

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN NAIROBI**  
**HCCHRPET/E\_\_\_\_/2025**

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In the matter of:	Violations of Articles 1(3), 2, 3(1), 10, 19, 21(1), (3) & (4), 22, 23, 24, 25, 26, 27(1) & (2), 28, 29, 33, 37, 38, 39(1), 47, 48, 50(1) & (2), 73, 74, 75, 79, 80, 152(4), 153(4), 165(3), 238, 243, 244, 245(2), 246, 247, 258, 259 and the Third Schedule on National Oaths and Affirmations and the Oath or Solemn Affirmation of Due Execution of Office for a Cabinet Secretary
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In the matter of:	Violation of Section 8, 8A(5), 10(1)(a), (b), (c), (d), (q), 10(2), 49(4), (5) & (13), 61, 95, 132(2) and the Sixth Schedule on the conditions as to the use of force and firearms of the National Police Service Act and Regulation 16 of Chapter 47 of the National Police Service Standing Orders
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In the matter of:	Violations of Section 9(a), (b) & (g), 10, 16(1)(a) & (2), 18 & 19 of the Public Officer Ethics Act
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KATIBA INSTITUTE ..... 1ST PETITIONER  
KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER  
INDEPENDENT MEDICO-LEGAL UNIT .....3<sup>RD</sup> PETITIONER

VERSUS

ONESIMUS KIPCHUMBA MURKOMEN  
CABINET SECRETARY, MINISTRY OF  
INTERIOR & NATIONAL ADMINISTRATION ..... 1ST RESPONDENT

AND

TRANSPARENCY INTERNATIONAL ..... 1ST INTERESTED PARTY  
INTERNATIONAL COMMISSION  
OF JURISTS – KENYA (ICJ KENYA) ..... 2ND INTERESTED PARTY  
MATHARE SOCIAL JUSTICE CENTRE.....3<sup>RD</sup> INTERESTED PARTY  
INTERNATIONAL JUSTICE MISSION ..... 4TH INTERESTED PARTY

HAKI AFRICA.....5TH INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .....6TH INTERESTED PARTY

INDEPENDENT POLICING OVERSIGHT AUTHORITY .....7TH INTERESTED PARTY

## PETITION

### 1 Introduction

1. *We have told the police, anyone coming near a police station, shoot them. Anyone.'*
2. This statement was made by CS Onesimus Murkomen on 26 July, just one day after more than 10 people had died during protests in Kenya and [eight] days after a police officer shot an unarmed man in the head at point-blank range.
3. CS Murkomen was speaking to a crowd outside the Deputy County Commissioner's Office in Kikuyu constituency. CS Murkomen expressed his anger at protestors and addressed claims that police stations had been targeted during the 26 July protests. Speaking to the members of the National Police Service, he said that he would defend their conduct, *'as long as long as you've not come out of the [police] station looking for someone to kill'*.
4. As part of a continued conflation of concepts of self-defense and defense of property, Murkomen stated:

*Do what you can to defend yourself, and we will deal with the rest later. Have you heard me? We will defend you. We will support you. We cannot allow our country. If it wasn't for you people who are being despised by people talking a lot of English and they stay in Karen, if it was not for you, would this country be here?*

5. Later, in a follow-up statement, CS Murkomen sought to clarify his earlier remarks. He insisted that he had never called for the police to shoot 'anyone coming near a police station,' but was simply restating the law. He pointed to Section 61(2) and Schedule 6(1)(b) of the National Police Service Act, explaining that he was merely reminding officers of their legal authority. He

then quoted Schedule 6(1)(b), including subsections (c), (d) and (e), which explicitly allow the use of lethal force to protect property, to prevent someone from escaping police custody, or to stop anyone from helping a detainee flee.

6. CS Murkomen stated that the law on when police can use deadly force was ‘very clear’. He did not mention, that subsections (C), (D), and (E) had been held to be unconstitutional by the High Court (put in number) years ago and were void. See *Katiba Institute & Another v Attorney-General & Another*, [2022]KEHC17072(KLR).
7. In these statements, CS Murkomen has explicitly called on the police to kill Kenyans, falsely claimed that their conduct would be justified under the law and the Constitution, and asserted that the government would defend their unlawful actions. We assert that CS Murkomen’s statements are a violation of, among others, Articles 10 and 245(2)(b) of the Constitution and amount to unlawful incitement under Article 33(2) of the Constitution.
8. CS Murkomen’s violations of the Constitution and the law are concomitant breaches of the code of conduct and ethics and oath of office which, taken together, require him as a public officer to obey, respect and uphold the Constitution and all other Kenyan laws , serve the people of Kenya, and honour and dignify the office of the Cabinet Secretary.
9. We urge the court to find that the Respondent is unfit to hold public office, more so the Ministry of Interior and National Administration which superintends over the National Police Service for violating the national values and principles of governance set out under Article 10 of the Constitution and the Code of Conduct and Ethics as set out in the Public Officer Ethics Act.

## **2 The Parties**

### **2.1 The Petitioners**

10. The 1st Petitioner is Katiba Institute. Katiba Institute is a Kenyan non-governmental, not-for-profit organisation established as a company limited by guarantee. Katiba Institute’s mandate is to instil a culture of constitutionalism in Kenya and the East African region. Katiba Institute has pursued public interest litigation and participated as a friend of the court in

litigation regarding all parts of the Constitution, including the national values and principles of governance and the code of conduct of public officers. Katiba Institute brings this Petition on its own behalf and in the public interest.

11. The 2<sup>nd</sup> Petitioner is the Kenya Human Rights Commission (KHRC). KHRC was founded in 1992 and registered in Kenya in 1994 as a national non-governmental organisation. Its mandate is to enhance human rights-centred governance at all levels.
12. The 3<sup>rd</sup> Petitioner is the Independent Medico-Legal Unit (IMLU). IMLU is a governance, health and human rights organisation dedicated to the eradication of torture, violence and discrimination through litigation, medical and psychosocial rehabilitation of survivors of torture, monitoring government adherence to its human rights obligations and advocacy for policy, legal and institutional reforms.

## **2.2 The Respondent**

13. The Respondent is the Cabinet Secretary for Interior and National Administration. The Cabinet and its composition are established under Article 152 of the Constitution, and they are enjoined by Article 153 (4) to act in accordance with the Constitution

## **2.3 The Interested Parties**

14. The 1st Interested Party is Transparency International (TI). TI is a not-for-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption free society through good governance and social justice initiatives, towards establishing a corruption-free world through inter alia advocacy, strategic litigation, research and civic engagements.
15. The 2nd Interested Party is the Kenya Chapter of the International Commission of Jurists (ICJ Kenya). ICJ Kenya is an international, non-partisan, and non-profit professional society with long-established and well-recognised expertise in the rule of law.
16. The 3rd Interested Party is Mathare Social Justice Centre (MSJC). MSJC is a grassroots organisation working on campaigns to promote and protect human rights, social justice, and environmental justice around the Mathare area.

17. The 4th Interested Party is the International Justice Mission (IJM). IJM is a non-government whose mission is to protect people in poverty from violence by rescuing victims, bringing criminals to justice, restoring survivors to safety and strength, and helping local law enforcement build a safe future that lasts.
18. The 5th Interested Party is Haki Africa. Haki Africa's mission is to empower Kenyan and African communities to understand and champion for their rights so that they can agitate for good governance, transparency, and development in their societies.
19. The 6th Interested Party is the Kenya National Commission on Human Rights (KNCHR). KNCHR is an independent constitutional commission established under Article 59 Constitution of Kenya mandated to promote, protect, monitor, investigate and receive complaints against violation of Human Right and Freedoms for all Kenya.
20. The 7th Interested Party is the Independent Policing Oversight Authority (IPOA). IPOA is established through the Independent Policing Oversight Authority Act with the mandate to provide for civilian oversight of the police in Kenya.

### **3 Statement of Standing and Jurisdiction**

21. Katiba Institute and the co-petitioners have standing to bring this petition under Articles 22(1) & (2) and 258(1) & (2) of the Constitution. Article 22(1) states, 'Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened'. Articles 22(2)(a)-(c) authorise Katiba Institute to file this petition on behalf of another person who cannot act in their own name, in the interest of a group or class of people, and in the public interest.
22. Article 23 vests the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Similarly, Article 165(3) vests this Court with
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

#### **4 Facts supporting the Petition**

23. On Thursday, 26 June 2025, at a press briefing at Harambee House, addressing police and security personnel, the Cabinet Secretary stated, *‘You should only run when you see that with whatever you have, even if you were to kill five or six, there are still many left (protestors)’* and *‘We have directed the police that anyone who dares to approach a police station with criminal intent to shoot them’*
24. The CS went on to tell police officers to use guns to defend their lives and protect police stations from attacks by the public, saying it is ‘an order from above’ and urged that the guns are not decorations and that officers use them to defend the country. He then thanked the police for a job well done during the 25 June 2025 protests, terming the protest as acts of terrorism, and assured the officers that he would defend them at all costs, as the security agencies had, according to him, exercised remarkable restraint amid extreme provocation.
25. The CS maintained that only 10 deaths were recorded all over the country, but states that what happened on Wednesday, 25 June 2025, was not a protest but was terrorism disguised as dissent. This, even as he back-handedly condoled with all families that lost their loved ones, saying that even though some of them were killed while looting, the pain of losing them stings.
26. The CS condemned what he called criminal anarchists who he said unleashed a wave of violence, looting, sexual assault and destruction of property and

claimed that what happened was not spontaneous and that it was deliberate, coordinated, funded, premeditated and politically instigated while pointing out that mobilized protestors along Kiambu and Thika roads were chanting '*it is time to take over power*' and '*occupy State House*'.

27. On Friday, 27 June 2025, the Respondent attempted to justify his comments after public outrage, and said, '*we have not told police to misuse their weapons. We are reminding and defending them of their safety. They know well*'. Even in doing so, he still explicitly cites provisions which were declared unconstitutional in the use-of-force decision law meaning he only further entrenches his incitement to unlawful action wilfully. The Respondent, as a public officer and in his position, knows or ought to know that this is not in fact the governing law on the use of force and firearms.
28. Still, there was neither express retraction of his initial statements on Thursday, 26 June 2025, nor did his clarification get enough attention, through media or otherwise, to offset the worry and fear his initial comments, which were well publicised, had elicited. He also did not renege on the unlawful assurance he had made to police officers countrywide that the government was behind them [if they shoot and kill or maim] and would defend them if they were to be arraigned in court.
29. In 2017, Katiba Institute (KI) and other parties challenged amendments to the National Police Service Act that introduced additional circumstances for the use of firearms by the police:
  - To protect property
  - To prevent a person charged with a felony from escaping lawful custody
  - To stop a person who attempts to rescue another who has been charged with a felony and is in lawful custody
30. The High Court declared the amendments unconstitutional for violating the right to life, dignity, and fair hearing. The Court noted that the amendments were a potential avenue for gross human rights abuse. Justice Mrima held that there were other reasonable ways of protecting property and restraining those in lawful custody from escaping, other than using firearms.

31. The judgment was delivered on 16 December 2022, even though the Attorney-General appealed the findings vide *Civil Appeal No. E242 of 2023*, the High Court decision was not stayed and is still valid law to the extent that the Courts have provided guidance on the use of firearms.
- When less extreme means are inadequate
  - To protect their own lives or the lives of others
  - To protect themselves or others against an imminent threat to their life or serious injury

## **5 Legal Basis for the Petition**

32. These laws relate to the Respondent's inciting comments as a public officer, whether it was an abdication of his code of conduct and oath of public office and what the effect of this comments are on his suitability to continue serving as a public officer let alone the Cabinet Secretary for the Ministry of Interior and National Administration.

### **5.1 Constitution of Kenya 2010**

33. Article 1(1) of the Constitution of Kenya 2010 states that 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution'. Under Article 1(3), sovereign power is delegated to the national executive, and these delegated powers are to be exercised under the Constitution.
34. Article 2 concerns the Supremacy of the Constitution. Articles 2(1)-(4) state that:
- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
  - (2) No person may claim or exercise State authority except as authorised under this Constitution.
  - (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
  - (4) Any law, including customary law, that is inconsistent



with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

35. Article 3(1) states, 'Every person has an obligation to respect, uphold and defend this Constitution'.

36. Article 10 establishes the national values and principles of governance. The national values and principles:

bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

Article 10(1).

37. Article 10(2) asserts that the national values and principles of governance include:

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

38. Chapter Four of the Constitution establishes the Bill of Rights. Article 19(1) states that '[t]he Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies'. According to Article 19(2), human rights and fundamental freedoms are protected in order to 'preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'. The rights and fundamental freedoms guaranteed in the Bill of Rights:

- (a) belong to each individual and are not granted by the State;
- (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
- (c) are subject only to the limitations contemplated in this Constitution.

Article 19(3).

39. Article 20 addresses the application of the Bill of Rights. Articles 20(1)-(4) state that:

- (1) The Bill of Rights applies to all law and binds all State organs and all persons.
- (2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
- (3) In applying a provision of the Bill of Rights, a court shall—
  - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
  - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
- (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
  - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
  - (b) the spirit, purport and objects of the Bill of Rights.

40. Article 21 addresses the implementation of rights and fundamental freedoms. Articles 21(1), (3) & (4) state that:

- (1) 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.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

41. Article 22(1) gives every person the ‘the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened’.
42. Article 22(2) states that court proceedings can also be instituted:
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.
43. Article 23(1) gives this Court jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights’.
44. In proceedings alleging that a fundamental right or freedom has been denied, violated, infringed, or threatened, this Court may grant appropriate relief, including:
  - (a) a declaration of rights;
  - (b) an injunction;

- (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.
45. Article 25 states that these fundamental rights and freedoms shall not be limited by any law:
- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
  - (b) freedom from slavery or servitude;
  - (c) the right to a fair trial; and
  - (d) the right to an order of habeas corpus.
46. Article 26(3) states, ‘A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law’.
47. Article 27(1) guarantees that ‘Every person is equal before the law and has the right to equal protection and equal benefit of the law’. Article 27(2) describes equality as including ‘the full and equal enjoyment of all rights and fundamental freedoms’.
48. Article 28 states that ‘[e]very person has inherent dignity and the right to have that dignity respected and protected’.
49. Article 29 states that every person has the right to freedom and security of the person, including the right not to be:
- (a) deprived of freedom arbitrarily or without just cause;
  - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
  - (c) subjected to any form of violence from either public or private sources;

- (d) subjected to torture in any manner, whether physical or psychological;
  - (e) subjected to corporal punishment; or
  - (f) treated or punished in a cruel, inhuman or degrading manner.
- 50. Article 33 guarantees every person the right to freedom of expression, including the ‘freedom to seek, receive or impart information or ideas’. Art 33(1)(a).
- 51. Article 37 provides that every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.
- 52. Article 39(1) states that every person has the right to freedom of movement.
- 53. Article 47 provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) stipulates that if a person’s right or fundamental freedom has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- 54. Article 48 requires the State to ‘ensure access to justice for all persons’.
- 55. Article 49 concerns the rights of arrested people. Those rights include:
  - (a) to be informed promptly, in language that the person understands, of—
    - (i) the reason for the arrest;
    - (ii) the right to remain silent; and
    - (iii) the consequences of not remaining silent;
  - (b) to remain silent;
  - (c) to communicate with an advocate, and other persons whose assistance is necessary;
  - (d) not to be compelled to make any confession or admission that could be used in evidence against the person;

- (e) to be held separately from persons who are serving a sentence;
- (f) to be brought before a court as soon as reasonably possible, but not later than—
  - (i) twenty-four hours after being arrested; or
  - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
- (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
- (h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

56. Article 50(2) states that every accused person has the right to a fair trial. A fair trial includes the right:

- (a) to be presumed innocent until the contrary is proved;
- (b) to be informed of the charge, with sufficient detail to answer it;
- . . . . .
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
  - (i) an offence in Kenya; or
  - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
- . . . . .

57. Article 73 sets forth the responsibilities of leadership and integrity for State officers, including the Cabinet Secretary Ministry of Interior and National Administration. Article 73(1) requires State officers to exercise their authority in a way that follows the purposes and objects of the Constitution and promotes public confidence in the integrity of the office.
58. Article 74 sets out that before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe to the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.
59. Article 75 provides for the conduct of state officers. Article 75 (1) states that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—
- a) any conflict between personal interests and public or official duties;
  - b) compromising any public or official interest in favour of a personal interest; or
  - c) demeaning the office the officer holds.
60. Article 75(2) stipulates that a person who contravenes clause (1), or Article 76, 77 or 78(2)—(a) shall be subject to the applicable disciplinary procedure for the relevant office; and (b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office while Article 75(3) states that a person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.
61. Article 152 (4) of the Constitution provides that each person appointed as a Cabinet Secretary—assumes office by swearing or affirming faithfulness to the people and the Republic of Kenya and obedience to this Constitution, before the President and in accordance with the Third Schedule; and may resign by delivering a written statement of resignation to the President.
62. Article 153 provides for the Cabinet’s decisions, responsibility and accountability. Article 153 (4)(a) mandates Cabinet Secretaries to act in accordance with this Constitution.

63. Article 165 establishes the High Court. It vests unlimited jurisdiction in criminal and civil matters to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'. It also has jurisdiction under Article 165(3)(d):
- to hear any question respecting the interpretation of this Constitution including the determination of—
- (i) the question whether any law is inconsistent with or in contravention of this Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution....
64. Article 238 (1) of the Constitution defines national security as the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.
65. Article 238 (2) states that the national security of Kenya shall be promoted and guaranteed in accordance with the following principles—
- a) national security is subject to the authority of this Constitution and Parliament;
- b) national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
66. The National Police Service is established under Article 243 of the Constitution
67. Article 244 sets out the objects and functions of the National Police Service which include to strive for the highest standards of professionalism and discipline among its members; prevent corruption and promote and practice transparency and accountability, to comply with constitutional standards of human rights and fundamental freedoms, to train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity and to foster and promote relationships



with the broader society.

68. Article 245 establishes the office of the Inspector-General of the National Police Service, who, under Article 245 (2) (b), is to exercise independent command over the National Police Service and perform any other functions prescribed by national legislation.
69. Article 259(1) requires that the Constitution be interpreted in a way that:
  - (a) promotes its purposes, values and principles;
  - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - (c) permits the development of the law; and
  - (d) contributes to good governance.
70. The third Schedule of the Constitution provides for the National Oaths and Affirmations and the oath and solemn affirmation of due execution of office for a Cabinet Secretary reads as follows:

*I, ....., being appointed a Cabinet Secretary of Kenya, do swear/solemnly affirm that I will at all times be faithful to the Republic of Kenya; that I will obey, respect and uphold this Constitution of Kenya and all other laws of the Republic; that I will well and truly serve the people and the Republic of Kenya in the Office of a Cabinet Secretary; that I undertake to hold my office as Cabinet Secretary with honour and dignity; that I will be a true and faithful counsellor to the President for the good management of the public affairs of the Republic of Kenya; that I will not divulge directly or indirectly such matters as shall come to my knowledge in the discharge of my duties and committed to my secrecy except as may be required for the due discharge of my duties as Cabinet Secretary; and that I will perform the functions of my office conscientiously and to the best of my ability. (In the case of an oath— So help me God.)*

## **5.2 Acts of Parliament**

### **5.2.1 The National Police Service Act**

71. The object and purpose of the National Police Service Act is to give effect to Articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes.
72. Section 8 provides for the Command of the Service, and Section 8 (1) stipulates that the Service shall be under the overall and independent command of the Inspector-General.
73. Section 8(A)(5) states that the Cabinet Secretary may lawfully give a direction in writing to the Inspector-General with respect to any matter of policy for the National Police Service.
74. Section 10 provides for the functions and powers of the Inspector-General, including implementing policy decisions, auditing police operations and functioning, coordinating all police operations, advising the Government on policing matters and services and monitoring the implementation of policy, operations and directions of the service;
75. Section 49 sets out the general powers of police officers. Section 49(1) states that, subject to Article 244 of the Constitution and the Bill of Rights, a police officer may exercise such powers and shall perform such duties and functions as are by law imposed or conferred on or assigned to a police officer.
76. Section 49 (4) provides that a police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.
77. Section 49 (5) provides that where a police officer is authorised by law to use force, the officer shall do so in compliance with the guidelines set out in the Sixth Schedule.
78. Section 49 (10) provides that police officers shall respect the law, regulations, and Service Standing Orders and, to the best of their capability, prevent and oppose any violations of them.
79. Section 49 (13) stipulates that a police officer who abuses any powers

conferred by this Act commits an offence and is liable to disciplinary or criminal action and a person whose rights are violated by a police officer shall be entitled to redress and compensation upon the decision of a court, tribunal or other authority.

80. Section 61(1) of the Act stipulates that a police officer shall perform the functions and exercise the powers conferred by the Constitution and this Act by use of non-violent means, and Section 61 (2) sets forth that, despite subsection (1), a police officer may use force and firearms in accordance with the rules on the use of force and firearms contained in the Sixth Schedule
81. Section 95 (1) provides that it is unlawful for a police officer to subject any person to torture or other cruel, inhuman or degrading treatment and Section 95(2) A police officer who subjects a person to torture commits a criminal offence and shall be liable on conviction to imprisonment for a term not exceeding twenty five years.
82. Article 132 (2) provides that the Cabinet Secretary may put in place a system of ensuring continuous and sustainable police reforms regarding policy matters.
83. Section 12 of Part A of the Sixth Schedule on conditions as to the use of force jointly enjoins the Cabinet Secretary responsible for Internal Security and the Inspector-General to make regulations for giving further direction on the lawful use of force, and the regulations should include, among other things—a list of lawful means to use force, training requirements to be allowed to use these means and procedures for reporting the use of means of force, indicating whether the use of such means was necessary or not.
84. Similarly, Section 8 of Part B of the Sixth Schedule on conditions as to the use of firearms jointly enjoins the Cabinet Secretary and the Inspector-General to make further regulations on the use of firearms which should include regulations that specify the circumstances under which police may carry firearms and the type of firearms and ammunition permitted and to regulate the control, storage and issuing of firearms including procedures that ensure that officers are accountable for the weapons and ammunition issued to them.

### **5.2.2 Public Officer Ethics Act**

85. The object of this Act is to advance the ethics of public officers by providing for a code of conduct and ethics for public officers and to provide for connected purposes.
86. Section 8 provides that a public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly.
87. Section 9 is on professionalism. A public officer must carry out his duties in a way that maintains public confidence in the integrity of his office and treat the public and his fellow public officers with courtesy and respect
88. Section 10 is on the respect for the rule of law. It provides that a public officer must carry out his duties in accordance with the law and in carrying out his duties, a public officer shall not violate the rights and freedoms of any person under Part V of the Constitution.
89. Section 18 requires that a public officer who has a duty to give advice shall give honest and impartial advice without fear or favour.
90. Section 19 provides that a public officer shall not knowingly give false or misleading information to members of the public or to any other public officer.

### **5.2.3 Penal Code**

91. Section 96 provides for the offence of incitement to violence and disobedience of the law-

Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated—

92. to bring death or physical injury to any person or to any class, community or body of persons; or

- a) to lead to the damage or destruction of any property; or
- 93. to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

### **5.3 International law**

#### **5.3.1 African (Banjul) Charter on Human and People's Rights**

- 94. Article 9 (2) provides that every individual shall have the right to express and disseminate his opinions within the law.
- 95. Article 27 (2) further provides that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

## **6 Violations of the Constitution and the law**

- 96. By inciting police officers that the guns in their custody are not toys and directing them to shoot anyone approaching the police station or otherwise endangering the life of a police officer, the Respondent has violated his duties under Articles 1(3), 2, 3(1), 10, 19, 21(1), (3) & (4), 22, 23, 24, 25, 26, 27 (1) & (2), 28, 29, 33(2), 37,38, 39(1), 47, 48, 50 (1) & (2), 73, 74, 75, 79,80, 152 (4),153(4), 165(3), 238, 243, 244, 245, 246, 247, 258, 259 and the Third Schedule on National Oaths and Affirmations and the Oath or Solemn Affirmation of Due Execution of Office for a Cabinet Secretary.
- 97. By directing police officers on how to act in the line of duty, the Respondent exceeded his legal authority and violated of Article 245(2)(b) of the Constitution as read with Section 8 of the National Police Service Act, which states that the Inspector General of Police, not a Cabinet Secretary, has overall and independent command of the National Police Service.

## **7 Relief Requested**

- 98. The Petitioners pray for the following relief:

### **7.1 Declaratory Orders**

1. A declaration that by inciting police officers that the guns in their custody are not toys and directing them to shoot anyone approaching the police station or otherwise endangering the life of a police officer, the Respondent has violated his duties under Articles 1(3), 2, 3(1), 10, 19, 21(1), (3) & (4), 22, 23, 24, 25, 26, 27 (1) & (2), 28, 29, 33, 37,38, 39(1), 47, 48, 50 (1) & (2), 73, 74, 75, 79,80, 152 (4),153(4), 165(3), 238, 243, 244, 245, 246, 247, 258, 259 and the Third Schedule on National Oaths and Affirmations and the Oath or Solemn Affirmation of Due Execution of Office for a Cabinet Secretary.
2. A declaration that by purporting to direct police officers in their line of duty, the Respondent acted ultra vires and in violation of Article 245 (2)(b) of the Constitution as read with Section 8 of the National Police Service Act which provides that the overall and independent command of the National Police Service is under the Inspector-General of Police.
3. A declaration that the Respondent has contravened Clause 1 of Article 75 (c) and has demeaned the office of the Cabinet Secretary, Ministry of Interior and National Administration.
4. A declaration that Regulation 11(2)(c), (d) & (e) of Chapter 38 and Regulations (1)(b), (c) & (d), 2(1)(c)(i), (ii) & (iii) of Chapter 47 of the National Police Service Standing Orders are unconstitutional.

## **7.2 Structural Interdict**

99. An order directing the Respondent to issue a public written statement published in a Newspaper of nationwide circulation, at his personal expense, retracting his comments in full and referencing the judgment in HCCHRPet. 379/2017 setting out the specific true limitations on the law on the use of force and firearms.
100. An order directing the Respondent to issue a public written statement published on a TV station of wide nationwide circulation, at his personal expense, retracting his comments in full and clarifying the circumstances in which police officers may lawfully use lethal force as outlined in *Katiba Institute & Another v Attorney-General & Another*, [2022] KEHC 17072 (KLR). An order directing the Respondent to hold a press conference at which he publicly

retracts his comments regarding the use of force in full and adequately explains the circumstances in which police officers may lawfully use lethal force as outlined in *Katiba Institute & Another v Attorney-General & Another*, [2022] KEHC 17072 (KLR).

101. Any further relief or orders, including a structural interdict, to ensure that the Respondent complies with this Court's rulings and that those harmed by the Respondent's violations of the Constitution and the law and any unlawful use of force from 26 June 2025 be justly and appropriately accommodated at the Respondent's expense.

### **7.3 Damages.**

102. An order finding that the Respondent is liable for the harm caused by their violations of the Constitution and the law.
103. An order, incidental, consequential, and aggravated damages against the Respondent in favour of all individuals who have died or have been seriously injured as a result of police action, caused by a member of the police on duty or that which happened while in police custody from 26 June 2025 to the date of his retraction and clarification of the law.

### **7.4 Other relief**

104. An order that, although this petition has been filed in the public interest, the Respondent abdicated his mandates under the Constitution and the law, and the Respondent must indemnify the Petitioner for the expenses associated with the litigation at his expense.
105. Any other orders this Court considers appropriate to protect the Constitution and the interests of justice.

Dated 01 July 2025, Nairobi.



Eileen Imbosa  
Advocate for the Petitioner

**Drawn and filed by**

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c/o Katiba Institute  
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+254704594962

**To be served on**

The Cabinet Secretary  
Ministry of Interior & National  
Administration  
Harambee House.  
PO Box 30510-00100  
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All Interested Parties



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN NAIROBI**  
**HCCHRPET/E\_\_\_\_/2025**

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In the matter of:	Violations of Articles 1(3), 2, 3(1), 10, 19, 21(1), (3) & (4), 22, 23, 24, 25, 26, 27(1) & (2), 28, 29, 33, 37, 38, 39(1), 47, 48, 50(1) & (2), 73, 74, 75, 79, 80, 152(4), 153(4), 165(3), 238, 243, 244, 245(2), 246, 247, 258, 259 and the Third Schedule on National Oaths and Affirmations and the Oath or Solemn Affirmation of Due Execution of Office for a Cabinet Secretary
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In the matter of:	Violation of Section 8, 8A(5), 10(1)(a), (b), (c), (d), (q), 10(2), 49(4), (5) & (13), 61, 95, 132(2) and the Sixth Schedule on the conditions as to the use of force and firearms of the National Police Service Act and Regulation 16 of Chapter 47 of the National Police Service Standing Orders
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In the matter of:	Violations of Section 9(a), (b) & (g), 10, 16(1)(a) & (2), 18 & 19 of the Public Officer Ethics Act
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KATIBA INSTITUTE ..... 1ST PETITIONER  
KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER  
INDEPENDENT MEDICO-LEGAL UNIT .....3<sup>RD</sup> PETITIONER

VERSUS

ONESIMUS KIPCHUMBA MURKOMEN  
CABINET SECRETARY, MINISTRY OF  
INTERIOR & NATIONAL ADMINISTRATION ..... 1ST RESPONDENT

AND

TRANSPARENCY INTERNATIONAL ..... 1ST INTERESTED PARTY  
INTERNATIONAL COMMISSION  
OF JURISTS – KENYA (ICJ KENYA) ..... 2ND INTERESTED PARTY

MATHARE SOCIAL JUSTICE CENTRE .....	3RD INTERESTED PARTY
INTERNATIONAL JUSTICE MISSION .....	4TH INTERESTED PARTY
HAKI AFRICA.....	5TH INTERESTED PARTY
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .....	6TH INTERESTED PARTY
INDEPENDENT POLICING OVERSIGHT AUTHORITY .....	7TH INTERESTED PARTY

## CERTIFICATE OF URGENCY

I, Eileen Imbosa, an Advocate of the High Court of Kenya, on record for the Petitioners, certify that the Application is of utmost urgency and should be heard at the earliest opportunity because:

1. On Thursday, 26 June 2025, a day after the 25 June 2025 protests held in commemoration of the 60 young people who died during the 25 June 2024 anti-Finance Bill protests, the Respondent attended a widely publicised press conference where he incited police officers to shoot anyone approaching the police station or otherwise endangering the life of a police officer.
2. Despite the High Court in *Katiba Institute & Another v Attorney-General & Another (Petition 379 of 2017 [2022] eKLR)* having already declared unconstitutional the amendments to the National Police Service Act that sought to introduce additional circumstances for the use of firearms by the police, including to protect property, the Respondent is still relying on the provisions on the use of force and firearms as set out in the National Police Service Standing Orders which remain unchallenged and still have the expanded provisions permitting use of firearms to protect property.
3. The Respondent's directive is likely to result in a spike in cases of extra-judicial executions and generalised reports of violence leading to loss of lives and gross human rights violations.
4. This motion will be rendered nugatory unless it is heard as a priority over any other matter in the cause.

Dated 01 July 2025, Nairobi.



Eileen Imbosa  
Advocate for Petitioner

**Drawn and filed by**

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MATHARE SOCIAL JUSTICE CENTRE ..... 3<sup>RD</sup> INTERESTED PARTY

INTERNATIONAL JUSTICE MISSION .....	4TH INTERESTED PARTY
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KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .....	6TH INTERESTED PARTY
INDEPENDENT POLICING OVERSIGHT AUTHORITY .....	7TH INTERESTED PARTY

## NOTICE OF MOTION

TAKE NOTICE that on \_\_\_\_\_ at 9.00 a.m. or the Court's earliest convenience, the Petitioner will move this Honourable Court for the following orders:

5. An order certifying this application as urgent.
6. An order that, pending *inter partes* hearing and determination of this application, the Respondent to issue a public written statement published in a Newspaper of wide nationwide circulation, at his personal expenses, retracting his comments in full and referencing the judgment in HCCHRPet. 379/2017 setting out the specific true limitations on the law on use of force and firearms.
7. An order that, pending *inter partes* hearing and determination of this application, the Respondent to issue a public written statement published on a TV station of wide nationwide circulation, at his personal expenses, retracting his comments in full and referencing the judgment in HCCHRPet. 379/2017 setting out the specific true limitations on the law on use of force and firearms.
8. An order that, pending *inter partes* hearing and determination of this application, the Respondent to hold a press statement at Harambee House, invite all the police officers and members of the security agencies present, and publicly retract his comments and directives issued on 26 June 2025 in full and referencing the judgment in HCCHRPet. 379/2017 setting out the specific true limitations on the law on use of force and firearms
9. An order that, pending *inter partes* hearing and determination of this application, the Independent Policing Oversight Authority provide details

of all individuals who have died or been seriously injured as a result of police action, caused by a member of the police on duty or that which happened while in police custody from 26 June 2025 to date.

### **Basis for Application**

The Application is based on the information below; the Affidavit of Nora Mbagathi filed with this Motion and any other information that may be adduced at the hearing.

1. The Constitution of Kenya 2010 is based on these fundamental precepts: The Constitution is the supreme law of the Republic. No one can exercise State authority except as allowed under the Constitution. Any law inconsistent with the Constitution is void to the extent of that inconsistency. Every person and every State organ must respect and uphold these constitutional precepts.
2. The Constitution also establishes the Bill of Rights as an essential part of Kenya's democratic State and as the framework for social, economic, and cultural policies. The rights and fundamental freedoms in the Bill of Rights belong to each individual, are not granted by the State, and are subject only to the limitations contemplated under the Constitution. 'It is a *fundamental duty* of the State and every State organ and Officer to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights'. Article 21(1). Although some rights and freedoms may be limited, those limitations must be made only by law. No person, State officer, or State organ can limit a right unless that limitation is justified by law.
3. On Thursday, 26 June 2025, at a press briefing at Harambee House, addressing police and security personnel, the Cabinet Secretary stated, '*You should only run when you see that with whatever you have, even if you were to kill five or six, there are still many left (protestors)*'
4. The Respondent went on to tell police officers to use guns to defend their lives and protect police stations from attacks by the public, saying it is 'an

order from above' and urged that the guns are not decorations and that officers use them to defend the country. He then thanked the police for a job well done during the 25 June 2025 protests, terming the protest as acts of terrorism, and assured the officers that he would defend them at all costs, as the security agencies had, according to him, exercised remarkable restraint amid extreme provocation.

5. The Respondent maintained that only 10 deaths were recorded all over the country, but states that what happened on Wednesday, 25 June 2025, was not a protest but was terrorism disguised as dissent. This, even as he back-handedly condoled with all families that lost their loved ones, saying that even though some of them were killed while looting, the pain of losing them stings.
6. The Respondent condemned what he called criminal anarchists who he said unleashed a wave of violence, looting, sexual assault and destruction of property and claimed that what happened was not spontaneous and that it was deliberate, coordinated, funded, premeditated and politically instigated while pointing out that mobilized protestors along Kiambu and Thika roads were chanting '*it is time to take over power*' and '*occupy State House*'.
7. Granted, on Friday, 27 June 2025, the Respondent clarified his comments after public outrage, and said, '*we have not told police to misuse their weapons. We are reminding and defending them of their safety. They know well*'. A feeble attempt to minimise his previous comments by simply stating that the police are trained on the appropriate use of force, and a denial that the Ministry had not instructed the police to shoot civilians arbitrarily. Still, there was neither express retraction of his initial statements on Thursday, 26 June 2025, nor did his clarification get enough attention, through media or otherwise, to offset the worry and fear his initial comments, which were well publicised, had elicited.
8. Neither did he renege on the unlawful assurance he had made to police officers countrywide that the government was behind them [if they shoot and kill or maim] and would defend them if they were to be arraigned in court.

9. In 2017, Katiba Institute (KI) and other parties challenged amendments to the National Police Service Act that introduced additional circumstances for the use of firearms by the police:
  - To protect property
  - To prevent a person charged with a felony from escaping lawful custody
  - To stop a person who attempts to rescue another who has been charged with a felony and is in lawful custody
10. The High Court declared the amendments unconstitutional for violating the right to life, dignity, and a fair hearing. The Court noted that the amendments were a potential avenue for gross human rights abuse. Justice Mrima held that there were other reasonable ways of protecting property and restraining those in lawful custody from escaping, other than using firearms.
11. The judgment was delivered on 16 December 2022, and even though the Attorney-General appealed the findings vide *Civil Appeal No. E242 of 2023*, the High Court decision was not stayed and is still valid law to the extent that the Courts have provided guidance on the use of firearms.
  - When less extreme means are inadequate
  - To protect their own lives or the lives of others
  - To protect themselves or others against an imminent threat to their life or serious injury
12. Despite the Respondent being a public officer sworn to protect the Constitution and the law, his pronouncements on 26 June 2025 were a mockery of the Constitution, inconsistent with its purpose and objects, was demonstrably contemptuous of the People and a betrayal of public trust and confidence in the office of the Cabinet Secretary of Interior, one of the most critical Ministries that countermand national security. We ask the Court to act decisively and reestablish the rule of law and reaffirm the importance of the code of conduct signed by public officials and the oath of office.



Dated 01 July 2025, Nairobi.



Eileen Imbosa  
Advocate for Petitioner

**Drawn and filed by**

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KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER  
INDEPENDENT MEDICO-LEGAL UNIT .....3<sup>RD</sup> PETITIONER

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MATHARE SOCIAL JUSTICE CENTRE ..... 3<sup>RD</sup> INTERESTED PARTY

INTERNATIONAL JUSTICE MISSION ..... 4TH INTERESTED PARTY

HAKI AFRICA..... 5TH INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS..... 6TH INTERESTED PARTY

INDEPENDENT POLICING OVERSIGHT AUTHORITY ..... 7TH INTERESTED PARTY

## **AFFIDAVIT OF NORA MBAGATHI IN SUPPORT OF PETITION AND MOTION**

I, Nora Mbagathi, make oath and state:

### **1 Introduction**

1. I am an adult resident of Nairobi and the Executive Director at Katiba Institute, the 1st Petitioner. My address of service for this affidavit is PO Box 26586-00100. I am familiar with the matters relating to this Petition and am competent to swear this affidavit.
2. This affidavit is based on my knowledge. If I rely on information that extends beyond my own knowledge, I cite the sources of that information and, when possible, include the source as an exhibit to the affidavit.
3. On Thursday, 26 June 2025, the Respondent held a press briefing at Harambee House, addressing police officers and security personnel. At the briefing, he made comments inciting police officers to use their issued firearms to defend their lives and protect police stations from attacks by the public, saying it was ‘an order from above’ and urging the officers to use them to defend the country.
4. The Respondent went on to thank the police officers for a job well done during the Wednesday, 25 June 2025 protests, terming the protest as acts of terrorism, and assured the officers that he would defend them at all costs implying that the officers would be absolved from cooperating in any subsequent disciplinary and accountability processes, as the security agencies had, according to him, exercised remarkable restraint amid extreme provocation. *(See attached a transcript of the video of the Respondent’s briefing of police officers and officers from other security agencies on 26 June 2025*

marked NM-1 and link at <https://www.youtube.com/watch?v=Yx-ywBaq3MA>)

5. Due to public outrage, the Respondent on Friday, 27 June 2025, attempted to justify his comments and said, ‘we *have not told police to misuse their weapons. We are reminding and defending them of their safety. They know well*’, and then proceeded to explicitly cite provisions which were declared unconstitutional in the use-of-force decision law meaning he only further entrenched his incitement to unlawful action wilfully yet the Respondent as a public officer ought to have known the provisions he was relying on were not in fact the governing law on the use of force and firearms.
6. There was neither express retraction of the Respondent’s initial statements on Thursday, 26 June 2025, nor did his clarification or justification get enough attention as his initial statements, through media or otherwise, to offset the worry and fear his initial comments, which were well publicised, had elicited. Neither did he renege on the unlawful assurance he had made to police officers countrywide that the government was behind them [if they shoot and kill or maim] and would defend them if they were to be arraigned in court. (See attached a transcript of the video of the Respondent’s justification of his comments on his X account marked NM-2 and link at <https://t.co/y0vI8WNGWD>)
7. The Respondent did not, at least publicly, renege on the unlawful assurance and promise that he had made to police officers countrywide on 25 June 2025 that the government was behind them [if they shoot and kill or maim] and would defend them if they were to be arraigned in court and as such the country remains in apprehension on the implication of the shoot-to-kill order.
8. In 2017, Katiba Institute (KI) and other parties challenged amendments to the National Police Service Act that introduced additional circumstances for the use of force and firearms by the police-to protect property, prevent a person charged with a felony from escaping lawful custody and to stop a person who attempts to rescue another who has been charged with a felony and is in lawful custody which amendments were declared unconstitutional for violating the right to life, dignity, and a fair hearing. (See annexed and

*marked NM-3 a copy of the judgment)*

9. In the judgment, the court noted that the amendments were a potential avenue for gross human rights abuse and maintained that there were other reasonable ways of protecting property and restraining those in lawful custody from escaping, other than using firearms.
10. The judgment was delivered on 16 December 2022, even though the Attorney-General appealed the findings vide *Civil Appeal No. E242 of 2023*, the High Court decision was not stayed and is still valid law to the extent that the Courts have provided guidance on the use of firearms to when less extreme means are inadequate, to protect their own lives or the lives of others and to protect themselves or others against an imminent threat to their life or serious injury
11. Despite the Respondent being a public officer sworn to protect the Constitution and the law, he made pronouncements on 26 and 27 June 2025 that are a mockery of the Constitution, inconsistent with its purpose and objects, and demonstrably contemptuous of the People and their lives.
12. It is imperative that the court pronounces itself and adjudges the Respondent as having betrayed the public trust and confidence vested in the office of the Cabinet Secretary of Interior, one of the most critical Ministries that countermand national security and for the court to re-establish the rule of law and reaffirm the importance of the code of conduct and ethics signed by public officials and the oath of office, and the implications of breaching it.
13. What I have stated in this affidavit is true and correct to the best of my knowledge, information, and belief. When I have relied on information outside my direct experience, I have explained why that information is reliable and included supporting exhibits.

Sworn by Nora Mbagathi on 01 July 2025 in Nairobi.



A handwritten signature in black ink, appearing to be 'Nora Mbagathi', written over a horizontal line.

BEFORE ME  
COMMISSIONER OF OATHS

Deponent

**Drawn and filed by**

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All the Interested Parties

NM-1

This is the Exhibit Marked "....."  
Referred to in the Annexed Affidavit Declaration  
of..... **Nora Mbagathi**.....  
Sworn / declared before me  
this **2nd** day of **July** 20**25**  
at..... **Nairobi**.....  
.....  
**Commissioner For Oaths**

From 0:55 seconds on the KTN News YouTube Channel at <https://t.co/y0vI8WNGWD>

We have told the police, anyone coming near a police station, shoot them. Anyone.

Anyone taking stones and intending to hit a police officer and kill a police officer will not be entertained. You think firearms are 'mandazi'.

But the citizens of this area coming to report should come and the incident recorded and taken to court, that one should happen. But anyone coming to take firearms from the station, someone who has come to the police station and wants to take over a government office, to take firearms ,who wants to take your life, 'pass' with him.

The other issues that arise I will stand in for you and defend you as long as you've not come out of the station looking for someone to kill. But where someone has come to the police station wanting to take over the armoury, looking for firearms, looking to take your life. Even if its contempt for the police and even if someone despises the police, don't accept to be beaten with 'rungus' and yet you are a police officer with a firearm. That will be hard.

Do what you can to defend yourself, and we will deal with the rest later. Have you heard me? We will defend you. We will support you. We cannot allow our country. If it wasn't for you people who are being despised by people talking a lot of English and they stay in Karen, if it was not for you, would this country be here?

This is the Exhibit Marked "NM-2"  
Referred to in the Annexed Affidavit Declaration  
of.....Nora Mbagathi.....  
Sworn / declared before me  
this.....2nd.....day of.....July.....2025.....  
at.....Nairobi.....

X Post

X account (@kipmurkomen) at 5:32 p.m. on Saturday, 28 June 2025, at <https://t.co/y0vI8WNGWD>

Commissioner For Oaths

And I am saying this with all humility, I cannot order an Inspector-General of Police on anything because the Constitution denies me to do so. And I did not order the Inspector-General or any police officer to carry out any extra-judicial anywhere. Your Excellency what I did was to state the law. And as a lawyer, I have studied, read this law, and I understand what the law says. And what I told the police officers is, if you will not find me anywhere where I said somebody should be shot to be killed. You will not find me anywhere where I said that a police officer should take orders from myself. No. I restated the law. And reminded them what the law says. And for the benefit of those Your Excellency who have been speaking out there, I want to read for them the NPS Act, Section 61(2) and particularly schedule 6 (b)(1) Your Excellency is very clear on the use of firearms and I want to read it verbatim.

It says Your Excellency that firearms may only be used when less extreme means are inadequate and for the following purposes. One, saving or protecting the life of an officer or other persons, two, in self-defence or in defence of other persons against imminent threat of life or serious injury. C, protection of life and property through justifiable use of force, D, preventing a person charged with a felony from escaping lawful custody. 5 or E, preventing a person who attempts to rescue or rescue a person charged with felony from escaping lawful custody. Your Excellency, I am not the one who wrote the law. The law says a police officer when faced with a situation of a threat of his life must be able to use the firearm.



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA IN NAIROBI**  
**HCCHRPET/E/2024**

KATIBA INSTITUTE ..... 1ST PETITIONER  
KENYA HUMAN RIGHTS COMMISSION.....2ND PETITIONER  
INDEPENDENT MEDICO-LEGAL UNIT .....3<sup>RD</sup> PETITIONER

VERSUS

ONESIMUS KIPCHUMBA MURKOMEN  
CABINET SECRETARY, MINISTRY OF  
INTERIOR & NATIONAL ADMINISTRATION ..... 1ST RESPONDENT

AND

TRANSPARENCY INTERNATIONAL ..... 1ST INTERESTED PARTY  
INTERNATIONAL COMMISSION  
OF JURISTS – KENYA (ICJ KENYA).....2ND INTERESTED PARTY  
MATHARE SOCIAL JUSTICE CENTRE.....3RD INTERESTED PARTY  
INTERNATIONAL JUSTICE MISSION.....4TH INTERESTED PARTY  
KENYA NATIONAL COMMISSION ON  
HUMAN RIGHTS.....5TH INTERESTED PARTY  
INDEPENDENT POLICING OVERSIGHT  
AUTHORITY.....6TH INTERESTED PARTY

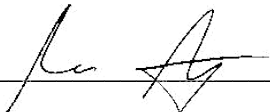
**CERTIFICATE OF AUTHENTICITY**

*(Under Sections 78 and 106 B of the Evidence Act Cap. 80 of the Laws of Kenya)*

1. On 1 July 2025, I downloaded the YouTube video from the KTN News Kenya Official Channel.
  1. The Respondent's comments are captured from 0.54 seconds to Minute 2.26 of the video and were posted on 27 June 2025, and the video can be found at <https://www.youtube.com/watch?v=Yx-ywBaq3MA>
2. On 2 July 2025, I downloaded a video that had been posted on the Respondent's verified X account (@kipmurkomen) at 5:32 p.m. on Saturday, 28 June 2025, which video can be found at <https://t.co/y0vI8WNGWD>
3. I downloaded from my Dell Inspiron 7306 2n1, device ID 5XN9N93.

2. My Laptop was in good working condition and operated and performed the actions described above seamlessly and without any technical difficulties.
3. I certify that the printed copies of the electronic documents I have produced before the court are authentic. I have also produced a certificate of authentication.

Certified at Nairobi this 02 day of 07 2025

  
\_\_\_\_\_  
Nora Mbagathi

**Katiba Institute & another v Attorney General & another; Independent Policing and Oversight Authority & 3 others (Interested Parties) (Constitutional Petition 379 of 2017) [2022] KEHC 17072 (KLR) (Constitutional and Human Rights) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17072 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**CONSTITUTIONAL PETITION 379 OF 2017**

**AC MRIMA, J**  
**DECEMBER 16, 2022**

**BETWEEN**

**KATIBA INSTITUTE ..... 1<sup>ST</sup> PETITIONER**  
**AFRICA CENTRE FOR OPEN GOVERNANCE (AFRICOG) .. 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**INDEPENDENT POLICING AND OVERSIGHT AUTHORITY ... INTERESTED PARTY**  
**INTERNATIONAL JUSTICE MISSION ..... INTERESTED PARTY**  
**KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY**  
**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY**

**Provisions of the law that granted the Police permission to use firearms to protect life, property and to prevent felonies from escaping lawful custody were not legally sustainable.**

*The case discussed the scope of the powers given to the police to use firearms to protect life, property and to prevent felonies.*

Reported by John Ribia

***Constitutional Law*** – fundamental rights and freedoms – right to life – right to a fair hearing – right to human dignity – where paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act provided that the police could use firearms to protect life, property and to prevent felonies from escaping lawful custody – whether the impugned provisions contravened the rights to life, human dignity and fair hearing - Constitution of Kenya, 2010 2(1), (4), 10, 20(3), 21(1), 24, 24(1), 26, 26(3), 28, 29, 50(1)(2).



**Constitutional Law** – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – criterion utilized by the courts when determining whether a limitation on a fundamental right and freedom was justifiable - whether paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that firearms could be used to protect life and property on preventing felonies from escaping lawful custody were justifiable limitations to the rights to life, human dignity and the right to a fair hearing – Constitution of Kenya, 2010 articles 24(1), 2628, 29 and 50(1)(2); National Police Service (Amendment Act) No 11 of 2014, Sixth Schedule, Part B, paragraph 1(c), (d) and (e).*

### **Brief facts**

The petitioners contended that paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that firearms could be used to protect life and property on preventing felonies from escaping lawful custody was a claw back from the gains made by the Constitution of Kenya, 2010 (the Constitution) as far as the protection of the right to life, dignity and fair hearing was concerned under articles 23, 28 and 50 of the Constitution. The petitioners claimed that the impugned amendments were unconstitutional for failing to provide for the necessary safeguards as articulated under article 24(2) of the Constitution and for failing to provide justification of the of the limitation that met the requirements of article 24(1) of the Constitution.

### **Issues**

- i. Whether paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act that provided that the police could use firearms to protect life, property and to prevent felonies from escaping lawful custody contravened the rights to life, human dignity and fair hearing.
- ii. What was the criterion to be utilized by the courts in determining whether a limitation on a fundamental right and freedom was justifiable?
- iii. Whether the use of firearms by the police to protect life and property on preventing felonies from escaping lawful custody was a justifiable limitation to the right to life.

### **Relevant provisions of the Law**

#### **National Police Service Act, Act No 11A of 2011**

#### **Sixth Schedule, Part B, Paragraph 1**

#### ***B – CONDITIONS AS TO THE USE OF FIREARMS***

1. *Firearms may only be used when less extreme means are inadequate and for the following purposes—*
  - (a) *saving or protecting the life of the officer or other person;*
  - (b) *in self-defence or in defence of other person against imminent threat of life or serious injury;*
  - (c) *protection of life and property through justifiable use of force;*
  - (d) *preventing a person charged with a felony from escaping lawful custody; and*
  - (e) *preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.*

### **Held**

1. Constitutional interpretation or judicial interpretation was the legal creativity of attributing or assigning meaning to the provisions of the Constitution. The Constitution was a document *sui generis*; it was the supreme law of the land.
2. The Constitution had to be interpreted holistically in the way it was intended by the framers. The Constitution did not favour formalistic approaches to its interpretation. It was not to be interpreted as a mere statute. The Constitution was to be promoted in a manner that promoted its values and principles. In interpreting the Constitution, non-legal considerations were important to give its true meaning and values.



3. The right to life was not one of those rights which could not be limited under article 25 of the Constitution. The right to life could be limited in appropriate circumstances. The constitutional safeguard for the right to life under article 26(3) of the Constitution provided that the right to life was not absolute. It could be alienated, but to the extent that the Constitution or any other law authorised. For any limitation to a right or fundamental freedom in the Constitution to be sustainable, such had to be within the parameters set by article 24 of the Constitution.
4. Article 24(2) of the Constitution provided the confines within which legislation could limit a right and fundamental freedom. The provision called upon the legislation to ensure certain parameters were met for the limitation to be sustainable. Article 24 had a deliberate scheme to safeguard rights and fundamental freedoms in the Bill of Rights such that their limitation was only permissible within structured and strict parameters. Limiting a right or fundamental freedom was a delicate act of considering many parameters and such an undertaking should not be mechanical. The criterion for limiting a right was;
  1. whether the limitation had been specifically provided for by a legislation;
  2. the nature of the right or fundamental freedom to be limited;
  3. the importance or the purpose of the limitation;
  4. the nature and extent of the limitation;
  5. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others;
  6. the relation between the limitation and its purpose (the effect of the limitation); and
  7. whether there were less restrictive means to achieve the purpose.
5. The impugned amendments did not expressly and specifically express the intention to limit the right to life. However, the limitation could be strenuously construed from the impugned amendments. The permissive use of firearms may not necessarily mean that it would lead to loss or deprivation of life or to the limitation of the right to life in any manner whatsoever. There was need for a legislation to be crystal clear on its intention to limit any right or fundamental freedom provided for in the Constitution. An example was section 6 of the Access to Information Act that set limitations on the right of access to information; that was not the case with the impugned amendments.
6. The limitation had to be specific enough for the citizen to know the nature and extent of the limitation and that the limitation had to be easily accessible to the citizen. The impugned amendments could be used by police officers to deprive life, however, they lacked clarity of the intention to limit the right to life. The impugned amendments did not clearly state the nature of the right to be limited.
7. The amendments were couched in a manner that it forced one to vaguely infer or construe that the right to life under article 26 of the Constitution was threatened and likely to be limited by such amendments. Such a case ran contra to article 24(2)(b).
8. According to the Sixth Schedule to the National Police Service Act (NPS Act), the purpose of the alleged limitation of the right to life was to allow police office use firearms in instances where less extreme means was inadequate. The intent of the limitation was informed by the reality that there were some instances where the use of firearms on persons was necessary.
9. The purpose of paragraph 1(c) of Part B of the Sixth Schedule to the National Police Service (Amendment) Act was to justify the use of firearms in protection of life and property. Paragraph 1(d) was aimed at allowing police officers to use firearms in preventing a person charged with a felony from escaping lawful custody and paragraph 1(e) allowed police officers to use firearms in preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.
10. Whereas the right to life had a bearing to the rest of the rights and fundamental freedoms, that alone did not place the right to life at a higher pedestal than the rest of the rights and fundamental freedoms. It was a fact that firearms could be used in appropriate instances to protect property and in the process to suppress life.



11. The use of firearms on property and persons called for balance and exercise of restraint, but it could not be flatly held that life could not be suppressed in protection to property.
12. The extent of any limitation imposed by legislation was found in the wording or the text of the legislation. The extent of the limitation lacked clarity. It was not reasonably possible to deduce that the contemplated use of firearms in the impugned amendments had to lead to the limitation of the right to life. It was that ambiguity that deprived the impugned amendments the clarity on the extent of the limitation. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedoms of others. Although the nature of the proportionality test would vary depending on the circumstances, in each case courts would be required to balance the interests of society with those of individuals and groups.
13. There was a delicate balance to be struck between a person's right to property or the need to apprehend law breakers on one hand and on the other hand, such entitlement not be seen to be a justification to terminate another person's right to life.
14. The need to prevent persons in custody charged with felonies, from escaping from lawful custody, an act that protected the society at large and their attendant rights and fundamental freedoms, ought not be used a reason to threaten or potentially end such escapees' right to life whenever they try or were aided to flee from lawful custody.
15. The effect of the impugned amendments went beyond the intended purpose which was to protect life and property and to resist escape from lawful custody. The amendments were a potential avenue for gross abuse of other rights and fundamental freedoms. A police officer could casually shoot someone and allege that his life or property was in danger. Just like the fact that the extent of the limitation was not provided, the negative effects appurtenant from the use of the impugned amendments were limitless. The deleterious effects of the amendments surpassed the intended purpose of the amendments.
16. The objective of any legislation did not go beyond what was necessary to achieve its goals. It also made sure that the least severe or restrictive means were used to attain a legislative imperative. The provisions that preceded the impugned amendments (paragraph 1(a) and (b)) provided for the use of firearms in instances when less extreme means was inadequate in order to save or protect the life of the officer or other person and in self-defence or in defence of other person against imminent threat of life or serious injury.
17. Section 21(2) of the Criminal Procedure Code provided for the manner in which a person who resisted an arrest ought to be apprehended. If such provision was read together with paragraph 1(a) and (b) of Part B of the the Sixth Schedule to the National Police Service (Amendment) Act , then that accorded a lesser restrictive means to achieve the general purpose under Part B of the Sixth Schedule. The provisions coupled with other reasonable ways of protecting life, property and restraining those in lawful custody from escaping should be adequate to cover for the intended use of firearms in lesser ways than those contemplated in the impugned amendments. The impugned amendments tended to be too harsh and aggressive in attaining the intended purpose.
18. The impugned amendments variously impugned the Constitution. They infringed article 2(4) of the Constitution. The intended limitations to the rights and fundamental freedoms vide the impugned amendments were not in consonance with article 24 of the Constitution. They failed the limitation test.
19. Even though the right to life under article 26 of the Constitution was not among the rights which could not be limited, the impugned amendments were a potential threat the right to life as guaranteed in the Constitution. The right to human dignity under article 28 of the Constitution was out rightly threatened as well.
20. An offender who attempted to escape from lawful custody committed an offence that was punishable in law. Prior to being punished, the offender had to be taken through the criminal justice system. If



such an offender was executed summarily courtesy of the impugned amendments, then that was an affront the right to a fair trial under article 50 of the Constitution. The impugned amendments posed a potential danger of intruding into the sanctity of fair trials. The impugned amendments were not legally sustainable for being an affront to the Constitution.

21. Whereas the impugned amendments may have been well-intentioned, that alone did not make them pass the constitutional muster. They had to be in tandem with the Constitution. As long that bar was not attained, the amendments remained constitutionally infirm.

*Petition allowed.*

### **Orders**

- i. Declaration issued that paragraph 1(c), (d) and (e) of Part B of the Sixth Schedule to the National Police Service Act of 2011, as amended by section 54 of the National Police Service (Amendment) Act 2014 contravened articles 2(4), 24, 26(1), 28 and 50 of the Constitution. To that end, the said provisions were null and void ab initio and had no legal effect whatsoever.
- ii. Declaration issued that section 21(2) of the Criminal Procedure Code must be read to permit the use of firearms, if need be, and only in the circumstances construed in paragraphs 1(a) and 1(b) of Part B of the Sixth Schedule to the National Police Service Act 2011.
- iii. Parties were to bear their respective costs.

### **Citations**

#### **Cases**

##### **Kenya**

1. *Buoga v Attorney General & another* Constitutional Petition E290 of 2022; [2022] KEHC 13214 (KLR) - (Applied)
2. *Center for Rights Education and Awareness & others v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR) - (Applied)
3. *Haki Na Sheria Initiative v Inspector General of Police & 3 others* Civil Appeal 261 of 2018; [2020] KECA 566 (KLR) - (Explained)
4. *Kandie, Karen Njeri v Alassane Ba & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Explained)
5. *Ndii v Attorney General* Petition E282, 397, E400, E401, E402, E416 & E426 (Consolidated) of 2020; [2021] KEHC 9746 (KLR) - (Applied)
6. *Njuguna v Attorney General* [1997] KLR 188 - (Explained)
7. *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Civil Appeal 172 of 2014; [2017] KECA 751 (KLR) - (Explained)

##### **Uganda**

*Attorney General v Susan Kigula and 417 others* [2009] UGSC 6 - (Explained)

##### **South Africa**

1. *Ex-parte Minister for Safety and Security and others: In Re S v Walters & another* [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 - (Mentioned)
2. *S v Makwanyane and another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 - (Explained)

##### **United Kingdom**

*Beckford v Queen* [1988] AC 130 - (Mentioned)

##### **United States**

*Tennessee v Garner* 471 US 1 (1985) - (Explained)

##### **Canada**

1. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)
2. *R v Oakes* [1986] 1 SCR 103 - (Applied)





## **Regional Court**

*Leydi Dayán Sánchez v Colombia* Case 12.009, Report Nº 43/08 - (Explained)

### **Statutes**

#### **Kenya**

1. Access to Information Act, 2016 (Act No 31 of 2016) section 6- (Interpreted)
2. Constitution of Kenya (Repealed) section 71- (Interpreted)
3. Constitution of Kenya, 2010 articles 2 (1) (4); 10; 20 (3); 21 (1); 24 (1); 23; 26 (3); 28; 29; 50 (1) (2); 239; 244; Schedule Sixth; section 7- (Interpreted)
4. Criminal Procedure Code (cap 75) section 21 (2)- (Interpreted)
5. Independent Policing Oversight Authority Act, 2011 (Act No 35 of 2011) sections 5, 6- (Interpreted)
6. National Police Service (Amendment) Act, 2014 (Act No 11 of 2014) section 54 - (Interpreted)
7. National Police Service Act, 2011 (Act No 11A of 2011) sections 3, 24(d); 27 (d); Schedule Sixth; part B; paragraph 1 (c) (d) (e)- (Interpreted)
8. Police Act (Repealed) (cap 84) sections 28, 84- (Interpreted)

### **Instruments**

1. African Charter on Peoples' and Human Rights (ACPHR), 1981
2. Code of Conduct for Law Enforcement Officials, 1979
3. European Convention on Human Rights, 1950
4. International Covenant on Civil and Political Rights (ICCPR), 1966
5. UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990
6. Universal Declaration of Human Rights (UDHR), 1948

None mentioned

## **JUDGMENT**

### **Introduction:**

1. Katiba Institute, a constitutional research, policy and litigation institute and Africa Centre for Open Governance (AfriCOG), a non-profit organization with the mission to promote good governance and the implementation of the Constitution, (being the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein respectively) instituted the petition dated July 31, 2017.
2. The petition was supported by the affidavit of Yash Pal Ghai deposed to on an even date.
3. The petitioners challenged the constitutionality of paragraph 1(c), (d) and (e) of part B of the sixth schedule to the National Police Service Act, No 11 of 2014 as amended by section 54 of the *National Police Service (Amendment Act) No 11 of 2014* (hereinafter referred to as 'the impugned amendments').
4. The petition was opposed.

### **The Petition:**

5. The petitioners contended that the introduction of the impugned amendments was a claw back from the gains made by the 2010 Constitution as far as the protection of the right to life, dignity and fair hearing is concerned under articles 23, 28 and 50 of the Constitution.
6. The petitioners averred that the impugned amendments set out the conditions for the use of firearms being to save and to protect life, self-defence, protection of property, preventing a person charged with





- felony from escaping lawful custody and preventing a person who attempts to rescue a person charged with a felony from escaping lawful custody.
7. The petitioners based their case on the basis of articles 2(1), (4), 10, 20(3), 21(1), 24, 24(1), 26, 26(3), 28, 29, 50(1)(2) of the [Constitution](#).
  8. They pleaded that while the [Constitution](#) permits the right to life to be limited by written law under article 26(3), that law must pass the tests set under article 24(1) of the [Constitution](#).
  9. They asserted that the impugned amendments were not reasonable and justifiable in an open democratic society based on human dignity.
  10. It was their case that the impugned amendments did not indicate the intention to limit the right, the nature and extent of that limitation, which were cardinal requirements under article 24(2) of the [Constitution](#).
  11. In tracing the history of the right to life, the petitioner pleaded that the [1969 Constitution](#) (now repealed) provided for deprivation of life in certain circumstances as were provided in section 71 of the said [Constitution](#) a position which was reflected in section 84 of the repealed [Police Act](#).
  12. It was their case that the [2010 Constitution](#) did away with the exceptions under section 71 of the old [Constitution](#) and section 28 of the [Police Act](#) by defining the right to life as one that could not be deprived intentionally except as provided for under article 26(3).
  13. The petitioners maintained that the whereas written law may authorize deprivation of life, it must be tested against the requirements of article 24(1) and (2) of the [Constitution](#) so as to be cleared as being justifiable and reasonable.
  14. In respect to international instruments, the petitioners impugned the amendments hinging their arguments on provisions of article 4 of the [African Charter on Human and Peoples Rights](#), article 6(1) of [International Covenant on Civil and Political Rights](#), article 3 of [Universal Declaration of Human Rights](#), article 3 of the [Code of Conduct for Law Enforcement Officials](#) and paragraph 9 of the [United Nations Basic Principles of on the Use of Force and Firearms by Law Enforcement Officials](#).
  15. The petitioners claimed that the impugned amendments were unconstitutional for failing to provide for the necessary safeguards as articulated under article 24(2) of the [Constitution](#) and for failing to provide justification of the of the limitation that meets the requirements of article 24(1) of the [Constitution](#).
  16. They reiterated that the impugned amendment was unconstitutional for authorizing shooting and potential killing of non-violent persons who pose no threat.
  17. The petitioners posited that absent risk to life or serious injury, shooting and possibly killing a non-violent person in order to protect, prevent escape or to prevent a person from assisting in an escape is inherently arbitrary an incompatible with the right to life, dignity, freedom and security of a person as provided for in article 26, 28 and 29 of the [Constitution](#) respectively and incompatible with article 24 on the limitation of rights.
  18. It was their case that the authority created by the impugned amendments empower the police to replace the criminal justice system with their own determination of guilt, passing judgment and imposing punishment instead of arresting the suspect and bringing them before court to face the law.



19. The petitioners took issue with the fact that the impugned amendments placed property above sanctity of life and to that extent does not meet the proportionality test and least restrictive measure test under article 24(1) of the [Constitution](#).
20. The petitioners further averred that paragraph 1(c) was ambiguous for failing to define defence of property. It was claimed that it is incapable of giving the police or ordinary citizens sufficient guidance as what property justifies the use of firearm.
21. It was averred that the provision has inadequate guidance as when a police officer's is permitted to use the firearm and the citizen unclear as to the consequences of his or her behaviour.
22. The petitioner pleaded that the foregoing leaves the law open to abuse by police officers and seeking defence for negligence, recklessness and extra-judicial killings.
23. It was their case, therefore, that the foregoing would impede accountability for wrong doing by the police contrary to articles 10, 26, 28, 29, 239 and 244 of the [Constitution](#).
24. The petitioners urged further that the impugned amendment will result in arbitrary and inconsistent application of the firearms laws and consequently deprivation of equal protection of the law.
25. On the foregoing factual and legal matrix, the petitioners prayed for the following reliefs: -
  - a. A declaration be and is hereby issued that paragraph 1(c), (d) and (e) of part B of the sixth schedule to the [National Police Service Act](#) of 2011, as amended by sections 54 of the *National Police Service (Amendment) Act* 2014 contravene articles 26(1), 28, 29 and 50 of the [Constitution](#).
  - b. A declaration be and is hereby issued that the aforementioned paragraph of part B of the sixth schedule to the [National Police Service Act](#) of 2011, as amended by sections 54 of the *National Police Service (Amendment) Act* 2014 contravene article 2(4) of the [Constitution](#) and is thus null and void.
  - c. A declaration that section 21(2) of the [Criminal Procedure Code](#) must be read in conformity to section 7 of the sixth schedule of the [Constitution](#) so as to be construed to permit the use of firearms in circumstances construed in paragraphs 1(a) and 1(b) of part B of the sixth schedule to the [National Police Service Act](#) 2011.
  - d. An order be and is hereby issued invalidating paragraph 1(c), (d) and (e) of part B of the sixth schedule to the [National Police Service Act](#) 2011.
  - e. Any other just and expedient order the court may deem fit to make.
  - f. Costs of and incidental to this petition.

#### **The Petitioners' Submissions:**

26. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners filed joint written submissions dated February 9, 2018. From the outset, they reiterated that the petition sought to declare paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service (amendment) Act* No 11 of 2014 unconstitutional for derogating the strides made by the 2010 [Constitution](#).
27. It was their case that the amendment violated articles 26, 28, 29 and 50(1) on the [Constitution](#) on the right to life, dignity, freedom and security of a person and right to fair hearing respectively.



28. Reference was made to report by the Commission of Inquiry into the Post-Election Violence of 2007-08(Waki Commission) where it was found that there was need for police to exercise use of firearms in a minimal and proportionate manner in view of the fact that the police accounted for 962 casualties out of whom 405 succumbed.
29. It was submitted that the 2010 [\*Constitution\*](#) did away with numerous exceptions allowed under the old [\*Constitution\*](#) and the [\*Police Act\*](#) where the right to life was one that could not be deprived intentionally other than under article 26(3).
30. In reference to the [\*National Police Service Act\*](#) of 2011, it was submitted that the changes therein were in compliance with the 2010 [\*Constitution\*](#) that reflected stronger protection of the right to life in line with modern conceptions of police power.
31. It was submitted that before the amendment, the [\*National Police Service Act\*](#) authorised police to use lethal force in clearly defined and circumscribed situations. The amendment thus, introduced two criteria that allowed firearm in less extreme measures.
32. The petitioners' position was that the police ought to only use firearm in instances where there was threat to life or threat of serious injury.
33. In buttressing the right to life, it was submitted that the right to life is the foundation of all other rights and its interpretation must be given the widest meaning. Reliance to that end was placed on the South African decision in [\*State -vs- Makwanyane & another\*](#) 1995 (3) Sa 391 (CC) 1995 where it was observed that: -

"The right to life is more than existence – it is a right to be treated as a human being with dignity; without dignity, human life is substantially diminished. Without life there cannot be dignity."
34. Further reliance was placed on the Ugandan Supreme Court case in [\*Attorney General v Sussan Kigula & 417 others\*](#) (2009) UGSC 6 (20 January 20009) where it was observed thus: -

"Life is sacrosanct and may only be taken away after due process up to the highest court, and after the President has had opportunity to exercise the prerogative of mercy."
35. In reference to the Colombian and United States Supreme Court decision in [\*Leydi Dayan Snachex -vs- Colombia\*](#) and [\*Tennessee v Garner\*](#) 471 US 1 11 (1985) respectively, it was argued that to shoot and possibly kill a non-violent person, running away from the police, rather than securing his arrest is inherently arbitrary and incompatible with the right to life and human dignity. In the latter case it was observed that: -

"Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does to justify the use of deadly force to do so."
36. It was their submission that parliament might have meant well but the amendment fails to provide guidance on the permissible use of firearms. It was claimed that lends itself to various interpretations thereby threatening the right to life.



37. In respect of use of firearms only when necessary and proportionally, support was found in the Court of Appeal in Stephen Iregi Njuguna v Attorney General (1997) eKLR where it was observed that: -

"The police do not have an unqualified licence to resort to shooting. They are authorised to shoot only when necessary to do so and it is up to them to demonstrate that shooting was necessary."
38. On the foregoing arguments, the petitioners submitted that the amendments do not align to the limitation of rights under article 24 of the Constitution.
39. In his oral highlights, Miss Nkonge counsel for the petitioners submitted that the petition challenged the changes brought to National Police Service Act, through the amendment of section 54 of the National Police Service Act No 11 of 2014 which introduced of three paragraphs to the 6<sup>th</sup> schedule of part B.
40. Counsel stated that the amendments were not tied to protection of life or to the victim or of the police officer instead the provision contravened article 24 of the Constitution and as such they are regressive of the law in as far as protection of life is concerned.
41. It was submitted that the amendments can lead to arbitrariness by police and violation of rights and that the vague nature of the amendment can lead to loss of life, hence need for proper control.
42. Seeking to distinguish the decision in America case in Bedford v Queen 1988, counsel submitted that use of force is only justified in instances of self-defence.
43. In the end, counsel urged that the prayers sought for in the petition be granted.
44. All the interested parties supported the petition. As such, this court will, in the first instance, consider their respective cases.

#### **The 1<sup>st</sup> Interested Party's Case:**

45. In support of the petition, the Independent Policing Oversight Authority, (hereinafter referred to as 'the IPOA') filed a replying affidavit deposed to by David Njaga Nderitu on September 14, 2017, the Director Complaints Management and Legal Services.
46. While speaking to IPOA's objective to be accountable and provide security whilst observing the highest standard of professionalism as set out in section 5 of the IPOA Act, he deposed that under section 6, IPOA has an obligation to receive and investigate complaints related to disciplinary or criminal offences committed by any member of the National Police Service.
47. On the foregoing mandate, he deposed that between January and June 2016, the IPOA received 117 complaints regarding police shootings and deaths and 105 cases between July and December of the same year.
48. He further referred to IPOA's Report on police conduct during protests and gatherings to demonstrate incidences of misuse of firearms by police that resulted in serious injuries, maiming and deaths.
49. Based on the foregoing, he deposed that the impugned amendments broadening the circumstances under which police officers may use firearms is against police reforms.
50. It was his case that IPOA was created as a result of the challenges faced by Kenyans due to excessive force used by the police.



51. In highlighting the 1<sup>st</sup> interested party's written submissions dated February 6, 2018, Mr Kinoti, counsel for stated that the amendments took the country back to where it was before the promulgation of the 2010 Constitution.
52. He submitted that police shootings are rife and the amendments tend to limit key foundational rights that call for compelling of public interest invitation which the respondents have not done.
53. It was his case that the respondents have not discharged the burden that the amendments were within the limits set by article 24 of the Constitution.
54. It was his case that the right to property cannot be elevated to that of life. He submitted that the safeguards for the use of firearms will be rendered otiose where the law itself permits otherwise. Reference was made to the South African decision in Ex-parte Minister for Safety and Security and others: In Re S v Walters & another (CCT28/01 (2002) ZACC 6: 2002 (4) SA 613; 2002(7) BCLR 663.
55. It was further his case that the impugned amendments do not meet the mandatory constitutional threshold requirements for limitation as set out in article 24(1). Support was found in Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017] eKLR where it was observed that: -
 

"The limiting law must be clear enough and devoid of ambiguity for if a guaranteed constitutional right is to be limited the limitation must be specific enough for the citizen to know that nature and extent of the limitation."
56. In denouncing the use of firearms in the protection of property, the 1<sup>st</sup> interested party referred to the United Nations Office Drug and Crime (UNODC) resource book on the use of force and firearms in law enforcement where it is stated that: -
 

"A threat merely against property does not justify using firearms against a person....."
57. It was his case that the limitations imposed by the impugned amendments were disproportionate in view of the nature of the rights to be affected, the effect of the limitation on the rights and the justification given for the limitation.
58. On the basis of the foregoing, counsel urged the court to declare the impugned amendments unconstitutional.

#### **The 2<sup>nd</sup> Interested Party's Case:**

59. The International Justice Mission, an international human rights agency whose mission is to rescue millions, protect half a million and prove that justice is unstoppable, supported the petition through the affidavit of Wamathai Kimani, the Director System Reform, deposed to on September 25, 2017.
60. In giving examples on its mandate, the 2<sup>nd</sup> interested party deposed that it has over the years represented victims of arbitrary arrests and detention falling under the scope of the National Police Service Act and to that end, in the year 2017, it secured the release of 267 individuals wrongfully accused by the police.
61. It was his case that it represented David Makara in the Chief Magistrates Court at Nyahururu in Criminal Case No 34321 of 2002, Joseph Musyoka in Criminal Case No 4778 of 2010 among others who were all victims of excessive use of force by firearms by police.



62. He further gave the example of Douglas Tutu, Moses Wanyoike and Johnston Ndichu who had gone fishing in Crescent Island in Naivasha where, while being arrested, the said Moses Wanyoike was shot and killed by a policeman.
63. He deposed that the 2<sup>nd</sup> interested party is representing the families of the deceased unarmed persons who were victims of police killing.
64. It was his deposition that if the amendments were allowed to stand, it would create legal justification for police officers to kill more innocent people without cause, while also limiting probable accountability measures to the wrongful deaths by shootings.
65. It was his case that the impugned amendments were not in tandem with the limitation set in article 24 of the [Constitution](#) for being unreasonable and unjustifiable.
66. He urged the court to declare the impugned amendments as unconstitutional.
67. The 2<sup>nd</sup> interested party did not file written submissions, however, Mr Majani Counsel orally submitted stating that the purpose of the [National Police Service Act](#) is sacred and to that end, section 3 gives effect to various provisions of the [Constitution](#).
68. It was his case that the amendments were unconstitutional for giving the police sweeping powers for the use of firearms which directly infringe on the right to life.
69. It was his case that the amendments cannot stand since the police are allowed to use firearm to protect property, a scenario that elevates property to life.

### **The 3<sup>rd</sup> Interested Party's Case:**

70. Kenya Human Rights Commission, supported the petition in reliance to its written submissions dated December 3, 2017 and the deposition of the George Kegoro, its Executive Director.
71. In its written submissions, it was its case that the impugned amendments disproportionately increased the purposes for which police officers would use firearms in contravention of article 26(3) of the [Constitution](#) and article 1 of the [Universal Declaration of Human Rights](#).
72. It was its case that deprivation of life must be evaluated under paragraph 7 of the General Comment 3 of the African Charter on Human and Peoples Rights which provides for appropriateness, justice, predictability, reasonableness, necessity and proportionality.
73. The 3<sup>rd</sup> interested party referred to section 21 of the [Criminal Procedure Code](#) which allows the police or a private person to use all means necessary to effect arrest where arrest is forcibly resisted. It was his case that the said section forbids the use of unreasonable force in effecting arrest by stating that nothing in the section justifies the use of greater force that is reasonable for the apprehension of the offender.
74. In his oral highlights, Mr Malenya, counsel for the 3<sup>rd</sup> interested party was emphatic that amendments are too broad and give police officers additional discretion to abuse power, hence unconstitutional.
75. It was his case that the right to life is *jus cogens* and according to article 4 of the [Human and Peoples Rights](#), ratified by Kenya in 1992 and as such no state organ is permitted to derogate from.
76. He urged the court to declare the impugned amendments unconstitutional.

### **The 4<sup>th</sup> Interested Party's Case:**

77. Kenya National Commission on Human Rights, (KNCHR) supported the petition.





78. It was deposed on its behalf that the impugned amendments created unfettered discretion for members of the police service to exploit, as a justification, the use of force in a manner that contravenes the right to life guaranteed under article 26(3) of the [\*Constitution\*](#).
79. While referring to an audit report on the status of police reforms in Kenya and the extent of police abuse of firearms, it was its case that the report indicated that counter-terrorism operations at the Coast and in North Eastern had been abusive and depicted as discriminatory, with extrajudicial killings laced with ethnic and religious profiling that disproportionately targeted ethnic Somali and Muslim communities.
80. It was deposed further that the report showed that 141 persons were killed by the police in 2015 and 204 in 2016 and 80 as at June 2018. It was contended that some of the killings were as a result of premeditated murder, extra-judicial killings, of suspects, enforced disappearances and blatant execution of suspected persons.
81. Further deposed was that despite the requirement in part A of the sixth schedule for police officer to report to the superior explaining the circumstances that necessitated the use of force immediately, such incidents are seldom brought to the attention of public despite the presence of Internal Affairs Unit established under section 87 of the [\*National Police Act\*](#) and IPOA.
82. It was also deposed that the impugned amendments were in contravention of international principles of use of lethal force which require that lethal force should not be used except in self-defence of to others against the imminent threat or death of serious injury.
83. It was reiterated that the amendments created unfettered discretion for the use of firearms in contravention of the right to life.
84. In its written submissions dated April 17, 2019, the KNCHR referred to [\*S v Walters & another\*](#) (CCT 28/01) (2002) ZACC6 where it was observed that: -  
  
".... State ought to play an exemplary role in promoting a culture of respect for human life and dignity."
85. It was its case that the elevation of the right to property to that of life was opening up lives to be taken away in the protection of property and in violation of article 26 of the [\*Constitution\*](#).
86. To disapprove of the impugned amendments, KNCHR referred to the Intercession Activity Report by the African Commissions on Human and People's Rights Working Group on Death Penalty and Extra-Judicial Killings in Africa where it observed its disappointment to observe that there were efforts in Kenya to undermine the progress of police reform and the strong protections of the right to life in the [\*National Police Service Act\*](#) 2011 by giving licence to use lethal force in defence of property.
87. According to KNCHR, the police should abide by principle 9 of the [\*United Nations Basic Principles\*](#) which only prohibits the use of force and firearms by law enforcement officials except "in self-defence or defence of others against the imminent threat of death or serious injury to prevent the perpetration of serious crime involving grave threat to life..."
88. On vagueness of the impugned amendments, it was its case that the use of the word "justifiable cause" rendered it open to interpretation by police officers without any guidance on the extent or degree of force that may be used.
89. In the end, the 4<sup>th</sup> interested party urged the court to declare the impugned amendments unconstitutional for being inconsistent with article 2(4) on supremacy of the [\*Constitution\*](#).



90. Mr Abdikadir, counsel for the 4<sup>th</sup> interested party associated himself with the submission of the petitioner. It was his submission that the amendments added three more grounds to the police for use a firearm, a position which is a derogation from the article 244(c) of the [Constitution](#).
91. It was his submission that the amendments equated life to property. Support was drawn from the United States Supreme Court in [Tennessee -vs- Garner](#).
92. It was his position that it was unconstitutional for the amendments to allow the police to use firearm on escapees who are not armed.
93. Counsel called for the declaration of unconstitutionality of the impugned amendments.

#### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Cases:**

94. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition through the replying affidavit of Peter Wanyoike Thuku, the Legal Officer deployed at the Office of the Inspector General of Police, deposed to on December 4, 2017.
95. It was his deposition that in 2013, Parliament amended part (b) of the sixth schedule of the [National Police Service Act](#) to include 1(c), (d) and (e) in order to cater for circumstances where firearms may be used when less extreme measures are not effective.
96. He deposed that according to part A of the sixth schedule, the use of firearms is not carte-blanc, a police officer is required to always attempt to use non-violent means and force may be employed only when non-violent means are ineffective.
97. It was his deposition that under the impugned amendments, the officer intending to use firearms shall identify themselves and give a clear warning of the intention to use firearm with sufficient time for the warning to be observed.
98. He deposed that police officers in execution of the mandate of protecting life and property as provided for under section 24(d) and 27(d) of the [National Police Service Act](#), often encounter dangerous situations when they are confronted by dangerous armed criminals.
99. It was his case that in order to apprehend offenders it is imperative to have firearms and use them to enforce arrest when less extreme measures are inadequate.
100. It was his case that police officers are trained and are guided by legislation to avoid use of firearms especially on children.
101. He deposed that where injury is caused by use of force and firearms by law enforcement officers, they have the duty to report the incident to their superiors.
102. It was his contention that declaring the impugned unconstitutional would in effect put the police in danger from felonies and hamper the effort to protect life and property thus putting the public in danger.

#### **The Respondents' Submissions:**

103. In reference to sections 24 and 27 of the [National Police Service Act](#) (hereinafter referred to as the '[NPS Act](#)'), it was submitted that the provision that establishes the functions of the Kenya Police and Administration Police gave effect to the [Constitution](#).





104. It was their case that section 49(3) of the [NPS Act](#) gave the police the obligation to enforce and ensure compliance with the law and that according to section 49(5) of the [NPS Act](#), police are required to be reasonable in use of firearms and are required to use non-violent means first.
105. It was submitted that the [NPS Act](#) does not allow for the uncontrolled use of firearms and that according to 6<sup>th</sup> schedule a victim whose rights are violated by a police officer is entitled to redress and compensation upon decision of a court, tribunal or other authority.
106. In demonstrating the mandatory safeguards in place, it was stated that police officers are to report on what necessitated the use of force and that firearm must only be used after giving proper notice.
107. It was further submitted that the amendments were constitutional since they were passed in Parliament after due process and it sought to address the genuine concern of terrorism, cattle rustling, robbery with violence among others in which police officers had been killed in the line of duty.
108. It was his case that the amendments are well crafted since they used the word ‘may’ as opposed to ‘shall’.
109. In respect to use of firearms to protect property, it was their case that it is justified where non-violent means is inadequate. It was her case that police officers are also human beings and as such the right to life applies to them also.
110. It was maintained that police officers under section 87(1) of [NPS Act](#) are held accountable for the use of firearms by the Internal Affairs Unit.
111. In reference to article 2(2) of the [European Commission on Human Rights](#), it was submitted that the use of firearms is justified for the protection of life and property the world over. Reliance to that end was placed on the case of [Bedford v Queen](#) 1988.
112. It was her case that there has to be neutrality, proportionality and precaution as the basis for use of firearms and that the amendments are not vague as they measure up to international standards.
113. He urged the court to strike out submissions by the interested parties as they introduced facts not in the petition.
114. In the end, it was submitted that the amendments were within the limits under article 24 of the [Constitution](#).
115. The respondents further urged its case through written submissions dated October 29, 2018 and supplementary ones dated February 15, 2021.
116. It claimed that the rights alleged to have been contravened are not absolute rights and accordingly are subject to limitation. However, in reference to section 61 of the [NPS Act](#), it was their case that the use of firearms is not permitted in absolute terms.
117. In conclusion, it was urged that the petitioner’s and the interested parties cases be dismissed with costs.

**Analysis:**

118. Having carefully considered the material before court, two issues arise for the court’s consideration. They are: -
  - i. Principles of constitutional and statutory interpretation.



- ii. Whether paragraph 1(c), (d) and (e) of part B of the sixth schedule to the National Police Service (Amendment) Act No 11 of 2014 contravene articles 2(4), 24, 26(1), 28, 29 and 50 of the Constitution.

119. This court will, going forward, consider the issues sequentially.

**Principles of constitutional and statutory interpretation:**

120. Constitutional interpretation also referred to as judicial interpretation is the legal creativity of attributing or assigning meaning to the provisions of the Constitution.
121. The Constitution is a document *sui generis*. It is the supreme law of the land and its interpretation has over time been developed by courts and scholars both locally and internationally.
122. Locally, superior courts have made pronouncements on how the Constitution ought to be interpreted. In David Ndii & others v Attorney General & others [2021] eKLR, the learned judges, while referring to various decision of the apex court and the Court of Appeal spoke to the subject as follows: -

"399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

- a. First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in *In the Matter of the Kenya National Commission on Human Rights*, Supreme Court Advisory Opinion Reference No 1 of 2012; [2014] eKLR thus (at paragraph 26):

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

- b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle *In Re Interim Independent Election Commission* [2011] eKLR, para [86] thus:

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the



preamble, in article 10, in chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.

- c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in *In Re the Speaker of the Senate & another v Attorney General & 4 Others*, Supreme Court Advisory Opinion No 2 of 2013; [2013] eKLR. (paragraphs 155-157):

(155) In both my respective dissenting and concurring opinions, *In the Matter of the Principle of Gender Representation in the National Assembly and Senate*, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the Constitution, 2010 and the Supreme Court Act, 2011 provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

(156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to



resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

- d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on chapter four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:

(232) ...References to *Black's Law Dictionary* will not, therefore, always be enough, and references to foreign cases will have to take into account



these peculiar Kenyan needs and contexts.

(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to “facilitate the social, economic and political growth” of Kenya.

400. With these interpretive principles in mind, which we will call the canon of constitutional interpretation principles to our transformative Constitution, we will presently return to the transcendental question posed in these consolidated petitions....."

123. The Court of Appeal also spoke to constitutional interpretation in the case of *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR when it made the following remarks: -

"(21) .... Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

that as provided by article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.



that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.

that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. .... The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.”

124. With respect to statutory interpretation, this court, in Petition No E290 of 2022, *Victor Buoga -vs- The Hon Attorney General & another*, (unreported) stated as follows: -

“A court dealing with the statutory interpretation must also subject the statutory provision to the three tests developed in the Canadian case in *R vs Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103. The tests are the objective test which the limitation is designed to serve. Second, the means chosen to attain the objective must be reasonable and demonstrably justified. This is the proportionality test. Third, the effect of the limitation.”

125. Having set out the parameters for constitutional and statutory interpretation, this court will now consider constitutionality of the impugned section.

**Whether paragraph 1(c), (d) and (e) of part b of the sixth schedule to the National Police Service (Amendment) Act No 11 of 2014 contravene articles 2(4), 24, 26(1), 28, 29 and 50 of the Constitution:**

126. For ease of this discussion, a reproduction of the impugned amendments as contained in paragraph 1(c), (d) and (e) of part B of the sixth schedule to the *National Police Service (Amendment) Act* is necessary. They provide as follows: -

**B - Conditions as to the use of firearms:**

1. Firearms may only be used when less extreme means are inadequate and for the following purposes—



- a. saving or protecting the life of the officer or other person;
- b. in self-defence or in defence of other person against imminent threat of life or serious injury;
- c. protection of life and property through justifiable use of force;
- d. preventing a person charged with a felony from escaping lawful custody; and
- e. preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.

127. This issue calls for an interrogation of article 26 of the [Constitution](#) which is the right to life and the extent to which that right may be limited. Perhaps it is of importance to note the right to life is not one of those rights which cannot be limited under article 25 of the [Constitution](#).

128. It, therefore, means that the right to life may be limited in appropriate circumstances. This matter avails an opportunity to ascertain whether the impugned amendments are within the confines of permissible limitation to the right to life.

129. The constitutional safeguard for the right to life is found in article 26 of the [Constitution](#) which provides as follows: -

26. Right to life

- (1) Every person has the right to life.
- (2) The life of a person begins at conception.
- (3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

130. As stated above and according to article 26(3) of the [Constitution](#), the right to life is not absolute. It can be alienated, but to the extent that the Constitution or any other law authorises.

131. For any limitation to a right or fundamental freedom in the [Constitution](#) to be sustainable, such must be within the parameters set by article 24 of the [Constitution](#).

132. Article 24(1) of the [Constitution](#) starts it off as follows: -

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
  - (a) the nature of the right or fundamental freedom;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
  - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.





133. Article 24(2) of the [Constitution](#) further confines within which a legislation may limit a right and fundamental freedom. The provision calls upon the legislation to ensure certain parameters are met for the limitation to be sustainable. It provides as follows:

- (2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-
- a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
  - b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
  - c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

134. Article 24(3) places the burden on any one seeking to limit any right or fundamental freedom to justify it while article 24(4) is on the application of the provisions on equality in the Bill of Rights to Muslim law. Article 24(5) provides for the specific rights and fundamental freedoms to persons serving in the Kenya Defence Forces and the National Police Service which may be limited by a legislation.

135. A closer look at article 24 of the [Constitution](#) reveals a deliberate scheme to safeguard rights and fundamental freedoms in the Bill of Rights such that their limitation is only permissible within structured and strict parameters.

136. The superior courts in Kenya have severally discussed the import of article 24 of the [Constitution](#).

137. The Court of Appeal in Civil Appeal 261 of 2018, [Haki Na Sheria Initiative v Inspector General of Police & 3 others](#) [2020] eKLR while relying on decisions of the Supreme Court discussed the instant subject in some detail. The Learned Judges of Appeal had the following to say: -

"47. Article 24 of the Constitution should also be read together with article 25, which provides for the rights that cannot be limited (non-derogable rights) as follows:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to a fair trial; and
- (d) the right to an order of habeas corpus".

48. The Supreme Court of Kenya in *Karen Njeri Kandie v Alassane Ba & another* [2017] eKLR stated as follows:

"Kenyan courts have previously analysed the limitation test enshrined in article 24 of the Constitution; for example, in the case of *Attorney-General & another v Randu Nzai Ruwa & 2 others* Civil Appeal No 275 of 2012; [2016] eKLR, the Court of Appeal observed that the rights and freedoms in the Bill of Rights





can only be limited under article 24 of the Constitution, and neither the State nor any state functionary can arbitrarily do so. The court further endorsed the holding of the trial court with respect to article 24, and stated thus:

"Our reading of article 24(1) is that not only must the law limiting a right or fundamental freedom pass constitutional muster but also the manner in which the law is effected or proposed. So both the law prescribing the limitation and the manner in which it is acted upon must satisfy the requirement of article 24."

49. The Supreme Court further stated as follows:

"77. After carefully considering article 24 of the Constitution and the above cases, we find that the test to be applied in order to determine whether a right can be limited under article 24 of the Constitution, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead the court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration.

79. Is this limitation reasonable and justifiable? It is important to consider the factors set out in the Constitution, that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, and the fact that the need for enjoyment of the right by one individual does not prejudice the rights of others, as well the consideration the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose. We will herebelow carry out an analysis on the rights that the appellant alleges were unjustifiably limited."

50. The limitation of fundamental rights and freedoms under article 24 of the Constitution was a question of inquiry by this court in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* [2017 eKLR (Civil Appeal 172 of 2014)] and the court held that:

"While article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the Constitution, Article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations.



First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose”.

51. In that appeal, the court further reiterated that the first inquiry the court should delve into is whether there is a law that restricts the enjoyment of a fundamental right and whether the limitation was justifiable or reasonable in an open and democratic society. In considering this latter point, the court held that:

“The limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen.”

52. This position was buttressed in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR (Civil Appeal No 56 of 2014) wherein the court set out similar prescriptions for a law that would limit fundamental rights to ensure legal certainty. Applying the principles therein to the appeal at hand, the law in question is the Public Order Act. It is clear to us that the impugned provisions do constitute a limitation on certain fundamental rights.

53. In *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* (*supra*) this court noted that:

Even after establishing the existence of a law limiting any specific right and accepting that it is reasonable and justified the means chosen to achieve the objective must pass a proportionality test by considering the parameters set out in article 24(1)(a)-(e).”

138. The foregoing buttresses the fact that limiting a right or fundamental freedom is not a walk in the park. It is a delicate act of considering many parameters and such an undertaking should not be mechanical.
139. To aid and guide the rest of the courts, the Supreme Court in *Karen Njeri Kandie v Allassane Ba & another* [2017] eKLR while concurring with the test laid in *R vs Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 developed a criterion in determining whether a right or fundamental freedom is appropriately limited.
140. From the reading of the said decision, the criterion may be summed up as under: -
  - (a) Whether the limitation has been specifically provided for by a legislation.
  - (b) The nature of the right or fundamental freedom to be limited;
  - (c) The importance or the purpose of the limitation;



- (d) The nature and extent of the limitation;
  - (e) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;
  - (f) The relation between the limitation and its purpose (the effect of the limitation); and
  - (g) Whether there are less restrictive means to achieve the purpose.
141. This court will now apply the above criterion in determining whether the limitation to the right to life imposed by the impugned amendments meet the constitutional muster.

**Whether the limitation has been specifically provided for by a legislation:**

142. The impugned amendments in this matter do not expressly and specifically express the intention to limit the right to life. However, the limitation can be strenuously construed from the impugned amendments. This court says so because from the reading of the impugned amendments it may be correctly argued that the permissive use of firearms may not necessarily mean that it will lead to loss or deprivation of life or to the limitation of the right to life in any manner whatsoever.
143. There is need for a legislation to be crystal clear on its intention to limit any right or fundamental freedom provided for in the [Constitution](#). A good example is the [Access to Information Act](#), No 31 of 2016. The said Act expressly states in section 6 as follows: -
6. Limitation of right of access to information:
- (1) Pursuant to article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—
144. Section 6 of the [Access to Information Act](#) leaves no doubt of its intention to limit the right of access to information. That is not, however, the case with the impugned amendments.
145. Further, the Court of Appeal frowned upon legislation that was not clear on the intention to limit rights. In [Seventh Day Adventist Church \(East Africa\) Limited v Minister for Education & 3 others](#) [2017 eKLR the court observed that the limitation must be specific enough for the citizen to know the nature and extent of the limitation and that the limitation must be easily accessible to the citizen.
146. In sum, the impugned amendments, though can be used by police officers to deprive life, lack clarity of the intention to limit the right to life.

**The nature of the right or fundamental freedom to be limited:**

147. The impugned amendments, once again, do not clearly state the nature of the right to be limited.
148. The amendments are couched in a manner that it forces one to vaguely infer or construe that the right to life under article 26 of the [Constitution](#) is threatened and likely to be limited by such amendments.
149. Such a case runs contra article 24(2)(b) of the [Constitution](#).

**The importance or the purpose of the limitation:**

150. According to the sixth schedule to the [NPS Act](#), the purpose of the alleged limitation of the right to life is to allow police office use firearms in instances where less extreme means is inadequate.



151. The intent of the limitation was informed by the reality that there are some instances where the use of firearms on persons becomes necessary.
152. In this case, the purpose of paragraph 1(c) is to justify the use of firearms in protection of life and property. Paragraph 1(d) is aimed at allowing police officers to use firearms in preventing a person charged with a felony from escaping lawful custody and paragraph 1(e) allows police officers to use firearms in preventing a person who attempts to rescue or rescues a person charged with a felony from escaping lawful custody.
153. This court must point out that the petitioners have strenuously argued that the impugned amendments wrongly placed the right to life at par with the right to property. The court has keenly considered the argument.
154. Whereas it can be argued, rightly so, that the right to life has a bearing to the rest of the rights and fundamental freedoms, that alone does not place the right to life at a higher pedestal than the rest of the rights and fundamental freedoms. This court so says since it is a fact that firearms may be used in appropriate instances to protect property and in the process, to suppress life.
155. The use of firearms on property and persons, therefore, calls for balance and exercise of restraint, but it cannot be flatly held that life cannot be suppressed in protection to property.

**The nature and extent of the limitation:**

156. The extent of any limitation imposed by legislation is found in the wording or the text of the legislation.
157. At hand, the impugned amendments use permissive language. However, the extent of the limitation lacks clarity. It is not reasonably possible to deduce that the contemplated use of firearms in the impugned amendments must lead to the limitation of the right to life. It is that ambiguity that deprives the impugned amendments the clarity on the extent of the limitation.  
  
The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others:
158. This is the proportionality test as discussed in *Queen v Big M Drug Mart Limited* [1985] 1SCR 295. The court held that ‘...although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups....’
159. In *R vs Oakes* case (*supra*) the Supreme Court held as follows: -

"70. There are..... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd*, *supra*, at p 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".



160. The Court of Appeal in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* case (*supra*) also addressed the aspect of the proportionality of legislation that seek to limit rights and fundamental freedoms.
161. Having regard to the circumstances of the case herein, the foregoing constitutional edict requires a delicate balance to be struck between a person's right to property or the need to apprehend law breakers on one hand and on the other hand, such entitlement not be seen to be a justification to terminate another person's right to life.
162. With respect to persons in custody charged with felonies, the need to prevent them from escaping from lawful custody, an act that protects the society at large and their attendant rights and fundamental freedoms, ought not be used a reason to threaten or potentially end such escapees' right to life whenever they try or are aided to flee from lawful custody.
163. As said, it is all about a delicate act of balancing the interests at hand at any particular instance.

#### **The effect of the limitation:**

164. The effect of a provision in a legislation intending to limit a right and fundamental freedom was discussed in *R vs Oakes* case (*supra*) as follows  
  
"71. With respect to the third component, it is clear that the general effect of any measure impugned under S.1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."
165. In this case, the effect of the impugned amendments goes beyond the intended purpose which is largely to protect life and property and to resist escape from lawful custody.
166. The amendments are a potential avenue for gross abuse of other rights and fundamental freedoms. A police officer may casually shoot someone and allege that his life or property was in danger. Just like the fact that the extent of the Limitation is not provided, the negative effects appurtenant from the use of the impugned amendments are limitless.
167. The deleterious effects of the amendments, therefore, surpass the intended purpose of the amendments.



**Whether there are less restrictive means to achieve the purpose:**

168. Having discussed the purpose of the impugned sections, the foregoing constitutional provision ensures that the objective of any legislation does not go beyond what is necessary to achieve its goals. It also makes sure that the least severe or restrictive means are used to attain a legislative imperative.
169. The provisions that precede the impugned amendments [that is paragraph 1(a) and (b)] provide for the use of firearms in instances when less extreme means is inadequate in order to save or protect the life of the officer or other person and in self-defence or in defence of other person against imminent threat of life or serious injury.
170. Further, section 21(2) of the [Criminal Procedure Code](#), cap 75 of the laws of Kenya provide for the manner in which a person who resists an arrest ought to be apprehended. If such provision is read together with paragraph 1(a) and (b) of part b of the sixth schedule, then that accords a lesser restrictive means to achieve the general Purpose under part b of the sixth schedule.
171. Those provisions [that is paragraph 1(a) and (b)] coupled with other reasonable ways of protecting life, property and restraining those in lawful custody from escaping should be adequate to cover for the intended use of firearms in lesser ways than those contemplated in the impugned amendments.
172. The impugned amendments, therefore, tend to be too harsh and aggressive in attaining the intended purpose.

**Whether the impugned amendments are a derogation of articles 2(4), 24, 26(1), 28, 29 and 50 of the Constitution:**

173. On the basis of the foregoing discussion, it comes to the fore that impugned amendments variously impugn the [Constitution](#). To that end, they infringe article 2(4) of the [Constitution](#).
174. Further, the intended limitations to the rights and fundamental freedoms vide the impugned amendments are not in consonance with article 24 of the [Constitution](#). They fail the limitation test.
175. Even though the right to life under article 26 of the [Constitution](#) is not among the rights which cannot be limited, there is no doubt that the impugned amendments are a potential threat the right to life as guaranteed in the [Constitution](#). That being the case, the right to human dignity under article 28 of the [Constitution](#) is outrightly threatened as well.
176. When it comes to apprehending an offender, who attempts to escape from lawful custody, the offender in making the attempt commits an offence. That offence is punishable in law. Prior to being punished, the offender must be taken through the criminal justice system. If such an offender is executed summarily courtesy of the impugned amendments, then that is an affront the right to a fair trial under article 50 of the [Constitution](#). Therefore, the impugned amendments pose a potential danger of intruding into the sanctity of fair trials.
177. Deriving from the foregoing discussion, there is no doubt that the impugned amendments are not legally sustainable for being an affront to the [Constitution](#).

**Disposition:**

178. Whereas the impugned amendments may have been well-intentioned, that alone does not make them pass the constitutional muster. They must be in tandem with the [Constitution](#). As long that bar is not attained, the amendments remain constitutionally infirm.



179. That being the position in this matter, this court must take steps to ensure that the Constitution is duly defended and upheld.
180. To that end, this court finds the petition merited and hereby make the following final orders: -
- a. A declaration be and is hereby issued that paragraph 1(c), (d) and (e) of part b of the sixth schedule to the National Police Service Act of 2011, as amended by sections 54 of the National Police Service (Amendment) Act 2014 contravene articles 2(4), 24, 26(1), 28 and 50 of the Constitution. To that end, the said provisions are null and void ab initio and have no legal effect whatsoever.
  - b. A declaration be and is hereby issued that section 21(2) of the Criminal Procedure Code must be read to permit the use of firearms, if need be, and only in the circumstances construed in paragraphs 1(a) and 1(b) of part b of the sixth schedule to the National Police Service Act 2011.
  - c. As this matter is a public interest litigation, parties shall bear their respective costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

xxxxxxx, Learned Counsel for the Appellant.

xxxxxxx, Learned Counsel for the Respondent.

Kirong/Nawatola – Court Assistants.

