



**Sora v Inspector General of Police & 4 others (Petition E523 of 2022)  
[2024] KEHC 16498 (KLR) (Constitutional and Human Rights) (31 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16498 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E523 OF 2022  
LN MUGAMBI, J  
DECEMBER 31, 2024**

**BETWEEN**

**JAFFER KANU ISAAK SORA ..... PETITIONER**

**AND**

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

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF MAGISTRATE COURT, MARSABIT ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 28<sup>th</sup> November 2022, is supported by the Petitioner’s affidavit in support of even date. The Petitioner challenges his prosecution for an offence of trafficking in narcotic drugs which he alleges was instigated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in circumstances that do not comply with the laid down legal requirements of Section 74 of Narcotics and Psychotropic Substances Control Act on investigation and prosecution of such offences. That this prosecution was instigated politically to frustrate his political ambitions.
2. He assails the Respondents actions for violating his right to a fair hearing, the right to equality before the law and the right of movement and infringement of his social and economic rights.
3. Consequently, the Petitioner seeks the following relief:



- i. A declaration that the Petitioners right to fair hearing as guaranteed by Article 50 of *the Constitution* has been contravened by the Respondents.
- ii. A declaration that under Articles 27 and 28 of *the Constitution*, the Petitioners right to equality before the law and fair treatment enjoins the Respondents to protect and respect the Petitioners rights to fair hearing and the Petitioners right to equal benefit and protection of the law has been infringed.
- iii. A declaration that there is contravened by the Respondents of the Petitioner's right to fair administrative action as guaranteed by Article 47 of Constitution.
- iv. A declaration that the 5<sup>th</sup> Respondent act of withholding the Petitioners Passport infringes on his Right under Article 39 and 43 of *the Constitution*.
- v. An Order of Certiorari be issued quashing the decision of the Respondents to charge the Petitioner in the Marsabit Chief Magistrates Court Criminal Case No.242 of 2019 (Consolidated with CR 366 of 2019 and the consequent Orders therein).
- vi. Compensation to the Petitioner for the violation of his fundamental rights as enshrined in *the Constitution*.
- vii. Any other relief that this Court may deem just grant.
- viii. Costs of the Suit be provided.

#### **Petitioner's Case**

4. The Petitioner avers that he is the Chairman of the Diligence Development Party. He was its presidential candidate in the General Elections. Currently, he is a student at the University Birkbeck in London. He asserts that his political ambition unsettled some government officials and are eager to ruin his party.
5. The Petitioner depones that on 19<sup>th</sup> June 2019 alongside others, he was arrested for transporting narcotic drugs namely cannabis sativa(bhang) in a Toyota Prado Registration No. KCF 007Q hauling trailer registration number ZB 9366. The quantity of the bhang was 89 bales of 5-kilogram worth Ksh.11,125,000. As a consequence, he was charged with trafficking of Narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance Control Act.
6. The Petitioner asserts that the police in seizing the cannabis sativa did not adhere to the procedure set out under Section 74 of the *Narcotic drugs and Psychotropic Substances (Control) Act* as the cannabis sativa was tested, weighed and analyzed in his absence.
7. He avers that the 1<sup>st</sup> Respondent went on further through the Anti-Terrorism Police Unit to file a case against him and consequently sought orders to search his house. Upon completion of investigations, no evidence found to link him to terrorism claims.
8. The Petitioner is aggrieved that despite the Respondents' failure to follow the set procedure with regard to the narcotic drugs, they still went ahead to charge and prosecute him in his absence. He also stresses that the charges are malicious and illegal as they were politically instigated.
9. He depones that as a result of these malicious charges and actions, he has in addition, together with family; suffered public humiliation, ridicule, trauma, psychological torture.



## Respondents' Case

10. In response to the Petition, the Respondents filed their grounds of opposition dated 14<sup>th</sup> February 2023 on the premise that:
- i. The Respondents acted within the confines of Article 157 of *the Constitution* and as such the Petitioner has not demonstrated that the Respondents failed to act independently or acted capriciously in bad faith or abused the process in a manner as to trigger the High Court's intervention.
  - ii. In reference to Article 157 (6) and (10) of *the Constitution* that allows the 2<sup>nd</sup> Respondent to commence criminal proceedings without anyone's direction, the prayers sought for should not be granted as the same would deny the Respondents their statutory and constitutional mandate to investigate and prosecute a criminal matter as provided for under the Penal Code.
  - iii. The accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial Court where the Petitioner is assured of a fair trial and protection of the law and as such the assertion by the Petitioner that his prosecution is instituted maliciously is baseless.
  - iv. The 1<sup>st</sup> Respondent has a lawful duty to conduct criminal investigations as provided for under Section 35 of the *National Police Service Act* and such duty is not under the command or directions of any person.
  - v. The Petitioner has an opportunity to defend himself during his trial before the 4<sup>th</sup> Respondent and his presumption of innocence would be upheld.
  - vi. The Petitioner has failed to exhaust all legal remedies availed to him as the issues raised and orders sought can only be determined and issued in an application for judicial review or appeal.
  - vii. The Petitioner has not established how the balance of convenience lies in their favour.
  - viii. The Petition has been filed in bad faith, misconceived, premature and an abuse of the Court process and meant to derail and defeat the cause of justice.
  - ix. The Petitioner has not demonstrated prima facie case arguable case on breach of any constitutional provision or fundamental and human rights or any other provision of the law against the Respondent.
  - x. *The Constitution* as well as the existing laws provides sufficient safeguards that the Petitioner can seek recourse in the event that he is prejudiced by the outcome of the criminal case in the Chief Magistrate's Court at Marsabit.
  - xi. No constitutional issues are discernible in the Petition to warrant its admission and adjudication before this Court and therefore ought to be dismissed with costs.

## Parties Submission

### Petitioner's Submission

11. On 11<sup>th</sup> January 2024, the Petitioner through Khaminwa and Khaminwa Advocates filed submissions where the issues for argument were identified as: Whether the Petitioner is properly before this Court; whether the Respondents acted within the confines of *the Constitution* and the Law and whether the Petition should be allowed.



12. Counsel rebutting the Respondent's allegation that this matter ought to have been filed under judicial review, stated that the Supreme Court in *Petition No. 11 (E008) of 2022 Hon. Mike Mbuvi Sonko vs The Clerk, County Assembly of Nairobi City & 11 Others* made it clear that a matter can be lodged in the High Court either through a judicial review application or under the High Court's supervisory jurisdiction. He added that Article 165 (6) of *the Constitution* grants the High Court this supervisory jurisdiction over the subordinate court.
13. Recognizing the Respondents constitutional and statutory mandate, Counsel submitted that nonetheless the 2<sup>nd</sup> Respondent is required under Article 157(11) of *the Constitution* to have regard to public interest, the interests of administration of justice and need to prevent and avoid abuse of the legal process.
14. Counsel argued that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent's whilst carrying out their mandate have harassed, tortured and arrested the Petitioner without any justification in breach of Articles 25, 27,28, 29,49 of *the Constitution*. Counsel relied in *Commissioner of Police & Another v Kenya Commercial Bank Ltd & 4 Others* [2013] eKLR where it was held that:

“An oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.”
15. Counsel further argued that the Respondents are in violation for proceeding to prosecute the criminal suit in his absence contrary to Article 50(2)(f) of *the Constitution*. Counsel asserted that despite his attempts to raise the issue with the Court the same was not considered.
16. Reliance was placed in *Maina & 4 others v Director of Public Prosecutions & 4 others* [2022] KEHC 15 (KLR) where the guiding principles in considering such matters was outlined as follows:
  - a. Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice.
  - b. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction; or
  - c. Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; or
  - d. Where the allegations constitute an offence alleged but there either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.”
17. On the last issue, Counsel submitted that the Respondents' failure to file a replying affidavit rendered the Petitioner's allegations undisputed and facts uncontroverted. To buttress this point reliance was



placed in Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another [2016] eKLR where it was held that:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”

18. Like dependence was placed in Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR.
19. Counsel further argued that the trial Court had erred in law and fact in failing to consider the Petitioner’s rights under Article 50(1), 50 (2)(k) and 50(2)(f) of *the Constitution*. Likewise, it failed to consider that the charge of Trafficking Narcotic Drugs contrary to Section 4(a) of the Narcotic & Psychotropic Substance Control Act is not sustainable due to the Respondents’ breach of the law.
20. Counsel as well argued that the trial Court erred in fact and law in failing to consider that the 2<sup>nd</sup> Respondent failed to prove its case beyond reasonable doubt. Equally it was argued that the 5<sup>th</sup> Respondent’s decision to proceed with the Petitioner’s Trial in his absence contravened Article 10 and 47 of *the Constitution*. For these reasons, Counsel urged the Court to allow the Petition.

### **Respondents’ Submissions**

21. Senior Litigation Counsel, Mbaikyatta Darlive filed submissions for the Respondents dated 3<sup>rd</sup> April 2023. Counsel highlighted the issues for consideration as: whether the conservatory orders should be granted; whether the doctrine of constitutional avoidance applies; whether the Petitioner’s constitutional right was violated; and whether the Petition meets the threshold of a constitutional petition.
22. Counsel in the first issue, underscored that it was not disputed that the Petitioner was arrested and that the narcotic drugs were found in his vehicle. It was emphasized thus that the criminal case had been instigated against the Petitioner by virtue of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents powers as set out under Article 157 and 245 of *the Constitution* as operationalized by the *National Police Service Act* and the *Office of the Director of Public Prosecutions Act*.
23. Counsel further argued that the Respondents’ mandate is well recognized by the Courts and so are generally reluctant to interfere unless circumstances justify such an intervention. Reliance was placed in Justus Mwenda Kathenge v Director of Public Prosecutions & 2 others [2014] eKLR where it was held that:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);

- i. he has acted without due regard to public interest,
- ii. he has acted against the interests of the administration of justice,
- iii. he has not taken account of the need to prevent and avoid abuse of Court process.”

24. Similar dependence was placed in Hon. FML and 2 others v Director of Public Prosecutions & 3 others; Registrar of Companies & 10 others (Interested Parties) (2021) eKLR.



25. Accordingly, Counsel submitted that grant of the conservatory orders would be against public interest as cautioned by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others* (SCK Petition No.2 of 2013).
26. Counsel further argued that the onus of proving the cited allegations was on the Petitioner. Reliance was placed in *Mbuthia Macharia v Annah Mutua & another* (2017) eKLR where the Court of Appeal held that:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burden initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”
27. Moving to the second issue, Counsel submitted that the Petition does offend the doctrine of constitutional avoidance as this matter is well provided for in statute that is criminal law. To buttress this point reliance was placed in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) where the Supreme Court stated that the principle of avoidance entails a court not to determine a constitutional issue when a matter may properly be decided on another basis.
28. Comparable dependence was placed in *S v Mhlungu*, 1995 (3) SA 865 (CC), *Tabitha Mugure Henry vs District Adjudication & Settlement Officer Tigania East/West & 5 others* (Petition No.26 of 2015) and *Abdullah Mangi Muhammad vs Lazarus Beja & 5 others* (2021) eKLR.
29. On whether the Petitioner’s rights had been violated Counsel rebutting the allegation of absence noted that Article 50(2)(f) of *the Constitution* states that an accused person has the right to be present when tried unless his conduct makes it impossible for the trial to proceed.
30. Counsel submitted that the Petitioner had fled to the United Kingdom upon being admitted to bail where he still remains. Counsel argued that the Petitioner who had initially attended the trial, willingly chose to absent himself from the matter and fled to the United Kingdom while violating the terms of his bail.
31. Reliance was placed in the Ugandan case of *Uganda vs Gulindwa Paul Tumusiime* HCT-00-AC-CM-005-2015 where it was held that:

“In my view, a defendant of full age and sound mind who is properly notified of his trial and chooses to absent himself as a result violates his obligation to attend court, deprives himself of his right to be present and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights...”
32. Counsel was further certain the instant Petition does not meet the constitutional threshold set out in *Anarita Karimi Njeru v Republic* (1979) eKLR that is:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with a reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
33. Identical dependence was placed in *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* (2021) eKLR and *Benard Ouma Omondi & another v Attorney General & another* (2021) eKLR.



34. According to Counsel, the Petitioner has only made general allegations and cited constitutional provisions without giving the particulars with clarity of the alleged violation. In sum, Counsel urged the Court to find that the instant Petition is defective and thus ought to be dismissed.

### **Analysis and Determination**

35. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether or not the Petitioner's case invokes the doctrine of constitutional avoidance.
  - ii. Whether or not the Respondents' upheld their constitutional and statutory mandate in this matter.
  - iii. Whether the Petitioner's constitutional rights were violated by the Respondents; and
  - iv. Whether the Petitioner is entitled to the relief sought.

### **Whether or not the Petitioner's case invokes the doctrine of constitutional avoidance.**

36. The doctrine of Constitutional avoidance is stirs up the jurisdictional question. According to the doctrine, which has jurisprudentially developed through judicial precedents, disputes or controversies that are provided for resolution through other legal means besides *the Constitution* ought to be resolved through such other means without invoking *the Constitution*. As such, disputes that can be resolved through the application of the statute or a regulatory regime must not be a subject of Constitutional litigation.
37. In Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR elucidated on the doctrine as follows:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....



18. Similarly, the same court stated in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

38. This was also reiterated in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR; where the Court citing the Supreme Court of India decision expressed itself as follows:

- “ 12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur* [1986] LRC (Const) the Court expressed itself as follows at page 307;

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const (per (Georges C.J));

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

39. The Court thus concluded:

- “ 14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3)(b) of *the Constitution* should not be invoked



until such mechanisms have been exhausted... *The Constitution* cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of *the Constitution*: See *Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed...”

40. In the same manner, the Court in *Council of County Governors vs Attorney General & 12 others* (2018) eKLR expressed itself as follows:

“ 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

60. In the South African case of *S v Mhlungu*, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.”

41. In the instant case, the Petitioner contends that his prosecution for drug trafficking under Section 4 of Narcotic Drugs and Psychotropic Substances Control Act contravened the provisions of section 74 of Narcotic Drugs and Psychotropic Substances Control Act because the drugs were not tested in his presence and further, the trial Court proceeded with his trial in his absence thereby violating his rights under Article 50 (2) (f) of *the Constitution*.

42. The issue of drugs being tested in his absence is an evidentially issue as the intent of testing the drugs is to eventually use the ensuing report in his prosecution against him. It will thus become an issue in contention when the prosecution finally tenders report as evidence during the trial or when the documents are supplied by the prosecution to the accused. At this juncture, the Petitioner can object to its admissibility in evidence before the trial Court which will determine that issue. This therefore is an issue for the trial court and not this Court. If dissatisfied the trial Court’s finding, the Criminal Procedure Code Cap 75 which regulates criminal trials allows the aggrieved party to seek a revision of the order before the High Court.

43. On the issue of the trial of the Petitioner being tried in absentia by the trial Court, a challenge can also be mounted through the the revision procedure under the Criminal Procedure Code.

44. Section 362 of the Criminal Procedure Code is wide enough to cover all the situations being complained of in this Petition. It provides thus:

362. Power of High Court to call for records



The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

45. If the Subordinate Court is in breach of procedural requirements of conducting a fair trial or makes an order that allows inadmissible evidence during its proceedings, nothing stops the Petitioner from moving the High Court on Revision under Section 362 of the Criminal Procedure Code for a statutory remedy instead of invoking *the Constitution* to remedy trial court's proceedings. I hold the firm view that trial court's proceedings related complaints should be remedied under procedure for regulating criminal trials provided for in the Criminal Procedure Code either by way of appeal or revision as opposed to inviting this Court to examine them through a petition for enforcement of fundamental rights and freedoms.
46. I am emboldened making this finding by the decision in the Court of Appeal decision of Methodist Church in Kenya Registered Trustees & another vs. Jeremiah Muku & another CA Civil Appeal No. 233 of 2008 which upheld the High Court decision that had found that invocation of constitutional remedies should only be reserved for serious breaches of *the Constitution* and not correction of errors of either substantive law or procedure committed in the course of litigation. The Court of Appeal stated:

“... The law as stated by the learned Judge is undoubtedly correct and supported by the authorities he relied on.

In *Maharaj v. Attorney General of Trinidad and Tobago (No. 2)* [1979] AC 385, the Privy Council said at page 399 – para D.

“In the first place, no human right or fundamental freedom recognized by Chapter I of *the Constitution* is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. In the second place, no change is involved in the rule that a Judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6 (1) for what has been done by a Judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the Judge himself which has been created by section 6(1) and (2) of *the Constitution*. In the third place, even a failure by a Judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that



the consequences of the judgment or order cannot be put right on appeal to an appellate court”

We have deliberately quoted the majority judgment of the Privy Council at length because it explains to what extent a judgment or order of a court can contravene the human right or fundamental freedoms guaranteed by the former Constitution. As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review...”

47. Applying the above principle to the facts of this case, this Court must decline the invitation to interfere with the trial court’s proceedings in respect of alleged errors which if any, can be properly be corrected under the revision procedure or appeal under the provisions of the Criminal Procedure Code. The Court finds that the doctrine of Constitutional avoidance applies hence declines to exercise constitutional jurisdiction at this point. I dismiss the Petition.

48. Each Party will bear its own costs of the Petition.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF DECEMBER, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

