to respond to the 1st appellant's numerous requests for information on the status of the investigations was in breach of the Constitution. To this end, the appellants claimed that the respondents were jointly and severally liable for the violations of the deceased's constitutional rights to life, dignity and fair treatment.

[4] The appellants particularised the alleged violations, arguing that the actions of the officers of the National Police Service were excessive, arbitrary and unreasonable, hence in violation of Article 26 of the Constitution, Article 6 of the International Covenant on Civil and Political Rights (***ICCPR***) as well as General Comment 36 of the said Article 6, and Articles 2 and 4 of the African Charter on Human and Peoples Rights (Banjul Charter). It was also argued that the shooting of the deceased violated his entitlement to equal benefit and protection of the law under Article 27 of the Constitution, Article 2 of ICCPR and Article 3 of the Banjul Charter. It was further contended that the shooting violated his right to inherent

dignity, freedom and security of persons and freedom from any form of violence under Articles 28 and 29 of the Constitution, Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (**CAT**), Article 7 of the ICCPR and Article 5 of the Banjul Charter. Moreover, the failure to institute prosecution violated the deceased's right to trial under Articles 25(c) and 50(2) of the Constitution. They also submitted that the delay in investigations and prosecution compounded these violations contrary to Article 47 of the Constitution, Article 2(3) (a) to (c) of the ICCPR and Articles 4, 12 and 14 of CAT.

[5] Consequently, the appellants sought the following orders:

- i. *A declaration that the use of lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary to protect life or prevent serious injury from an imminent threat. The intentional taking of life by police officers is permissible only if it is strictly necessary to protect life from an imminent threat. Thus, the use of lethal force against Arshad Sharif by shooting him on the head was arbitrary, disproportionate, unlawful and unconstitutional.*
- ii. *A declaration that the unlawful shooting to death of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on October 23, 2022 violated his right to life under Article 26 of the Constitution; right to equal benefits and protection of the law under Article 27 of the Constitution; right to dignity under Article 28 and right to security of the person under Article 29 of the Constitution.*
- iii. *A declaration that the appellants are entitled to effective remedies as guaranteed by Article 23 of the Constitution; Article 2(3) of the ICCPR; Article 14 of CAT and Article 7(1) of the Banjul Charter for the violations of Arshad Sharif's fundamental rights and freedoms*

through the unlawful and admitted shooting of Arshad Sharif by the Kenyan Police officers at Kajiado County on October 23, 2022.

- iv. A declaration that the failure to conduct independent, prompt and effective investigations and to commence prosecution for the killing of Arshad Sharif by Kenyan police officers further violates the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21(1) of the Constitution, Article 6 and 7 of CAT; Article 2 and 7 of the ICCPR.*
- v. A declaration that Articles 244(a) and 246(3) of the Constitution command the respondents to punish and prosecute police officers who killed Arshad Sharif. Consequently, a mandatory order do issue compelling the respondents to conclude investigating, take disciplinary action and charge in court the police officers who shot and killed Arshad Sharif at Kajiado County, Kenya, on October 23, 2022.*
- vi. An order compelling the respondents to supply to the appellants copies of all documents, files, reports, letters, electronic mail (email) or evidence, in any medium, including but not limited to films, photographs, videotapes in their custody or possession relating to the shooting in question.*
- vii. An order directing the 1st respondent to issue a public apology, including an acknowledgement of the facts, and acceptance of responsibility to the family of Arshad Sharif within 7 days of this court's order.*
- viii. Damages for violation of the 1st appellant's constitutional rights.*
- ix. Costs of this suit.*

[6] The 1st to 5th respondents filed their responses in opposition. The 1st respondent urged that, though the Attorney General is the principal legal adviser to the

National Government, she does not exercise command over the Kenya Police officers. The 1st respondent further contended that the appellants had not levelled any breach of the deceased's rights or laid any case against the office of the Attorney General.

[7] The 2nd respondent contended that it had conducted its investigation in line with its mandate and forwarded its report to the 3rd respondent, who returned the files with requests for further investigations to fill identified gaps, which were addressed, and the files were re-forwarded to the 3rd respondent. Moreover, it was the 2nd respondent's case that the appellants' allegations fell outside its mandate and therefore could not be attributable to it.

[8] The 3rd respondent contended that it had been proactive in ensuring effective investigations and facilitating any prosecution if necessary. It argued that in any event, the appellants had not placed any evidence before the court to demonstrate lax in the performance of its mandate. It explained that after receipt of the file from the 2nd respondent, it independently reviewed the investigations file and flagged further areas for the 2nd respondent's attention; it called a meeting with the 2nd respondent to address the areas of concern; and thereafter held a meeting with the Pakistani High Commission, following a request for mutual legal assistance by the Inspector General of Islamabad to facilitate effective investigations.

[9] It was the 3rd respondent's case that it wrote back to the 2nd respondent requesting clarification on the identified gaps and updated the Ministry of Foreign Affairs; the 2nd respondent submitted the investigations file on 16th March 2023, addressing the areas of concern, but it returned the investigations file a second time, directing the 2nd respondent to conduct a conclusive cover of the re-highlighted areas. It directed the 2nd respondent to take the requisite action by 29th May 2023. The 3rd respondent submitted that it only became aware of the petition before the High Court, in the course of these interactions and actions, and due to the complexity of the matter, the 2nd respondent was of the view that there was a

need for joint comprehensive analysis of the investigations file before any decisions were made.

[10] It was also the 3rd respondent's case that the correspondence with the investigative agencies is privileged and could not be disclosed to protect the integrity of the investigative process. It further submitted that any orders directing the 3rd respondent to exercise its prosecutorial powers would be unconstitutional, as it enjoys decisional independence; it is not under the direction or control of any other person; and that the agencies involved in the investigations should be allowed to perform their functions without interference. The 5th respondent opposed the petition and urged that the appellants had not demonstrated any refusal or omissions to exercise its disciplinary control, considering that neither a report nor a request with particulars to summon or investigate any police officer for disciplinary infractions in the course of their duties had been addressed to it.

[11] In a Judgment delivered on 8th July 2024, the High Court (*Mutuku J*) framed two issues for determination: *whether the appellants had met the threshold of a constitutional petition; and if so, what reliefs were available*. On the first issue, the trial court determined that the petition had met the threshold settled in ***Anarita Karimi Njeru Vs Republic*** [1979] KLR. Particularly, the appellants had pleaded with precision and specificity the rights and freedoms alleged to have been breached by the respondents.

[12] On whether the respondents had breached the right to access to information under Article 35 of the Constitution for failing to inform the family of the deceased the status of the investigations and if prosecution was anticipated, the court found that even though the right to access information guaranteed under Article 35 of the Constitution is limited under Article 24 and Section 6 of the Access to Information Act, the 2nd and 3rd respondents did not adduce any evidence to show in what manner the law protected the information. Further, the court reasoned, even if the information was privileged under the law, nothing prevented the said respondents from giving updates to the family of the deceased on the

circumstances surrounding the shooting of the deceased and any anticipated further action in the matter, without the disclosure of the privileged information.

[13] On whether the respondents breached the right to life, the right to equal protection and the benefit of the law, the trial court found that the shooting of the deceased under the circumstances disclosed in the matter violated Articles 26, 27, 28 and 29 of the Constitution, notwithstanding the allegations that the fatal shooting was a mistaken identity. The trial court reasoned that the 1st respondent could not escape liability in the matter, as it is the adviser of the national government on all matters legal, including the Constitution, international law, human rights and in facilitating, promoting and monitoring the rule of law, the protection of human rights and democracy. In the same breath, the 4th respondent was responsible to act on the recommendations of the 2nd respondent, including compensation of the victims of police misconduct, which it failed to; the 5th respondent was liable by virtue of the provisions of Article 246 of the Constitution which commands the office to observe due process, exercise disciplinary control over and remove persons holding or acting in offices, which it failed to do.

[14] On the violations of the freedom against torture and inhuman or degrading treatment, the court found that the deceased was subjected to torture within the definition under Article 1 of CAT. Further, the failure to conduct independent, prompt and effective investigations and commence prosecution or complete investigations or in any manner act on the outcome of those investigations by the respondent violated the rights to life, freedom against torture, inhumane and degrading treatment under Articles 21(1) of the Constitution, Articles 6 and 7 of the CAT and Articles 2 and 7 of the ICCPR.

[15] Consequently, the court entered Judgment in favour of the appellants as follows:

- i. *A declaration that the use of lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly*

necessary to protect life or prevent serious injury from an imminent threat; that the intentional taking of life by police officers is permissible only if it is strictly necessary to protect life from an imminent threat and that the use of lethal force against Arshad Sharif by shooting him on the head was arbitrary, unproportionate, unlawful and unconstitutional.

- ii. A declaration that the unlawful shooting to death of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on October 23, 2022 violated his right to life under Article 26 of the Constitution; right to equal benefits and protection of the law under Article 27 of the Constitution; right to dignity under Article 28 and right to security of the person under Article 29 of the Constitution.*
- iii. A declaration that the appellants are entitled to effective remedies as guaranteed by Article 23 of the Constitution; Article 2(3) of the ICCPR; Article 14 of CAT and Article 7(1) of the Banjul Charter for the violations of Arshad Sharif's fundamental rights and freedoms through the unlawful and admitted shooting of Arshad Sharif by the Kenyan Police officers at Kajiado County on October 23, 2022.*
- iv. A declaration that failure to conclude the conduct of independent, prompt and effective investigations and to take appropriate action including prosecution of the perpetrators of the fatal shooting of Arshad Sharif, if found culpable, further violates the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21(1) of the Constitution, Article 6 and 7 of CAT; Article 2 and 7 of the ICCPR.*
- v. A declaration that Article 244(a) and 246(3) of the Constitution commands the respondents to take appropriate actions, including to punish and prosecute police officers who killed Arshad Sharif, if found culpable. Consequently, a mandatory order compelling the respondents to conclude investigating, take appropriate action*

including disciplinary action and prosecution of the police officers who shot and killed Arshad Sharif at Kajiado County Kenya on October 23, 2022.

- vi. An order compelling the respondents to supply the appellants with the update of the status of the investigations and the recommendations the respondents, especially the 2nd and the 3rd respondents, had arrived at in regard to the appropriate action to be taken at the conclusion of the investigations.*
- vii. Judgment in favour of the 1st appellant against the respondents jointly and severally for a global sum of Kshs 10,000,000/= by way of general damages, which sum shall attract interest at court rates from the date of filing this Petition until payment in full.*
Costs of this Petition.

ii. Proceedings before the Court of Appeal

[16] Aggrieved by the decision of the High Court, the 2nd respondent, on one hand, moved the Court of Appeal vide **Civil Appeal No. E082 of 2024**, seeking that *the appeal be allowed; the Judgment, decree and orders of the High Court be set aside; and the costs of the appeal.* The appeal was premised on twelve grounds of appeal in its Memorandum of Appeal, that the learned Judge erred in:

- i. Failing to find that the 2nd respondent conducted independent investigations into the shooting of Arshad in accordance with its mandate and satisfied the requirements for independent, prompt, effective and accountable investigations;*
- ii. Finding the 2nd respondent liable for alleged violations of constitutional rights and fundamental freedoms by officers despite the officers not being under the command and control or employment of the 2nd respondent;*
- iii. Finding that the respondent had failed to discharge the burden of proof;*

- iv. *Finding that the 2nd respondent was liable for the failure to act on the outcome of its investigations by punishing the police officers through initiating prosecutions or disciplinary action, despite the 2nd respondent's lack of prosecutorial mandate in law;*
- v. *Making blanket findings of constitutional violations against the respondents without considering their separate constitutional mandate in the circumstances of the matter;*
- vi. *Failing to take into consideration the 2nd respondent's pleadings, submissions and evidence in arriving at its conclusion;*
- vii. *Failing to find that the disclosure of information related to the investigations sought by the 1st appellant was exempted/limited in law;*
- viii. *Issuing mandatory orders requiring the 2nd and 3rd respondents to provide the 1st appellant with an update on the status of the investigations and recommendations arrived at without considering that the matter was under consideration by the 3rd respondent;*
- ix. *Issuing orders requiring the 2nd respondent to conclude investigations despite clear uncontroverted evidence that the 2nd respondent had concluded the investigations and forwarded the files to the 3rd respondent;*
- x. *Granting damages against the respondents jointly and severally without considering the particular mandate of each of them; and*
- xi. *Awarding the 1st appellant exaggerated and exorbitant general damages of Kshs. 10,000,000.00 without any factual or legal basis.*

[17] The appellants on the other hand filed a notice of cross-appeal seeking to partially set aside the trial court judgment on the grounds that the learned Judge erred in awarding an inordinately low amount in damages which failed to redress the admitted shooting of the deceased; declining to grant the additional reliefs appropriate to redress the violations, address systematic violations disclosed and deter future violations; declining to direct the respondents to issue a public apology

to the victim's relatives, including acknowledgement of the facts and acceptance of responsibility. They sought the following reliefs:

- i. *The appeal be dismissed, and the cross appeal be allowed;*
- ii. *Enhancement of the damages awarded to the 1st appellant;*
- iii. *A declaration that Articles 244(a) and 246(3) of the Constitution obligate the respondents to punish and prosecute police officers who killed Arshad;*
- iv. *Mandatory orders compelling the respondents to conclude the investigations, take disciplinary action and charge in court the two police officers who shot and killed Arshad;*
- v. *An order compelling the respondents to supply the 1st appellant with copies of documents, files, reports and letters in their custody relating to the shooting of Arshad;*
- vi. *Order directing the 1st respondent to issue a public apology, acknowledging the facts and accepting the responsibility to the family of the deceased within 7 days of the Court's Order.*

[18] Similarly, the 3rd respondent filed a notice of cross-appeal seeking to set aside the entire Judgment and declarations by the trial court and costs. The cross appeal was premised on the following grounds that the learned Judge erred in:

- i. *Failing to appreciate that the constitutional and statutory responsibility, including on the decision to initiate, take over or discontinue any criminal proceedings rests on the 3rd respondent;*
- ii. *Failing to appreciate that in the exercise of the prosecutorial powers under Article 157 of the Constitution, the principle of the independence is guaranteed to ensure that the 3rd respondent exercises the powers in due regard to public interest, administration of justice and prevention of the abuse of the legal process;*

- iii. *Failing to appreciate that the 3rd respondent can only reasonably exercise its constitutional mandate to charge if it is presented with a complete investigation file;*
- iv. *In arriving at a decision not supported by evidence that the 3rd respondent failed to act promptly, independently and with impartiality;*
- v. *Holding the 3rd respondent liable for acts and omissions which were beyond its mandate and responsibilities;*
- vi. *Failing to appreciate that the 1st appellant did not present any evidence on the acts or omissions on the part of the 3rd respondent or the resultant infringement to hold the 3rd respondent accountable or liable; and*
- vii. *In awarding exorbitant general damages without any factual or legal justification.*

[19] In a Judgment delivered on 31st July 2025, the Court of Appeal (*Musinga (P), M. Ngugi & Tuiyott JJ. A*) partially allowed the appeal by the 2nd respondent and cross appeal by the appellants; dismissed the cross appeal by the 3rd respondent for being filed out of time; and directed each party to bear its costs. In its determination on the issue whether the trial court erred in finding that the respondents had violated the deceased's constitutional rights, the Court of Appeal held that it was undisputed from the record, pleadings and submissions that the deceased met his death at the hands of police officers and as such, the deceased's right to life under Article 26 of the Constitution, Article 6 of the ICCPR and Article 4 of the Banjul Charter, had been violated. On *whether the deceased had been subjected to torture, cruel, inhuman, and degrading treatment violating his rights under Article 29 of the Constitution*, the Court of Appeal observed that there was no evidence that the deceased had been subjected to severe pain or suffering, whether physical or mental prior to his death.

[20] On whether the 2nd respondent was jointly or severally liable for the action of the police officers who shot the deceased, the Court of Appeal observed that Article 245 of the Constitution and Sections 8 and 8A of the National Police Service Act, Cap 11A, vests the command of the National Police Service in the Inspector General of Police. Further, the National Police Service Commission is mandated under Article 246 (3)(a) and (b) of the Constitution to recruit and discipline members of the National Police Service. Guided by these provisions, the court concluded that the violation of the deceased's right to life through the fatal shooting by police officers could not be directly or vicariously attributed to the 2nd respondent. The learned Judges determined that the 2nd respondent had performed its functions and mandate in accordance with Sections 6, 7 and 29 of the Independent Policing Oversight Authority Act No. 35 of 2011. For these reasons, the Court of Appeal found that the 2nd respondent had exhausted its mandates and could not be held liable for the failures, omissions, and inaction of the other respondents.

[21] On whether the trial court erred in issuing blanket orders against the 2nd respondent together with the other respondents and in holding them jointly and severally liable for violation of the deceased's rights, the Court of Appeal considered Sections 6, 7, and 29 of the Independent Policing Oversight Authority Act (IPOA Act) against the facts on the record and noted that IPOA had on its own motion, performed its mandate as it investigated the killing of the deceased and forwarded the inquiry file to the Office of the DPP by 26th January 2023, about three (3) months after the fatal shooting. The DPP required IPOA to address investigative gaps, which it did, and returned the file on 29th May 2023. The court held that, having investigated the matter and sent the inquiry file to the 3rd respondent, the 2nd respondent had exercised its statutory mandate. Accordingly, the trial court erred by issuing blanket orders against the respondents for failing to carry out prompt and independent investigations into the fatal shooting of the deceased.

[22] On whether the trial court erred in issuing mandatory orders against the respondents, the court held that the trial court, having set out the respective mandates of the respondents, did not interrogate the alleged violations against the respective respondents. To this end, the court reasoned that an analysis of the different roles and responsibilities of the 2nd respondent, compared with those of other respondent state entities, was paramount and had bearing on the issue of damages awarded by the trial court. Consequently, the appellate court found that, contrary to the trial court's finding, the 2nd respondent conducted investigations and made recommendations in line with its mandate, but lacked the authority to prosecute or impose disciplinary action against the police officers involved.

[23] On the question of damages, the Judges noted that the orders granted by the trial court were discretionary in nature. Further, the High Court did not consider any irrelevant factor, ignore relevant consideration, or give an amount so inordinately low or high as to be a wholly erroneous estimate of the damages, to warrant interference in the exercise of the discretionary powers. In the end, the court upheld the damages awarded to the 1st appellant.

[24] On the cross appeal by the appellants, the appellate court held that the 2nd respondent had exercised its mandate diligently and the onus lay on the 3rd respondent to exercise its mandate under Article 157 of the Constitution to determine whether or not to prefer charges against any suspects. However, the learned Judges found that the 2nd respondent failed in its statutory duty to give information to the 1st appellant. The court reasoned in that regard that the 2nd respondent had a duty to give the 1st appellant information relating to the investigations into the death of her husband, particularly in view of the provisions of Sections 6(a) and 7(1)(c) of the IPOA Act. That finding notwithstanding, the court determined that this inaction was in breach of the 2nd respondent's statutory mandate and not in breach of the right to information under Article 35 of the Constitution. It therefore directed the 2nd respondent to give the appellants an update of the investigations into the death of the deceased within 30 days of the

judgment. Regarding the request for an apology, the appellate court declined to direct the 1st respondent to issue a public apology, an acknowledgement of the facts or acceptance of responsibility, for the reason that it was not an order for the court to issue at the stage of the investigations and pending decision whether to prosecute or not.

iii. Proceedings before the Supreme Court

[25] Dissatisfied with the Court of Appeal Judgment, the appellants filed this appeal premised on the grounds that the learned Judges erred in law by:

- i. *Dismissing suo motu the claim for torture and cruel, degrading and inhuman treatment under Article 29 of the Constitution;*
- ii. *Conflating the state's civil responsibility with individual culpability, hence wrongly declining, despite the admitted killing of the deceased, to order the 1st respondent to acknowledge the facts and to issue an apology for reasons that the 3rd respondent had yet to establish the facts in a criminal trial;*
- iii. *Absolving the 2nd respondent of all blame despite the evidence on record that the 2nd respondent had failed in its constitutional mandate to update the appellants on the status of the investigations and had failed to recommend any disciplinary action against the two police officers who had fatally shot Arshad;*
- iv. *Declining to order the 3rd respondent to conclude investigations, take disciplinary action or charge in court the two police officers who fatally shot Arshad; and*
- v. *Declining to enhance the compensation of Kshs 10,000,000.00 awarded for the admitted wrongful killing of Arshad in line with the comparable precedent from this Court.*

[26] The appellants consequently seek the following reliefs:

- i. *The petition be allowed with costs;*
- ii. *The judgment of the Court of Appeal in Civil Appeal partially allowing the appeal and dismissing the cross appeal be set aside;*
- iii. *A declaration that the unlawful killing of Arshad Sharif by the Kenyan police officers at Kajiado County, Kenya on October 23, 2022 violated his right to life under Article 26 of the Constitution; right to equal benefits and protection of the law under Article 27 of the Constitution; right to equal benefit and protection of the law under Article 27; right to dignity under Article 28 and right to security of the person under Article 29 of the Constitution;*
- iv. *A declaration that failure to conclude the conduct of independent, prompt and effective investigations and to commence prosecution of the killing of Arshad Sharif, by the Kenya Police officers, further violates the positive obligation to investigate and prosecute violations of the right to life, torture, inhuman and degrading treatment under Article 21(1) of the Constitution, Articles 6 and 7 of CAT; Articles 2 and 7 of the ICCPR;*
- v. *A declaration that Articles 244(a) and 246(3) of the Constitution command the respondents (according to their mandates) to discipline and prosecute police officers who killed Arshad Sharif. A mandatory order compelling the respondents, in accordance with their respective mandates, to conclude the investigation, take disciplinary action against, and charge in court the police officers who shot and killed Arshad Sharif at Kajiado County, Kenya, on October 23, 2022;*
- vi. *A declaration that the appellants are entitled to effective remedies as guaranteed by Article 23 of the Constitution; Article 2(3) of the ICCPR;*

Article 14 of CAT and Article 7(1) of the Banjul Charter for the violations of Arshad Sharif's fundamental rights and freedoms through the unlawful admitted killing of Arshad Sharif by the Kenyan Police officers at Kajiado County on October 23, 2022.

- vii. An order directing the 1st respondent to within 7 days of this Court's orders, to issue a public apology and an acknowledgement of the facts to the family of Arshad Sharif;*
- viii. An order compelling the respondents to supply the 1st appellant copies of all documents, files, reports, letters, electronic mail or evidence in any medium, including but not limited to films, photographs, videotapes, in their custody, concerning the shooting in question;*
- ix. The damages be enhanced; and*
- x. No orders for costs on grounds of public interest or an order for costs against the respondents to deter future violations.*

[27] In response, the 1st and 4th respondents filed grounds of objection dated 14th November 2025, urging that the orders inviting the Court to compel the 3rd respondent to institute criminal charges offend Article 157(10) of the Constitution; orders seeking to compel the 4th respondent, to conclude investigations and discipline the police contravenes the provisions of Articles 244 (a) and 246(3) of the Constitution; the Court of Appeal's directive compelling the respondents to provide information under Article 35 (1) of the Constitution is untenable, as the right to access information is limited to citizens; even if the 1st appellant was entitled to information under Article 35, it could not be disclosed due to the provisions of Section 6(1)(a) as read with 6(2)(g) of the Access to Information Act CAP 7M; the appellants have not shown sufficient grounds for this Court to interfere with the award of damages; and the award of compensation for the alleged violations is sufficient to vindicate the 1st appellant and therefore, there is no justification to compel the 1st respondent to issue a public apology.

[28] Similarly, the 2nd respondent filed grounds of opposition dated 28th September 2025 and a replying affidavit sworn by *Ms. Maureen Wangari*, its Senior Assistant Director, Legal Services, on 29th September 2025. The grounds are that: the appeal lacks merit in its entirety; the claim for torture, inhuman and degrading treatment under Article 29 of the Constitution was a subject of appeal and the Court of Appeal had jurisdiction to appraise it; the Court of Appeal did not absolve the 2nd respondent from all liability, but found it in breach of the statutory duty to update the 1st appellant on the status of the investigations and issued an appropriate relief to remedy the violation; the appeal introduces new claims, new issues, and seeks new reliefs not pleaded in the superior courts below; the appeal invites the Supreme Court to usurp the powers of the respondents, which are independent institutions; the appeal invites the Court to make blanket findings in disregard of the respondents respective constitutional and statutory mandate; the appeal conflates human rights claims against the state at the international law level against individual agencies.

[29] In its replying affidavit, the 2nd respondent reiterates its grounds of opposition and further contends, in support of the same that the appellants had made allegations of violation of the deceased's freedom against torture, cruel, inhuman or degrading treatment under Article 29 of the Constitution, which the trial court determined positively; the appellants had submitted on the same before the Court of Appeal; and consequently the Court of Appeal had jurisdiction under Rule 31(1)(a) of the Court of Appeal Rules. It also averred that there was no conflation of civil liability and criminal culpability, as the investigations, the review, and the decision whether to prosecute were still underway. Therefore, requiring the 1st respondent to issue an apology and admission of the facts was premature, especially as it would result in state responsibility at the international level. Moreover, the 2nd respondent argues that the allegations that the failure to issue information on the status of the investigation violated the 1st appellant's

rights under Articles 221(3), 26 and 27 of the Constitution impermissibly raise new claims not canvassed before the trial court or in the first appeal.

[30] The 3rd respondent filed a replying affidavit sworn by *Ms. Becky Arunga*, a prosecution counsel, on 23rd October, 2025 to the effect that: the Court of Appeal was correct in finding that the killing of the deceased did not amount to an act of torture, cruel inhuman or degrading treatment under the provisions of CAT; that the state prosecutorial powers are discretionary and a court of law cannot compel the manner in which the 3rd respondent exercises the powers pursuant to Article 157(10) of the Constitution; the 3rd respondent does not investigate but only directs investigations; the 1st appellant being a foreigner is not automatically entitled to information under Article 35 and the Access to Information Act; and the appellants claims for violations of their constitutional rights is not supported by evidence and are therefore for dismissal.

[31] The 5th respondent filed a replying affidavit sworn by *Mr. Peter Leley*, its Chief Executive Officer, on 9th October 2025, contending that the Court of Appeal acted within its jurisdiction in appraising the claim of torture under Article 29 of the Constitution. It is its case that any claim to the contrary is unfounded, misconceived and contrary to the pleadings by the parties. It was the 5th respondent's further argument that it has powers under Article 246(3)(b) of the Constitution to exercise disciplinary control over members of the police service, however, under Section 10(1)(g) of the National Police Service Commission Act, such control is only exercisable upon the establishment of the facts and not when the same is under active investigations.

[32] The appellants filed a rejoinder dated 17th December 2025, wherein they reiterate the arguments and further contend that they had pleaded violations of Articles 26 and 47 of the Constitution by the 2nd respondent's failure to give the 1st appellant a status update on the investigations before the trial court, and this issue was canvassed before the Court of Appeal. It is the appellants' rejoinder that the

2nd respondent's violations breached the positive obligations to protect, promote and fulfil the rights under the Bill of Rights, including the right to life. They cite the Court of Appeal's decision in ***Sharma Vs Attorney General*** [2025] KECA 1470 (KLR), to the effect that the state's duty to uphold the right to life included the positive obligation to investigate suspicious deaths and pursue accountability.

[33] Therefore, contrary to the case by the 2nd respondent, the appellants contend that the disclosure of investigative material during the pendency of the investigations is a fundamental component of the right to life. Moreover, there is a nexus between the *ex post failure* to provide the status of the investigations and the unlawful killing of the deceased. They rely on the international jurisprudence in the cases of ***Association 21 December 1989 Vs Romania*** (Application No. 33810/07); and ***Ogur Vs Turkey*** (Application No. 21594/93). On access to information, the appellants urge that the victim's right of access to information is implicit in the positive obligation to protect the right of life under Article 26 of the Constitution. In any event, they urge that a court of law is a state office within Article 21(3) obligations, pleaded or not.

[34] As regards the 3rd respondent's claim that it is independent and has absolute discretion, the appellants respond that the 3rd respondent's actions do not give public confidence in its decision-making and raise fears of a criminal cover-up. In response to the 5th respondent's claims that police officers facing grave criminal charges have immunity from internal disciplinary proceedings, the appellants state that such officers must be removed from any position of control or power, whether direct or indirect.

D. THE PARTIES' SUBMISSIONS

i. Appellants' submissions

[35] The appellants' submissions are dated 12th November 2025 and filed on 13th November 2025, premised on five issues. On *whether the Court of Appeal*

determined unpleaded issues, they argue that the appellate court determined and overturned the trial court's finding that the respondents had violated deceased's freedom against torture, cruel, inhuman and degrading treatment under Article 29 of the Constitution *suo motu*. They cite this Court's finding in ***Odinga & another Vs Independent Electoral and Boundaries Commission & 2 others*** [2017] KESC 31 (KLR); and the Court of Appeal decision in ***Independent Electoral and Boundaries Commission & another Vs Mule & 3 others*** [2014] KECA 890 (KLR) to the effect that it is undesirable, impermissible and a miscarriage of justice for a court to frame issues outside the pleadings by the parties before it.

[36] On the issue *whether the Court of Appeal misinterpreted Article 29 of the Constitution* on torture inhuman and degrading treatment, the appellants urge that the appellate court applied limitations outside the essential elements settled by this Court in ***Wamwere & 5 others Vs Attorney General*** [2023] KESC 3(KLR) to wit, infliction of severe mental or physical pain or suffering, and for a specific purpose, such as gaining information, punishment or intimidation. To this end, they contend that police officers, while pursuing a stolen vehicle shot and killed the deceased, for an act he or a third party was suspected of committing, causing severe pain and suffering contrary to Articles 29(c) and (f) of the Constitution, 16 of CAT and General Comment No. 2, Article 5 of the Universal Declaration of Human Rights, Articles 3, 4 and 5 of the African Charter on Human and People's Rights (***ACHPR***) and Article 7 of the ICCPR and General Comment No. 20. In any event, the appellants argue that even if the killing did not rise to torture, it undoubtedly was cruel, degrading and inhuman treatment. Reliance is placed on ***Wamwere & 5 others Vs Attorney General*** [*Supra*] in arguing that cruel and inhuman or degrading treatment or punishment requires a lesser threshold than severe pain or suffering, and both terms cover mental and physical ill-treatment.

[37] On the definition of inhuman treatment, the appellants sought to persuade the Court to adopt the definitions in: ***Leonard Mutua Munyao & another Vs Attorney General & another*** [2014] KEHC 5728 (KLR) that, ‘*inhuman treatment is physical or mental cruelty so severe that it endangers life or health*’; ***Samuel Rukenya Mbura Vs Castle Brewing Kenya Limited & another*** [2006] KEHC 2316(KLR) that, ‘*inhuman treatment is an action that is barbarous, brutal and cruel while degrading punishment is that which brings a person in dishonor or contempt*’; ***Harun Thugu Wakaba Vs Attorney General*** [2010] KEHC 2226 (KLR) that, ‘*a physical or mental cruelty so severe that it endangers life or health*’. Consequently, they submit that the actions by the police officers in fatally shooting a man who had fled his country to preserve his life satisfied the definitions of inhumane treatment set out above.

[38] On *whether the Court of Appeal conflated the state’s civil liability with individual criminal liability*, the appellants submit that by declining the order requiring the 1st respondent to issue a public apology, an acknowledgement of the facts, and an acceptance of responsibility to the family of the deceased, the court violated Kenya’s international human rights obligations. They rely on the *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, 2019*, particularly paragraphs 17 and 21; paragraph 37 of the *ILC Draft Articles of Responsibility of States for Internationally Wrongful Acts*; paragraph 16 of the *General Comment No. 3 2012 of CAT Implementation of Article 14 by States Parties*; paragraph 22 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which provides that a public apology is one of the reparations in the four limbs of transitional justice.

[39] They also cite the case of ***the Massacres of El Mozote and nearby places Vs El Salvador, Judgment (Merits, Reparations and Costs), 25 October 2012***, which set out the necessary criteria for a public apology. They

invite the Court to develop the law on apologies within the Kenyan human rights jurisprudence along the lines of the decision in ***Massacres of El Mozote and nearby places [Supra]***. In sum, the appellants fault the Court of Appeal for declining to direct the 1st respondent to issue a public apology for the admitted killing of the deceased.

[40] On *whether the Court of Appeal absolved the 2nd respondent of all blame*, the appellants assert that the Court of Appeal erred in absolving the 2nd respondent of all blame despite finding that it had failed to update the appellants on the status of the investigations. It is their case that once the appellate court found that the 2nd respondent failed its statutory duty to update the 1st appellant on the status of the investigations, it had violated her right to fair administrative action under Article 47 of the Constitution. Further, that the 2nd respondent violated the 1st appellant's rights by failing to recommend disciplinary action against the police officer who shot the deceased, contrary to Sections 5, 6 and 29(1)(b) of the IPOA Act.

[41] Moreover, the appellants argue that the 2nd respondent, in declining to disclose relevant details about the investigations, breached the duty to be transparent to the victim under paragraph 28 of the *General Comment No. 3*, Article 6 (on the right to life); paragraph 16 of *General Comment No. 3, 2012 CAT*; and paragraph 24 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. For these reasons, they argue that the 2nd respondent was as culpable as the other respondents for violating the deceased's right to life. They insist that, contrary to the respondents' arguments, the appellant did not plead a violation of the 1st appellant's right of access to information under Article 35 of the Constitution.

[42] Regarding the question as to *whether the Court of Appeal wrongly declined to compel the DPP to indict the police officers* who shot and killed the deceased, citing its independence under Article 157 of the Constitution, the appellants submit

that the appellate court's finding excused the 3rd respondent of this violation. They contend that the failure to prosecute was a violation of the deceased's right to life, contrary to Articles 21(1) and 26 of the Constitution, Article 6 of the ICCPR and paragraph 7 of the General Comment No. 3 of ACHPR. It is also their case that these provisions envision a duty to investigate violations of the right to life effectively, promptly, thoroughly and impartially and where appropriate, taking the appropriate action against those responsible.

[43] Consequently, the appellants submit that although the 3rd respondent is not bound by any direction, control or recommendation made by any institution or body, being an independent public office, where it is shown that the expectations of Article 157(11) of the Constitution have not been met, the High Court under Article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. They rely on this Court's decision in ***Jirongo Vs Soy Developers Ltd & 9 others*** [2021] KESC 32; and ***Saisi & 7 others Vs Director of Public Prosecutions & 2 others*** [2023] KESC 6 (KLR). Furthermore, the appellants contend that the 3rd respondent cannot enjoy absolute discretion and insulation from the reach of Article 165(3) of the Constitution. Reliance is placed on this Court's decision in ***Kenya Vision 2030 Delivery Board Vs Commission on Administrative Justice & 2 others*** [2021] KESC 35 (KLR). For these reasons, the appellants contend that the circumstances of this appeal warrant an order directing the 3rd respondent to act on the 2nd respondent's recommendation to prosecute the police officers implicated in the fatal shooting of the deceased.

[44] On damages, the appellants submit that the Court of Appeal disregarded this Court's directions in ***Export Processing Zone Authority & 10 others Vs National Environment Management Authority & 3 others*** [2014] KESC 75 (KLR) to the effect that in the assessment of damages in constitutional violations, the court must take a broader approach to the assessment of damages. Therefore, they urge the Court to enhance the damages awarded to the 1st appellant

beyond Kshs. 10,000,000/= to vindicate her and deter future violations. They rely on this Court's jurisprudence in ***Imanyara & 2 Others Vs Attorney General*** [2022] KESC 78 (KLR), in which this Court awarded damages to the victims of torture and related violations between Kshs 25,000,000/= and 15,000,000/=; ***Kariuki Vs Attorney General*** [2014] KECA 713 (KLR), where the Court awarded the victim Kshs 22,965,460.00/=; and ***Edward Akong'o Oyugi & 2 others Vs Attorney General*** [2019] KEHC 10211 (KLR). where the Court awarded Kshs 20,000,000.00/=.

ii. 1st and 4th Respondents Submissions

[45] The 1st and 4th respondents rely on their submissions dated 18th December 2025 and filed on 23rd December 2025. On *whether a court can compel the 3rd and 4th respondents to investigate and prosecute, respectively*, the 1st respondent submits that the 4th and 3rd respondents exercise independent powers in accordance with Articles 157(10) and 245 (2)(b) of the Constitution, respectively, and that no person or office can give directions on their exercise of the constitutional powers. The 1st and 4th respondents contend that the prayers to compel the 4th respondent to discipline the police officers or to compel the 3rd respondent to initiate the prosecution of the officer or officers involved in the killing of the deceased are in contravention of the Constitution. It is submitted that the High Court would have jurisdiction under Article 165 only to determine the validity of any decision to investigate or prosecute, by way of a constitutional reference or judicial review orders.

[46] They urge the Court not to interfere with the constitutional mandate of independent offices unless cogent reasons are given. In support, they rely on the High Court decisions in ***Republic Vs Commissioner of Police exparte Michael Monari & another*** [2012] KEHC 4595 (KLR); and ***Musyoki Kimanthi Vs Inspector General of Police & 2 others*** [2014] KEHC 5729 (KLR). Further, they rely on the decision by the Court of Appeal

in ***Meixner & another Vs Attorney General*** [2005] KECA 292 (KLR), determined that it is not the duty of the court to determine the sufficiency of evidence to prefer charges.

[47] As to *whether the 1st appellant was entitled to the right to access information*, the 1st and 4th respondents contend that the 1st appellant is a foreigner and the right to access information is expressly limited by the Constitution to citizens. In any event, they argue that the law on access to information was settled by this Court in ***Aluochier Vs Senate & 2 others*** [2025] KESC 59 (KLR), where it was held that information should flow from the custodian of such information, and that citizens should follow the prescribed procedure in the Access to Information Act, whenever they require information held by the state. The 1st and 4th respondents argue that this Court should compel the appellants to comply with the established procedures. Importantly, the respondents submit that the 2nd respondent has since complied with the Court of Appeal's directions and supplied information on the status of investigations to the 1st appellant.

[48] On *whether this Court should interfere with the award of damages*, the 1st and 4th respondents assert that appellants have not advanced any compelling grounds to warrant the Court's review and enhancement of damages. Particularly, the appellants have not demonstrated how the trial court misdirected itself in law; misapprehended the facts; considered irrelevant considerations; or that the award, albeit discretionary, is plainly wrong. They urge the Court to be persuaded by the decision of the Supreme Court of Canada in ***Vancouver (City) Vs Ward***, 2010 SCC 27, [2010]2 S.C.R 28; and the Constitutional Court of South Africa case in ***Dendy Vs University of Witwatersrand, Johannesburg & others***, [2007] 3 All SA 1 (SCA) that an award of damages is discretionary and cannot be interfered with in a whim. Further, it is their case that the damages awarded by the trial court are just and appropriate in the circumstances of this case. They cite ***Doucet-Boudreau Vs Nova Scotia (Minister of Education)*** 2003 SCC 62 to urge that the remedy awarded meaningfully vindicated the rights and freedoms

of the victim, is legitimate within a constitutional democracy, and is judicial and fair to both parties.

iii. 2nd Respondent's submissions

[49] The 2nd respondent's submissions opposing the appeal are dated 11th December 2025 and filed on 16th December 2025. On *whether the Court of Appeal absolved the 2nd respondent of all blame*, it is urged that the Court of Appeal found that the 2nd respondent had failed to provide the 1st appellant with a status update on its investigations, in breach of its statutory mandate. Further, the appellate court issued an appropriate remedy by directing the 2nd respondent to provide the appellant with an update on its investigations, its recommendations and responses from the 3rd respondent. Citing *Imanyara* [supra], the respondent contends that the award of appropriate reliefs is discretionary and the award of damages is not mandatory for all constitutional violations. Consequently, it is the 2nd respondent's case that an order for correction of a violation, as was directed by the Court of Appeal, is a sufficient remedy under Article 23(3) of the Constitution.

[50] On *whether the appellants have introduced new issues* before this Court, the 2nd respondent submits that the appellants did not prefer a claim for the violation of Article 21(3) of the Constitution before the trial court, but only introduced it before the Court of Appeal. It asserts that parties are bound by their pleadings, and the appellants, therefore, cannot make claims outside their initial pleadings. It cites *Osebe Vs IEBC & 2 others* [2019] KESC 56(KLR); *Odinga & another Vs IEBC [supra]*; and *Simon P. Kamau & 19 Others Vs Teachers Service Commission* [2015] KEHC 5983 (KLR) to argue that taking up novel issues at a second appellate stage, which have not been adjudicated upon by the superior courts below, amounts to assuming the jurisdictional mandate of other courts below.

[51] On *whether the Court of Appeal properly exercised its appellate mandate in reappraising the record*, the 2nd respondent submits that the appellate court was well within its jurisdiction under Section 3(2) of the Appellate Jurisdiction Act and

Rule 31 of the Court of Appeal Rules. The respondent relies on the persuasive decisions of ***Bethwel Wilson Kibor Vs Republic*** [2009] KECA 143 (KLR) and ***Gitobu Imanyara & 2 Others Vs Attorney General*** [2006] KECA 557 (KLR) to buttress the principle that, being a first appeal, it is trite law, that the court must re-evaluate the evidence and make its own findings or draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses and should make due allowances in that respect.

[52] On *whether the Court of Appeal correctly refrained from ordering the 3rd respondent to charge the perpetrators*, the respondent submits that this ground is wholly devoid of merit and a misapprehension of the constitutional architecture governing criminal investigations, disciplinary authority over police officers, and prosecutorial independence. It urges that Article 157 of the Constitution vests the 3rd respondent with the authority to exercise prosecutorial powers, which consist of the decisions to institute, take over, continue, or discontinue criminal proceedings. The 2nd respondent submits that the Court of Appeal appraised itself with the constitutional mandates, powers, and responsibilities of the respondents and acted within the permissible intrusion by the Judiciary.

[53] On *the award of damages*, the 2nd respondent submits that the Court of Appeal applied sound principles of appellate review in quantum when it considered the materials before it and reached a reasoned conclusion. It submits that the appellants have not met the high threshold required to displace the trial court's discretionary assessment of damages, as affirmed by the Court of Appeal.

iv. The 3rd Respondent's submissions

[54] The 3rd respondent filed its written submissions dated 8th December 2025 on 9th December 2025. On *whether the Court of Appeal overturned the trial court findings outside the pleadings*, the 3rd respondent submits that the Court of Appeal is mandated to re-evaluate the evidence on record and come to its own conclusion in line with the decision in ***Selle Vs Associated Motor Boat Co.*** [1968] EA

123. Therefore, the appellate court in considering the totality of the alleged violations was bound to re-evaluate the entire evidence. Consequently, the respondents submit that the Court of Appeal was well within its jurisdiction to determine that the act of killing the deceased did not rise to torture under Article 29 of the Constitution, but was a violation of Article 26 on the right to life. They further urged that the alleged violations of Article 29 lacked factual basis and that there is no evidence adduced to the effect that the fatal shooting was meant to punish, intimidate, coerce or obtain a confession from him.

[55] On *whether a court can compel the 3rd respondent to prosecute*, it is submitted that to safeguard the independence of the 3rd respondent in state prosecutions, the Constitution bars any person from directing or controlling the 3rd respondent in the exercise of this duty. More particularly, prosecutorial powers are discretionary and do not entail undertaking investigations. The respondent relies on the decision of this Court in ***Republic Vs Mohammed & another*** [2018] KESC 51 (KLR). The 3rd respondent further contends that the principle of separation of powers requires courts to accord deference to other constitutional bodies by allowing them to execute their constitutional mandate unless they violate the Constitution. To this end, citing the Court of Appeal decision in ***Mumo Matemu Vs Trusted Society of Human Rights Alliance & 4 others*** [2013] KECA 445 (KLR), the 3rd respondent contends that the doctrine of separation of powers is a feature of constitutional design and a pre-commitment in the Kenyan Constitution. For these reasons, it is submitted that this Court cannot direct the 3rd respondent in the manner of the execution of its constitutional mandate, but can only make declarations against its actions that contravene the Constitution.

[56] On the *issue of award of damages*, the 3rd respondent submits that it is an established principle that violations of fundamental rights must be remedied. However, it argues that the award of damages must be premised on reason and principle. Further, the 1st appellant has not advanced any reason to warrant the enhancement of the damages awarded by the trial court. It distinguishes this

Court's jurisprudence, relied on by the appellants and urges that none of the decisions relied on arose from an accidental fatal shooting due to mistaken identity.

v. The 5th Respondent's written submissions

[57] The 5th respondent's submissions opposing the appeal are dated 22nd December 2025 and filed on 4th March 2026. On the *issue of the 5th respondent's vicarious liability for the police officers' actions*, the 5th respondent submits that under Article 245 of the Constitution and Sections 8 & 8A of the National Police Service Act, the Inspector-General exercises command, administration, control, and management of the National Police Service. Further, under Section 51 of the said Act, police officers must obey and execute all lawful orders from their superiors in the service.

[58] According to the 5th respondent, this obligation underscores the extent of control or supervision exercised by the Inspector General over police officers' actions in the field. The 5th respondent submits that, although it is the employer, it does not exercise day-to-day control or operational supervision over the police, thereby precluding vicarious liability for acts committed in the course of police operations. Therefore, it is this respondent's case that such vicarious liability follows supervision, authority and command. To support this submission, the 5th respondent relies on the High Court decision of ***Anyanzwa & 2 others Vs Luigi De Casper & another*** [1981] KLR 10; and the English cases of ***Broom Vs Morgan*** [1953] 1 QB 597; ***Trustee of the Barry Congregation of Jehovah's Witnesses Vs BXB*** [2023] UKSC 15.

[59] On the *award of damages*, the 5th respondent submits that, in constitutional litigation, damages must be assessed based on the respondents' distinct constitutional mandates and the proven violations attributable to each state organ. They submit that a blanket or umbrella award, imposed jointly and without apportionment, disregards the constitutional and statutory architecture that

differentiates functions and responsibilities among state organs. Moreover, the 5th respondent states that the Court of Appeal, having applied the correct principles in declining to interfere with the trial court's finding, no basis exists for any interference on the award of damages at a second appellate stage. Moreover, the appellants' argument that this Court has awarded higher damages in other related matters is not a sufficient ground to warrant interference with the trial court's award.

E. ISSUES FOR DETERMINATION

[60] Having carefully considered the grounds of appeal, the submissions of the parties, and the authorities cited in support thereof, we have identified, the following four issues whose determination should be dispositive of this appeal.

- a) Whether there was a violation of the deceased's fundamental rights and freedoms.*
- b) Whether the 2nd respondent exhaustively executed its investigative mandate.*
- c) Whether this Court can compel the 3rd respondent to prosecute the officers responsible for the fatal shooting of the deceased.*
- d) Whether this Court should interfere with the award of damages by the trial court.*

F. ANALYSIS

- i. Whether there was a violation of the deceased's fundamental rights and freedoms*

[61] It is on record that on 23rd October 2022, while travelling in a vehicle registration number KDG 200M, the deceased was fatally shot by police. It is also on record that following this tragic incident, the Inspector General of Police admitted that there had been such a shooting but attributed the same, to a case of

mistaken identity. The details of the happenings of that day, are set out in paragraph 2 of this Judgment. Both the superior courts below held that the deceased's right to life had been violated by the unjustified shooting. The Court of Appeal, was more particular in this regard, as it correctly, in our respectful view, predicated the violation on Article 26 of the Constitution as read with Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of the African Charter on Human and Peoples' Rights (The Banjul Charter). The reckless shooting of the deceased, resulting in his death, was a clear violation of his right to life which is sacrosanct under our Constitution and International Law. On this, we shall say no more.

[62] However, the appellants have all along maintained that the deceased, was subjected to torture, cruel, degrading and inhuman treatment. While the trial court agreed with their assertion, the appellate court was of a different opinion. The appellants have invited us to be persuaded by the elements of torture and the definitions of inhuman treatment as pronounced by the courts. They cite this Court's decision in **Wamwere & 5 others Vs Attorney General** [2023] KESC 3(KLR). On torture, the Court stated as follows:

“Therefore, the ‘essential elements’ of what constitutes torture as can be identified from article 1 of “CAT” include:

- a) the infliction of severe mental or physical pain or suffering; and***
- b) for a specific purpose, such as gaining information, punishment or intimidation.”***

[63] With regard to inhuman treatment, the Court stated:

“We find that “inhuman or degrading punishment or treatment” refers to ill- treatment which does not have to be inflicted for a specific purpose. However, an intention to expose individuals to conditions which

amount to or result in the ill- treatment has to exist. Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Further, degrading treatment may involve less severe pain or suffering than torture; and will usually involve humiliation and debasement of the victim. The essential elements which constitute ill-treatment not amounting to torture would therefore be reduced to the intentional exposure to significant mental or physical pain or suffering.”

[64] They also urge us to be persuaded by the following pronouncements in **Leonard Mutua Munyao & another Vs Attorney General & another** [2014] KEHC 5728 (KLR) that, ‘inhuman treatment is physical or mental cruelty so severe that it endangers life or health’; **Samuel Rukenya Mbura Vs Castle Brewing Kenya Limited & another** [2006] KEHC 2316(KLR) that, ‘inhuman treatment is an action that is barbarous, brutal and cruel while degrading punishment is that which brings a person in dishonor or contempt’; and **Harun Thugu Wakaba Vs Attorney General** [2010] KEHC 2226 (KLR) that, ‘a physical or mental cruelty so severe that it endangers life or health’.

[65] We do not see how our elucidation of what entails torture, inhuman, and degrading treatment in **Wamwere** [supra], or the persuasive authorities cited above, can come to the aid of the appellants in their quest to convince us that, the shooting of the deceased subjected him to these violations. To subject someone to torture, inhuman, cruel, or degrading treatment, ordinarily presupposes that the victim, is alive and under the custody, control, or influence of his/her tormentor. Such treatment could very well cause the death of the victim, or s/he could live to tell his/her story. At any rate, one who claims to have been subjected to such treatment, has to produce evidence, usually medical or scientific, to aid the court not only in making a reasoned conclusion, but to mete out appropriate punishment

or award other suitable reliefs. Even if it can be said that the fatal shooting of the deceased subjected him to torture, cruel, inhuman, and degrading treatment, the appellants ought to have produced evidence to that effect. For example, that death was not instantaneous and the deceased was exposed to pain and suffering before succumbing to the injuries inflicted by the shooting. No such evidence was tabled before the trial court, thus prompting the Court of Appeal to decline the invitation by the appellants to find as prayed. We are in agreement with the appellate court for the foregoing reasons.

ii. Whether the 2nd respondent exhaustively executed its Investigative Mandate

[66] The appellants fault the 2nd respondent for not exhaustively carrying out its investigative duties, following the fatal shooting of the deceased by the Police. The Court of Appeal, having reappraised the evidence in line with its jurisdiction, found that the 2nd respondent had exhaustively carried out its mandate in this regard. This finding was based on the appellate court's consideration and application of the relevant provisions of the Independent Policing Oversight Authority Act to the evidence on record. However, the appellate court faulted the 2nd respondent for not having provided a Status Report to the appellants, regarding the investigations, recommendations made to the 3rd respondent, and the responses thereto by the latter. Since we sitting as the second appellate court, are in agreement with the Court of Appeal's factual findings and conclusions on this issue, the same shall rest here.

iii. Whether this Court can compel the 3rd respondent to prosecute the police officers responsible for the fatal shooting of the deceased

[67] It is the appellants' case that, although the 3rd respondent is insulated against interference by any person or authority in the exercise of his powers, where it falls short of the provisions of Article 157 (11) of the Constitution, the High Court can

intervene pursuant to Article 165 (3) (d) (ii) of the Constitution. The appellants place reliance on our decisions in **Jirongo Vs Soy Developers Ltd & 9 others** [supra] and **Saisi & 7 others Vs Director of Public Prosecutions & 2 others** [supra]. On the other hand, the 1st, 2nd and 3rd respondents submit that the 3rd respondent enjoys independence in the execution of his mandate, free from any direction or interference by any person or institution. They cite the High Court in **Monari & another Vs Commissioner of Police & another; Abubakar & another (Interested Parties)** [supra], where the court (Warsame J, as he then was) held that under Article 157(10) the Director of Public Prosecutions does not require the consent of any person or authority for commencement of criminal proceedings.

[68] Article 157 (10) of the Constitution provides:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

[69] The constitutional insulation of the Director of Public Prosecutions, against control or direction in the exercise of his/her powers in terms of when and whether to commence criminal proceedings, is unequivocal. There appears to be little or no room for manoeuvre to circumvent this independence; not even by the Supreme Court. Yet, the appellants point to Article 157 (11) of the Constitution and our decisions in **Jirongo** and **Saisi** (supra) to urge that there is indeed such room.

[70] Article 157 (11) of the Constitution provides:

“In the exercise of the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice, and the need to prevent and avoid abuse of the legal process.”

[71] In our view, the provisions of Article 157 (11) do not create room for an exception to the unequivocal insulation against control, or direction of the powers of the Director of Public Prosecutions, as to when and whether to prosecute or not. The edict seeks to ensure that the powers to prosecute as vested in the Director, do not exist for their own sake, but for the protection of the public interest, and the promotion of the administration of justice. That is why, they should not be deployed by the Director in a manner, that can lead to abuse of the legal process. Should these powers be used in a manner contrary to Article 157 (11), only then will the High Court intervene in terms of the provisions of Articles 23 and 165 (3) (d) (ii) of the Constitution. Otherwise, the insulation against control or direction of the powers of the Director as envisaged under Article 157 (10) remains intact. This is exactly what the Supreme Court held in **Jirongo** and **Saisi** [supra].

[72] The answer to the issue before us is therefore that, this Court cannot compel or direct the 3rd respondent to institute criminal proceedings against the police officers responsible for the fatal shooting of the deceased. The remedy to the appellants in this regard, lies elsewhere.

iv. Whether this Court should interfere with the award of damages by the trial court

[73] The appellants submit that the award of damages by the trial court, was underwhelming as it did not reflect the gravity of the constitutional violation complained of. They seek the enhancement of the same. Their claim for enhancement of damages did not find favour with the Court of Appeal. The appellate court held that an award of damages in such cases as this one is discretionary. As such, it could not interfere with the trial court's award as the appellants had not proven that, the court took into consideration irrelevant factors while ignoring relevant ones. In addition, the Court of Appeal was not convinced that the award was so inordinately low as to warrant interference.

[74] The appellants cite this Court's decisions in ***Export Processing Zone Authority & 10 others Vs National Environment Management Authority & 3 others*** [supra] and ***Imanyara & 2 Others Vs Attorney General*** [supra], to make their case for enhancement of damages. Their argument, put simply, is that the damages awarded in those cases were far much higher than in the instant case. In the cases cited above, this Court re-emphasized the principle that an award of general damages is discretionary. Such discretion has to be guided by various factors, such as, the nature of the breach complained of, the impact of the breach, its broader implications, among others. At the end of the day, each case has to be determined on its own merits. We note that the appellants have not placed before us, any set of facts indicating that, the trial court was not guided by the foregoing principles in arriving at the impugned award. In the circumstances, we are not persuaded that there is ground to force our interference by way of enhancement.

G. DETERMINATION

[75] Our determination of the four issues, leaves no doubt that the appeal before us, is one for dismissal. Consequently, we make the following Orders:

H. ORDERS

- i) The Appeal dated 11th September 2025 and filed on 12th September 2025 is hereby dismissed.***
- ii) Each Party shall bear its own Costs.***
- iii) The sum of Kshs. 6,000/= deposited as security be refunded to the appellants.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd Day of July, 2026.

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT
OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA