



**Abbey & another v Attorney General & 7 others; National Police Commission & 2 others
(Interested Parties) (Petition E008 of 2022) [2024] KEHC 7502 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E008 OF 2022
JN ONYIEGO, J
JUNE 21, 2024**

BETWEEN

HASSAN NUR ABDI ABBEY 1ST PETITIONER

HAWA IBRAHIM SHABURA 2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR CRIMINAL INVESTIGATIONS 3RD RESPONDENT

THE OCS EL WAK POLICE STATION 4TH RESPONDENT

THE DCIO EL WAK POLICE STATION 5TH RESPONDENT

THE OCS TAKABA POLICE STATION 6TH RESPONDENT

THE DCIO TAKABA POLICE STATION 7TH RESPONDENT

THE KENYA DEFENCE FORCES 8TH RESPONDENT

AND

THE NATIONAL POLICE COMMISSION INTERESTED PARTY

**THE KENYA HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY**

**THE INDEPENDENT POLICING AND OVERSIGHT
AUTHORITY INTERESTED PARTY**



JUDGMENT

1. The petitioners herein through the firm of Kinaro & Associates Advocates brought this suit by way of a petition amended on 01.02.2023 against the respondents seeking for orders that:
 - i. A declaration that the petitioners have established that their rights and fundamental freedoms under the Bill of rights of *the constitution* of Kenya, 2010 have been denied, violated, infringed and are threatened to be further violated in the manner pleaded within the petition, therefore that the petitioners are entitled to declarations as to their rights on account of those violations as pleaded herein under the provisions of article 23 (3) (a).
 - ii. A declaration that by arresting and detaining the 1st petitioner on 26th – 27th June, 2019, the agents of the 6th and 7th respondents were without a justiciable cause and therefore infringed on the 1st petitioners' rights under article 29(a) and (b) of *the constitution*.
 - iii. A declaration that the said arrest and detention of the 1st petitioner on 01.05.2021 was without justifiable cause and hence an affront to his rights under article 29(a) and (b) of *the constitution*.
 - iv. A declaration that the detention of the 1st petitioner from 01.05.2021 to 05 05. 2021 was unlawful, illegal and a breach of his fundamental rights to liberty under articles 29 (a) (b), 49(f), 9 (g) and (h) of *the constitution*.
 - v. A declaration that the decision to arrest and detain the 1st petitioner both on 26th and 27th day of June 2019 and 01st to 05th May, 2021 amounts to an adverse administrative action which the 1st petitioner ought to have been accorded written reasons for.
 - vi. A declaration that failure to provide written reasons in prayer (D) above amounts to abuse of the 1st petitioner's fundamental rights under article 47 of *the constitution*.
 - vii. A declaration that the failure of the respondents to present the 1st petitioner before the court infringed on his rights as enumerated under article 49(f) and 50 of *the constitution* in so far as presumption of innocence is concerned.
 - viii. An order for certiorari calling to this Honourable court for the purposes of quashing the charges against the 1st petitioner in Criminal Case No. E004 of 2023 at Mandera Law Courts (Republic v Hassanur Abdi Abbey) and quashing any criminal proceedings commenced pursuant thereto.
 - ix. A prohibitive order stopping the police officers of the 1st – 7th respondents from charging and or prosecuting the 2nd petitioner in respect to the ownership of motor vehicle registration number KBS 548N.
 - x. A declaration that the impoundment of motor vehicle registration number KBS 548N belonging to the 2nd petitioner is unreasonable, unjustifiable and is in breach to the 2nd petitioner's right to property under article 40 of *the constitution*.
 - xi. A declaration that the usage of the sand loaded in the motor vehicle re registration number KBS 548N at the time of impoundment is an abuse of power on the part of the 4th respondent and an affront to the right to property of the 2nd petitioner under article 40 of *the constitution*.



- xii. An order of compensation by way of special damages for each of the other breach of fundamental rights herein and make an award for each breach against the respondents jointly and severally.
 - xiii. An order of compensation by way of general damages for each of the breach of fundamental rights herein and make an award for each breach against the respondent jointly and severally.
 - xiv. An order that this court awards compensation for the loss of property and financial loss suffered by the 2nd petitioner for the determination of the motor vehicle which is her only source of income.
 - xv. Costs of this petition
 - xvi. Any other order that this court deems just and expedient in the circumstances.
2. The petition is supported by particulars stated on the face of it and further amplified by the averments contained in the petitioners' affidavits sworn on 30.01.2023. It is the petitioners' case that during the material time relevant to this case, Hawa Ibrahim Shabura (hereafter the 2nd petitioner) was the beneficial owner of motor vehicle registration number KBS 548N with which she engaged in an informal business partnership with the 1st petitioner for the supply and transport of sand and other materials for gain. Under the aforementioned business relationship, the 1st petitioner was tasked with the day to day operations of the business.
 3. That it is on the above premise that on 26.06.2019 at around 11.00 p.m. while driving in the said motor vehicle with the then driver, Siyat Mohammed Khalif, they were arrested by the DCI Takaba and thereafter detained at the Police Station for a night. It was stated that the 1st petitioner was however released on the morning of 27.06.2019 on a cash bail of Kes. 100,000 and in the afternoon, the police demanded a further Kes. 100,000 to secure the release of the driver and the impounded motor vehicle thus the 1st petitioner paid a total of Kes. 200,000/-
 4. It was averred that the reason for the arrest was communicated later while the 1st petitioner was in police custody as it was alleged that he was in possession of a motor vehicle which had allegedly been stolen.
 5. Further, that on 16.04.2021 at around 4.00 p.m., while the motor vehicle in question was at a garage within El Wak Township under the control of Abdinoor Isaack Muktar as the said driver, he(driver) was arrested by officers from KDF Elwak Camp wherein the said vehicle was detained. At the time of arrest, the said motor vehicle was allegedly loaded with sand for delivery to a customer within El Wak Township.
 6. The 1st petitioner further stated that under the instructions of the D.C.I. Manderla South one Hassabur Abdi, he was arrested and thereafter detained at El Wak Police station for five days until 05-05-2021 and upon payment of a cash bail of Kes. Fifty thousand Shillings which was later on refunded to her, he was released.
 7. It was deponed that during the time of arrest and impoundment of the motor vehicle, it was carrying sand and in good condition. That due to the natural effects of non-use, it has severely depreciated in value. That the OCPD Manderla South utilized the said sand loaded in the motor vehicle to construct his office hence occasioning the petitioners loss to their property. He deposed that, to date, the said motor vehicle has never been released and the police are demanding a ransom of Kes. 500,000/- before releasing it an amount the petitioners are unable and unwilling to part with.
 8. Further, it was stated that they were aware that the El Wak Police Administration and the Kenya Defence Forces wrote to their counterparts in Somalia on the possibility of the suit motor vehicle



having been stolen from Somalia to which a negative response was thus obtained. That it therefore showed that their arrests and subsequent detention was actuated by malice, vendetta and the same was devoid of any probable cause.

9. It was further stated that, despite there being no justifiable cause for their arrest and prosecution, police thereafter arraigned the 1st petitioner in court vide Criminal Case No. E004 of 2023 wherein he was charged with three criminal charges to wit: being in possession of uncustomed good contrary to section 200 (d) (iii) of the East African Community Customs Management Act of 2004; obtaining, registration by false pretences contrary to section 320 of the Penal code and giving false information to persons employed in the Public Service contrary to section 129 (a) of the Penal Code, charges which relate to the petition herein. This Honourable Court was therefore called upon to intervene and allow the petition herein by quashing the said charges.
10. The learned prosecutor representing the 9th respondent in opposing the petition filed grounds of opposition citing reasons that the petition lacked any specific violation and as such, the same ought to be dismissed. It was contended that the petition sought to interfere with the prosecutorial powers bestowed on the 9th respondent by dint of article 157 of *the constitution*. That the charges were approved against the 1st petitioner and there was intention to enjoin the 2nd petitioner based on the evidence availed. The respondent challenged the petitioners that it was incumbent upon them to demonstrate that the intended prosecution and /or arrest were hinged on illegality or bad faith. It was urged therefore that the petition be dismissed.
11. The court gave directions that the suit be canvassed by way of written submissions and only the petitioner and the 9th respondent complied with the said directions.
12. The petitioners submitted on issues coined for determination as follows:
 - i. Whether the actions of the respondents of arresting and arbitrarily detaining the 1st petitioner from 26th to 27th June, 2019 and arresting and detaining him again on 01.05.2021 to 05.05.2021 without arraigning him in court is a violation of his constitutional rights.
 - ii. Whether the actions of the respondents of withholding the 1st petitioner's cash bail and refusing to refund the same is a violation of the 1st petitioner's constitutional right to property.
 - iii. Whether the actions of the respondents of arresting the 1st petitioner on diverse dates (26th June, 2019 and May, 2021) rearresting him on 15th January, 2023 charging and consequently prosecuting him in Mandera Criminal Case No. E024 of 2023 amounts to malicious prosecution.
 - iv. Whether the acts of unjustifiably detaining the 2nd petitioner's motor vehicle registration number KBS 548N and utilizing the sand loaded therein at time of impoundment is a violation of her constitutional right to property.
 - v. Whether the petitioners are entitled to the reliefs sought.
13. On the first issue, it was argued that at the time of arrest, the 1st petitioner was not informed of the reasons of his arrest and the impoundment of the suit motor vehicle as the same was only communicated later. It was urged that the 1st petitioner who was alleged to be in possession of a stolen motor vehicle from Somalia National Army was framed and maliciously detained. Reliance was placed on the case of Moses Tengenya Omweno v Commissioner of Police & Another Civil Appeal No. 243 of 2011 [2018] eKLR where the Court stated that "...detention is indeed deprivation of liberty and that when it is illegal, it is not only an infringement of the freedom of movement, but also an act that undermines one's dignity."



14. On the second issue, the petitioners argued that upon the arrest of the 1st petitioner on 26.06.2019 at Takaba, he was released upon paying a cash bail of Kes. 200,000/- and upon the second arrest, paid Kes. 5000/- as cash bail. That it is no doubt that the 1st petitioner's financial property and the refusal to refund the same to date despite several requests amounted to a violation of the 1st petitioner's right to property.
15. On the third issue, the petitioners contended that courts have been emphatic that court process, including criminal proceedings should be used for the sole purpose of enforcing the law and doing otherwise amounts to an abuse of court process. The petitioners relied on the case of Peter George Anthony D'Costa v attorney General & Another [2013] eKLR where the court quashed a criminal prosecution instituted against the petitioner therein and insisted that court process must be used properly.
16. The petitioners argued that on 15.01.2023, the police officers from El Wak Police Station summoned the 1st petitioner to the police station wherein upon his arrival, arrested him and detained him in police custody without informing him of the reasons for the arrest and detention as they had done before a fact that led to the filing of this petition.
17. It was contended that, whereas it is the duty of the police to investigate on any complaint brought to them, the arrest of the 1st petitioner on 16-01-23 and subsequent prosecution is a manifestation of malice and unreasonableness on the part of the police against the 1st petitioner and the charges preferred against him in Mandera Criminal Case No. E004 of 2023 were simply trumped up. That had the respondents conducted their investigations decisively, the same would not warrant the charges and prosecution in Mandera Criminal Case No. E004 of 2023.
18. That this is so for the reason that the 1st petitioner only witnessed the sale of the motor vehicle which had the same registration details at the time of the sale; That the 2nd petitioner having established that she was the beneficial owner of the motor vehicle in question, having purchased the same from one Ibrahim Alio Maalim who equally recorded a statement confirming that he was the one who sold the motor vehicle in question to the 2nd petition, there was no justification in arresting the 1st petitioner.
19. The 9th respondent was condemned to have blatantly ignored the same and proceeded to charge the 1st petitioner on flimsy, frivolous and unsupported charges noting that the arresting officers did not swear any statements as to the investigations done to warrant the charges preferred against the 1st petitioner. The petitioners relied on the case of Republic v D.P.P & Another ex parte Kamani Nairobi Judicial Review Application No. 78 of 2015, where the Court while quoting the case of *R v attorney General ex parte Kipng'eno arap Ngeny*. High Court Civil Application No. 406 of 2001 where the court stated that:

'A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive...'
20. On the fourth issue, the petitioners averred that at the time of the arrest, the said motor vehicle was loaded with sand which the said driver was engaged in the supply of at the time of arrest. That the OCPD Mandera South utilized the said sand to construct his offices hence occasioning the petitioners loss to their property. That in recognition of article 40 of *the constitution*, given that the 2nd petitioner was the beneficial owner of the said motor vehicle, she ought to be accorded the right to protection of property as provided for in *the constitution* Article 40.
21. Learned counsel submitted that, the actions of the respondents to continue impounding the motor vehicle in question at the station to date without reasonable cause amounted to a violation of the 2nd petitioner's constitutional right to property. In her quest to demand for damages, the petitioners relied



on the case of Moses Kipkoech Rothich v Kenya National Highways Authority & 7 Others Petition No. 14 of 2016 [2018] eKLR where the court awarded the petitioner damages of Kes. 3,000,000 where his vehicle had been impounded for 10 months.

22. The petitioners urged this court that they were deserving of the reliefs sought for the reason that they had demonstrated that the actions of the respondents indeed violated the petitioners' rights as provided for in *the constitution*. That equity cannot suffer a wrong without a remedy and it is against that backdrop that an award of Kes. 4,000,000 to each of the petitioners was sought, Kes. 3,000,000 for breach of their rights and 7,000,000 to the 2nd petitioner for loss of user in regards to the motor vehicle in question.
23. The 9th respondent submitted that the amended petition lacked merit as there was no specific violation by the 9th respondent against the petitioners and therefore the same ought to be dismissed. That in the said petition, the petitioners did not disclose any specific right which was violated by the 9th respondent. It was urged that whoever alleges a violation of a fundamental human right, is obliged to specifically plead and prove it. Further, it was argued that the petition sought to interfere with the prosecutorial powers bestowed on the 9th respondent by dint of article 157 of *the constitution*. That the power to institute criminal proceedings lay with it and that it was within its constitutional right to prefer the charges against the 1st petitioner and further, its intention to prefer charges against the 2nd petitioner.
24. It was contended that the decision of the 9th respondent to prefer charges was premised on the facts presented before it by the police. Further, the petitioners did not demonstrate that they will not be accorded a fair trial or that the 9th respondent will not respect their constitutional rights. In the end, the 9th respondent urged this court to dismiss the petition herein for want of merit.
25. I have read and understood the amended petition by the petitioners, the grounds of opposition, the replying affidavit by the 9th respondent. Further, I have considered the submissions by the petitioners and the 9th respondent. The issues which germinate for determination are.
 1. Whether the arrest and detention of the 1st petitioner on 26th -27th June 2019 and subsequent arrest on 01-05-2021 unlawful and unconstitutional
 2. Whether the prosecution against the 1st petitioner in Mandera criminal case No. E004 of 2023 is malicious, unlawful and therefore unconstitutional hence should be quashed.
 3. Whether a prohibition order should issue against the arrest and prosecution of the 2nd petitioner in respect of ownership of motor vehicle registration No. KBS 548N
 4. Whether the 2nd petitioner is entitled to a refund of Kshs 200,000/= Cash bail deposited with the DCCI' office Takaba on 27-06-2019
 5. Whether the impoundment of Mv regn.KBS 548 N belonging to the second petitioner by the police and KDF was unlawful and therefore unconstitutional
 6. Whether the reliefs sought can issue

Whether the arrest and detention of the 1st petitioner on 26th -27th June 2019 and subsequent arrest on 01-05-2021 unlawful and unconstitutional

26. The crux of the matter herein, is the alleged unlawful arrest and detention of the petitioners, prosecution of the 1st petitioner, threat to arrest and prosecute the 2nd petitioner, unlawful impoundment of the second petitioners' motor vehicle Regn. No.KBS 548N, failure to refund



cash bail of Kshs 200,000 and therefore a prayer for declaratory orders on account of their unconstitutionality.

27. It is not in dispute that the power to investigate commission of crimes and recommendation for prosecution purely fall within the purview of the police.

28. The Police have a constitutional and statutory power under Articles 243-245 of *the Constitution* and section 58 of the *National Police Service Act* to arrest any person reasonably suspected of having committed a crime. Section 58 is in the following terms:

“ 58. Power to arrest without a warrant

Subject to Article 49 of *the Constitution*, a police officer may without a warrant, arrest a person—

- a. who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;
- b. who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;
- c. whom the police officer suspects on reasonable grounds of having committed a cognizable offence;
- d. who commits a breach of the peace in the presence of the police officer;
- e. in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;
- f. whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;
- g. whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or
- h. whom the police officer has reasonable cause to believe a warrant of arrest has been issued.”

29. However, in exercise of those powers, the officer or office charged with making a decision whether to arrest or not, must act reasonably, impartially, in good faith and within the law while observing clear constitutional dictates. He or she must not act capriciously or whimsically. However, the onus to prove whether an officer acted in bad faith or maliciously lie with the person alleging. See Section 107 of the *evidence Act*.

30. It is trite that, for a party to seek a relief based on breach or violation of a constitutional right or threat to violation of such right, he or she must prove with a reasonable degree of precision the nature of the violation or right under threat and the constitutional provision violated. See Anarita Karimi Njeru v Republic (1979)e KLR.



31. In this case, the petitioners gave in detail their side of the story on how the 1st petitioner was on 26th June 2019 arrested together with the 2nd petitioner's driver one Siyat Mohamed Khalif by Takaba DCI's office and the MV KBS 548N impounded. After depositing Kshs 100,000/= each, they were released with no charges preferred nor was their cash bail refunded. That again the 1st petitioner was arrested on 1st May 2021 and detained up to 5th May 2021 on grounds that the mv he was managing was stolen from Somalia. He was however released on cash bail of Kes 50, 000 and then set free without any charges being preferred.
32. According to the 1st petitioner, he was a mere employee to the 2nd petitioner hence had no business questioning her right of ownership of the motor in question. That despite the 1st petitioner confirming that she was the owner of the motor having bought it from one Ibrahim Aliow Maalim on 21-02-2018, the officers were adamant. A copy of the sale agreement with Aliow was attached and marked HS-1.
33. The question therefore is, was there justification in arresting and detaining the 1st petitioner in two occasions and then releasing him without any charges. As stated above, the 1st -8th respondents did not file any response. To that extent, the claim by the 1st petitioner is uncontroverted. There is no doubt that courts have a duty not to unnecessarily interfere with the mandate of other organs of the state as they all play a complimentary role. However, where the police in the course of discharging their duty acts maliciously, a court should not hesitate to say as such.
34. The Supreme Court of Kenya in the case of Justus Kariuki Mate & another v. Martin Nyaga Wambora & another (2017) eKLR held thus: -
- “(84) From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of *the Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of government responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practise from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.”
35. In Civil Appeal No. 11 of 2018 Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR the court of appeal held that:-
- “Where *the Constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutionals spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have.”
36. In the instant case, the police had no explanation as to why they arrested the 1st petitioner twice, detained and released him without any charges preferred. Worse still, they kept the 1st in custody for five days thus exceeding 24 hrs without justification contrary to Article 49(1) (f) of *the constitution*. The



right to personal liberty cannot be underscored. It is a fundamental constitutional right and cannot be taken away unless authorized by law which in this case was not. The arresting officer/s should have moved to the magistrate's court to secure a custodial holding order instead of keeping somebody in custody for five days and yet release him without any explanation or preferring charges. I am in agreement with the 1st petitioner that his arrest on the 26th -27th June 2026 2019 and 1st -to 5th may 2021 and subsequent detention beyond the constitutionally allowed period was a violation of his fundamental rights under Article 29 of *the constitution*.

37. Having held as above, I am duty bound to assess the extent of general damages as reasonable compensation for the injury suffered as a result of the unlawful arrest and detention. In the case of Charles Mwapagha vs Kenya airways limited & another (2015) e KLR the court awarded Kes 1,000,000 for unlawful detention for 8 days.
38. Similarly, in the case of Mbithi v Attorney General (civil suit 1105 of 2001)(2024)KEHC281(KLR) (Civ)(25 January 2024)(Judgment)the court awarded 600,000/= general damages for unlawful arrest and detention.. In the case of Puline Waruiru Gicheru vs Robert Kiragu Kimwaki and another (2015) e KLR the court upheld an award of kes 85,000/= awarded by the lower court for unlawful arrest and detention.
39. Guided by the above case law and taking into account the principle that similar claims should be awarded or attract comparable compensation, and further; considering the rate of inflation, I am of the opinion that a sum of kshs 800,000/= will be reasonable compensation as general damages for unlawful arrest and detention of the 1st petitioner.

Whether the 2nd petitioner is entitled to a refund of kes 200,000 cash bail deposited in Takaba DCI's office on 27-06-2019

40. It was the 2nd petitioner's averment that when the 1st petitioner was arrested together with the driver one siyat on 26-06-2019, she deposited Kes 100,000/= cash bail for each of them on 27-06-2019. Upon being released pending investigation, the same was not refunded to date hence the prayer for refund. This claim was supported by deposit receipt. The same having not been controverted, I am persuaded to believe that the amount quoted was paid as cash bail and was never refunded hence an order for refund.

Whether the prosecution against the 1st petitioner in Mandera criminal case No. E004 of 2023 is malicious, unlawful and therefore unconstitutional hence should be quashed.

41. After a long time of detention of the motor vehicle herein referred, the 1st petitioner was eventually arrested and charged in Mandera criminal case number E004 of 2023 on 16-01-2023.
42. It is trite that prosecutorial powers of the Director of Public Prosecution are constitutionally and statutorily provided for under Article 157 (10) of *the Constitution* and Section 4 of the Office of the Director of Public Prosecution Act No. 2 of 2013, which provides that the DPP does not require the consent of any person or authority to commence any criminal proceedings and in exercise of his/her powers and functions, shall not be under the direction or control of any person or authority.
43. The exercise of that power is however subject to Subsection (11) of Article 157 and Section 4 of the DPP Act, which provides that in exercise of the said power, the Director of Public Prosecution shall have regard to the public interest, the interest of the administration of justice and the need to prevent



and avoid abuse of legal process. In R v Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 the Court held that:

“ A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.

44. Despite the 2nd Petitioner confirming and producing a sale agreement showing that she was the owner of the mv in question, the 1st petitioner was arrested allegedly for being found in possession of unaccustomed good (mv KBS 548N). Despite service of the petition there was no response filed to challenge the claim that he was not the owner of the mv but an employee. The 1st petitioner averred that the arrest and arraignment in court after 4 years since 2019 when he was first arrested was actuated with malice to compel him too withdraw this petition.
45. Although it is not the duty of the civil court to determine in a criminal case in a civil case, a constitutional court can intervene in situations where the pending prosecution is outrightly hopeless and malicious. In the circumstances of this case, the arrest and subsequent arraignment in court had no basis but actuated with malice with the sole purpose of intimidating the petitioner to drop this petition.
46. If there was any genuine prosecution in relation to the illegality over ownership of the mv in question, the owner should be answerable and not a mere employee. On that ground, it is my finding that had the DPP acted properly based on the facts at hand, he could not have preferred the charges in question. To that extent the proceedings in Manderu CR. Case number E004 of 2023 be and is hereby terminated by an order of certiorari quashing the said proceedings forthwith.

Whether a prohibition order should issue against the arrest and prosecution of the 2nd petitioner in respect of ownership of motor vehicle registration No. KBS 548N.

47. The constitution makes provision for parliament to enact legislation establishing other police services under the supervision of the National Police Service. It is from this statute that the 3rd respondent derives its mandate as an organ of the National Police Service tasked to undertake specialized criminal investigative services. [See Geoffrey K. Sang V Director of Public Prosecutions & 4 Others [2020] eKLR].
48. The second petitioner urged this court to stop the 3rd and 9th respondent from ordering for her arrest and prosecution. The mandate of the police and DPP are clearly spelt out in the constitution. Courts only exercise supervisory role where such bodies act in excess of their powers, irrationally or against the principles of natural justice. In situations where such bodies abuse discretion, the high court can intervene.
49. Undoubtedly, the court may intervene where the said discretion is exercised unlawfully and in bad faith. [See George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & Another [2014] eKLR] where the court proceeded to state that:

“ 50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in



the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings... In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.

50. In *Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170*, the Court of Appeal held:

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”

51. In the instant case, the second petitioner is being speculative and therefore asking speculative orders to gag the powers of the ODPP or the police. I have no reason to issue speculative orders. There is no eminent fear that she will be arrested since 2019 when she was arrested and released. On that ground alone that prayer is disallowed.

Whether the impoundment of Mv regn. KBS 548 N belonging to the second petitioner by the police and KDF was unlawful and therefore unconstitutional

52. The mv in question according to the charge sheet against the 2nd petitioner is an un accustomed good. The 2nd petitioner did not attach any ownership documents like a log book to show that she had lawful ownership. Prima facie evidence by way of mv search, insurance cover or logbook must be produced to justify ownership. In the absence of this evidence, I am not in a position to blame the police for acting within the law. If she has any proof, let her tender the same before the police who will then have no reason to continue detaining the same failure to which she can institute civil proceedings for compensation and special damages for loss of user. On that ground, that prayer fails.

Whether the reliefs sought can issue

53. Besides the prayers already addressed, the petitioners prayed for declaration that they were entitled to special damages for the loss of Sand the motor vehicle was carrying when it was impounded, loss of business and compensation owing to depreciation of the mv which has been lying at the yard. It is trite law that special damages must be pleaded and specifically proved. According to the petition, there was no mention of any specific special damages in relation to any loss. Regarding loss of sand, there was no proof that the motor vehicle had sand on board.



54. It was averred that at the time of the impoundment of the motor vehicle registration KBS 548N, the same had sand and the OCPD Mandera South has since utilized the said sand to construct his office hence occasioning the petitioners loss to their property.
55. The onus rested on the petitioners to prove that indeed, the OCPD Mandera South has since utilized the said sand to construct his office hence occasioning the petitioners loss to their property. I say so for the reason that Under Section 107(1) of the *Evidence Act*, “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”. Accordingly, the burden is upon the party who alleges an occurrence of an action to bring enough evidence to prove that the said action indeed happened and the same was contra the expectations and /or the provisions of the law.
56. On costs, Section 27 of the *Civil Procedure Act* provides: -
- 27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
- provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.
57. In Republic v Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014 the court held as follows: -
- “The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”
58. Indeed, costs shall follow the event. It is my humble that the petitioners are entitled to their costs.
59. Having held as above, it is my finding that the petitioners have partially proved their case on a balance of probability and therefore find the 1st to the 3rd respondents vicariously liable jointly and severally. To that extent, I am inclined to make the following declaratory orders that;
- a. A declaration be and is hereby made declaring the arrest of the 1st petitioner on 26th June 2019 and 1st may 2021 and subsequent detention up to 5th May 2021 without trial as unlawful and illegal hence unconstitutional.
 - b. A declaration be and is hereby made declaring the arrest and subsequent prosecution of the 1st petitioner in Mandera PM’s court criminal case no. E004 of 2023 unlawful and malicious hence certiorari orders issued calling upon the said criminal proceedings for purposes of being quashed which I hereby do by terminating the same forthwith.
 - c. A declaration is hereby made declaring the retention of Kes 200,000/= deposited as cash bail at Takaba pllice station between 26th and 27th June 2019 which money has never been refunded to the depositor as illegal and irregular hence should be refunded forthwith.



- d. Pursuant to the declaratory order made in number (1) herein above, the 1st to the 3rd respondent shall be held jointly and severally liable and therefore condemned to compensate the 1st petitioner Kshs 800,000/= being general damages for unlawful arrest and detention.
- e. The petitioners are a warded costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024

J.N. ONYIEGO

JUDGE

