the interest of every subject of the realm, and while in these exceptional cases the private citizen may seem to be denied what is to his immediate advantage, he like the rest of us would suffer if the needs of protecting the country as a whole were not ranked as a prior obligation.

41. It was further submitted that it is clear from the petition that disclosure of this information is not essential for the Petitioners to make out their case since the petition is supported by a plethora of documents which include a detailed report of the departmental committee on administration and national security into the Garissa University terror attack, report of the joint committee on administration and national security relating to terrorist attacks, parliamentary Hansard reports and other reports relating to the attack. Indeed, counsel urged that the Petitioners have not demonstrated how these documents fall short in material respect and how the report sought to be disclosed is the *sine qua non* for establishment of their case. Counsel urged that it is trite law that where it is shown, as in this case, that national security would be gravely and directly compromised by disclosure of information, the interest of litigants must give way to the public interest of securing national security. Indeed, he noted that pursuant to Section 6(6) of the Act, interest of the litigants is not one of the factors the Court is enjoined to consider when considering public interest under Section 6(4).

42. To that end, counsel cited Lord Morris in **Connway v Rimmer** *(supra)* where he held that the public interest may require that relevant documents ought not to be produced if for example, national security would be or might be imperiled by the production and consequent disclosure of certain documents, the interest of a litigant must give away. Similarly, counsel relied on **United States v Reynolds** *(supra)* where the US Supreme Court noted that where there is a strong showing of necessity, the claim of privilege should not be lightly accepted but even the

most compelling necessity cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake.

43. Counsel urged that none of the decisions set out by the Petitioners relate to national security. In addition to, the Tshwane Principles overly relied upon do not have a bearing on the issue as they do not form corpus of international law, whether customary or treaty nor domestic law applicable in Kenya. Be that as it may, the information sought is not essential to the petition and consequently the task, if any, of holding public bodies accountable through the petition can be achieved without need to disclose information which would imperil national security.

44. Miss Musembi appearing for the 8th Respondent filed written submissions dated 5th April, 2021. Counsel submitted that the right to access information on the production of the 8th Respondent's investigative report is not an absolute right as listed in Article 25 of the Constitution. It was her contention that Article 24(1) expressly states that any limitation upon a constitutionally protected right must be anchored in law and that limitation should be reasonable and justifiable in an open and democratic society. Counsel therefore relied on the Supreme Court case of **Karen Kandie v Alassane Ba and Another, Petition No. 2 of 2015 (2017) eKLR** and **Dullu Kora Elisha v Kenya School of Law & Anor (2017) eKLR** for the tests to be applied under Article 24 of the Constitution. Counsel also cited the case of **Jack Mukhango & 12 Others v The Attorney General & 2 Others (2017) eKLR** where the Court stated that Article 35 is not absolute and cannot operate in isolation and must be read together with other Articles of the Constitution.

45. It was further submitted that limitation of the right can be illustrated through the Oakes Test developed by the Canadian Supreme Court when it sought to interpret the limitations clause in section 1 of the Canadian Charter of Rights and

Freedoms that allows reasonable limitations on rights and freedoms through legislation, if it can be demonstrably justified in a free and democratic society. The two-part legal test in **R v Oakes (1986) 1 S.C.R. 103** is outlined as follows; there must be a pressing and substantial objective for the law or government action; the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; the objective must be rationally connected to the limit on the charter right; the limit must minimally impair the charter right; and there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.

46. Counsel therefore submitted that the values that underpin a 'free and democratic' society and which should be used as the 'ultimate standard' for interpretation of the limitation clause are values such as respect for the inherent dignity of the human person, commitment to social justice, accommodation of a wide variety of beliefs, respect for cultural group identity, and faith in social and political institutions which enhances participation of individuals and groups in society.

47. Counsel further submitted that another factor that the state or the person seeking to justify the limitation must demonstrate, is the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. To that end, she relied on the case of **Jacqueline Okuta & Anor v Attorney General & 2 Others (2017) eKLR** where the Court held that the test for determining whether a restriction is appropriate is a proportionality test and that "a proportionality test preserves the rights, provides a framework for balancing competing rights and enables other important public concerns such as national security to be taken into account. The case of **Kenya National Human Rights Commission & Anor v Attorney General & 3 Others (2017) eKLR** was also cited for a similar proposition. Counsel therefore urged that the proportionality

test was applied in the limitation of the right when they released an abridged version of the report as sworn in their affidavit of 24th February, 2020 and therefore the production of the investigation reports of the 7th and 8th Respondents fall within the ambit of limitation provided in Section 6 of the Act as read with Article 24 of the Constitution.

48. Counsel also submitted that the Tshwane Principles, aim to ensure that information may only be withheld where the public interest in maintaining the information's secrecy clearly outweighs the public interest in the right to information. Counsel referred the Court to Principle 3 and 9 thereof, which state that no restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that the restriction is prescribed by law and that it is also good practice for national law to set forth an exclusive list of categories of information that are at least as narrowly drawn therein. Reliance was also placed on Section 42 of the Commission on Administrative Justice Act, 2011 and it was submitted that after the conclusion of its investigations, it made a report to the public offices and organizations concerned with necessary recommendations. Whilst relying on Section 50 of the Commission on Administrative Justice Act, 2011, she submitted that the information it holds, was privileged and that the reports being sought cannot be released to the public as per Section 6 (2) (g) of the Access to Information Act and thus urged the Court to dismiss the application.

49. We note that the Petitioners have relied on Article 35 to urge that they have the constitutional right to the information held by the 7th and 8th Respondents, namely the investigative reports relating the Garissa University terrorist attack on 2nd April 2015. We note further that they have urged that this information is required to enable them exercise their right to a fair trial under Article 50 of the Constitution. The constitutional and legal provisions set out in Article 35 of the

Constitution and the Access to Information Act demonstrate that unless there is good reason, a citizen should not be impeded from accessing information that is in the possession of the state or a state entity that is needed for the advancement or protections of a right. Therefore, a purposive interpretation of these provisions lean towards a conclusion that their dominant objective is the promotion of access to and disclosure of information by the state and state agencies, which should be the normal course, and that withholding of information is only in exceptional circumstances.

50. In the case of **Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others (supra)** the Court stated what the state should bear in mind when considering the request to access information:

> ***"34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State... 36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."***

51. The 7th and 8th Respondents have in this regard confirmed that they did conduct independent investigations on the Garissa University terrorist attack and prepared reports thereon. However, they maintain that the said reports are confidential and touch on national security. They further contend that due to the nature of the reports, the release thereof could undermine the national security of Kenya. They further contended that fall within the limitations under Section 6(1) and (2) of the Access to Information Act, 2016 and Article 24 of the Constitution.

52. Article 24 provides for limitations of rights and fundamental freedoms as follows;

1) ***A right of 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 and 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.

53. There are, therefore, two conditions that must be met before a right or fundamental freedom may be limited. They are: -

i. There must be a law in place on the limitation;

ii. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,

taking into account all relevant factors including those enumerated in Article 24 of the Constitution.

54. In addition, the burden on justifying the limitation on the right to access information rests on the person resisting disclosure, as provided in Article 24(3) which states that the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of the Article have been satisfied. In the present case the 7th and 8th Respondents have confirmed that they indeed hold the reports in question. Accordingly, the burden has now shifted to and rests with the 7th and 8th Respondents to demonstrate to the Court why the reports ought not be released. This is also stipulated in Principle 4 of the Global Principles on National Security and the Right to Information (Tshwane Principles) which provides:

The burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information.

55. Therefore, although the right of access to information is not absolute, to satisfy the requirements set out under article 24 of the Constitution, the Respondents must demonstrate that the limitation imposed on a constitutional right is fair, reasonable, necessary and justifiable in a democratic society, and that it falls within the exceptions provided in the Access to Information Act. Section 6(1) of the said Act provides for the limitations as follows:

(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—***

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual,

other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession

56. The Canadian Supreme Court in the case of **Republic v Oakes, [1986] 1 S.C.R. 103** considered the factors to consider in determining whether a limitation is reasonable and justifiable and held that:

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free

and democratic society before it can be characterized as sufficiently important.

"Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. 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. There are, in my view, 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:

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."

57. This position has been adopted and reiterated by the Kenyan Courts in various decisions. The High Court in the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** stated as follows on limitation of rights:

"72A limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that

same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right."

58. In the case of **Mary Nyawade vs Banking Fraud Investigation Department & 2 others (2017) eKLR,** it was held as follows:

> *"57. The grounds for exception to disclose information should be clearly and narrowly defined. Otherwise it is too easy to broaden exceptions and withhold important information. The presumption is always in favour of disclosure, unless the information meets a so-called three-part test, deduced from international law:- (a) the information relates to legitimate interests protected by the law, and (b) disclosure of the information threatens to cause substantial harm to that interest, and (c) the harm to the interest is greater than the public interest in receiving the information."*

59. The steps to be taken by a Judge in this respect were set out in the Canadian case of **Canada (AG) v Khawaja, 2007 FCA 388, [2008] 4 FCR 3 at para 8 [Khawaja],** as follows:

> *"The first step is to determine whether the information sought to be disclosed is relevant or not in the usual and common sense of the rule set out by the Supreme Court of Canada in R. v. Stinchcombe, that is whether the information at issue may reasonably be useful to the defence. The onus is on the party seeking disclosure to meet this stage of the test. The second step is to determine whether disclosure of the information at issue would be injurious to international relations, national defence or national security. It is not the role of the judge at*

this stage of the test to second-guess or substitute his opinion for that of the executive. The burden of convincing the judge of such probable injury is on the party opposing disclosure. The judge must be satisfied that executive opinions as to potential injury have a factual basis which has been established by evidence. The third step consists of determining whether the public interest in disclosure outweighs in importance the public interest in non-disclosure, and it is the party seeking disclosure that bears the burden of proving that the public interest scale is tipped in its favour.

60. The test for determining whether a restriction is appropriate should be one of proportionality as demonstrated by the international, regional and comparative human rights jurisprudence, as provided for in Article 24 of the Constitution. A proportionality test is appropriate as it preserves rights, provides a framework for balancing competing rights and enables other important public concerns, such as national security and public order, to be duly taken into account.

61. In the present application, it is noted that the 7th Respondent is established under the Independent Policing Oversight Authority Act (IPOA). Its mandate includes *inter alia*, to hold the police accountable to the public in the performance of their functions; give effect to the provision of Article 244 of the Constitution, that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; ensure independent oversight of the handling of complaints by the Service. In line with its mandate, the 7th Respondent conducted investigations into the conduct of the security operation by the National Police Service and made recommendations in respect of gaps that were identified. The 7th Respondent's justification for not releasing the report in question is that the same contains critical confidential information from national security organs, information

which if disclosed, would seriously imperil current security operations against the threat of terrorism and undermine national security.

62. On its part, the 8th Respondent is a commission established under the Commission on Administrative Justice Act. Its mandate as set out in section 8 of the Act includes investigating any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. The mandate also includes investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector.

63. The 8th Respondent also conducted its own investigations of the terror attack in the interest of the public. In the course of its investigations the 8th Respondent did interact with security agencies who disclosed the intricacies of security protocol and mechanisms involved in securing the nation. Due to the fact that the report contained highly sensitive information with potential to undermine national security, the 8th Respondent refrained from publicizing the entire contents of the report. In keeping with its practice of disclosing the findings of its investigations to the public, the 8th Respondent published an abridged version in its press release of 6th May 2016. The 8th Respondent maintained that the decision to keep the report confidential is an isolated case and was done in the public interest and constitutional duty. It is the 8th Respondent's contention that the abridged version is sufficient for the Petitioners' purposes.

64. We note that under Principle 4 of the **Tshwane Principles**, it is not sufficient for a public authority seeking to withhold information to simply assert that there is a risk of harm but such authority is under a duty to provide specific, substantive reasons to support its assertions. In the case of **Trusted Society of Human Rights**

Alliance & 3 Others v Judicial Service Commission (2016) eKLR the Court held that the exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to that information.

65. The 7th and 8th Respondent's in their averments have justified the withholding of their reports by citing national security considerations. They have averred that the reports contained information on the intricacies of security protocol and mechanisms involved in securing the nation in light of terrorist threats. Further, that the reports also contained highly sensitive information with potential to undermine national security. According to them the release of such a report therefore would greatly prejudice public interest and imperil national security.

66. Section 6(2) of the Access to Information Act stipulates the nature of information relating to national security that may not be disclosed as follows:

    (a) military strategy, covert operations, doctrine, capability, capacity or deployment;

    (b) foreign government information with implications on national security;

    (c) intelligence activities, sources, capabilities, methods or cryptology;

    (d) foreign relations;

    (e) scientific, technology or economic matters relating to national security;

    (f) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security;

    (g) information obtained or prepared by any government institution that is an investigative body in the course of lawful

investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security;

(h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;

(i) cabinet deliberations and records;

(j) information that should be provided to a State organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions;

(k) information that is referred to as classified information in the Kenya Defence Forces Act; and

(l) any other information whose unauthorized disclosure would prejudice national security.

67. It is not in dispute that the information sought by the Petitioners in the reports by the 7th and 8th Respondents relate to the Garissa University terrorist attack which took place on 2nd April 2015. The Court takes judicial notice of the fact that Kenya has been a target of terror attacks since the 1998. Indeed, the Petitioners have enumerated the various terrorist attacks on Kenya in their amended Petition dated 14th November 2019. The Court also notes that prevention of terrorism is not an event, but a continuous process of activities by security agencies. As averred by the 5th Respondent in answer to the Petition, standard operating procedure operations are reviewed and lessons learnt and implemented in the process. The information contained in the reports is clearly in the nature of information covered in Section 6(2)(a)(b)(c)(f)(g)(j)(k) and(l) of the Act.

68. It is further noted that under Section 6(4) of the Access to information Act the Court may require a public entity or private body to disclose information where the Court forms the opinion that public interest in disclosure outweighs the harm to protected interests. In considering the public interest Section 6(6) of the Act required particular regard to be had to the constitutional principles on the need to—

(a) promote accountability of public entities to the public;

(b) ensure that the expenditure of public funds is subject to effective oversight;

(c) promote informed debate on issues of public interest ;

(d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and

(e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.

69. In the present case, the Petitioners seek disclosure of the reports in question in furtherance of the constitutional principles on the need to promote accountability of public entities to the public, namely the National Police Service and the Kenya Defence Forces, regarding their role in responding to the Garissa University terrorist attack. The 7th and 8th Respondent however maintains that it has a duty to uphold the integrity of the nation as the release of the highly sensitive information could potentially undermine national security.

70. Having considered the submissions of the parties, we find that we are called upon to make a determination as to whether the release of the reports sought, will undermine the national security of Kenya. **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. The

government of Kenya through its various agencies is under an obligation to protect its people and territory against internal and external aggression. To achieve this, the security agencies engage in military strategy and other operations as more particularly set out in section 6(2) of the Access to Information Act.

71. Just as terrorism impacts on human rights and the functioning of society, so too can measures adopted by States to counter terrorism. Terrorism has a serious impact on a wide range of fundamental human rights, and States therefore have not only a right, but a duty to take effective counter-terrorism measures. Such measures and the protection of human rights are complementary and mutually reinforcing objectives, which must be pursued together as part of States' duty to protect individuals within their jurisdiction. Specifically, with regard to the limitation on the right to disclosure of information on terrorism related activities strategies and sources, this limitation serves a legitimate purpose of safeguarding national security, public safety, public order, and the human rights and freedoms of others.

72. The programs and activities employed to address the internal, foreign and defence security interests and concerns, are of necessity confidential and information relating thereto is highly sensitive. The disclosure of such information, including the identity of security agents or informants, or details of a sensitive investigative technique could harm national security by putting sources of information and security strategies at risk. This no doubt is the reason why the 7th and 8th Respondents maintain that any information or activities relating to the terrorist attack at Garissa University be kept out of the public's eye, in the interests of national security.

73. Furthermore, given the impact of terrorism on human rights, security and the functioning of various aspects of international and domestic societies, there is no doubt that countering of international and domestic terrorism is an important objective. This objective not only permits the limitation of certain rights, but also entails a greater public interest that outweighs the disclosure of sensitive information collected in the process. The public interest sought to be achieved by the limitation of disclosure of information on terrorist related strategies and activities, is the effective and timeous thwarting of actual or potential threats of terrorism against the State and its citizens.

74. We take judicial notice of the fact that the threat of terrorism across the world and in Kenya in particular is very real. Due to this threat, and being mindful that Kenya has been a target on several occasions, we agree with the Respondents that release of the reports would pose a threat to national security and prejudice public interest. To direct the 7th and 8th Respondents as urged by the Petitioners, to release reports which contain the strategies employed by the security agencies in combating the threat to terrorism, is in our view likely to put this country and the lives of its citizens, in jeopardy.

75. After considering and analyzing the facts the law and the cited authorities, we make a finding, that on a balance of probabilities the substantial harm to the overall public interest far outweighs the right of the Petitioners to access the information sought. Suffice it to add that the Petitioners have already been supplied with the abridged version of the report for their purposes. Accordingly, our view is that the application and threshold for limitation of disclosure of the subject reports has been demonstrated and met by the 7th and 8th Respondents.

Whether the Court is obligated to call for and scrutinize the reports in question so as to establish that the same are confidential and affect national security.

76. The Petitioners' counsel submitted that issues of national security do not fall beyond the jurisdiction of the Court. In their view, the Court can still examine the report, and counsel relied on Article 159(1) and 160 of the Constitution of Kenya and Principle 6 of the Tshwane Principle for the proposition that the reports held by the 7th and 8th Respondent can still be furnished to the Court and the Court can make a determination of the issues before it, based on that information. To that end, counsel cited the South African case of **M & G Media Ltd v President of the Republic of South Africa and Others (1242/09) (2013) ZAGPPHC 35; (2013) 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP)** where the constitutional Court affirmed the position that issues of national security are not beyond the jurisdiction of the Court.

77. Indeed, it was submitted that the Court should not rely on blanket and overboard assertions by the 7th and 8th Respondent claiming national security and urged the Court to be guided by the pronouncement in the case of **Corderoy and Ahmed v Information Commissioner, Attorney General's Office and Cabinet Office (2017) UKUT 495 (AAC); (2018) AACR 19 (United Kingdom)** for the proposition that in determining whether there is sufficient evidence to support an exemption claim, Courts are willing to examine the documents in question rather than merely rely on blanket assertions by the government. They also urged that the reports can be availed to the Petitioners' advocates who are bound by the duty of confidentiality. In this regard, they relied on the case of **Zaoui v Attorney General (2005) 1 N NZLR 577**.

78. On whether the Court should apply the measures proposed by the Petitioners, counsel for the 7th Respondent submitted that the Petitioners have not sought the order in their application, and urged that parties are bound by their

pleadings. To buttress that argument, counsel cited the Supreme Court of Kenya in the case of **Raila Amolo Odinga & Anor v IEBC & 2 Others (2017) eKLR** where it was held that in absence of pleadings, evidence if any, produced by the parties cannot be considered. Similarly, he cited the High Court in **Rose Owira & 23 Others v Attorney General & Anor; Kenya National Commission on Human Rights & 4 Others (Interested Parties) (2020) eKLR** where it was held that submissions cannot be used as an avenue to raise new issues which have not been raised in pleadings and urged that the Petitioners' submissions to that effect should not be considered. It was also submitted that even assuming the Court could consider the same *(quod non)*, it is not possible to disclose documents to advocates on record who would be under a duty to disclose the information to their clients. That unlike other jurisdictions like the United States and United Kingdom, our country does not have a system of specially vetted counsel appointed to receive confidential information.

79. In addition, that the case herein belongs to the Petitioners and not their advocates, and in that case, confidentiality cannot be maintained. Furthermore, our legal system does not provide a procedure for submission of confidential records *ex parte* to Courts for examination before determination on disclosure in our Access to Information Act, as compared to Section 80 of the South African Promotion of Access to Information Act. Accordingly, the Petitioners' reliance on South African jurisprudence, predicated on a special jurisdiction in the South African law, in a bid to translocate that special procedure to Kenya where none is provided for in our law, cannot work.

80. In a rejoinder, counsel for the Petitioners submitted that the judicial officers occupy the highest position in our society, a pillar of the Kenyan society and that they have a right to look at the documents and information and tell the Petitioners whether the information should be released or not. That a judicial

officer has authority to demand for the information and consider it. They told the Court that they did not know what information the 7th and 8th Respondent have and it is only just that the Court should be given the opportunity to look at that information. They stated that the Bill of rights, Chapter 4 of the Constitution is now a norm of international laws and Section 6(4) of the Access to Information Act allows for security information to be furnished in certain circumstances. Again, the Tshwane principles apply in Kenya by virtue of Article 2(5) and 2(6) of the Constitution. They opined that the Respondents have by-passed their obligation to accountability whilst pursuant to Article 159 of the Constitution, the Court is entitled to obtain information including national security information and should not be denied if the Court needs it.

81. As regards lack of law on disclosure of information to the Courts, the counsel submitted that the country cannot legislate on everything and that the Court can borrow principles from other democracies and other jurisdictions for example South Africa where the Court has stated that it can examine documents. Further, that under Article 20 of the Constitution, the Courts are required to develop the law and under Article 20(b) of the Constitution, the Court can adopt an interpretation that most favours the enforcement of the Bill of rights which are principles of international law. Lastly, it was submitted that the burden does not shift to the Petitioners who have claimed that the 7th and 8th Respondents have the reports and it is for them to prove that the same cannot be released on grounds of national security.

82. The Petitioners have proposed that should the Court find that the information should not be furnished to them, then the Court should direct that the same be furnished to counsel and the Court. The Respondents oppose the request and maintained that the greater public interest militates against disclosure of confidential information very likely to prejudice the country's national security

and place civilians and security forces at risk of terrorist attacks. Further, that an advocate's confidentiality relates to advocate-client relationship and cannot form a basis to be transposed to the question of disclosure of confidential information by a third party, as sought in the application. The Respondents were of the further view that even if the information were to be released to the Court, the same would still pose a danger of the information getting into the wrong hands.

83. It is noted in this respect that Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that nothing in the rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In addition, Rule 20 provides as follows as regards the manner of hearing of Petitions:

> ***20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—***
>
> ***(a) affidavits;***
>
> ***(b) written submissions; or***
>
> ***(c) oral evidence.***
>
> ***(2) The Court may limit the time for oral submissions by the parties.***
>
> ***(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.***
>
> ***(4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the court to arrive at a decision.***
>
> ***(5) A person summoned as a witness by the court may be cross examined by the parties to the petition.***

84. This Court is thus expressly given powers to call a witness and evidence, on its own motion if such witness and evidence will assist the Court in coming to just decision. In addition, even though there is no specific law on disclosure to the Courts of information which falls within the limitation under Article 24 of the Constitution and Section 6 of the Access to Information Act, 2016, the Court has jurisdiction and discretion under Article 165 of the Constitution to employ a procedure that will achieve substantive justice.

85. Further, the duty of the Court in any matter is to determine the issue in controversy with finality. Even though we have arrived at the finding that the threshold of limitation has been met, the Court has power and discretion to establish whether the information sought to be withheld on grounds of national security is confidential as alleged. A similar position was held in the House of Lords Case of **Conway v Rimmer (1968) AC 910** where the Court found that the Court is the final arbiter when dealing with the question whether the public interest necessitated the non-disclosure of relevant evidence.

86. There is however a dearth of authorities in our jurisdiction on the procedure and protocols to be employed by the Court in determining whether the nature of the information exempted is confidential and affects national security. In **Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR** the Court cited the case of **Tweed v Parades Commission for Northern Ireland** where Lord Bingham put the responsibility of making the decision as to whether to disclose or not in the Court's hands as follows:

> ***"4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skillfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the***

document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

87. Where the Court makes a determination that disclosure of confidential information should be made, various protocols may be followed. The Court may call for a redacted version of the information sought. The Court could also direct that the information be presented to the Judge in chambers by the authorized officer of the agency concerned for scrutiny by the Court in the absence of the parties. The Court could also call for the information *in camera* to be seen by the Judge in chambers and the parties' respective counsel only under certain protocols of secrecy and confidentiality. Lastly, the Court can choose to solely rely on affidavit evidence as regards the nature of information sought to be disclosed.

88. On the procedure for disclosure of redacted confidential information, the Court in **Munir Sheikh Ahmed v Capital Markets Authority case (supra)** held as follows:

16. The procedure to be followed on disclosure was also addressed by the House of Lords in the said case, where there was consensus that the judge considering disclosure should first receive and inspect the documents in question so that he or she may decide their relevance to justify disclosure in the interests of fair disposal of the case. If the judge decides that disclosure is necessary, then the question of redaction may have to be considered, in which the parties may be

invited to make submissions to the Court. If the judge decides the contrary in the case of any of the documents, that documents will not be disclosed to the applicant.

17. I am persuaded that this would be the most appropriate procedure to apply in the circumstances of this application in the interests of justice, and to also verify whether the limitations provided in section 6 of the Access to Information Act are applicable."

89. An example of *in camera* hearings on disclosure of confidential and sensitive information are those held in public interest immunity claims under the UK Criminal Procedure and Investigations Act 1996 and Criminal Procedure Rules 2005, Part 25. In such cases, the prosecutor in criminal proceedings may apply to the judge for authority to withhold the material. Claims for public interest immunity involving security material must be accompanied by a certificate signed by the Secretary of State, who is typically the Home Secretary. When determining whether a claim is appropriate, the Home Secretary must conduct a careful balancing exercise which entails taking detailed advice from prosecuting counsel on the material's relevance to the issues in the case into account. However, the decision on a public interest immunity claim is ultimately one for the trial judge alone.

90. Additionally, in civil proceedings the UK Justice and Security Act 2013 provides that a court may order a "closed material procedure" in certain civil proceedings in order to ensure that sensitive material can be considered as part of the case, while also being adequately protected.

91. Reliance on affidavit evidence in a claim of privileged information was the subject of discussion in the **Reynolds case.** The US Supreme Court when dealing

with the question of disclosure of privileged information on national security grounds and stated:

> ***"The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficulty. As to it, we find it helpful to draw upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination. The privilege against self-incrimination presented the courts with a similar sort of problem. Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses. Indeed, in the earlier stages of judicial experience with the problem, both extremes were advocated, some saying that the bare assertion by the witness must be taken as conclusive, and others saying that the witness should be required to reveal the matter behind his claim of privilege to the judge for verification. Neither extreme prevailed, and a sound formula of compromise was developed."***

92. In the **Reynolds case** the Respondents sought an investigative report relating to an air crash that claimed the lives of their husbands. The Appellants opposed the production on grounds that the report touched on the national security of the United States of America. The Court allowed the Appeal and remitted the matter to the lower Court to enable the Appellants present to the trial Court their claim of privilege not to release the report. In doing so, the Supreme Court stated as follows:

> ***"The Court must be satisfied from all the evidence and circumstances, and from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it***

cannot be answered might be dangerous because injurious disclosure could result. If the Court is so satisfied, the claim of privilege will be accepted without requiring further disclosure....

93. Similarly, Lord Reid in the UK House of Lords in the case of **Conway v Rimmer (1968) AC 910** held that the Court in dealing with claims of privileged information noted that it is essential that there should be no disclosure of anything which might give any useful information to those who organize criminal activities. In the same case Lord Morris, held that if a responsible minister stated that production of a document would jeopardize public safety it is inconceivable that any Court would make an order for its production.

94. In the **Reynolds case**, the Court explained the factors to be considered by the Courts in deciding whether to hold an in camera hearing or rely on affidavit evidence as follows:

Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion of privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most

compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

95. We are persuaded by the findings in the cited decisions. In the present application, it is our view that an *in* camera inspection of the reports as sought by the Petitioners, is not appropriate in the circumstances herein, and also not necessary, given that the Petitioners already have in their possession, an abridged version of the same. This is particularly pertinent in light of the provisions of section 6(5) of the Access to Information Act, which provides that a public entity is not obliged to supply information to a requester, if that information is reasonably accessible by other means.

96. Furthermore, the Respondents have demonstrated to us by their affidavits that the release of the reports would greatly compromise national security in view of the ever present threat of terrorism in our country. Lastly, as shown hereinabove, this Court is allowed to rely on affidavit evidence in the hearing and determination of petitions by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. We are therefore not inclined to order an examination of the 7th and 8th Respondents' reports by the Court or the Petitioners' advocates, for the foregoing reasons.

97. In conclusion, we note that there is no law in place on the procedures for confirmation of sensitive and confidential information for purposes of its disclosure, and we have had to look to other jurisdictions for guidance. There is therefore need for a law to be enacted setting out the necessary procedures and protocols on disclosure of confidential and sensitive information, including information touching on national security.

The Disposition

98. In the final analysis, Prayer 2 of the Petitioners' Notice of Motion application dated 14TH November 2019 is declined, and the same is hereby dismissed with no order as to costs, this being a public interest matter.

99. We additionally direct the Deputy Registrar of the Constitutional and Human Rights Division of the High Court at Nairobi to transmit a copy of this ruling to the offices of the Attorney General and the Clerk of the National Assembly, for their attention on the proposed law reforms.

100. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2021

PAULINE NYAMWEYA
JUDGE

MUGURE THANDE
JUDGE

DAVID KEMEI
JUDGE

DELIVERED AT NAIROBI THIS 26th DAY OF November 2021

M. Thande

MUGURE THANDE
JUDGE

In the presence of:

..... for the Petitioners

..... for 1st Respondent

..... for 2nd Respondent

..... for 3rd Respondent

..... for 4th Respondent

..... for 5th Respondent

..... for 6th Respondent

..... for 7th Respondent

..... for 8th Respondent

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL
DATED: 8.12.2021
DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI