



**Wangila & another v Nzowasco Co Ltd & 4 others (Petition E003 of 2023)  
[2024] KEHC 16094 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16094 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PETITION E003 OF 2023**

**REA OUGO, J**

**DECEMBER 18, 2024**

**IN THE MATTER OF ARTICLE 2(1) 2(4) 10, 21 (1), 22, 23, 43,  
244, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 24,  
25, 28, 29, 43, 48, 50, 157(11), 165, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 24, 25, 27, 28, 29,  
43, 47, 48, 49, 50, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ENFORCEMENT OF ARTICLES 2, 3(1),  
10, 19, 20, 21 (1), 22, 23, 24, 25, 28, 29(C), 47, 50, 258 AND 259**

**BETWEEN**

**BENJAMIN WACHIYE WANGILA ..... 1<sup>ST</sup> PETITIONER**

**ADLINE ZINGHE MUNENGWA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NZOWASCO CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**THE OCS – KIMILILI POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE’S COURT – KIMILILI ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The 1<sup>st</sup> petitioner is the owner of parcel number KIMILILI/KAMUSINGA/4810 and was constructing rental houses on the property. Before the 1<sup>st</sup> petitioner could complete construction in 2020, he applied to Nzowasco Co Ltd, the 1<sup>st</sup> respondent, to install water pipes and a drainage system and fix the water meter for each rental unit. The 1<sup>st</sup> respondent gave the 1<sup>st</sup> petitioner a hefty quotation therefore the 1<sup>st</sup> petitioner continued to use the water supplied by the 1<sup>st</sup> respondent which passed by his land and served the old apartments previously constructed on the land.
2. The 1<sup>st</sup> respondent attempted to obtain a bribe from the 1<sup>st</sup> petitioner to enable it to fit the meter. However, when its attempts to get the bribe failed, the 1<sup>st</sup> respondent invaded the 1<sup>st</sup> petitioner's property. It vandalised water pipes and the drainage system, and removed the meter, alleging that the 1<sup>st</sup> petitioner's tenants were not paying monthly water bills.
3. According to the 1<sup>st</sup> petitioner, he could not have illegally connected water to the new rental units as they were still under construction and unoccupied. He contends that he paid water bills to the 1<sup>st</sup> respondent whenever they were due. The 1<sup>st</sup> respondent's action to remove the water meter violated his tenants' right to clean and safe water and in adequate quantities contrary to the provisions of Article 43 (1) (d) of [the Constitution](#).
4. After the meter was removed, the 1<sup>st</sup> Petitioner sought a negotiated settlement with the 1<sup>st</sup> Respondent for its reconnection. However, when the negotiations proved unsuccessful, the 1<sup>st</sup> Petitioner reported the matter to Kimilili Police Station. Unfortunately, the 2<sup>nd</sup> respondent declined to issue him with a police abstract and to investigate his allegations against the 1<sup>st</sup> respondent.
5. The 1<sup>st</sup> petitioner also lodged a civil suit (Kimilili Civil Case No 240 of 2021 between Benjamin Wangila Wachiye v Sagina Mulama & Manager NZOWASCO Kimilili Office) seeking general damages. During the pendency of the suit, the 2<sup>nd</sup> respondent in collusion with the 1<sup>st</sup> respondent, in a bid to frustrate the 1<sup>st</sup> petitioner so that he could withdraw the suit, arrested the 2<sup>nd</sup> petitioner who is the wife of the 1<sup>st</sup> petitioner. The 2<sup>nd</sup> petitioner was charged in Kimilili Criminal Case No 279 of 2023 with the offence of causing illegal connection of water contrary to section 145 (e) as read with section 147 of the [Water Act](#) of 2016.
6. The 2<sup>nd</sup> petitioner was arrested on 23/03/2023 and arraigned on 28/03/2025 after the lapse of 5 days contrary to Article 49 (1) (f) of [the Constitution](#). The case in Kimilili Criminal Case No 279 of 2023 was heard and determined, however, the 2<sup>nd</sup> and 5<sup>th</sup> respondents further charged the 2<sup>nd</sup> Petitioner in Kimilili Criminal Case No 401 of 2023 with the same offence contrary to provisions of Article 50 of [the Constitution](#). Interestingly, in the second criminal case, it was alleged that the offence was committed on 27/3/2023 during which period the 2<sup>nd</sup> petitioner was in police custody. The 2<sup>nd</sup> petitioner couldn't commit the offence while in police custody. Therefore, the two criminal cases were instigated by malice and an abuse of the court process.
7. The actions by the 1<sup>st</sup> respondent to make a false report to the 2<sup>nd</sup> respondent to have the 2<sup>nd</sup> petitioner arrested on the allegation that she had committed an offence on 27/3/2020 while the 2<sup>nd</sup> petitioner was in police custody constituted a violation of the 2<sup>nd</sup> petitioner's rights under Article 29 of [the Constitution](#).
8. The petitioners therefore seek the following reliefs:



- i. A declaration that the first and second petitioners have a right to human dignity, rights to freedom and security of person, rights to fair administrative action, rights of arrested persons, rights to fair trial and right to socio-economic rights as enshrined under article 28,29,43,47,49 and 50 of The Kenya Constitution 2010.
- ii. A declaration that the first and second petitioners are entitled to enjoy their rights to human dignity, rights of arrested persons and rights to a fair trial as enshrined under articles 28,29,47 49 and 50 of The Kenya Constitution 2010.
- iii. A declaration that the respondents jointly and severally violated the petitioners' right to human dignity, rights to freedom and security of persons, rights to fair administrative action, rights of arrested persons, right to fair trial and their economic and social rights as enshrined under *the Constitution*
- iv. A declaration that the second and the fifth respondent actions of charging the second petitioner in court five days after he was arrested and put in custody and/or failure to charge in court within 24 hours constituted a violation of his rights under article 49 (1) (1) of *the Constitution* of Kenya 2010.
- v. A declaration that the first respondent by making a false report of crime to the 2<sup>nd</sup> respondent to have the second petitioner arrested and charged in court for an offence claimed to have been committed while the second petitioner was in person violated the second petitioner's constitutional right to freedom and security of persons as enshrined under article 29 of *the constitution* of Kenya 2010.
- vi. A declaration that the second and fifth petitioner failure to arraign the second petitioner in court within 24 hours after being arrested for the second offence violated the second petitioner's rights as enshrined under article 49 (1) (f) of *the Constitution* of Kenya 2010.
- vii. A declaration that the first respondent and his agents, servants and employees' actions of taking away the water meter and further vandalizing the water piping system on the first petitioner land parcel number KIMILILI/KAMUSINGA/4810 without just cause were unlawful and violated the first petitioner and his tenants' rights to clean and safe water and in adequate quantities as enshrined under article 43 (1) (d) of *the Constitution* of Kenya 2010.
- viii. A declaration that the first and second petitioners suffered harm and damage for violation of their rights to right to human dignity rights to freedom and security of persons, rights to fair administrative action, rights of arrested persons, right to fair trial and their socio-economic rights jointly and severally by the respondents.
- ix. An order of compensation to the first and second petitioners for violations of their rights under *the Constitution* jointly and severally by the respondents.
- x. An order that the criminal suits against the second petitioner in the subordinate court were a result of malicious prosecution.
- xi. An order of certiorari quashing the criminal cases against the second petitioner in the subordinate court.
- xii. An order of compensation to the petitioners jointly and severally by the respondents for violations of their constitutional rights as indicated herein.
- xiii. Cost of the petition and interest.



- xiv. Interest on the general damages to be awarded by court.
  - xv. Any other relief the honourable court can grant by a dint of Article 23 (3) of *the Constitution* of Kenya 2010.
9. The petition was met with grounds of opposition from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed based on the following grounds:
1. THAT the said petition is frivolous, vexatious, abuse of the court process and the orders sought are untenable and devoid of merit.
  2. THAT the relief sought to declare the criminal case against the 2<sup>nd</sup> petitioner in the subordinate court be declared malicious and premature in nature.
  3. THAT the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents have not violated the petitioner's fundamental rights and freedoms as enshrined in *the Constitution* of Kenya, 2010.
  4. The criminal process in the Trial Court provides for safeguards to ensure the petitioners are afforded fair trial as envisaged under Article 50 of *the Constitution* of Kenya, 2010 and the issues raised by the Petitioners can be ventilated in their defence.
  5. The petition is against the constitutional mandate of the 2<sup>nd</sup> respondent under Article 245 (4) (a) of *the Constitution* of Kenya, 2010.
10. The 2<sup>nd</sup> and 5<sup>th</sup> respondents filed an affidavit in response to the petition. The affidavit was deposed by PCW 101482 Rose Chepngetich. She was the investigating officer in the case file PCR26/2023 CF E401/2023.
11. It was averred that the 2<sup>nd</sup> petitioner was arrested on 23/3/2023 in connection with the offence of illegal connection of water contrary to section 145(e) as read with section 147 of the *Water Act* 2016. She was arrested after by the officers of the 1<sup>st</sup> respondent and police officers during an operation that was aimed to tame the illegal connections in the Kimilili and Webuye area. On 23/3/2023, the officers visited the petitioners' premises and discovered that they were taping water from a line of the 1<sup>st</sup> respondent that had been disconnected due to non-payment of a Water Bill amounting to Kshs 32,259/-.
12. The 2<sup>nd</sup> petitioner was arrested on 23/3/2023 and released on a police cash bail of Kshs 5,000/-. The 2<sup>nd</sup> Petitioner returned home and took steps to restore the water supply after the meter had been removed by personnel of the 1<sup>st</sup> Respondent. On 27/3/2023, while performing their routine duties, the 1<sup>st</sup> Respondent's water meter readers visited the petitioners' home and observed that the 2<sup>nd</sup> petitioner had once again reconnected the water illegally.
13. The reader reported the issue to her supervisor which prompted a fresh complaint vide OB22/06/05/2023 and as a result, the 2<sup>nd</sup> petitioner was arrested on 06/05/2023 and charged in court on 08/5/2023 vide PCR26/2023 CF E401/2023. The 2<sup>nd</sup> petitioner was arrested on a Friday and charged on a Monday promptly without delay. They denied that the 2<sup>nd</sup> petitioner was charged in violation of the 24 hours as alleged. The petitioners are therefore not entitled to any compensation as there was no infringement of rights.
14. The petitioners also filed a further affidavit dated 28/4/2024. It was advanced that the claim that the 2<sup>nd</sup> Petitioner was released from police custody on a cash bail of Kshs 5,000/- was untrue. Although this is noted on the charge sheet in Criminal Case No. E279 of 2023, the entry was made by the 2<sup>nd</sup> and 5<sup>th</sup> Respondents in an attempt to absolve themselves of the constitutional violation committed.



15. Section 53 (1) of the *National Police Service Act* requires that any arrested person held in police custody without a warrant of arrest must execute a bond to secure his release from custody and attend court whenever required to take plea for the charges. The provisions of section 123 (1) demand that any arrested person held in police custody without any warrant of arrest must execute a bond to secure his release from custody and to attend court whenever required to take a plea for the charges. The 2<sup>nd</sup> petitioner advanced that she did not execute any bond for her release before being arraigned in court. The 2<sup>nd</sup> and 5<sup>th</sup> Respondents have not provided any documentation to demonstrate that she executed a bond or was released from police custody following her arrest.
16. The 1<sup>st</sup> respondent did not file any response by way of an affidavit to oppose the petition.

### Submissions

17. Petitioners in their submissions identified the following as the issues before the court:
  1. Whether the 2<sup>nd</sup> petitioner was arraigned in court within 24 hours following his arrest and/or on the next working court day.
  2. Whether the failure to arraign the 2<sup>nd</sup> petitioner in court as required under Article 49 (1) (f) of *the Constitution* of Kenya 2010 violated the 2<sup>nd</sup> petitioner's rights of an arrested person.
  3. Whether the 2<sup>nd</sup> petitioner is entitled to damages for violation of her constitutional rights of an arrested person
  4. Whether there was probable cause for arresting the petitioner on 6/5/2023
  5. Whether the second charge against the 2<sup>nd</sup> petitioner was an act of malicious prosecution
  6. Whether the 2<sup>nd</sup> petitioner is entitled to damages for malicious prosecution.
  7. Whether the 1<sup>st</sup> respondent is liable for false imprisonment of the 2<sup>nd</sup> petitioner
18. The petitioner maintains in her submissions that she was detained in police custody for 5 days before being arraigned in court. She was entitled to the right guaranteed under Article 49 (1) (f) of *the Constitution*. The 5<sup>th</sup> respondent failed to adduce bond documents to prove that the petitioner was released on bond. The 2<sup>nd</sup> respondent was bound to keep records in the prescribed forms of all incidents taking place in a police station – see section 50 of the *National Police Service Act*. In this case, no documentation was presented to show that the cash bail had been issued. In *Anthony Murimi Waigwe v Attorney General & 4 Others* [2020] eKLR the courts observed as follows:

“26. From the Respondents pleadings, the Respondents only field grounds of opposition to which annexure “AMN 4” referred in the 3<sup>rd</sup> Respondent's submissions is not anywhere attached. Its source is mysterious and cannot be authenticated. No case number is disclosed and no dates to when the alleged referred order was issued nor is there an attached extracted court order to confirm that indeed the court granted the Respondents more time to detain the Petitioner pending investigation and for how long. The Respondents have had all the time to extract the order allowing detention of the Petitioner for more than 24 hours immediately after the date of arrest but none has been extracted and no reason for failure to do so has been given. In absence of the Courts order to that effect I find that the Respondent have failed to demonstrate that they held the Petitioner beyond 24 hours within the confine



of Article 49 of *the Constitution*. I find to the contrary that holding the Petitioner for 8 days without an order of the Court allowing them so to do, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents breached the provisions of Article 49(1) (f), and Article 29 (a) and (b) of *the Constitution*.”

19. The petitioners contend that the 2<sup>nd</sup> Respondent must adhere to constitutional standards when carrying out arrests and detentions. They were to present the 2<sup>nd</sup> petitioner to the trial court in strict adherence to Article 49 (1) (f) of *the Constitution*. The petitioners’ rights having been violated under Article 49 (1) (f) of *the Constitution* they submit that they are entitled to an award of damages. In *Gitobu Imanyara & 2 Others v Attorney General Civil Appeal No 98 of 2014 [2016] eKLR* the court stated:

“... it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.”

20. The petitioners submitted that Kshs 10,000,000/- would be sufficient compensation.

21. The petitioners argue that she was in custody on 27/3/2023 and no further offence could have been committed. They also questioned why it took the 2<sup>nd</sup> respondent more than one month to make the arrest. The petitioners took the position that the arrest of the 2<sup>nd</sup> petitioner on 6/5/2023 was instigated by malice. There were no sufficient grounds to initiate the case given that the 2<sup>nd</sup> petitioner was in custody. They cited the case of *Lawrence Onyango Oduori v Attorney General & Another [2022] eKLR* where the court held that the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings.

22. The petitioners argued that an award of Kshs 2,000,000/- against the respondents would be sufficient and Kshs 500,000/- should be awarded as exemplary damages. In *Chispine Otieno Caleb v Attorney General [2014] eKLR*, the Plaintiffs were awarded Kshs 2,000,000/= general damages for malicious prosecution and punitive exemplary damages in the sum of Kshs 500,000/= for being held in custody unlawfully.

23. It was submitted that the second arrest was made in bad faith. There was no legal justification for arresting the 2<sup>nd</sup> petitioner on 6/5/2023. She was unlawfully deprived of her liberty. Article 29 of *the Constitution* provides as follows:

“Every person has the right to freedom and security of the person, which includes the right not to be-

a. deprived of freedom arbitrarily and without just cause”

24. The petitioner contends that the 2<sup>nd</sup> petitioner was unlawfully imprisoned and is entitled to damages. In *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited t/a Paradise Beach Resort &*



Another [2012] eKLR, the petitioner was detained in a hotel for three days to enforce payment of bills incurred during a conference. The awarded Kshs 1,000,000/- as general damages. The 2<sup>nd</sup> petitioner herein having spent 6 days in custody, an award of Kshs 2,000,000/- would be sufficient compensation.

25. The 1<sup>st</sup> respondent identified three issues in their submissions:
- a. Whether the petitioners' rights have been infringed.
  - b. Whether the court should quash the proceedings in Kimilili Criminal Case No 279 of 2023 and Criminal Case No 401 of 2023: Republic V Adline Munegwa
  - c. Whether the petitioners are entitled to orders sought
26. On the first issue, it was submitted that constitutional violations must be specifically pleaded and proved. The petitioner failed to set out in concise terms what rights were violated, by whom, how, and the extent that they have suffered as a result of such violation. See the case of Anarita Karimi Njeru v Republic (1976-1980) KLR 1272 which decision was affirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
27. It was submitted that by dint of section 59 of the Water Act, 2016, the 1<sup>st</sup> respondent is mandated to enter any premises for routine checks and meter readings. Therefore, the allegation that the 1<sup>st</sup> respondent did not issue a notice and acted unreasonably by disconnecting illegal and unpaid water consumption is untrue. The petitioners had acted in blatant breach of contractual terms with the 1<sup>st</sup> respondent.
28. On whether the criminal proceedings against the 2<sup>nd</sup> petitioner should be quashed, it was submitted that the mere fact that a person had been charged in court does not constitute a constitutional violation.
29. The 5<sup>th</sup> respondent decided to charge the petitioners after conclusive investigations had been conducted by the Director of Criminal Investigations (DCI) and upon receipt of the inquiry file. The accuracy and the correctness of the evidence gathered in an investigation can only be assessed and tested in a trial.
30. The allegation that the prosecution was influenced by malice is baseless. There was no evidence placed by the petitioner to show that the 5<sup>th</sup> respondent acted contrary to the provisions of Article 157 of the Constitution. It relied on the case of Paul Ng'ang'a v Attorney General & 3 Others where the court held that a court can only interfere and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the constitution. In Hon James Ondicho Gesami v the Attorney General, Petition No 376 of 2011, the court observed that requiring a petitioner to subject himself to normal criminal prosecution did not in any way amount to an attack on his human dignity in violation of his constitutional rights.
31. It was submitted that stopping the intended criminal proceedings will be tantamount to usurping the mandate of the 5<sup>th</sup> respondent. Needless to say, the 2<sup>nd</sup> petitioner will be subjected to a fair trial before a court of competent jurisdiction where she will be able to raise any objections she may have with regards to the prosecution case.
32. On the final issue, it was submitted that the petitioners' failed to prove that their fundamental rights and freedoms were not violated as claimed. The petitioners have not proved the alleged violations and are not entitled to the orders sought.



## Analysis And Determination

33. I have considered the pleadings and the written submissions filed by the parties. The issues before this court are whether the rights of the petitioners under Articles 29, 43 (1) (d), and 49 (1) (f) of *the Constitution* were violated and the petitioners have also invoked the court's jurisdiction so that it can assess whether they established a case of malicious prosecution and are entitled to damages.

34. The 2<sup>nd</sup> petitioner contends that she was detained outside the 24 hours envisaged in *the Constitution*. It is not in dispute that the 2<sup>nd</sup> petitioner was arrested on 23/03/2023 and arraigned on 28/03/2025 after the lapse of 5 days. It is Article 49 (1) (f) of *the Constitution* provides as follows;

“49.

(1) An arrested person has the rights-

(f) to be brought to court as soon as reasonably possible, but not later than-

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day”

35. This provision was discussed by the court in *Salim Kofia Chivui v. Resident Magistrate Butali Law Court & Another* [2012] eKLR, where the court stated as follows:

“...I therefore find and hold that the petitioner's right under article 49(1)(f) were breached when he was arrested on 24th March 2011, detained in police custody and arraigned before the court in Butali on 29th march 2011”... the tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four-hours or for the period necessary to secure his production in court of the next available date in any case and detention beyond 24 –hours must be authorized by court as provided by article 49(1)(g). Once the person's attendance has been secure within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.”

36. The 2<sup>nd</sup> and 5<sup>th</sup> respondents have argued that the 2<sup>nd</sup> petitioner was arraigned in court after 5 days because she was released on police cash bail. A scrutiny of the charge sheet reveals that the 2<sup>nd</sup> petitioner was out on cash bail of Kshs 5,000/-. Therefore, it was plausible that while out on cash, bail any further offence could have been committed leading to the 2<sup>nd</sup> petitioner being charged for the subsequent offence. In this case, the 2<sup>nd</sup> and 5<sup>th</sup> respondents argue that the second criminal case against the 2<sup>nd</sup> petitioner was committed while she was out on bail. However, the 2<sup>nd</sup> petitioner in her further affidavit contends that the 2<sup>nd</sup> and 5<sup>th</sup> respondents should have adduced additional documents to show that she was released by police cash bail.

37. The applicable standard of proof in Constitutional Petitions is proof on a balance of probabilities. The petitioners have not shown that the 2<sup>nd</sup> petitioner was detained for 5 days given that the charge sheet indicates that she had been released on cash bail.



38. Therefore, the petitioners failed to prove a violation of the rights under Article 49 (1) (f) of *the Constitution* and that they were deprived of freedom arbitrarily envisioned under Article 29 of *the Constitution*.
39. In any event, a mere declaration that there has been that there have been constitutional violations of the rights of a petitioner does not in itself warrant the vitiating of the trial processes in the criminal court. In *Hussein Khalid and 16 others v Attorney General & 2 others* [2019] eKLR the Supreme Court held as follows;
- “
- “(122) Consequently, without downplaying the Appellants’ allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in *Kuria & 3 Others vs. Attorney General* [2002] 2 KLR 69 where it was stated that:
- “The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”
- (123) Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken.”
40. Similarly, the Court of Appeal in *Fappyton Mutuku Ngui v Republic* [2014] eKLR held that;
- “The correct position in law was set out in *Julius Kamau Mbugua v Republic* (2010) eKLR where the Court stated that the violation of the appellant’s right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.”
41. The petitioners are therefore not entitled to any order quashing the criminal proceedings against the 2<sup>nd</sup> petitioner. The petitioners also sought declarations that the criminal suits against the petitioners were a result of malicious prosecution and therefore ought to be quashed. However, malicious prosecution is a tort. Therefore, cases of malicious prosecution should be pursued through a civil suit rather than a constitutional petition. A civil suit on malicious prosecution is usually instituted once criminal proceedings have been terminated in favour of the plaintiff, in this case, the 2<sup>nd</sup> petitioner. The constitutional court is therefore not the appropriate forum to pursue a claim for malicious prosecution.



42. The petitioners also claim that the rights of their tenants to clean and safe water in adequate quantities have also been infringed as provided under Article 43 (1) (d) of *the Constitution*. However, the 2<sup>nd</sup> and 5<sup>th</sup> respondents contend that the petitioners had accrued water bills amounting to Kshs 32,259/-. The petitioners did not avail any receipts to show that they were up to date with the payment of their water bill as the services from the 1<sup>st</sup> respondent ought to be enjoyed upon payment of the requisite water bill.
43. Consequently, I find that the petitioner failed to prove its case, and therefore the petition is dismissed in its entirety. On costs, I find that the petitioners should not bear the burden of costs, as the claim involved an alleged violation of constitutional rights. Each party is hereby directed to bear their own costs for the proceedings.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF DECEMBER 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Ogutu For the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners

1<sup>st</sup> Respondent - Absent

2<sup>nd</sup> Respondent - Absent

3<sup>rd</sup> Respondent - Absent

4<sup>th</sup> Respondent - Absent

5<sup>th</sup> Respondent - Absent

Wilkister -C/A

