



**MC & another v Kipyegon & 5 others (Petition E514 of 2021) [2024] KEHC 10387 (KLR)  
(Constitutional and Human Rights) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E514 OF 2021  
LN MUGAMBI, J  
AUGUST 26, 2024**

**BETWEEN**

**MC ..... 1<sup>ST</sup> PETITIONER**

**CENTRE FOR RIGHTS EDUCATION AND AWARENESS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KEVIN KIPYEGON ..... 1<sup>ST</sup> RESPONDENT**

**ERIC KIRUI ..... 2<sup>ND</sup> RESPONDENT**

**WINNIE KISANGI ..... 3<sup>RD</sup> RESPONDENT**

**MUNYI NYAGAH ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 29<sup>th</sup> November 2021 is supported by the 1<sup>st</sup> Petitioner's affidavit in support of equal date.
2. The gist of this Petition are allegations that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents failed to effectively execute their due diligence obligation to investigate the 1<sup>st</sup> Petitioner's rape complaint against the 1<sup>st</sup> Respondent. That the respondents focused on 1<sup>st</sup> Petitioner's conduct with the 1<sup>st</sup> Respondent and implied that there was consent which hampered their objectivity to carry out effective investigations.



The Petitioners thus allege that the Respondents' actions were in violation of the State's due diligence obligation by failing to ensure the 1<sup>st</sup> Petitioner's constitutional rights were protected.

3. Accordingly, the Petitioners seeks the following relief:
  - i. A declaration that the 1<sup>st</sup> Respondent violated the fundamental rights of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, and 29(c) of *the Constitution*.
  - ii. A declaration that the failure of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to adequately respond to the 1<sup>st</sup> Petitioner's report of sexual violence in accordance with the required standard of due diligence was a violation of the fundamental rights and freedoms of the 1<sup>st</sup> Petitioner as provided in Articles 27, 28, and 29(c) of *the Constitution*.
  - iii. A declaration that the act of implying sexual consent by state actors in the criminal justice system in sexual violence cases is contrary to Section 42 of the *Sexual Offences Act* No. 3 of 2006 and a violation to the right to equality and non-discrimination before the law, therefore unconstitutional and should be null and void.
  - iv. A declaration that the act of subjecting the 1<sup>st</sup> Petitioner to secondary victimization is contrary to Sections 8(1) (c), 10(a), 11(1) and 19(1) and (2) of the *Victim Protection Act* No. 17 of 2014 and a violation of the right to equality and non-discrimination before the law, therefore unconstitutional and should be null and void.
  - v. An order compelling the 5<sup>th</sup> Respondent to conduct fresh and proper investigations against the 1<sup>st</sup> Respondent and to institute criminal proceedings against him.
  - vi. An order compelling the 5<sup>th</sup> Respondent to impose appropriate legal and administrative sanctions against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for mishandling the report of sexual violence made by the 1<sup>st</sup> Petitioner against the 1<sup>st</sup> Respondent.
  - vii. The Court do hold the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents jointly and severally liable for violating the 1<sup>st</sup> Petitioner's fundamental rights and freedoms.
  - viii. The Court awards the 1<sup>st</sup> Petitioner Kshs 10,000,000 being general damages for the physical and psychological pain and suffering caused by the Respondents.
  - ix. The Court be pleased to issue an order that the Respondents do jointly and severally bear the costs of this Petition.
  - x. Consequent to the grant of the prayers above the Court be pleased to issue any other or further remedy (directions and orders) that the Court shall deem fit and necessary to give effect to the foregoing orders, and/or favour the cause of justice.

#### **Petitioners' Case**

4. The 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent were former classmates way back in Primary School. On 26<sup>th</sup> May, 2021 the 1<sup>st</sup> Petitioner invited the 1<sup>st</sup> Respondent to visit her in her house at Kahawa Wendani. At the time, the 1<sup>st</sup> Petitioner was a student at Kenyatta University.
5. When he arrived, they did catch up on their lives after High School as they sipped wine and listened to music. The 1<sup>st</sup> Petitioner cooked supper, a meal of rice for dinner and beef as she continued taking her wine.



6. Owing to the nationwide curfew that was in force at the time and heavy traffic that was around Kahawa Wendani at the time, they reasoned that the 1<sup>st</sup> Respondent should stay overnight at her place for it was getting late for him to leave for his place at Ngong.
7. After the meal and drinks the started watching a movie together during which the Petitioner dozed off and fell asleep.
8. The 1<sup>st</sup> Petitioner avers that at around midnight she was woken up by a person grabbing her and pinning her to the bed. To her surprise, it was the 1<sup>st</sup> Respondent who was on top of her naked and shoving his penis into her vagina. She confronted him and the 1<sup>st</sup> Respondent started begging for forgiveness.
9. That night, the 1<sup>st</sup> Petitioner went and informed his neighbour Billy what had happened. Billy accompanied her to the House. They picked her laptop for safe-keeping and then proceeded to lock the door from outside to prevent the 1<sup>st</sup> Respondent from escaping.
10. The Petitioner decided to report the incident at Kahawa Wendani Police Station. Her friend, Ashley Kimberly accompanied her to the Police Station.
11. There at the Station, they found the 2<sup>nd</sup> Respondent, a Police Officer at Kahawa Wendani Police Station with other police officers on the night they went to report the rape incident. In the presence of other police officers, the 2<sup>nd</sup> Respondent proceeded to openly question the 1<sup>st</sup> Petitioner about the incident and the Petitioner narrated how it had unfolded. The 2<sup>nd</sup> Respondent made some indifferent comments wondering what else she expected after inviting a man into her house, cooked for him, served him wine and offered him a place to sleep. Still another negatively commented her dressing was inappropriate and this too might have contributed. Further, the 2<sup>nd</sup> Respondent said that they had been receiving similar complaints which turned out to be false.
12. At some point, the Police Officers requested to her to show the phone messages she had exchanged with the 1<sup>st</sup> Respondent. They then saw one in which the Respondent had referred to her as ‘baby’ but she had not responded to it. That prompted a further comment in which she was told that she was in a relationship with the 1<sup>st</sup> Respondent yet she had gone to report him for rape. Another one chipped in describing that her conduct of cooking meat for the 1<sup>st</sup> Respondent, serving him wine, watching a movie together and offering him a place to sleep all amounted to consent for sex. The 2<sup>nd</sup> Respondent then inquired from the 1<sup>st</sup> Petitioner if she ever lost someone in her family and when she answered affirmatively, he informed her that the feeling she was experiencing will also fade away just like grief that is felt by those who lose their family members does.
13. All the same, the 2<sup>nd</sup> Respondent requested a police officer by the name Baraza to book the complaint. They then called an ambulance to take the 1<sup>st</sup> Petitioner to hospital (Medicines San Frontiers (MSF). She underwent a number of medical tests and was given some shots before being dropped at her house.
14. Getting to the house, 1<sup>st</sup> Petitioner and her friend Ashley Kimberly found out that the 1<sup>st</sup> Respondent had escaped. They also came across a condom wrapper and put in the same bag they had kept the underwear that 1<sup>st</sup> Petitioner wore at the time of the incident.
15. The 1<sup>st</sup> Petitioner went back to the Police Post the following day and recorded her statement. She was also informed that her case had been assigned to 3<sup>rd</sup> Respondent who took her statement to be the investigator.

The 1<sup>st</sup> Petitioner began making follow ups on her case from there on but no progress was being made to arrest of the 1<sup>st</sup> Respondent. On occasions she would go to the Police Station where she would



find the 2<sup>nd</sup> Respondent who would scold her for dealing with the 3<sup>rd</sup> Respondent instead of him and even ask her for money so that the Directorate of Criminal Investigations (DCI) can track and arrest the 1<sup>st</sup> Respondent. Aggrieved, she reported the matter to the Kenya Police Headquarters (Vigilance House) on 14<sup>th</sup> June 2021. The OCS Kahawa told by an Officer known as Collins Sanga to assist the 1<sup>st</sup> Petitioner.

16. The police advised her to lure the 1<sup>st</sup> Respondent into her house so that they could arrest. When she finally got him and tricked him to go to her house on 1<sup>st</sup> of July, 2021; she made frantic calls to the police officers but her calls were not picked. She had to send her friend Ashley Kimberly to go for the police officers who then came and arrested 1<sup>st</sup> Respondent. She later on called the 3<sup>rd</sup> Respondent to find out when the 1<sup>st</sup> Respondent would be arraigned in Court. However, the 3<sup>rd</sup> Respondent started inquiring if she would agree on settling the matter instead but the Petitioner declined.
17. The 4<sup>th</sup> Respondent who identified himself to the 1<sup>st</sup> Petitioner as an Inspector from Kahawa Sukari Police Station thereafter informed the petitioner that the 1<sup>st</sup> Respondent had been released on cash bail. On her subsequent visits to the Police Station, the 4<sup>th</sup> Respondent just like the 2<sup>nd</sup> Respondent was constantly taunting her for incriminating a man she had wine and dined with for rape.
18. She also deposed at one point, the 1<sup>st</sup> Respondent's family offered her family Ksh.70, 000 so to settle the matter after which the 4<sup>th</sup> Respondent informed her that her brother had withdrawn her case. The 1<sup>st</sup> Respondent was thus not arraigned in Court.
19. The 1<sup>st</sup> Petitioner avers that the experience in the hands of the police left her traumatized and she had to attend psychological sessions to cope.
20. It is against the preceding background that the Petitioners felt compelled to institute this Petition against the respondents for the failure to act with due diligence in to effectively investigate the rape complaint filed by the 1<sup>st</sup> Petitioner thus leading to eventual acquittal of the 1<sup>st</sup> Respondent. According to the Petitioners, the Respondents failed in their duty to respect and protect the rights and fundamental freedoms under Articles 27, 28 and 29(c) of *the Constitution*.

### **1<sup>st</sup> Respondent's Case**

21. In reply to the Petitioner's case, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 1<sup>st</sup> January 2022 and a supplementary affidavit dated 14<sup>th</sup> June 2023. He avers that following the 1<sup>st</sup> Petitioner's complaint, he was arrested. He disputed the allegations of rape that the 1<sup>st</sup> Petitioner had levelled against him. He was thereafter released on cash bail pending conclusion of investigations.
22. He deposes that on 10<sup>th</sup> January 2021, he was arraigned before the Ruiru Law Courts in Criminal Case No. E004 of 2022: Republic vs Kevin Kipyegon. The matter was heard and concluded on merits. He was acquitted after the Court found he had no case to answer in a ruling delivered by the Principal Magistrate Hon. J.A. Agonda on 27<sup>th</sup> January 2023.
23. The 1<sup>st</sup> Respondent further asserts that he has no control over the manner in which police officers discharge their duties. For these reasons, he contends that this Petition is in bad faith and full of falsehoods. Accordingly, he prayed that it be dismissed with costs.

### **2<sup>nd</sup> Respondent's Case**

24. In response to the Petition, the 2<sup>nd</sup> filed a replying affidavit sworn on 18<sup>th</sup> May 2023. Recounting the events of the fateful night, he avers that the 1<sup>st</sup> Petitioner and her friend went to report the rape incident on the morning of 26<sup>th</sup> May 2021. He explained that the 1<sup>st</sup> Petitioner related how she had invited the



- 1<sup>st</sup> Respondent to her house the previous day and the two ate and drunk together as they watched movies. He deponed that the 1<sup>st</sup> Petitioner said they went to bed together and that is when she realized she had been raped.
25. He deponed that since there was no female police officer at the time of lodging the complaint, he recorded the incident in the Occurrence Book (OB) and called medical personnel so that she could be examined. The next day the case was assigned to the 3<sup>rd</sup> Respondent for investigation. The 1<sup>st</sup> Respondent was later arrested and was subsequently arraigned before Ruiru Law Courts.
26. He swore that the delay in arraigning the 1<sup>st</sup> Respondent in court was because the police case file No.CR.266/13/2022 and SOE04/2022 was forwarded to the Director of Public Prosecutions (DPP) through the DCI Ruiru for perusal and advice. The DPP'S directive to charge the 1<sup>st</sup> Respondent with rape was issued on 15<sup>th</sup> December 2021. The 1<sup>st</sup> Respondent was subsequently charged in Court.
27. In light of these factors, he posits that the 1<sup>st</sup> Petitioner's allegation that the police failed to carry out their mandate is unfounded. This is because the 1<sup>st</sup> Respondent was duly charged, arraigned in court and eventually acquitted of the charge. He vehemently denied the 1<sup>st</sup> Petitioner's claim of secondary victimization.
28. The 2<sup>nd</sup> Respondent further stated that the 1<sup>st</sup> Petitioner has failed to demonstrate how the Respondents' actions constituted a violation of her constitutional rights as established in Anarita Karimi Njeru vs R (1976-1980) KLR 1272.

### **3<sup>rd</sup> Respondent's Case**

29. In reply, the 3<sup>rd</sup> Respondent filed a replying affidavit sworn on 19<sup>th</sup> May 2023 in which she deponed that upon arriving at work on 26<sup>th</sup> May 2021, she was assigned the 1<sup>st</sup> Petitioner's case vide OB: 02/26/05/21 to investigate.
30. Accompanied by her colleague PC Barisa, they went to the 1<sup>st</sup> Petitioner's house and questioned her on what had transpired. She then filed her report on the matter. Additionally, the 3<sup>rd</sup> Respondent called the 1<sup>st</sup> Petitioner the next day to record her statement. She notes that the 1<sup>st</sup> Petitioner's friend, Ashely Kimberly also recorded her statement.
31. The 3<sup>rd</sup> Respondent contends that the 1<sup>st</sup> Petitioner agreed to assist the police apprehend the 1<sup>st</sup> Respondent. This happened on 1<sup>st</sup> July 2021. Upon arrest, the statement of the 1<sup>st</sup> Respondent was also recorded.
32. She asserts that the 1<sup>st</sup> Petitioner's allegation of secondary victimization is groundless as the case was assigned to her and was always in contact with the 1<sup>st</sup> Petitioner. She further denied the allegation that they asked the 1<sup>st</sup> Petitioner to seduce the 1<sup>st</sup> Respondent to enable the police make the arrest. She explained that it is the Petitioner who voluntarily agreed to work closely with the police to have the 1<sup>st</sup> Respondent was apprehended. She noted that at the time of her involvement police officers were there.
33. In closing, she contended that the 1<sup>st</sup> Petitioner failed to prove her case in line with the requirement set out in Anarita Karimi Njeru case(supra). Equally that she performed her duty in accordance with the law.

### **4<sup>th</sup> Respondent's Case**

34. The 4<sup>th</sup> Respondent vide a replying affidavit sworn on 18<sup>th</sup> May 2023 stated that when he was informed of the 1<sup>st</sup> Petitioner's case by the 2<sup>nd</sup> Respondent, he instructed that she be taken to the hospital for



examination. He avers that on the next day upon perusing the OB, he assigned the reported cases to investigating officers for action and had the 3<sup>rd</sup> Respondent investigate the 1<sup>st</sup> Petitioner's case.

35. He depones that on 14<sup>th</sup> June 2021, he received a call from Vigilance House (the Police Headquarters) concerning the 1<sup>st</sup> Petitioner's case directing him to action the matter. In response, he called the 1<sup>st</sup> Petitioner to his office to discuss the matter.
36. He then instructed the 3<sup>rd</sup> Respondent to liaise with the DCI Ruiru to track and apprehend the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was later on arrested on 1<sup>st</sup> July 2021 with the help of the 1<sup>st</sup> Petitioner. He stated that the 1<sup>st</sup> Respondent was subsequently released on cash bail.
37. He equally echoed the deposition of the 2<sup>nd</sup> Respondent on what ensued after the matter was forwarded to the DPP. He as well pinpoints that the Petitioner has failed to meet the threshold set in Anarita Karimi Njeru(supra). In conclusion, he argued that he had carried out his duties lawfully and thus it was the 1<sup>st</sup> Petitioner burden to prove otherwise.

### **6<sup>th</sup> Respondent's Case**

38. In reply, the 6<sup>th</sup> Respondent filed its grounds of opposition dated 18<sup>th</sup> May 2023 on the premise that:
  - i. The Petitioners have not demonstrated how the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have violated their Constitutional Rights.
  - ii. The Petition has not been pleaded with precision since it does not adequately particularize the claim relating to any alleged violation of *the Constitution*.
  - iii. It is well settled law that the Petitioners ought to demonstrate how the Respondents' conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. This was established in the case of Anarita Karimi Njeri vs R (1976-1980) KLR 1272 where the court stated that Petitioners must state and identify the rights with precision and how the same have been or will be infringed.
  - iv. The impugned actions of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents as outlined by the petitioners in their pleadings have been reasonably undertaken in good faith and upon lawful and relevant grounds anchored upon *the Constitution* and statute law.
  - v. The constitutional and statutory mandate conferred upon the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents can only be interfered with by Court where it has been sufficiently demonstrated that they have acted arbitrarily and contrary to their constitutional powers and mandates.
  - vi. The mere allegation that a human right or fundamental freedom of the Petitioners has been or is likely to be contravened is not of itself sufficient to entitle the Petitioners the remedies sought. The Petitioners must demonstrate real danger so imminent and evident, true and actual and not fictitious; so that it deserves immediate redress by this Court.
  - vii. The strict interpretation of Article 23(3) (c) is that the relief for Temporary Orders thereunder is, prima facie, only available when a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
  - viii. No evidence has been adduced before the court to show that the Petitioners have suffered prejudice, damages or violation of their rights and freedoms under *the constitution*.
  - ix. Both the application and Petition are frivolous, without merit, an abuse of the court process and ought to be dismissed with costs to the Respondents.



## Parties Submissions

### Petitioner's Submissions

39. On 9<sup>th</sup> June 2022, Counsel Winfred Odali filed submissions in support of the Petitioners' case. Supplementary submissions were correspondingly filed on 5<sup>th</sup> July 2023. The issues raised for discussion were: whether the act of implying sexual consent is unconstitutional; whether the Respondents subjected the 1<sup>st</sup> Petitioner to secondary victimization and whether the Respondents violated the 1<sup>st</sup> Petitioner's constitutional rights.
40. Relying on Recommendation 29(e) in the CEDAW General Recommendation 35 of 2017 in the first issue, Counsel submitted that there is an obligation on state parties to ensure that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances.
41. As such, the UN Handbook for Legislation on Violence against Women recommends that States should enact legislation that minimizes secondary victimization of the complainant by enacting a definition of sexual assault that requires the existence of "unequivocal or voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant was consenting. Counsel further relied on Rule 70 of the Rules of Procedure and Evidence of the International Criminal Court (ICC) and Article 4(2)(a) on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
42. In the same way, reliance was placed in *MC v Bulgaria* Appl. No. 39272/98, Council of Europe: European Court of Human Right where it was held that:

"In accordance with contemporary standards and trends in that area, the Member States' positive obligations under Articles 3 and 8 of the European Convention on Human Rights must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim."
43. Similar reliance was placed in *Daniel Kaberu v Republic (Criminal Appeal No. 6 of 2019)* and *Lawrence Frank Wanyama and Another v Republic (Criminal Appeal No. 183 of 2019)*.
44. In the context of this case, Counsel submitted that the police officers assumed that since the 1<sup>st</sup> Petitioner and 1<sup>st</sup> Respondent were long time acquaintances, the same amounted to consensual sex. Correspondingly that hosting the 1<sup>st</sup> Respondent indicated that the 1<sup>st</sup> Petitioner was agreeable to having sexual intercourse with the 1<sup>st</sup> Respondent. Considering this, Counsel argued that this deduction undermined the investigation and eventually the prosecution leading to the acquittal of the 1<sup>st</sup> Respondent. It was stressed as guided by the international instruments that implying sexual consent is unlawful and unconstitutional.
45. On the second issue, Counsel noted that according to the European Crime Prevention Network, secondary victimization is defined as the victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim. In this regard, the Declaration on the Elimination of Violence against Women (DEVAW) under Article 4 places an obligation on state parties to ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions. This is in the same way echoed in UN Declaration on Basic Principles of Justice and Support for Victims of Crime and



Abuse of Power. It was further pointed out that the National Police Officers Standing Orders provide guidelines which dictate the conduct of police officers during discharge of their duties.

46. Recounting the 1<sup>st</sup> Petitioner's account, Counsel was certain that she had been subjected to secondary victimization contrary to the relevant provisions of the law and as such the Respondents should be held accountable.
47. Turning to the third issue, Counsel commenced by stating that the Respondents had violated the 1<sup>st</sup> Petitioner's rights and women's rights in general. Particularly, the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources, the right to equality and freedom from discrimination and the right to human dignity.
48. It was submitted that as a general rule, state responsibility is based on acts or omissions committed either by State actors or by actors whose actions are attributable to the State. In view of this, Counsel noted the Committee on the Elimination of Discrimination against Women, General Recommendation 19 of 1992 in Paragraph 9 establishes the principle of due diligence obligation of the State in violence against women. Accordingly, States may be responsible for private acts if they fail to act with due diligence to prevent violation of rights or to investigate and punish acts of violence. This obligation is also resonated in the Maputo Protocol.
49. Reliance was placed in *C.K. (A Child) through Ripples International as her guardian and Next friend) & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others* [2013] eKLR where it was held that it is the responsibility of the state to ensure that the police investigate claims of sexual violence by not only arresting sexual offenders, but conducting effective investigations and prosecutions. The court found that there was a failure of the state obligations to investigate because even when the arrests were made, the offenders were released due to poor investigations and subsequent prosecution.
50. Consequently, in light of this case Counsel submitted that the State had failed in its due diligence obligation to conduct proper investigations and prosecution into the sexual violence case reported by the 1<sup>st</sup> Petitioner against the 1<sup>st</sup> Respondent and hence ought to be held liable.
51. Speaking to violation of Article 27 of *the Constitution*, Counsel submitted that the concept of violence against women as defined in international legal instruments and documents has placed an emphasis on the fact that such violence is gender-based, a form of discrimination. This was aptly recognized by the CEDAW Committee in its General Recommendation 19 of 1992 in Comment 6. Similarly, Article 18(3) of the African Charter on Human and People's Rights which mandates states to ensure the elimination of every discrimination against women and also ensure the protection of the rights of women as stipulated in international declarations and conventions.
52. Additional reliance was placed in *P.O. v Board of Trustees, A F & 2 others* (2014)eKLR where it was held that:

“The International Labour Organization [ILO] in Working Paper 3/2011 titled 'Gender-Based Violence in the World of Work: Overview and Annotated Bibliography' by Adrienne Cruz and Sabine Klinger characterizes gender-based violence as "the most prevalent human rights violation in the world. Of the varied ways in which sex discrimination manifests across the globe, such violence is exceptionally dehumanizing, pervasive and oppressive. No other form of sex discrimination violates so many fundamental human rights as articulated in the 1948 United Nations Universal Declaration of Human Rights. These include Article 1 [All Human beings are born free and equal in dignity and rights]; Article 3 [Everyone has the right to life, liberty and Security of the Person]; and Article 5 [No one shall be subjected to



torture or to cruel, inhuman and degrading treatment or punishment].” The Authors state that gender-based violence reflects and reinforces inequalities between men and women. At least one in three women in the world, according to this paper, is estimated to have been coerced into sex, physically beaten and/or otherwise abused in her lifetime.”

53. Like dependence was also placed in *Opuz v Turkey*, No. 33401/02, ECHR, 2009.
54. In this case, Counsel submitted that the 2<sup>nd</sup> to 5<sup>th</sup> Respondents’ failed to conduct proper investigations since the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent were acquaintances hence assuming consent by that virtue. Likewise, that these Respondents’ approached her family to settle the matter and accepted to have the case withdrawn by the brother yet the 1<sup>st</sup> Petitioner is an adult capable of making her decisions. Owing to these circumstances, Counsel submitted that indeed these Respondents had violated the 1<sup>st</sup> Petitioner’s right to equality and freedom from discrimination.
55. On human dignity, Counsel noted that Article 5 of the African Charter provides that every person shall have the right to respect and dignity inherent in a human being, and further prohibits all forms of exploitation and degradation of man, particularly cruel, inhuman, or degrading punishment and treatment. Parallel dependence was also placed in other international instruments that prohibit violation of this right.
56. Counsel stated that the 1<sup>st</sup> Respondent in taking advantage of the 1<sup>st</sup> Petitioner violated her right to dignity. Correspondingly that the 2<sup>nd</sup> Respondent’s manner of questioning and his ridicule also violated this right. This was also the case with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ who subjected the 1<sup>st</sup> Petitioner to rape myths and stereotypes.
57. Counsel in conclusion submitted that the 1<sup>st</sup> Petitioner having established how the respondents had failed their statutory duty and violated her rights, she was entitled to the reliefs sought. Reliance was placed in *C.K. (A Child) through Ripples International as her guardian and Next friend* (supra) where it was held that:
  - “(i) A declaration be and is hereby made to the effect that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ respective complaints violates the first eleven petitioners’ fundamental rights and freedoms under-
    - a. Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights,
    - b. Articles 2, 4, 19, 34 and 39 of the United Nations Convention on the rights of the child;
    - c. Articles 1, 3, 4,16 and 27 of the African Charter on the Rights and welfare of the child and
    - d. Articles 2 to 7(inclusive) and 18 of the African Charter on Human and people’s rights.
  - (ii) An order of mandamus be and is hereby made directing the 1st respondent together with his agents, delegates and/or subordinates to conduct prompt, effective, proper and professional investigations into the 1st to 11th



petitioners' respective complaints of defilement and other forms of sexual violence.”

58. In addition to the declaratory reliefs, Counsel relying on the UN Declaration on Basic Principles of Justice and Support for Victims of Crime and Abuse of Power noted that this instrument recognizes the right for victims to be compensated by the perpetrator. Moreover, that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes.
59. Additional dependence was placed in *M W K v another v Attorney General & 3 others* (2017) eKLR where it was held that:

“It is well settled that award of compensation is an appropriate and effective remedy for redress of an established infringement of a fundamental right under *the constitution*. The quantum of compensation will, however, depend upon the facts and circumstances of each case.

Award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.”

60. According to Counsel in the supplementary submissions, the eventual Ruling that was issued by the Trial Court in acquitting the 1<sup>st</sup> Respondent was as a result of the lack of due diligence in investigating the 1<sup>st</sup> Petitioner's case.
61. Counsel noted that the learned Hon. Magistrate pointed out at Page 6 of the Ruling that the investigating officer did not collect the complainant's attires, including the pants for medical exam. Further, the complainant, and witnesses Ashley and Billy all confirmed that there were condoms in the room where the rape occurred. However, this evidence was not secured by the investigating officer neither was it presented before the trial court. These acts are deemed to amount to failure by the police to conduct proper investigations.
62. Counsel further took issue with the Trial Court's reliance on the 1<sup>st</sup> Petitioner's past sexual history as attested to by one of the witnesses. Similarly, that the Court considered his evidence at Pages 7 and 8 as a key element in drawing a conclusion in the case. Particularly the witness stated “the victim has been calling men and she gauges men using their financial capabilities and she has been doing that most of the time and the guy did not have money, she would dump the guy and look for the next prey” before going on to state “the act was consensual”.
63. Counsel asserted that the Court's reliance on the 1<sup>st</sup> Petitioner's past sexual history and character evidence was unconstitutional as goes against the provisions of Section 34 of the *Sexual Offences Act*. Counsel also took issue with the Hon. Magistrate's failure to consider that the 1<sup>st</sup> Respondent took advantage of the 1<sup>st</sup> Petitioner while she was intoxicated and had passed out. As such not in a position to consent.
64. Counsel also pointed out that the Ruling applied rape myths and gendered stereotypes through the reasoning of the court to the detriment of the 1<sup>st</sup> Petitioner's case and thus ended up blaming her for the whole ordeal. Particularly the Court stated that

“the complainant lured the accused into her house’, ‘she wore a short nightdress’, ‘I wonder what was the intention of the complainant inviting a man in her house at night 8.00 pm



and stayed overnight with her’, ‘she has the tendency of inviting men in her house and gauge them on their financial capabilities and when she realized the man had no money, she would dump him and look for another prey’, ‘the complainant was sexually active’, ‘there were no fresh bruises’, ‘the accused was...comfortable fidgeting with his phone’, ‘the demeanour of the accused...was calm and collected’, ‘the complainant was not truthful regarding being raped by accused.’”

65. To this end, Counsel reiterated that the state had failed to punish the 1<sup>st</sup> Respondent due to the failure by the police to conduct proper investigations as well as the court’s reliance on rape myths and gendered stereotypes. For this reason, Counsel asserted that the State should be held accountable.

### **1<sup>st</sup> Respondent’s Submissions**

66. Gekonge and Associates Advocates filed submissions for the 1<sup>st</sup> Respondent dated 4<sup>th</sup> July 2023. Counsel highlighted the issues for discussion as whether the 1<sup>st</sup> Respondent violated the 1<sup>st</sup> Petitioner’s rights under Articles 27, 28 and 29(c) of *the Constitution* and whether the 1<sup>st</sup> Petitioner had any control of the Police.
67. Counsel recapping the facts of this case submitted that it was clear that 1<sup>st</sup> Respondent had been acquitted of the rape charge. It was stated that this was premised on the fact that the prosecution had failed to establish a prima facie case against the 1<sup>st</sup> Respondent.
68. It was stated that the 1<sup>st</sup> Respondent has been released on cash bail pending the police investigation which is his constitutional right. Nonetheless Counsel stressed that the 1<sup>st</sup> Respondent has no control in the manner the investigations are carried out by the police. It was equally asserted that the 1<sup>st</sup> Respondent just like the 1<sup>st</sup> Petitioner was entitled to a fair trial which he underwent. For this reason, Counsel submitted that the 1<sup>st</sup> Respondent had not violated the 1<sup>st</sup> Petitioner’s rights as alleged.

### **2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents’ Submissions**

69. State Counsel, Ruth Wamuyu for these Respondents filed submissions dated 18<sup>th</sup> August 2023. On whether these Respondents acted negligently in performing their duties, Counsel answered in the negative.
70. Counsel highlighted that it was evident from the adduced documents that the 1<sup>st</sup> Petitioner’s complaint was received and acted upon. Moreover, due to the nature of the crime, the 1<sup>st</sup> Petitioner was assigned a female officer to preserve her dignity. The 4<sup>th</sup> Respondent besides oversaw the investigations and even contacted the DCI for assistance in tracking the 1<sup>st</sup> Respondent. These Respondents in the end charged the 1<sup>st</sup> Respondent following the DPP’s directive.
71. Counsel in view of this stressed that the 1<sup>st</sup> Petitioner’s allegations were baseless as it was evident that these Respondents had upheld their mandate under Section 24 of the *National Police Service Act*.
72. On the allegation of secondary victimization by the Respondents, Counsel relying on Section 107 and 108 of the *Evidence Act* submitted that whoever lays a claim before the Court against another bears the burden of proof. Consequently, it was argued that the 1<sup>st</sup> Petitioner is under obligation to prove the existence of secondary victimization. Reliance was placed in *Bwire vs Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) where it was held that:

“The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or nonexistence of a fact in issue”



73. In conclusion, Counsel submitted that the Petition had not met the threshold of a constitutional petition as the Petitioners had failed to adduce evidence to demonstrate how these Respondents had violated the 1<sup>st</sup> Petitioner's constitutional rights.

### **Analysis And Determination**

74. It is my considered view that the issues that arise for determination are:

- i. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents' as the State actors failed to perform their due diligence obligation and undermined the investigations into the 1<sup>st</sup> Petitioner's rape complaint.
- ii. Whether the 1<sup>st</sup> Petitioner's rights under Articles 27, 28 and 29(c) of *the Constitution* were violated by the Respondents; and
- iii. Whether the 1<sup>st</sup> Petitioner is entitled to the relief sought.

### **Whether the State through the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents failed to perform its due diligence obligation and undermined investigations into the 1<sup>st</sup> Petitioner's complaint of rape.**

75. The State's obligation in the protection of fundamental rights and freedoms is anchored in Article 21 of *the Constitution* which provides as follows:

1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

76. The State is required to observe, respect, protect, promote and fulfil the rights and fundamental rights. The State may be held liable for the breach of its positive and negative obligations in regard to human rights. Positive obligations are those that require the State to take necessary measures to safeguard or protect the human rights of an individual. Negative obligations on the other hand refer to the duty not to do harm, or refrain from doing something that is injurious to human rights. To observe and respect human rights demanded by Article 21(1) is in that sense a negative obligation in that it demands the State to refrain from doing harm by not contravening the human rights. To protect, promote and fulfil requires that the State undertake steps that would ensure others do not contravene those rights and fundamental freedoms that *the Constitution* guarantees hence are positive obligations bestowed on the State.

77. In this regard, the Court in *Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya*



National Commission on Human Rights & 3 others (Amicus Curiae) [2020] eKLR discussed as follows:

“ 110. According to the Human Rights Committee’s General Comment No. 31 on the ICCPR at paragraph 8:

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”

111. From the above excerpt, it is clear that the State does indeed have an obligation to prevent violations by State actors and non-State actors. In other words, the State must protect citizens from threats to their rights. I therefore find myself in agreement with the holding in *Florence Amunga Omukanda & another v Attorney General & 2 others* [2016] eKLR that:

“60... the State has a legal duty and a positive obligation to protect each of its citizen’s rights to security of their person and their property by securing peace through the maintenance of law and order...”

78. The South African Court in *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 affirming the positive and negative obligations placed on the State opined as follows:

“ ... The starting point is section 7(2), which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court has held that in some circumstances this provision imposes a positive obligation on the state and its organs “to provide appropriate protection to everyone through laws and structures designed to afford such protection.”

173 Implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective...

191. Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the state, all of which will accord with the duty *the Constitution* imposes, so long as the measures taken are reasonable.



79. With reference to the case at hand, the Court in C K (A Child) through Ripples International as her guardian & next friend) & 11 others (supra) discussing a similar matter and the implication of State obligation stated as follows:

“The respondents in this petition failed to implement the rights and fundamental freedoms as enshrined under Article 21 of *the Constitution* of Kenya, 2010. The respondents have failed in their fundamental duties as stated under Article 21 in failing to observe, respect, protect, promote and fulfill the petitioners’ fundamental rights and freedoms in particular the rights and freedoms relating to special protection as members of vulnerable group(Article 21(3), equality and freedom from non-discrimination(Article 27) humanity dignity(Article 29), access to justice (Article 48 and 50) and protection from abuse, neglect, all forms of violence and inhuman treatment(Article 53(1),(d) under *the Constitution* of Kenya, 2010...In the instant petition the police have allowed the dangerous criminals to remain free and/or at large. The respondents are responsible for arrest and prosecution of the criminals who sexually assaulted the petitioners and the failure of State agents to take proper and effective measures to apprehend and prosecute the said perpetrators of defilement and protect the petitioners being children of tender years, they are in my opinion responsible for torture, defilement and conception of young girls and more particular the petitioners herein.

In case of JESSICA LENAHAN(Gonzales) et al V UNITED STATES,Case 12.626, Report No.80/11, August, 17,2011. The inter-American Commission on Human Rights considered Police obligations to enforce a restraining order in circumstances where a father took his children from their mother’s custody without permission and killed them. The Commission found that there was “broad International consensus” that States “may incur ..responsibility for failing to act with due diligence to prevent, investigate, sanction and offer reparations for acts of violence against women”.....women.

The State’s duty to protect is heightened in the case of vulnerable groups such as girl-children and the State’s failure to protect it need not be intentional to constitute a breach of its obligation. The courts have found that State has a clear duty to investigate crime and found the failure to do so constitute a Constitutional violation of claimant’s rights.

In *R. V Commissioner of Police & 3 Others ex-parte PHYLIS TEMWAI KIPTEYO HC.MISC.APPL.27 OF 2008*, (2011) EKLR(BUNGOMA)the court stated:-

“All the same, the life of the victim and the interests of the family are protected by *the Constitution* and the statutes. The State through the respondents herein are responsible for security of citizens in this country. It is the duty of the state to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the State to investigate the disappearance of the victim herein who was its subject and its employee (emphasis added).

I agree with the above-mentioned case that once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally short thereof amounts to violation of fundamental rights of the complainant.

In the instant case the police owed a Constitutional duty to protect the petitioners’ right and that duty was breached by their neglect, omission, refusal and/or failure to conduct prompt,



effective, proper and professional investigations and as such they violated the petitioners' fundamental rights and freedoms as entrusted in *the Constitution*."

80. Turning to the instant case, the Petitioners were categorical that there was failure by the State to perform its obligation with due diligence to protect the rights of the Petitioner from sexual violence as required under Article 21. The Court must now evaluate the facts in the instant petition to determine if the State failed perform its due diligence to conduct effective investigations as alleged.
81. It is clear from the evidence of the 1<sup>st</sup> Petitioner that when she went and lodged a complaint of rape that night, the police booked her complaint. The 1<sup>st</sup> Petitioner alleged that the reception by the police officers was characterized by an insensitive and dismissive attitude. I will deal with this particular allegation as I examine the next issue of whether or not secondary victimization was established by the petitioner. As of now, the issue is whether the petitioner has demonstrated that the State through the Respondents failed in its duty to protect her rights through failure to conduct effective investigations.
82. When the booking of the complaint by police officers at Kahawa Wendani Police Post on 26<sup>th</sup> May 2021 was done; the 1<sup>st</sup> Petitioner and her witness Ashley Kimberly confirm in their affidavits that the police officers called an ambulance that very night. The 1<sup>st</sup> Petitioner was immediately rushed to the hospital where she was medically examined. Medical reports that were prepared were collected and kept as part of the evidence by the investigator who was putting together investigations file in respect of the complaint. The following day, the 1<sup>st</sup> Petitioner (complainant) and her witness Ashley Kimberly were asked to go back to the police station where they recorded their witness statements. The investigation diary (annexure AK 1) has documented these events captured as OB entries Nos. 02/26/5/2021; OB 05/26/5/2021; OB 06/26/05/2021 and OB 16/1/7/2021. The statements taken from the 1<sup>st</sup> Petitioner and Ashley Kimberly are also provided and are marked AK2 & AK3 respectively. Thereafter, the 1<sup>st</sup> Respondent was arrested. His statement was taken too and afterwards the investigation file was forwarded to the DCIO Ruiru for perusal and advice on 7<sup>th</sup> July, 2021 which meant that the 1<sup>st</sup> Respondent could not be charged immediately. The forwarding letter dated 7<sup>th</sup> of July, 2021 was annexed to 4<sup>th</sup> Respondent replying affidavit- annexure ZMN 1. As they awaited the advice they had sought, the 1<sup>st</sup> Respondent (suspect then) was released on a police cash bail- annexure ZNM 2 dated 3<sup>rd</sup> July, 2021. Meanwhile, the DCIO referred the matter to the Director of Public Prosecution seeking directions thereby delaying the matter even further as deposed by the 4<sup>th</sup> Respondent in paragraph 7 of the replying affidavit sworn 18<sup>th</sup> May, 2023:

"That delay in arraigning the suspect in Court was because the police file No. CR 266/13/2022 and SOE 04/2022 was forwarded to the Office of Director of Public Prosecution Ruiru for perusal and advice."

83. Apparently, that advice did not come until 15<sup>th</sup> December, 2021. When it finally came, the directions were that the suspect be charged (per the letter annexure- ZNM3). The 1<sup>st</sup> Respondent was thus charged with offences as per the charge sheet (annexure ZNM 4). He was tried in Ruiru SOE 4/2022. He was acquitted by the Court in a ruling that dismissed all the charges- annexure ZMN 5.
84. I will first deal with the complaint about delayed arraignment of the 1<sup>st</sup> Respondent made by the Petitioners. Given the chronology of event as demonstrated above, I am not persuaded that the alleged inaction by the Respondents to charge the 1<sup>st</sup> Respondent forthwith was deliberate. On the contrary, the delay has been sufficiently explained by the 2<sup>nd</sup> - 6<sup>th</sup> Respondents. 2<sup>nd</sup> - 5<sup>th</sup> Respondent sought advice after compiling the investigation file to close any gaps that might have been there and hence referred the matter to the DCI and to then the Director of Public Prosecution who *the Constitution* under Article



157 (6) vests state powers to institute and undertake criminal proceedings in respect of any alleged offences and whose concurrence must be obtained prior to any person being arraigned to answer to a criminal charge.

85. The other complaint by the 1<sup>st</sup> Petitioner was that the 1<sup>st</sup> Respondent was released on police cash bail after arrest instead of being taken to Court. That complaint is also misconceived and untenable. As the police awaited the DCIO and ODPP's advice, that was the most logical thing to do. They could not hold the 1<sup>st</sup> Respondent in police cells or take him to Court before getting the DPP's concurrence. Article 49 protects the rights of an arrested person by providing that an arrested person may be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. In this case, the 1<sup>st</sup> respondent was released 'pending a charge' to enable the police get further and necessary advice as well as the DPP's consent to prosecute. It would have been unconstitutional for the police to arraign him without the getting the approval of the DPP or to hold him in custody beyond 24 hours.
86. Given the promptness displayed by the Respondents in acting on the complaint by the 1<sup>st</sup> Petitioner that night, booking the complaint and ensuring that the Petitioner received medical attention immediately to preserve the evidence and taking down the Petitioner's and that of her witness statement the following day when their memory was still intact; to that extent I do not see any fault or negligence on the part of the State to protect the rights of the 1<sup>st</sup> Petitioner since it set in motion criminal law through its actions that night and the following day.
87. The cause of the delay in arraigning or prosecuting the 1<sup>st</sup> Respondent was clearly explained and cannot be blamed on the 2<sup>nd</sup> to 6<sup>th</sup> Respondents. The Respondents could not take the 1<sup>st</sup> Respondent (suspect) to Court without the approval of the Director of Public Prosecution to whom the investigation file for was ultimately forwarded for an objective assessment of the evidence to determine whether the case was prosecutable. The DPP delayed with the file a bit. He is not a party in this Petition hence was not given an opportunity to say his side of the story.
88. The Petitioner also accuses the police of having formed a negative perception by questioning her conduct which undermined their objectivity to conduct of an effective investigation. She particularly complains they equated her conduct to having impliedly consented to the sexual act. She stated that the police allowed themselves to fall into rape myths and stereotypes in making reference to her conduct with the respondent.
89. I do not agree with the Petitioner her conduct with the 1<sup>st</sup> Respondent is totally irrelevant. If any reference was made to conduct with other men or persons outside that particular that was incident directly in issue, I would agree that this was irrelevant material and prejudicial but as long as the interaction was confined to the behaviour towards each other with the 1<sup>st</sup> Respondent before, during and after the incident complained of, that was relevant information which could not be ignored by the investigator and had to be considered alongside what she had stated. Her conduct was essential particularly because the issue here was whether there was a reasonable belief in consent whose decision cannot be reached without analyzing a combination factors. Conduct of both the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> Respondent was thus relevant to the investigation even for purposes of assessing credibility of the complaint so as to reduce the risk of a made-up charge and/or unfair prosecution as while the 1<sup>st</sup> petitioner insisted there was the lack of consent, the 1<sup>st</sup> Respondent on the other hand maintained there was consent. It one's word against the other and a probe into conduct was necessary corroborative factor that could enable the investigator resolve the credibility issue in regard to the two conflicting accounts.



90. The conduct of both the Petitioner and the 1<sup>st</sup> Respondent in the whole matter was a relevant fact in issue for any objective and impartial investigation. All that was needed to guard against myths and stereotypes or any form of harassment during interrogation. There was thus nothing wrong in probing the conduct of the petitioner for as long it was professionally undertaken regard being had to her emotional sensitivity and respect to her dignity.
91. Article 245(4), (a) of *the Constitution* which sets out some of the functions of the Inspector General provides that other than directions on policy, no person may give directions to the Inspector General in respect to investigation of any particular offence or offences. It states:
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
- a. The investigation of any particular offence or offences;
92. The above provision should however be read harmoniously with Article 157 (4) which states the DPP can direct the Inspector General to investigate any information relating to commission of an offence. It is to the DPP that the Respondents forward all their files and the DPP was to determine the sufficiency of the evidence to mount a prosecution that had a realistic prospect of success. The DPP would thus decide not to prosecute or return the file to the Respondents to cover any loose ends.
93. In the instant case, the DPP sanctioned the prosecution. That can only mean that upon assessment of the evidence gathered by the investigator, the DPP was in fact satisfied that necessary evidential threshold had been met and there was a realistic prospect of a conviction. He did not return the investigation file or decline to prosecute. That itself absolves the Respondents (police officers 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>) from the complaint that they did not exercise due diligent in carrying out an effective investigation. As is evident; after collecting the evidence and compiling the investigation file, they did not stop at that, they sought advice from the counterparts in the Directorate of Criminal Investigation who further forwarded the investigation file to the DPP for additional review and advice. Curiously the DPP is not a respondent in this Petition despite okaying what the Petitioner complains was inadequately carried out investigation.
94. In my view, the claim that was lack of due diligence to carry out an effective investigation on the part of the Respondents has no basis.
95. Moreover, the fact that the 1<sup>st</sup> Respondent was not convicted cannot solely be blamed on the failure to conduct effective investigations. This criminal trial had many dynamics as can be discerned from the ruling of the trial Court. One fundamental finding by the trial Court was the finding that the 1<sup>st</sup> Petitioner lacked credibility meaning that there was no truth in the allegations. An investigation could not undo a concoction or half-truth. In the 2<sup>nd</sup> last paragraph of the trial Court ruling, the Magistrate observed:
- “I hold that the complainant was not truthful regarding being raped by accused. Her evidence had some contradictions and it is trite law that where there is any tinge of doubt the benefit of doubt goes to the accused”
96. The failure of the case also hinged on palpable dishonesty detected by the trial court on the part of the 1<sup>st</sup> Petitioner. The Petitioner cannot thus cherry pick and blame it purely on poor investigation when her own credibility in lodging the complaint was fatally punctured by the trial court.



97. The allegation that the State through the Respondents failed to conduct effective investigations and thus violated Article 21 (1) of *the Constitution* for failing to undertake steps to protect the rights of the 1<sup>st</sup> Petitioner is not proved and thus allegation is dismissed.

Violation of Constitutional rights under Articles 27, 28 and 29 (c) of *the Constitution*

98. The constitutional threshold for Constitutional petitions was established in the Anarita Karimi case (supra). This test was affirmed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR as follows:

“(349) .... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

99. There must be a link between the alleged violation and the evidence in support. The *Evidence Act* Cap 80 states as follows:

107. Burden of proof

1. 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

100. The Supreme Court discussing the burden of proof in Samson Gwer & 5 others vs Kenya Medical Research Institute & 3 others [2020] eKLR held as follows:

“[50] This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”



101. On Article 27 of *the Constitution*, the Supreme Court in *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) stated that:

“ [50] In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

102. With dual respect, the claim of discrimination against the 1<sup>st</sup> Petitioner was not substantiated by any proof. It was a mere mention with no evidence to back it up. It is rejected.

103. I will consider alleged violation of Article 28 and 29 together. With reference to Article 28 of *the Constitution* the Court in *MWK & another v Attorney General & 4 others; Independent Medical Lega Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) (Constitutional Petition 347 of 2015)* [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment) opined that:

“ 49. Article 28 provides no definition of dignity. However, its role and importance as a foundational constitutional value has been emphasized in a number of cases. In the South African case of *S v Makwanyane*, 18 O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3... The right to dignity is at the heart of *the Constitution*. It is the basis of many other rights. The basis is that of recognizing that every person has worth and value and must be treated with dignity. This is also



highlighted in the international treaties Kenya has assented, some of which are mentioned above...”

104. Discussing Article 29, the Court in *Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others* (2016) eKLR held as follows:

“Article 29 of *the Constitution* combines a right to freedom and security of person with a right to be free from bodily and psychological integrity. It is essentially intended to protect the physical integrity and dignity of the individual...”

105. It was the 1<sup>st</sup> Petitioner’s contention that the Respondents displayed insensitive and dismissive attitude towards her on the night to she was reporting the rape case. That they told her she had willed it upon herself for inviting man into her house, cooking for him, serving him alcohol, watching a movie together and finally letting him to spend the night in her house. That further, she had also dressed seductively.

106. If these facts are proved to the satisfaction of this Court, I would have no hesitation in finding that such dismissive and fault-finding attitude was lacking in sensitivity, professionalism and a direct affront to Article 244 (a) which requires the National Police Service to strive to the highest standards of professionalism and discipline among its members. Besides, it would also be indignifying in the very least.

107. The Respondents however denied the allegations they took any condemnatory stance against the 1<sup>st</sup> Petitioner in their replying affidavits. It was thus their word as against the Petitioner. Despite the sharp variance in the testimonies of the two opposing sides and the materiality of this particular issue, this trial conducted by way of affidavit evidence only.

108. No cross-examination was conducted to enable the witnesses clarify and explain their positions vividly despite their being these variances on a material issue. The veracity of each side’s testimony could thus not be confirmed. And despite being fully aware of the centrality of this evidence, the Petitioners counsel opted for untested affidavit evidence which is very limiting in hotly contested dispute such as the one before the Court. The Court is now left in limbo with the two conflicting positions and is thus unable without the benefit of cross-examination to affirmatively resolve the credibility question. This was even more critical considering that the trial court which observed had watched and heard the 1<sup>st</sup> Petitioner did in fact express serious doubts as to the credibility of the rape complaint. Secondary victimization presupposes that one is an actual primary victim in the first place. In this case, the rape complaint was found by the trial Court to be untruthful and its decision has not challenged through the appellate mechanism. How then would secondary victimization be possible if in the first place there was no victimization in the sense of truthful allegations rape?

109. In the overall analysis, I find that this Petition lacks merit and is hereby dismissed. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF AUGUST, 2024.**

**L N MUGAMBI**

**JUDGE**

