



**Kigo v Attorney General & 4 others (Petition 217 of 2019) [2023] KEHC 18092 (KLR)
(Constitutional and Human Rights) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 217 OF 2019

HI ONG'UDI, J

MAY 26, 2023

BETWEEN

MOSES MACHARIA KIGO PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 4TH RESPONDENT

MUSA YEGO 5TH RESPONDENT

JUDGMENT

1. The petition dated 6th June 2019 was filed under Articles 2, 3, 19, 20, 21, 22 , 25 (c), 27, 47, 50 (2)(c) and (e), 165(3)(a) (b) and (d) of *the Constitution*. Accordingly the petition seeks orders that:
 - a. A declaration that the actions of the respondents of calculated, deliberate disobedience of lawfully made and binding court orders is a subversion of and is in violation of the constitutional obligations of State Officers and amounts to a flagrant breach of Articles 73(1) and (2) of *the Constitution*.
 - b. A declaration that the actions of impounding the exhibits and the petitioner’s lorry despite orders to release the exhibits by the Chief Magistrate’s Court in Criminal Case No.1424 of 2018 and the High Court at Nyahururu Criminal Revision No.11 of 2019 amounted to the breach of the petitioner’s fundamental:
 - i. Right to fair trial guaranteed under Article 25 (c) of *the Constitution*;



- ii. Right to equal protection and equal benefit of the law guaranteed under Article 27(1) of the Constitution;and
 - iii. Right to acquire and own property guaranteed under Article 40(1)(a) of the Constitution and further amounted to abuse of office, unlawful interference with the administration of justice and due process and contempt of Court.
- c. A declaration that the petitioner is entitled to both exemplary and general damages for the aforesaid breaches of the Constitution and other laws relating to administration of justice by the courts.
 - d. Orders pursuant to the above declaration prohibiting the respondents jointly and severally from harassing and arresting the petitioner and his staff and agents on matters in respect of which he was acquitted in Criminal Case No.1424 of 2018 in the Chief Magistrate's Court at Nyahururu.
 - e. Orders pursuant to the above declarations setting out the exemplary and general damages payable to the petitioner.
 - f. The respondents do personally and individually pay the petitioner costs of these proceedings in any event.

The Petitioner's case

2. The genesis of the instant petition as supported by the averments in the petitioner's affidavit of even date is that the petitioner was charged under Criminal Case No.1424 of 2018 in the Chief Magistrate's Court at Nyahururu. He was charged with seven counts of offences relating to the Standards Act where a plea of not guilty was entered. The prosecution closed its case after calling 8 witnesses and producing 22 exhibits. In its Ruling dated 19th December 2018 the trial court found that there was no case to answer with reference to Count 4, 5, 6 and 7. The petitioner was accordingly acquitted, of the same. Furthermore the court ordered that Exhibits 3, 4, 5, 6, 7, 14 and 22 be released to the petitioner. The release order was not complied with.
3. Following an inquiry the 2nd respondent, informed the Court that the exhibits had been forwarded to the 4th respondent (former DCI, Mr. Kinoti), who collected and recorded them vide OB No.15/25/12. The 2nd respondent additionally stated that it had not been consulted over the matter by the 4th respondent. In view of this the trial court summoned DCI Nyandarua North, Wilfred Okello and Investigating officer, John Kamau Mugo who were present in Court when the orders were issued, to give an explanation, which they did.
4. The trial court in its Ruling dated 7th January 2019 following the stated account held that it's Court Order dated 19th December 2018 had been flouted by the 3rd and 4th respondents despite the 2nd respondent clearly stating that it did not intend to appeal its decision. The Court granted the two officers an opportunity to purge the contempt within 14 days.
5. It is deposed that the respondents in an attempt to avoid compliance filed an appeal to the High Court at Nyahururu vide Miscellaneous Criminal Application No.7 of 2019. The Court dismissed the application noting that the trial court's orders had not been complied with. The exhibits were finally released following the High Court Ruling on 25th May 2019. The same were released to the petitioner the same day.



6. The petitioner deposed that as soon as they left the Court premises with the exhibits, they were re-arrested along the Nyeri - Nairobi Road. The arrest was carried out by officers from the 4th respondent's flying squad who were led by the 5th respondent. The exhibits were once again impounded and delivered to the 4th respondent's headquarters. It was noted that another accused person's exhibits in Criminal Case No.1425 of 2018 Republic v Elijah Thuku and another who were arrested on the same day were released but his were not. He termed this action as unlawful and discriminatory.
7. He deposed that the release order was granted on 27th May 2019. On this day the petitioner followed his lorry KBK 825B which was transporting the exhibits. Along the Nyahururu- Nyeri Highway, the said vehicle was yet again stopped by the 4th respondent's Flying Squad Unit as led by the 5th respondent. The driver was directed to drive to the 4th respondent's headquarters where the exhibits were impounded. As well the driver and turn boy were detained in custody. He deposed that this incident was covered by the Media who sought to know why the officers had impounded the exhibits and detained the persons yet they were lawfully released by the Court. He averred that the 5th respondent in response stated verbatim that: "Yes we know the High Court has ordered the release and that is why we intercepted...we are not going to allow release of food unfit for human consumption."
8. This assertion was denied by the petitioner who informed that he was not an importer, and that his outlet had bought the goods from Gilani's Supermarket. He deposed that none of the other outlets that bought items from Gilani's Supermarket had been subjected to similar criminal proceedings. Considering this, he argued that the proceedings were actuated by malice.
9. He further deposed that he had written a letter to the Independent Police Oversight Authority and the 3rd respondent over the issue but so far no action had been taken. He accordingly brought this petition against the respondents for their blatant disregard for the rule of law as state organs and violation of constitutional principles, values and rights.

The 1st, 3rd, 4th and 5th Respondents' case

10. The 1st, 3rd, 4th and 5th respondents in response filed their replying affidavit dated 19th November 2019 through the 4th respondent's Assistant Superintendent, Mike Muia (No. 231754). He deposed that sometime in June 2018 a multiagency team impounded a consignment of sugar and other goods from the petitioner who trades as 'Mugo Wholesale and Supermarket' in Nyahururu township. Samples of the sugar were subjected to testing and analysis by the Kenya Bureau of Standards (KEBS) laboratory. The report indicated that the sugar failed to meet the set safety standard for healthy sugar hence unfit for human consumption.
11. He further deposed that in the process it was discovered that the petitioner had contravened various provisions of the law which he was charged with. He informed that in total disregard of the KEBS report and health concerns, the Trial court on 19th December 2018 released this sugar to the petitioner. He deposed that in an attempt to gather further clarification and information on the quality of sugar, the 4th respondent wrote to KEBS on 17th April 2019. KEBS confirmed that the sugar did not meet food safety parameters and should not be released for direct human consumption. Further, the 4th respondent sought expert opinion from the Ministry of Health and Government Chemist. He informed that both in their letters dated 18th April 2019, 31st July 2019 and 2nd August 2019 concluded that the sugar was harmful for human consumption.
12. With this information, the 4th respondent upon release of the same sugar to the petitioner by the court, impounded it. Additionally, he deposed that KEBS also issued a seizure notice with regard to the sugar.



He asserted that the state is obligated to safeguard the rights envisaged under Article 46(1)(a),(b) and (c) of *the Constitution* and as such their actions were conducted in public interest.

13. He as well deposed that the petitioner had filed the instant suit to circumvent the required procedure for contempt if at all the petitioner was of the view that the respondents had disobeyed a court order.

The Respondent's case

14. The 2nd respondent equally in opposition to the petition filed grounds of opposition dated 13th February 2020 on the basis that:
 - i. No sufficient grounds have been advanced to warrant the grant of the orders sought by the petitioner.
 - ii. The petition is a legal misadventure, calculated at circumventing and subverting the interests of justice by seeking to stop investigating into the safety of the impounded sugar.
 - iii. The petitioner has failed to demonstrate how his fundamental rights and freedoms were violated by the respondents.
 - iv. The petition is an attempt to interfere with the powers and functions of the 2nd, 3rd, 4th and 5th respondents.
 - v. The respondents have not breached any law to warrant this Court to grant any of the orders sought.
 - vi. The petitioner has not established the grounds for his entitlement to exemplary and general damages as he has not demonstrated that he has suffered any loss or injury as a result of the actions complained.
 - vii. The petition is misconceived, actuated by malice and lacks merit and should be dismissed.

The Petitioners' submissions

15. The petitioner through his advocates, Gitobu Imanyara and Company Advocates filed written submissions and a list of authorities dated 14th December 2022. Counsel identified six (6) issues as falling for determination.
16. On the first issue on disobedience of court orders, counsel submitted that after the Court orders were issued in Criminal Case No.1424 of 2018 and the High Court decision in Criminal Revision Case No.11 of 2019, the impugned exhibits were released to the petitioner. The exhibits as submitted were soon after impounded again. Counsel submitted that this action by the 4th respondent was in complete defiance of the orders of the High Court and Trial court and in violation of Article 73 of *the Constitution*. He asserted that the respondents' actions were a clear indication of lack of respect for the Court process.
17. In support reliance was placed on the case of Kenya Human Rights Commission v Attorney General & another (2018) eKLR where it was held that the decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy.
18. On the second issue on the respondents' re-impounding of the exhibits counsel while relying on Article 238(2) of *the Constitution* submitted that the impounding of the petitioner's exhibits alongside his motor vehicle by the 5th respondent was in blatant abuse of the law and procedure



- regarding investigations as well inconsistent with their constitutional mandate. He added that the 4th respondent's averment that the sugar was harmful had been subject to Criminal Case No.1424 of 2018 where the petitioner had been acquitted of the charges and the exhibits released to him.
19. It was noted that despite the respondents' lack of intent to appeal against the acquittal orders, the 5th respondent proceeded to intercept, impound and seize the petitioner's motor vehicle and exhibits without any legal basis. Counsel further submitted that the respondents had not made an application to Court of their intention to prefer new charges against the petitioner. That the respondents usurped their powers and acted contrary to the principles of *the Constitution* to ensure proper administration of justice. Their actions were therefore actuated by malice and bad faith he argued. Reference was made to the case of Nairobi High Court Miscellaneous Application No. 1769 of 2003; Republic vs. Ministry of Planning and Another ex-parte Professor Mwangi Kaimenyi where it was held that where a body uses its power in a manifestly unreasonable manner, acts in bad faith, refuses to take relevant factors into account in reaching its decision or bases its decision on irrelevant factors the Court should intervene on the ground that the body has in each case abused its power.
 20. Counsel relying on the case of Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272 submitted that the respondents failed to accord the petitioner the right to equal protection and equal benefit of the law under Article 27(1) when they acted in complete contrast with the case of CMCC No. 1425 of 2018; Republic vs Elijah Thuku Karanja and another whose charges and orders given were similar to the petitioner's case.
 21. Equally that the respondents deprived the petitioner his right to property under Article 40 of *the Constitution* by impounding his motor vehicle and exhibits. Moreover that despite the Court acquitting him they proceeded to cease his property which is offensive to his right to a fair trial under Article 25(c) of *the Constitution*.
 22. On whether the court has jurisdiction to deal with the petition counsel submitted that it does owing to Article 165(3) (a) (d) (e) and 165(6) of *the Constitution*. He argued that the petition was not geared towards stopping the mandate of the respondents but that the petitioner only took issue with the manner in which they exercised their constitutional mandate.
 23. Counsel noted that the 2nd respondent under Article 157(11) of *the Constitution* mandates him to have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. To support this he relied on the case of Agnes Ngenesi Kinyua v Director of Public Prosecution & another [2019] eKLR where it was held that it is clear that whereas the discretion given to the respondents to prosecute criminal offences is not to be lightly interfered with where, it is clear that there is no evidence at all or that the prosecution's evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution. Also see (i) R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001 (ii) Kuria & 3 others vs. Attorney General [2002] 2 KLR 69.
 24. On the issue of reliefs counsel submitted that the petitioner in view of Section 107 of the *Evidence Act* had proved that the respondents had breached his constitutional rights and freedoms and as such was entitled to the damages sought in the petition. He referred to the case of Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR and submitted 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, though the court's discretion for award of damages in Constitutional violation cases is limited by what is appropriate and just according to the facts and circumstances of a particular case.



25. The 1st respondent did not file any submissions but he supported the 2nd, 3rd, 4th and 5th respondents' submissions.

The 2nd, 3rd, 4th and 5th Respondents' submissions

26. Principal Prosecution Counsel, Faith Mwila on behalf of the respondents filed written submissions dated 7th December 2022. She identified 4 issues for determination.
27. On the first issue, as to whether the petitioner's constitutional rights were violated she submitted that for the petitioner to prove this allegation, he ought to discharge the burden in the manner prescribed in the case of Anarita Karimi Njeru v Republic (1979) KLR 154 and reaffirmed in the case of Mumo Matemu v Trusted Society of Human Rights & 5 others (2013) eKLR and others. The threshold is that, one must plead in a precise manner the constitutional provisions said to be violated and the manner in which the same was violated.
28. According to Counsel the petitioner had failed to state the alleged constitutional provisions alleged to have been violated and did not demonstrate how the violations were committed. She pointed out that the petitioner had not stated the actions of each respondent which was deemed as a violation and specifically whom he was seeking orders against. As such she submitted that the threshold had not been met and neither had the petitioner discharged his burden.
29. Additionally Counsel submitted that the respondents' actions did not breach the petitioner's constitutional rights since the acts were done to prevent commission of a crime and to investigate a crime. Likewise, that it was their statutory mandate to protect the safety and health of Kenyans.
30. On disobedience of court orders, counsel submitted that the 3rd, 4th and 5th respondents were carrying out their statutory duties when they intercepted the petitioner's lorry with the exhibits so as to safeguard the rights under Article 46 of *the Constitution*. It was argued hence that their actions were lawful. With regard to the court orders, she submitted that the petitioner had failed to demonstrate that the respondents willfully disobeyed them. This is since the 4th respondent in compliance with the court orders returned the consignment of sugar to the court and the same was released to the petitioner.
31. On the third issue, Counsel submitted that Article 157 of *the Constitution* empowers the 2nd respondent to institute and undertake criminal proceedings against any person while Section 51 of the National Police Service directs the police to maintain law and order while protecting life and property. She thus contended that the instant petition was an attempt to stop the arrest and prosecution of the petitioner for the alleged offence. She therefore submitted that it has been held that courts are not to usurp the respondents mandate as seen in the cases of (i) Republic v Commissioner of Police and another ex parte Michael Monari 7 and another (2012) eKLR. and (ii) Republic v Chief Magistrate Milimani and another Ex parte Tusker Mattresses Ltd and 3 others (2013) eKLR.
32. On the final issue, Counsel submitted that the petitioner was not entitled to an award of general and exemplary damages since the circumstances of the case do not warrant the award. Moreover that the petitioner had not shown the arbitrary acts done by the respondents. In support she relied on the case of Mikidadi v Khaigan and another (2004) eKLR where it was held that exemplary damages are only awarded in limited instances such as where there is oppressive, arbitrary or unconstitutional action by servants of the government. Also see: Kasimu Sharifu Mohammed v Timbi Limited (2011) eKLR.

Analysis and Determination

33. I have perused the pleadings and submissions of the parties herein and the authorities relied on. Consequently the issues that arise for determination are as follows:



- i. Whether the respondents' violated their constitutional and statutory mandate in the circumstances of this case.
- ii. Whether the petitioner's rights under Articles 25(c), 27(1), 40(1)(a) of *the Constitution* were violated by the respondents; and
- iii. Whether the petitioner is entitled to general and exemplary damages and the reliefs sought.

Issue No. (i) Whether the respondents' violated their constitutional and statutory mandate in the circumstances of this case.

34. The key contention in the instant petition is that the respondents' actions were unlawful and contrary to the provisions of *the Constitution*. The petitioner termed the actions as malicious and carried out in bad faith. This was stated to be offensive to the principles of leadership and integrity and a usurpation of their roles and mandate as statutory bodies. This assertion was opposed by the respondents who argued that their actions were in line with their statutory mandate and protection of the rights under Article 46 of *the Constitution*. Moreover it was argued the instant petition was an attempt to interfere with their mandate as outlined in *the Constitution* and Acts of Parliament.
35. The respondents mandate is clearly spelt out in *the Constitution* and the law. The National Police Service, one of the organs charged with the maintenance of national security in Kenya is established under Article 243 of *the Constitution*. The National Police Service is commanded by the Inspector General as provided in Article 245(1) (b).
36. The *National Police Service Act*, 2011 which gives effect to the operations of the National Police Service under *the Constitution* establishes the 4th respondent under Section 28 of the Act. The functions of the Directorate of Criminal Investigations, as provided under Section 35 of the Act are:
 - a. collect and provide criminal intelligence;
 - b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;
 - c. maintain law and order;
 - d. detect and prevent crime;
 - e. apprehend offenders;
 - f. maintain criminal records;
 - g. conduct forensic analysis;
 - h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
 - i. co-ordinate country Interpol Affairs;
 - j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - k. perform any other function conferred on it by any other written law.



37. On the other hand the 2nd respondent, the Director of Public Prosecutions derives his powers from Article 157 of *the Constitution*. This Article is operationalized by the *Office of the Director of Public Prosecutions Act*, 2013. Article 157(4), (6), (10) &(11) of *the Constitution* provides as follows:

- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
- (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

38. The Court in the case of Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019] eKLR discussing the mandate of the 3rd and 4th respondents opined as follows:

“ 50 ...The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.....

52. Regarding prosecution Odunga J in Agnes Ngenesi Kinyua aka Agnes Kinywa vs. Director of Public Prosecution (supra) held as follows:

“it must be emphasized that a constitutional petition challenging prosecution does not deal with the merits of the case but only with the process. The Court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the applicant. Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to



allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”

39. Further, in *Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 others* [2014] eKLR, with regard to the constitutional mandate of the 2nd respondent the Court observed as follows:

“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.

40. Undoubtedly it is clear that the Courts will not be quick to interfere with the respondents mandate as long as it is done within the confines of the law. On the other hand, it is also unmistakable that this Court is vested with the requisite jurisdiction to interfere under Article 165 (3)(d) (ii) where this mandate is carried out unlawfully and in contravention of the constitutional principles.

41. The account of this case in a nutshell is that the petitioner was charged under Criminal Case No.1424 of 2018 before the Chief Magistrates’ Court at Nyahururu. The case was heard and petitioner acquitted of Counts 4, 5, 6 and 7 vide the Court’s Ruling dated 19th December 2018. The Court additionally ordered that Exhibits 3, 4, 5, 6, 7, 14 (marked as M1 to M6) and 22 be released to the petitioner. It is noted that the 2nd respondent in its letter dated 21st December 2018 to the 4th respondent indicated that it was not going to appeal the cited Ruling with reference to the stated counts and as such the mentioned Exhibits ought to be released to the petitioner.

42. The record reflects that the respondents failed to obey this Court Order. The respondents’ attempt to stay the Contempt of Court Orders in the High Court at Nyahururu in Criminal Revision No. 7 of 2019 failed. The court observing that the respondents had not purged the contempt, stated that issuance of the sought orders would be an abuse of the court process. The respondents finally released the exhibits to the petitioner but soon after the release, impounded the same.

43. Two issues were highlighted in this regard. First that the respondents had acted unlawfully and against the principles of *the Constitution* and the law. Secondly that the respondents were guilty of blatantly defying the issued Court orders after the release of the exhibits.

44. Principally, *the Constitution* under Article 2(1) of *the Constitution* affirms that:

This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

45. In line with this, *the Constitution* stipulates the values and principles of governance under Article 10 of *the Constitution* which binds all persons whenever any of them applies, enacts or interprets the law. As well, *the Constitution* under Article 73 of *the Constitution* states that the authority assigned to a State Officer is as follows:

- a. is a public trust to be exercised in a manner that--
 - i. is consistent with the purposes and objects of this Constitution;
 - ii. demonstrates respect for the people;



- iii. brings honour to the nation and dignity to the office; and
 - iv. promotes public confidence in the integrity of the office; and
- (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
46. Additionally the 2nd respondent is required under Article 157 (11) of *the Constitution* in exercise of his power to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
47. It is discernible from the facts of this case that upon acquittal of the petitioner in the stated counts and an order to release the exhibits, the 4th respondent was not keen on complying with the order. According to the 4th respondent, the exhibits were not supposed to be released as were harmful. This is in spite of the clear court order. The 4th respondent's intention was made apparent with the impounding of the stated exhibits soon after their release. It is my considered finding that the 4th respondent's action was a clear statement that it was never intent on honoring the court order whose content had been subjected to legal criminal proceedings before the Trial court.
48. It should be emphasized that a court order that is not complied with is not only an affront to the court in question but the judicial authority at large. It is vital to note that the legitimacy of the criminal process must be upheld to ensure the community and Country at large have confidence in the criminal justice process. In that, if found guilty the accused will be punished and if found not guilty he/she will be set free, without the fear of being charged again with the same criminal offense. All this must be done while upholding the constitutional rights and freedoms.
49. The Judiciary therefore provides checks and balances on the respondents in order to preserve law and order in the Country. Its role thus is to safeguard the principles, values and processes as determined by *the Constitution* and the law. Consequently the judicial process should not be trivialized in such a manner that leaves the community and citizenry without remedy against breach of their rights and legal processes. This inevitably would result in the State infringing on their rights and the law with impunity. Perceptibly this must be safeguarded against and condemned.
50. The 4th respondent's actions in this matter as also supported by the other respondents was inconsistent with the set principles and values of *the Constitution*. The exercise of their mandate in this matter was offensive to the dictates of the law and criminal justice system. It is made manifest that the 2nd respondent in its letter stated that it would not appeal the Court's Ruling which is the legal process undertaken when a party is dissatisfied with a Court's Ruling or Judgment. In a country where the criminal justice system has a defined procedure, the respondents opted to overlook the process as a consequence usurping their power unlawfully. In light of the circumstances of this case, I am of the view that the instant matter is a classic case of abuse of the Court process. This is because there is no law supporting the process followed by the respondents in this case. If they wanted to use force then they should have forced the 2nd respondent to appeal against the Ruling.



51. This conclusion is guided by and supported by the Court of Appeal decision in the case of Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR where the Court observed as follows:

“...abuse of process has been defined in WIKIPEDIA, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In *Beinosi V Wyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro V Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.”

Issue No. (ii). Whether the petitioner’s rights under Articles 25(a), 27(1) and 40 (1)(a) of *the Constitution* were violated by the respondents

52. The petitioner alleged that the result of the respondents’ actions was violation of his right to a fair trial, right to equal protection of the law and the right to enjoy his property. This was challenged by the respondents’ who said they acted within their mandate and that the petitioner had not proved his case against them.
53. The threshold for proving constitutional cases is now well settled and reiterated in law. In the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR the Court reiterating the principle held as follows:

“ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”



54. The standard of proof as set out in the case of Anarita Karimi Njeru (supra) places the onus of proof on the petitioner. In this case, the petitioner is required to prove the elements that constitute the violation of the cited rights to justify a finding that his rights were indeed violated. This is by showing the manner of infringement through laying of factual basis through the evidence adduced.
55. To begin with, Article 25 (c) of the Constitution which outlines the non-derogable rights provides as follows:
- the right to a fair trial.
56. The Black's Law dictionary (2nd Edition) defines a fair trial as follows:
- The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.
57. The Trial court's verdict upon hearing the prosecution case against the petitioner in the cited counts was an acquittal. Nevertheless, the respondents went on to impound the exhibits in question with an intention to instigate fresh charges. This was deemed as a violation of this right. This is because the trial process had been completed and a verdict rendered. I find myself in agreement with the petitioner. The respondents having presented their case against him and a verdict made ought not to have attempted to revive the issue. This as dictated by the law is offensive to the right against a fair trial and principles of the criminal justice system. I find that the respondents' actions in this regard violated the petitioner's right. I find further guidance from Article 50(2)(o) of the Constitution which provides that among the rights of an accused person one is:
- “ not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”
58. The petitioner next argued that he was subjected to discriminatory treatment. The basis was that a fellow accused person who was also arrested at the same time Criminal Case No.1425 of 2018 Republic v Elijah Thuku Karanja and another was issued with release orders for his exhibits which the respondents' released promptly. The petitioner asserted that this was contrary to his case where his exhibits were not released with like promptness. This right is envisaged under Article 27(1) of the Constitution and reads as follows:
- “ Every person is equal before the law and has the right to equal protection and equal benefit of the law.”
59. The Supreme Court in the case of Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) citing the definition of discrimination with approval stated as follows:
- “(48) Black's Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination...”
60. The test for determining whether the petitioner's claim on discrimination is successful constitutes showing that there was a nexus between the elements of his criminal case and those of the accused in the Criminal Case No.1425 of 2018 and that the circumstances and facts of the case were similar.



61. I must state as a starting point that from both the pleadings and the petitioner's evidence, it is not clear the basis or ground upon which he was allegedly discriminated against. While the petitioner indicates that him and others were arrested on the same day and that they bought their goods from the same company, (Gilani's Supermarket), this is not supported by the evidence adduced.
62. Similarly, the petitioner does not show whether he and the cited accused persons' charges were all the same to show an unjust differentiation where the facts are identical. It is important to emphasize that each case is determined on its own unique circumstances. There is no evidence placed before this court to show that indeed the petitioner had been arrested together with others for similar offences e.t.c and the others were released together with their goods.
63. On the next right, the petitioner submitted that the impounding of the exhibits was against his right to property. This is envisaged under Article 40(1)(a) of *the Constitution* which states as follows:
- Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- a. of any description
64. The main argument in this matter revolves around the manner in which the 4th respondent impounded the petitioner's exhibits. There is nothing on the record to show that the 4th respondent impounded the exhibits for any other reason other than that which had been submitted and tested before the Trial court. This being the case and relying on the examination herein, the inevitable conclusion is that impounding of the exhibits which forms part of the petitioner's property was unlawful and un-procedural, especially in light of the order of the trial court which had not been set aside or reviewed. This led to the flagrant violation of the petitioners Article 40(1)(a) of *the Constitution*.

Issue No. (iii). Whether the petitioner is entitled to general and exemplary damages and reliefs sought.

65. From the foregoing analysis, the conclusion arrived at is that the 3rd & 4th respondents' actions in the circumstances of this case were unlawful and in violation of the constitutional principles set out under Article 73 of *the Constitution*. Equally, their actions led to violation of the petitioner's rights under Articles 25(c) and 40(1)(a) of *the Constitution*.
66. The petitioner among the reliefs sought, requested for an award of general and exemplary damages. This was opposed by the respondents who asserted that the petitioner was not entitled to either of the damages. The question that follows is whether the petitioner is entitled to these damages.
67. To begin with, the principles for grant of damages in constitutional petitions and as guided by Article 23 of *the Constitution* was set out by the Court of Appeal in the case of Gitobu Imanyara & 2 others(supra) where it was observed that:
- “The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements.”
68. With regard to general damages, the Court in the case of Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another [2019] eKLR perceived as follows:
- “96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that



has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of this public law remedy evolved by the Courts. The following principles clearly emerge from decided cases;

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
- iii. This remedy would be available when it is the only practicable mode of redress available;
- iv. Against claim for compensation for violation of a fundamental right under *the constitution*, the defence of Sovereign immunity would be inapplicable.

97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.”

69. I find an award of general damages to be warranted and will be sufficient to vindicate the petitioner for the violation of his constitutional rights. The only consolation is that his sugar was finally released to him. In making this determination I am guided by the principles and criteria set out above. Further there is the necessity to hold the respondents accountable for the constitutional violations. I therefore award the petitioner Kshs.600,000/= as general damages.

70. As for exemplary damages, it is important to state that these damages are normally awarded where the respondents conduct aggravated the violation of the petitioner’s rights. These damages are normally awarded to punish the respondents, primarily where the conduct was motivated by malice. In this regard, the Court of Appeal in the case of Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR discussing exemplary damages opined as follows:

“32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for



himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.

Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.”

71. Further explanation was given by the Court in the case of Abdulhamid Ebrahim Ahmed Vs Municipal Council of Mombasa [2004] eKLR where it was determined as follows:

“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of Rookes supra related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service.”

In the above case the court having also awarded general damages settled on exemplary damages of Ksh.100,000/=.

72. Applying these principles to the present case I find that the 4th respondent’s conduct was not only arbitrary and unlawful but also an affront to the rule of law. This is because on top of violating the petitioner’s constitutional rights, the respondents violated the constitutional and legal principles envisaged for proper management of the criminal justice system. Correspondingly, the respondents’ conduct was an affront to the authority of the court. First in failing to file an appeal due to their dissatisfaction with the trial court’s verdict and their flagrant conduct in the manner in which they pretended to comply with the court order and at the same time blatantly disobey it. The 4th & 5th respondents were both operating under the office of the 3rd respondent. In all that was happening there is no evidence that the 3rd respondent asked his officers to show cause and neither did he take any disciplinary action against them. I therefore find that grant of exemplary damages is justified as guided by the set principles and circumstances of this case. The petitioner is awarded Kshs.150,000/=.

The upshot is that the petition dated 6th June 2019 has merit and is allowed. The following orders are issued

- a. A declaration that the actions of the respondents of calculated, deliberate disobedience of lawfully made and binding court orders is a subversion of and is in violation of the constitutional obligations of State Officers and amounts to a flagrant breach of Articles 73(1) and (2) of *the Constitution*.
- b. A declaration that the actions of impounding the exhibits and the petitioner’s lorry despite orders to release the exhibits by the Chief Magistrate’s Court in Criminal Case No.1424 of



2018 and the High Court at Nyahururu Criminal Revision No.11 of 2019 amounted to breach of the petitioner's fundamental rights:

- c. The 4th and 5th respondents are prohibited from harassing the petitioner in respect of the counts he was acquitted of, in Criminal Case No.1424 of 2018 Nyahururu Chief Magistrate's Court.
- d. An award of Kshs.600,000/= as general damages against the 4th & 5th Respondents in favour of the petitioner.
- e. An award of Kshs.150,000/= as exemplary damages against the 1st, 3rd, 4th & 5th respondents in favour of the petitioner.
- f. Interest on the above amounts to run from today's date at court rates.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 26TH DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong'udi

Judge of the High Court

