

The Doctrine of Command Responsibility in Kenya: Holding Police Leaders Accountable for Misconduct and the Case of Baby Pendo

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Abstract: The doctrine of command responsibility is a fundamental principle of international law designed to hold leaders accountable for the actions of their subordinates. The military is well-trained in this doctrine but the same training has not been given to our police officers. In this paper, I interrogate how the can be applied to hold Kenyan police leaders accountable for the actions of their trigger-happy subordinate officers, despite the lack of training and awareness within the police force. Central to this analysis, I argue that Article 245 of the Constitution of Kenya 2010 and Section 8 of the National Police Service Act are explicit that police leaders can be held accountable for the actions of their subordinates. I draw from the decision of Justice Jaius Ngaah, which emphasised the importance of responsibility regardless of the label used, and Justice Kimondo's ruling in the Baby Pendo Case, which signals the progressive adoption of this doctrine in Kenya to highlights this opportune time for reform. A comparative study with South Africa shows that although the term "command responsibility" is not explicitly used in both Kenya and South Africa, the concept is similarly applied. Finally, I will use the Baby Pendo case to posit that this is the crucial moment for Kenya's courts to set a precedent and address systemic police violence and brutality using the doctrine of command responsibility.

Keywords: accountability, police misconduct, command responsibility, leadership, human rights.

1. Introduction

Kenya has historically approached the issue of police brutality by focusing on its visible consequences the "leaves" of the problem rather than addressing its root causes. While efforts have been made to hold individual officers accountable for misconduct, the leadership responsible for directing and enabling such actions has largely escaped scrutiny.¹ Recently, Kenyan courts have taken a more decisive approach, using the

legal axe to target the roots of police impunity by holding both commanders and subordinates accountable.² The doctrine of command responsibility which holds leaders accountable for the actions of their subordinates has gained prominence in international law, especially in the context of war crimes and crimes against humanity.³ Its application in Kenya's domestic policing context remains underdeveloped. Military officers are trained in this doctrine but police officers rarely receive similar education with the effect being the perpetuation of a culture of impunity where police leaders evade responsibility for their subordinates' misconduct even if there is a factual link and they gave orders and instructions that led to the misdeeds. The tragic death of Baby Pendo in 2017 during post-election violence has starkly highlighted the failure of the police force to respect human rights and the inability of the justice system to hold leadership accountable for such violations.⁴ This case presents an opportunity for Kenya to reform its policing system and ensure that police leaders are held responsible for their subordinates' actions.⁵ This paper aims to establish how the doctrine of command responsibility can be applied within the Kenyan police force, with particular focus on the Baby Pendo case as a pivotal moment for reform.

The paper aims to examine whether Kenya's legal framework can integrate this doctrine, despite the lack of its explicit mention within the legal framework. It will draw on judicial precedents, such as Justice Ngaah's suggestions, to demonstrate that even if the doctrine is not explicitly named, it can still address systemic issues and still applies. It will conclude with recommendations for using the Baby Pendo case as a cornerstone for judicial reforms to hold police leaders accountable, paving the way for broader changes in the police system.

¹ Festus M Kinoti, 'Police Reforms: Killing the Leviathan, a Case for Command Responsibility for Police Superiors in Kenya' (2022) SSRN, 2-4. <https://ssrn.com/abstract=4312492> accessed 4 June 2025.

² See Justice Jaius Ngaah position in Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others (Interested Parties) (Application E082 of 2024) [2024] KEHC 16607 (KLR) (Judicial Review) (31 December 2024) para 103.

³ Chantal Meloni, 'The Evolution of Command Responsibility in International Criminal Law' in Morten Bergsmo, CHEAH Wui Ling, SONG

Tianying and YI Ping (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher 2015) 686-687.

⁴ Demas Kiprono, 'Baby Pendo's Pending Trial Could Reshape Police Accountability in Kenya' (16 August 2024) International Commission of Jurists Kenya <https://icj-kenya.org/news/baby-pendos-pending-trial-could-reshape-police-accountability-in-kenya/> accessed 8 June 2025.

⁵ Leah Aoko, 'Doctrine of Command Responsibility: The Fight for Justice in Kenya's Baby Pendo Case' (4 March 2025) Utu Wetu Trust <https://utuwetutrust.org/doctrine-of-command-responsibility-the-fight-for-justice-in-kenyas-baby-pendo-case/> accessed 9 June 2025.

2. The Doctrine of Command Responsibility: Concept and Legal Foundations

The doctrine of command responsibility has become a central tenet of international criminal law,⁶ holding commanders or superiors criminally accountable for the unlawful actions of their subordinates when they fail to prevent, punish or report such acts.⁷ Rooted in customary international law and international humanitarian law, it was solidified after World War II as a mechanism to ensure accountability for war crimes, crimes against humanity, and genocide.⁸ Its origins can be traced to ancient military traditions where leaders were held accountable for their subordinates' actions. In the 5th century B.C., Sun Tzu, the Chinese military strategist, argued that military leaders should bear responsibility for disobedience among their troops.⁹ This idea was echoed in 1439 when King Charles VII of France issued the Ordinance of Orleans, holding commanders responsible for the unlawful acts of their soldiers, even without direct knowledge.¹⁰ These early examples laid the foundation for the formalization of the doctrine in international law.

The modern development of command responsibility gained significant momentum after World War II.¹¹ The Nuremberg Trials (1945–1946) marked a turning point in international criminal law, establishing that military and political leaders could be held criminally responsible for war crimes, crimes against humanity, and genocide.¹² The Nuremberg Tribunal ruled that superior orders or ignorance of subordinates' actions were not valid defenses.¹³ This principle was further reinforced in subsequent legal proceedings, such as the Tokyo Trials¹⁴ and in the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁵ and the International Criminal Tribunal for Rwanda (ICTR).¹⁶ These tribunals expanded the doctrine, clarifying that commanders could be held liable for failing to control their subordinates who committed atrocities.

The Rome Statute of the International Criminal Court (ICC), adopted in 1998, codified command responsibility. Article 28 of the Rome Statute makes military commanders criminally

responsible for crimes committed by forces under their control if they knew, or should have known, about the crimes and failed to take reasonable measures to prevent or stop them. Civilian superiors are equally accountable if they knew or consciously disregarded information about their subordinates' criminal activities and failed to act to prevent or repress these crimes.¹⁷ This legal framework reinforced the idea that individuals in power are not exempt from responsibility for the actions of their subordinates. Kenya's commitment to international justice is evident in its legal system. As a signatory to the Rome Statute, Kenya incorporated its provisions into domestic law with the enactment of the International Crimes Act (ICA) in 2008, which came into force in 2009. Section 7 of the ICA explicitly adopted Article 28 of the Rome Statute, making the doctrine of command responsibility part of Kenyan law. This marked a significant step in ensuring that military and police commanders in Kenya could be held accountable for the actions of their subordinates.

The application of command responsibility in Kenya, though not capped explicitly as "command responsibility doctrine" has had important consequences. It provides a legal basis for prosecuting individuals, such as military and police commanders, for crimes committed by their subordinates.¹⁸ One example is the Baby Pendo case that is pending before the High Court, where police officers were charged with crimes against humanity, including murder, rape, and torture.¹⁹ These charges were brought under Sections 6 and 7 of the ICA, in line with the Rome Statute. However, applying the doctrine in Kenya has raised critical questions, especially about its extension to police officers. Despite the legal framework provided by the ICA, challenges persist in holding law enforcement leaders accountable for their subordinates' actions. Police misconduct, including unlawful use of force, remains a major issue in Kenya.

The Waki Commission's report highlighted 405 unlawful killings by police officers, but the existing legal framework at the time lacked provisions to hold commanders accountable.²⁰ In 2011, the Independent Policing Oversight Authority (IPOA)

⁶ Antonio Cassese (ed), *International Criminal Law: Cases and Commentary* (Oxford University Press 2011) 422.

⁷ Carol T Fox, 'Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses' (2004) 55 Case W. Res. L. Rev. 443, available at

<https://scholarlycommons.law.case.edu/caselrev/vol55/iss2/7> accessed 8 June 2025.

⁸ Cassese (ed), *International Criminal Law* (n 6).

⁹ Marx Markham, 'Evolution of Command Responsibility in International Humanitarian Law' [2011] Penn State Journal of International Affairs 50.

¹⁰ Anne E Mahle, 'Command Responsibility: International Focus' (2008) PBS http://www.pbs.org/wnet/justice/world_issues_com.html accessed 9 June 2025.

¹¹ Cassese (ed), *International Criminal Law* (n 6) 422-425.

¹² United States v Karl Brandt et al., Vol II, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (U.S. Govt Printing Office 1950) 186, 212 (relating to the criminal responsibility of the accused Schroeder).

¹³ See United States v Wilhelm List et al., Vol XI, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (U.S. Govt Printing Office 1950) para 214 and United States v Wilhelm von Leeb et al., *High Command Case* (U.S. Military Tribunal V, Nuremberg, 28 October 1948) (High Command Case) 39.

¹⁴ United States v Soemu Toyoda, *Record of Proceedings* (National Archives Microfilm Publication M1661, 1991)

<https://www.worldcat.org/title/record-of-proceedings-in-the-trial-of-usa-v-soemu-toyoda/oclc/223681940> accessed 9 June 2025.

¹⁵ The ICTY was established by the UN to deal with international crimes that took place during the conflict in the Balkans in the 1990s; see Art 7(3) Statute of the ICTY. See also Prosecutor v Delalić, Mucić et al. IT-96-21-T, 16 November 1998 (Celebić case), the Trial Chamber of the ICTY, paras 366-357, 363 and Prosecutor v Delalić, Mucić et al. IT-96-21-A, ICTY Appeals Chamber Judgment, 20 February 2021, para 195.

¹⁶ The ICTR was established to investigate and prosecute those involved in the 1994 Genocide in Rwanda; see Art 6(3) Statute of the ICTR. See also Kayishema and Ruzindana, Trial Chamber Judgment, para 213 and Prosecutor v Aleksovski, Case No IT-95-14/1-T, Trial Judgment of the ICTY, 25 June 1999, paras 75-76.

¹⁷ K Ambos, 'Superior Responsibility' in A Cassese (ed), *General Principles of International Criminal Law* (2nd edn, 2008) 830-31.

¹⁸ Kinoti, 'Police Reforms: Killing the Leviathan,' (n 1) 4.

¹⁹ Chief Magistrate's Court at Kisumu Inquest No. 6 of 2017, *Baby Samantha Pendo (deceased)*, 1-9.

²⁰ Report of the Commission of Inquiry into the Post-Election Violence (2008) (Waki Report) 416–418, available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf, accessed 8 June 2025.

was established to provide civilian oversight of the police.²¹ IPOA investigates allegations of police misconduct, including unlawful use of force. The National Police Service (NPS) Act also introduced measures to regulate the use of force by police officers, requiring superior officers to prevent unlawful actions.²² However, the effectiveness of these reforms has been limited due to inconsistencies in enforcement and persistent human rights violations. The challenge of holding police commanders accountable is further complicated by the “blue code of silence,” an unwritten code within the police force that discourages officers from reporting misconduct. This code shields superior officers from accountability, allowing them to ignore or condone unlawful actions. While IPOA and the NPS Act represent progress, they fail to adequately address the criminal liability of superiors for failing to prevent or stop unlawful conduct. The provisions in the NPS Act and IPOA are steps toward improving accountability but do not capture the full scope of responsibility required under command responsibility. The current legal framework does not explicitly criminally penalise police superiors for failing to prevent unlawful conduct. For example, if a police superior knows or should know that subordinates are about to engage in unlawful actions, such as breaking into homes and assaulting residents, they might escape by arguing that the law does not hold the superior accountable for failing to intervene due to the inapplicability of the doctrine of command responsibility. The court have been the ones that have stood firm to reject this argument.²³ Similarly, if a superior fails to stop ongoing unlawful conduct, they can easily argue that they are not criminally liable under the current provisions. The failure to hold superior officers accountable has been compounded by the “blue code of silence.”²⁴ Many superiors aware of their subordinates’ criminal conduct fail to intervene and instead protect the offenders. This has led to cases such as Baby Pendo²⁵ and Stephany Moraa,²⁶ where unlawful use of power by police commanders has been tested. The current legal framework does not ensure full accountability and oversight, leaving a gap in enforcement. This paper will show how these inadequacies can be solved by the application of the doctrine of command responsibility to domestic offences in the next section.

3. Legal Framework for Police Accountability in Kenya

The application of the doctrine of command responsibility in domestic offences, particularly within the context of police accountability, has garnered increasing attention in Kenya,

especially following key judicial decisions that have begun to reshape the landscape of police leadership and accountability.²⁷ One of the central elements in this discourse is Article 245(2)(b) which grants the Inspector-General of the National Police Service the authority to exercise independent command over the service.²⁸ This provision implicitly supports the notion that police leaders are not only responsible for the actions of their subordinates but can also be held accountable when these actions violate legal or constitutional provisions. The provision establishes that the Inspector-General has command over the police force giving him a clear and independent responsibility to oversee the actions of all officers within the service. This constitutional framework forms the foundation for the possible application of command responsibility in domestic legal contexts, as it positions the Inspector-General as the ultimate authority, with the duty to ensure that the officers under his command act in accordance with the law. The constitutional mandate of independent command suggests that police leadership is inherently linked to accountability, and this accountability should extend beyond mere oversight to encompass criminal liability when serious breaches occur.

The National Police Service Act further reinforces this responsibility by detailing the Inspector-General’s powers in managing the service.²⁹ It provides that the Inspector-General has the exclusive authority to command, control and administer the police force³⁰ and specifies that the Inspector-General is responsible for issuing lawful orders and directives and in situations where subordinates violate these orders, the Inspector-General remains liable for the actions that result from such violations.³¹ This legal framework suggests that, like military command responsibility, the doctrine of command responsibility could logically extend to domestic police misconduct in cases where subordinates fail to act in accordance with legal and constitutional standards.³² The question arises as to whether command responsibility can be applied to domestic offences in cases of police misconduct?³³ Command responsibility holds superiors accountable for the actions of subordinates when the superior fails to prevent or punish illegal conduct and in Kenya it applies through the International Crimes Act which domesticates the Rome Statute.³⁴ The current legal framework limits command responsibility to international crimes. However, there is a growing recognition that some forms of police misconduct, even if not classified as international crimes, should still attract the principle of command responsibility especially when the actions of police officers result in significant violations of

²¹ Independent Policing Oversight Authority Act (Cap 86) ss 3–23.

²² National Police Service Act 2011, section 8 and 8A.

²³ See the argument by the applicant in Republic & another v Yoma & 11 others & another; Independent Medico-Legal Unit & 2 others (Interested Party) (Criminal Case E074 of 2022 & Miscellaneous Criminal Application E033 of 2023 (Consolidated)) [2024] KEHC 8984 (KLR) (Crim) (25 July 2024) (Ruling).

²⁴ The Chief Magistrate’s Court at Nairobi, Inquest No. 14 of 2017, Stephany Moraa Gisemba (deceased) at 10-11 where the court stated that policemen often commit crimes knowing that they will be protected by their fellows.

²⁵ Baby Pendo case (n 23).

²⁶ Stephany Moraa Case 1–3.

²⁷ Joshua Malidzo Nyawa, ‘Command Responsibility, National Security, and the High Court of Kenya – II: The Sirens are Calling’ (10 January 2025) Constitutional Law and Philosophy

<https://indconlawphil.wordpress.com/2025/01/10/command-responsibility-national-security-and-the-high-court-of-kenya-ii-the-sirens-are-calling-guest-post/> accessed 9 June 2025.

²⁸ Constitution of Kenya 2010, art 245(2)(b)

²⁹ National Police Service Act, sections 8 and 8A.

³⁰ Ibid.

³¹ Ibid, s 8(4).

³² Kinoti, ‘Police Reforms: Killing the Leviathan,’ (n 1) 15.

³³ Ibid, 13-14.

³⁴ International Crimes Act (Cap 60) s 7 and the 1st Schedule.

constitutional rights.³⁵

Justice Jairus Ngaah's decision in the *Katiba Institute v. Inspector General of Police* case demonstrates a growing trend towards recognising the responsibility of police leaders for the actions of their subordinates.³⁶ In this case, the High Court found that the Inspector-General of Police, Japhet Koome, was personally liable for the actions of the police officers under his command during a protest.³⁷ The Court emphasised that the Inspector-General had failed to take appropriate action to prevent the excessive use of force against the protestors and he was held accountable for the officers' actions.³⁸ The Court's decision was a landmark ruling, as it signaled a shift in Kenyan jurisprudence by suggesting that the principle of command responsibility can be applied domestically even in the absence of international crimes. The Court found that the Inspector-General by issuing unconstitutional orders and failing to control his subordinates had abdicated his responsibility to ensure that police officers acted within the bounds of the law.³⁹ Justice Jairus Ngaah stated that the name given is not of relevance but the fact remains that police commanders can be held responsible for conducts of their subordinates where they exercised control over them, gave directions to them to commit an offense or did not take reasonable effort to prevent the commission of an offense by their subordinates.⁴⁰ This case is a significant development in the application of command responsibility in Kenya as it acknowledges the potential for police commanders to be held accountable for domestic offences committed by their subordinates.⁴¹ It also sets a precedent for future cases where police leadership may be called to account for human rights violations,⁴² particularly in instances where there is evidence of failure to prevent or address misconduct.⁴³ This ruling aligns with the provisions of Article 245 of the Constitution and Section 8 of the National Police Service Act, which already establish the Inspector-General's responsibility for police conduct. By holding the Inspector-General personally accountable for the actions of his officers the Court has paved the way for the potential domestic application of command responsibility in future cases of police misconduct.⁴⁴

4. Comparative Study: South Africa's Approach to Police Accountability

South Africa's approach to police accountability shares similarities with Kenya's legal framework, despite the absence of explicit references to "command responsibility." South

Africa's Constitution⁴⁵ and the South African Police Service Act⁴⁶ provide robust provisions for leadership accountability. These laws require police leadership to be held accountable for misconduct within the police force, even though the term "command responsibility" is not directly invoked. The South African Police Service Act mandates that the Independent Complaints Directorate (ICD) investigate police misconduct and deaths in custody, thus ensuring police leadership faces consequences when subordinates commit unlawful acts.⁴⁷ When compared to Kenya's system, both countries exhibit a shared understanding of the responsibility of police leaders for the actions of their subordinates. In Kenya, the National Police Service Act, though not explicitly, can be used to hold police commanders accountable for crimes committed by their subordinates.⁴⁸ Despite not explicitly naming "command responsibility," both South Africa and Kenya recognize the importance of holding police leaders responsible when they fail to prevent or punish misconduct within their forces. While the terminology may differ, both countries incorporate similar principles in their legal frameworks ensuring that police leadership is accountable for the actions of subordinates when the necessary conditions are met despite both of them avoiding the explicit use of the term command responsibility in domestic offenses. The next section will analyse Baby Pendo's case to show why there is need for allowing the application of the doctrine in Kenya and give recommendations on what ought to be done for the doctrine to be able to be used as a solution to the endless police brutality that has historically been engrained in Kenya.

5. The Baby Pendo Case: The Key to Police Accountability in Kenya

The Baby Pendo case is emblematic of the entrenched culture of police impunity in Kenya.⁴⁹ The brutal death of six-month-old Samantha Pendo during the 2017 post-election violence has become a symbol of the failure of law enforcement to respect human rights and the persistent challenges in holding the police accountable for their actions.⁵⁰ The case took a significant legal turn when the Director of Public Prosecutions (DPP) invoked the International Crimes Act (ICA) to charge senior police officers citing command responsibility.⁵¹ This case has not only brought to light the immense suffering inflicted on the victim's family but also the broader systemic issues within the Kenyan

³⁵ Gautam Bhatia, 'Command Responsibility, National Security, and the High Court of Kenya' (8 January 2025) Constitutional Law and Philosophy <https://indconlawphil.wordpress.com/2025/01/08/command-responsibility-national-security-and-the-high-court-of-kenya/> accessed 9 June 2025.

³⁶ Kenya Human Rights Commission & 8 others v Nchebere (n 2).

³⁷ Ibid, para 113.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid, para 103.

⁴¹ Nyawa, 'Command Responsibility, National Security, and the High Court of Kenya,' (n 27).

⁴² Fox, 'Closing a Loophole in Accountability for War Crimes,' 445–449.

⁴³ Bhatia, 'Command Responsibility, National Security, and the High Court of Kenya' (n 35).

⁴⁴ Meloni, 'The Evolution of Command Responsibility in International Criminal Law' 4–5.

⁴⁵ See Constitution of South Africa 1996, s 206. See also United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (2011) page 59

https://www.unodc.org/pdf/criminal_justice/Handbook_on_Police_Accountability_Oversight_and_Integrity.pdf accessed 9 June 2025.

⁴⁶ South African Police Service Act 68 of 1995; section 53 (2).

⁴⁷ Ibid.

⁴⁸ Kenya Human Rights Commission & 8 others v Nchebere (n 2) para 103–113.

⁴⁹ Kinoti, 'Police Reforms: Killing the Leviathan,' (n 1) 2.

⁵⁰ Ibid.

⁵¹ Ibid.

police service.⁵²

On August 12, 2017, following the announcement of the contested presidential election results protests erupted in Kisumu which was a stronghold of the opposition.⁵³ The Police launched violent operations in several areas including the Nyalenda estate where Baby Pendo's family resided. The police who were equipped with riot gear and wielding batons entered residential homes in the middle of the night aiming to suppress the protests by any means necessary.⁵⁴ Despite the family's attempts to escape the ensuing violence, Baby Pendo, held by her mother was struck in the head by a police baton, suffering fatal injuries. The post-mortem revealed that the infant's death was caused by blunt force trauma to the head.⁵⁵ An inquest was initiated into the incident, and the Chief Magistrate's Court in Kisumu heard the heart-wrenching testimonies of witnesses and family members.⁵⁶ Despite overwhelming evidence that police officers were involved, there was a significant gap in identifying the perpetrators.⁵⁷ The witnesses could not identify the officers responsible due to the cover-up tactics commonly employed by the police.⁵⁸ Officers involved in the operation were not forthcoming with information and some even denied their involvement claiming no operation had been initiated for the area where Baby Pendo's family lived.⁵⁹ This lack of cooperation from the police coupled with the "blue code of silence" led the court to recommend that the senior officers responsible for the operation be held liable under the doctrine of command responsibility.⁶⁰ The matter started at the Magistrates Court as inquest and as a full trial in the High Court where the applicant tried to raise a preliminary objection to challenging the admissibility of the matter by claiming inapplicability of the command responsibility doctrine in Kenya.

The doctrine holds superiors accountable for the crimes committed by their subordinates if they fail to prevent or punish such crimes.⁶¹ The High Court's ruling in 2024 delivered by Justice Kanyi Kimondo rejected and dismissed the preliminary objection and directed the matter to continue before another judge of the same division marking a moment in Kenya's legal landscape.⁶² Justice Kimondo dismissed the suspects' request for a merit-based review of the evidence and emphasised that the trial court and not the High Court was the appropriate forum for determining the admissibility and sufficiency of the

evidence.⁶³ He stated that it was the role of the trial court to establish whether the suspects held a superior-subordinate relationship with the perpetrators and whether they failed to take the necessary and reasonable measures to prevent the crimes. Justice Kimondo further referenced the International Criminal Tribunal for the former Yugoslavia judgment in *Prosecutor v. Sefer Halivovic*, where the Tribunal established that the individual criminal responsibility of commanders for failing to prevent or punish crimes committed by their subordinates is a principle of customary international law.⁶⁴ In this context, the High Court affirmed that the application of the command responsibility doctrine is not premature, as the trial court is the appropriate body to determine whether the evidence supports the charges under the International Crimes Act. The key elements of command responsibility were outlined by the Court to include a superior-subordinate relationship, knowledge or reason to know about the criminal act, and the failure to take necessary measures to prevent or punish the crime. These elements are at the heart of the Baby Pendo case and will be crucial in the trial to come.

The Baby Pendo case presents a historic opportunity for Kenya to apply the command responsibility doctrine in a domestic context.⁶⁵ While the application of command responsibility has been recognised in international law, it remains largely untested in Kenya's judicial system. The invocation of the ICA represents a shift from focusing on individual responsibility to holding senior officers accountable for the failure to control their subordinates.⁶⁶ The case could serve as a landmark ruling in setting a precedent for future cases involving police brutality and human rights violations, signaling to the public and law enforcement that commanders can no longer shield themselves from responsibility for the misconduct of their subordinates. Despite the significant ruling by Justice Kimondo, the delay in taking pleas from the accused officers and the persistence of police impunity are cause for concern.⁶⁷ The case's outcome will either reinforce the public's faith in the judiciary's ability to deliver justice or, conversely contribute to a growing disillusionment with the rule of law in Kenya. The Judiciary through the Kimondo's ruling has already established itself as the last defender of justice and the rule of law by stating that police commanders can be held responsible for conducts of subordinates.⁶⁸

⁵² Ibid.

⁵³ Ibid, 3.

⁵⁴ Reuters, 'Special Report: Amid Claims of Police Brutality in Kenya, a Watchdog Fails to Bite' (23 February 2018)

<https://www.reuters.com/article/us-kenya-police-watchdog-specialreport/special-report-amid-claims-of-police-brutality-in-kenya-a-watchdog-fails-to-bite-idUSKCN1G7178> accessed 10 June 2025.

⁵⁵ Reuters, 'Kenyan Court Charges Four Police Officers Over Baby's Death After 2017 Elections' (5 May 2025)

<https://www.reuters.com/world/africa/kenyan-court-charges-four-police-officers-over-babys-death-after-2017-elections-2025-05-05/> accessed 10 June 2025.

⁵⁶ Rael Ombuor, 'Inquest Examines Killing of Baby in Kenya Post-Election Violence' (20 February 2018) <https://www.voanews.com/a/inquest-examines-killing-of-baby-in-kenya-post-election-violence/4262421.html> accessed 10 June 2025.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Tonny Raymond Kirabira, 'Why Kenya Is Trying Now Its First Crimes Against Humanity Case' (AllAfrica, 19 November 2022)

<https://allafrica.com/stories/202211190299.html> accessed 11 June 2025.

⁶⁰ Baby Pendo Case (n 230 above).

⁶¹ Fox, 'Closing a Loophole in Accountability for War Crimes:' 445-449.

⁶² Baby Pendo Case (n 23) para 64.

⁶³ Ibid, para 49.

⁶⁴ Ibid, para 50.

⁶⁵ Nyawa, 'Command Responsibility, National Security, and the High Court of Kenya,' (n 27).

⁶⁶ Kiprono, 'Baby Pendo's Pending Trial Could Reshape Police Accountability in Kenya' (n 4).

⁶⁷ International Commission of Jurists (ICJ) Kenya, 'The Baby Pendo Case and the Unfulfilled Promise of Accountability' (29 December 2024) <https://icj-kenya.org/news/the-baby-pendo-case-and-the-unfulfilled-promise-of-accountability/> accessed 10 June 2025.

⁶⁸ Nyawa, 'Command Responsibility, National Security, and the High Court of Kenya,' (n 27).

The Baby Pendo case highlights the urgent need for reform within the Kenyan police force. The concept of command responsibility should not only be applied in high-profile cases but must be institutionalised within the police force's operational structure. To ensure that such violations do not recur, there must be a comprehensive training program on command responsibility for police commanders. This training should be integrated into police academies and should be an ongoing part of professional development throughout an officer's career. Commanders must understand the legal and ethical obligations they bear in ensuring that their subordinates adhere to the law, especially when it comes to the use of force. In addition to training, the National Police Service Act (NPSA) should be amended to explicitly incorporate command responsibility as a mode of criminal liability. The current legal framework in Kenya has significant gaps in holding police leaders accountable for the actions of their subordinates. While the NPSA does provide for disciplinary actions, it does not go far enough in addressing criminal liability at the senior officer level. An amendment to the NPSA, borrowing from the ICA, would provide clarity and strengthen the legal tools available to address police misconduct. Furthermore, strengthening oversight mechanisms is critical to ensuring that command responsibility is not merely a theoretical construct but a practical tool for holding police officers accountable. Independent bodies such as the Independent Policing Oversight Authority (IPOA) must be empowered to monitor police activities closely and investigate allegations of misconduct without interference. These bodies should have the authority to

initiate investigations into senior officers when their subordinates are implicated in serious human rights violations.

6. Conclusion

The persistent culture of impunity within Kenya's police force has allowed police brutality to thrive thereby undermining public trust and violating basic human rights.⁶⁹ The failure to hold police leaders accountable for the actions of their subordinates lies at the root of this problem. The doctrine of command responsibility extends accountability beyond individual officers to the commanders who facilitate or fail to prevent misconduct. The Baby Pendo case which is emblematic of the police force's disregard for human rights serves as a crucial moment to reform the system and address the root causes of police brutality. Despite the lack of training and explicit legal provisions for command responsibility in Kenya's police force, the legal framework offers a solid foundation for its application. Even without explicitly invoking the term "command responsibility," Kenyan law can and should hold police leaders accountable for the actions of their subordinates. There is need of comprehensive reforms, including the integration of command responsibility into police training, amendments to the National Police Service Act, and the strengthening of oversight mechanisms. These measures are vital to ensure that Kenya's policing system evolves into one that is both accountable and committed to upholding the rule of law.

⁶⁹ Kinoti, 'Police Reforms: Killing the Leviathan,' (n 1) 28 and 31.