



**Ugochukwu & another v Kombo & 4 others (Petition E052 of 2022)
[2023] KEHC 21948 (KLR) (21 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E052 OF 2022
OA SEWE, J
AUGUST 21, 2023**

BETWEEN

ANAMONYE ANTHONY UGOCHUKWU 1ST PETITIONER

LINA KAMALE KITOO 2ND PETITIONER

AND

ESTHER KOMBO 1ST RESPONDENT

DAVID MUNGAI 2ND RESPONDENT

STATION COMMANDER, BAMBURI POLICE STATION 3RD RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

- (1) The petitioners filed this Petition contending that, on the 19th March 2022, the 1st and 2nd respondents and two other police officers from Bamburi Police Station, while under the instructions and command of the 2nd and 4th respondents, raided the 1st petitioner's residence at Biksal Plaza in Mtwapa and arrested them without any lawful cause. They averred that, on the date in question, four people in civilian clothes arrived at the 1st petitioner's residence at around 8.15 a.m.; and that they repeatedly banged on the 1st petitioner's door threatening to kill the 1st petitioner if he failed to open the door. They further stated that, while the 1st petitioner was busy calling Mtwapa and Bamburi Police Stations to confirm that the four persons were indeed police officers, the front door was pulled down with the help of a technician and the petitioners were arrested on allegations that the 1st petitioner, who is a Nigerian citizen, was a drug dealer.



- (2) The petitioners further averred that they were taken to Bamburi Police Station where, upon perusing the 1st petitioner's passport and related documents, the 1st respondent was satisfied that he was lawfully present in Kenya, but insisted that he had to pay some money as a bribe before being released. They therefore averred that there was no lawful reason for their arrest or confinement; and added that their request to be released on cash bail was declined for no justifiable cause. The petitioner averred that ultimately, the police officers managed to extort a sum of Kshs. 21,500/= from them which was handed over to the 1st respondent; after which they were released at around 6.00 p.m. and given back some of the items that had been seized from them, including three mobile phones, one laptop computer, Nigerian currency, the 1st petitioner's expired Nigerian passport no. A07536295 and school documents.
- (3) They alleged that the police officers did not return to the 1st petitioner the following items that they had carried away from his residence at the time of his arrest:
- (a) the 1st petitioner's valid Nigerian passport no. A11502311
 - (b) US Dollars 550
 - (c) A brand new Apple iPhone 12 Pro Max phone, with its receipt
 - (d) A pair of Apple earpods
- (4) The petitioners further stated that upon release, the 1st petitioner went to Mtwapa Police Station and recorded a complaint against the 4 police officers from Bamburi Police Station who raided his residence and assaulted him. He pointed out that although his statement was recorded under OB No. 84/19/3/2022, the Mtwapa police omitted everything to do with his complaint against their colleagues. The OCS of Mtwapa Police Station thereafter referred the 1st petitioner to her counterpart at Bamburi Police Station. Having spent the whole of 21st March 2022 at Bamburi Police Station to no avail, the 1st petitioner decided to report the matter to the Independent Policing Oversight Authority (IPOA), Mombasa Branch and was given complaint no. IPOA/CMU/000834-2022. He however complained that no tangible action was taken by IPOA; and therefore that he was constrained to file this Petition instead.
- (5) In the premises, the petitioners alleged violations of their rights as follows:
- (a) That the 1st petitioner was discriminated against simply because he is a Nigerian, in contravention of Articles 27(4) and (5) of *the Constitution*;
 - (b) That the petitioners' right to inherent dignity under Article 28 was grossly violated in the manner of their arrest and the insults hurled at them before and after their arrest;
 - (c) That the petitioners were deprived of their freedom and detained for no apparent reason contrary to Article 29(a) and 29(b) of *the Constitution*;
 - (d) That the petitioners were subjected to gross violence contrary to Article 29(c) of *the Constitution*;
 - (e) That the petitioners were subjected to torture and inhuman treatment in contravention of Articles 29(d) and (f) of *the Constitution*;
 - (f) That the 1st and 2nd respondents jointly with other officers and/or individually infringed the 1st petitioner's right to privacy contrary to Article 31 of *the Constitution* by breaking into and



searching his residence without any lawful cause; and in seizing the 1st petitioner's property and going through/browsing his phones and laptop computer without his consent.

- (g) That in taking away the 1st petitioner's money and new mobile phone and failing to return the same, the respondents deprived him of his property in contravention of Article 40(3) of the Constitution.
 - (h) That the respondents failed to inform the petitioners the reason for their arrest and thereafter declined to grant them cash bail in violation of Article 49(1)(a) and (h) of the Constitution.
- (6) The petitioners further averred that the conduct of the police officers towards them displayed impunity of the highest order and flew in the face of the mandatory provisions of the National Police Service Act, particularly Sections 49, 50, 61 thereof. They further blamed the interested party for inaction following the 1st petitioner's complaint against the aforementioned police officers. In the premises, the petitioners prayed for the following reliefs:
- (a) A declaration that the conduct of the police officers and the respondents violated the petitioners' rights and fundamental freedoms provided for under Articles 27(4), 27(5), 28, 29(a), 29(b), 29(c), 29(d), 29(f), 31, 40(3), 49(1)(a) and 49(1)(h) of the Constitution;
 - (b) An order of compensation in general damages of Kshs. 5,000,000/= against the respondents jointly and severally for violating the 1st petitioner's human rights and fundamental freedoms;
 - (c) An order of compensation in general damages of Kshs. 5,000,000/= against the respondents jointly and severally for violating the 2nd petitioner's human rights and freedoms;
 - (d) An order directing the 1st respondent to refund to the 1st petitioner a sum of Kshs. 21,500/=;
 - (e) An order directing the respondents to return to the 1st petitioner his Nigerian passport no. A11502311 and all his possessions listed in paragraph 45 of the Petition;
 - (f) An order of Mandamus directing the 4th respondent and the interested party to take disciplinary action against the 1st, 2nd and 3rd respondents and against all culpable police officers who took part in the violation of the petitioners' rights and fundamental freedoms.
 - (g) Interest at court rate;
 - (h) Costs of the Petition;
 - (i) Any other relief as the Court may deem fit to grant.
- (7) The Petition was supported by the affidavits of the petitioners, sworn on the 22nd September 2022 and 23rd September 2022, respectively. In his affidavit, the 1st petitioner reiterated the averments set out in the Petition regarding the circumstances surrounding their arrest on 19th March 2022 and their eventual release at about 6.00 p.m. on the same day. He annexed to his affidavit several documents to buttress his assertions, including copies of treatment notes, P3 Form, Police Abstract, M-Pesa transaction transcripts and email communication with the interested party. He reiterated his assertion that, as of the time of his deposition the 4th respondent and the interested party were yet to take any disciplinary action and/or recommend prosecution against the culpable officers. He added that the interested party had declined to disclose to him the full names and ranks of all the police officers who harassed him or share information that might assist him in pursuing a civil claim against them.
- (8) Similarly, the 2nd petitioner, Lina Kamale Kitoo, reiterated the assertions set out in their Petition with regard to the circumstances of their arrest on 19th March 2022. She confirmed that she was in the



company of the 1st petitioner at his apartment in Biksai Plaza in Mtwapa when they were arrested. At paragraph 9 to 12 of her affidavit, she narrated how the police officers hurled insults at her in Kiswahili by calling her a prostitute, and demeaned them by forcing them to kneel outside the apartment in front of all the tenants who had been attracted by the commotion, before being driven away in the boot of a waiting private car. Thus, her averments were essentially a replication of the 1st petitioner's deposition. She added that she was left traumatized by the whole ordeal. She accordingly prayed that their Petition be allowed and the reliefs prayed for therein granted.

- (9) On behalf of the 3rd, 4th and 5th respondents, an affidavit was filed by PC Diba Halake, an officer attached to the Directorate of Criminal Investigation, Mtwapa Police Station. As the investigating officer concerned, he averred that on Saturday 11th June 2022, he arrested two Nigerian nationals, namely Okorare Emmanuel Tabore and Anamonye Anthony Ugochukwu, for the offence of being unlawfully present in Kenya. He added that they had received public complaints that the two were engaged in the circulation of fake currency; and that at the time of their arrest they did not produce any identification or travel documents to explain their stay in Kenya. PC Halake further stated that upon producing his passport on 12th June 2022 through his girlfriend, Okorare Emmanuel Tabore was released vide OB No. 35.
10. In respect of the 1st petitioner, PC Halake deposed that, on 13th June 2022, he handed over a Police Abstract vide report No. 48/8/6/2022 and a Foreigner Certificate, otherwise known as an Alien Identification Card, No. 10146682, issued on 26th May 2021 which was expiring on 4th October 2022. He was accordingly instructed by the Deputy DCIO, CI Joshua Shoka, to release and did release the 1st petitioner on cash bail of KShs. 30,000/= for which an official receipt was issued. He continued with his investigations and sent the 1st petitioner's Alien Identification Card to the Registrar of Persons, Nairobi, for verification.
- (11) PC Halake further deposed that he later got to learn that the 1st petitioner had made a complaint to IPOA, Mombasa, whose staff visited the DCI, Mtwapa, to inquire into the complaint and were attended to by the DCIO. He averred that the IPOA officers were advised to await the report from the National Registration Bureau; which report was given on 6th October 2022, indicating that the requisite information be sought from Immigration Office, Nairobi. He complied and was awaiting a response as at the time of his deposition. PC Halake annexed several documents to his affidavit and asserted that he performed his functions in accordance with the laid down procedures and was therefore not privy to the allegations raised in this Petition.
- (12) In response to the Petition, the interested party filed Grounds of Opposition dated 3rd March 2023 contending that:
- (a) The interested party has been wrongfully enjoined in this Petition;
 - (b) The petitioners have not clearly demonstrated the violation or threatened violation of their fundamental rights and freedoms;
 - (c) The order of Mandamus sought against it, namely, to take disciplinary action against the 1st, 2nd and 3rd respondents, is not within its mandate.
- (13) In addition to the Grounds of Opposition aforesaid, the interested party relied on the Replying Affidavit sworn on its behalf on 7th March 2023 by one of its investigating officers, Mr. James Njuru. In addition to setting out the mandate of the interested party, Mr. Njuru confirmed that the 1st petitioner lodged a complaint with the interested party on 21st March 2022 against certain police officers at Bamburi Police Station. He further averred that the matter was assigned to him for investigations; and



that his investigations are still on course. He also complained that, due to lack of cooperation on the part of the 1st petitioner and his advocate, not much progress has been achieved in the investigations. He therefore prayed for the dismissal of the Petition contending that the slow pace of the investigations is a direct result of the 1st petitioner's lack of enthusiasm. He annexed documents to his affidavit to demonstrate that he communicated with the 1st petitioner but that his letters elicited no response.

- (14) With the leave of the Court, the 1st petitioner filed a Further Affidavit sworn on 23rd March 2023 in which he denied the assertions by Mr. Njuru; particularly the averment that he has been uncooperative. He averred that it was only after the Petition was served on the interested party that Mr. Njuru got in touch and asked him to produce the 2nd petitioner. Thus, he asserted that the interested party chose to not investigate his complaint in disregard of its statutory mandate.
- (15) A perusal of the record reveals that, although duly served with the Petition, the 1st and 2nd respondents opted to not file a response thereto. Accordingly, directions were given on 16th March 2023 that the Petition be canvassed by way of written submissions. Thereupon Mr. Situma, counsel for the petitioners, filed his written submissions on 13th April 2023. He relied on the two affidavits sworn by the petitioners on 23rd September 2022 and urged the Court to find that the two petitioners were subjected to the most harrowing experiences by the 1st and 2nd respondents together with two other police officers from Bamburi Police Station. He further pointed out that, even though the interested party was informed of the petitioners' complaints, it opted to take no action, in clear breach of its mandate.
- (16) Thus, it was the submission of Mr. Situma that none of the respondents have denied the allegations set out in the Petition. He pointed out that the affidavit of PC Diba Halake of Mtwapa Police Station has no relevance to the facts in issue herein. Accordingly, Mr. Situma proposed the following issues for determination:
 - (a) Whether the petitioners' rights and fundamental freedoms were violated;
 - (b) Whether the interested party is a proper party in this Petition; and,
 - (c) Whether the petitioners are entitled to the reliefs sought.
- (17) Mr. Situma submitted that the petitioners have succinctly set out in their Petition the violations committed by the respondents as by law required and demonstrated the violations complained of by their averments in their respective affidavits. He further urged the Court to take into consideration the exhibits annexed to the 1st petitioner's affidavit which, in his view, sufficiently corroborates the petitioners' assertions. Thus, counsel submitted that the petitioners have availed overwhelming evidence in proof of the violations complained of by them.
- (18) On whether the interested party is a proper party to this Petition, Mr. Situma relied on Section 5 of the [Independent Policing Oversight Authority Act](#) that mandates IPOA to, inter alia, hold police officers accountable to the public in the performance of their functions. He therefore submitted that the prayer for Mandamus is well founded and in accord with the interested party's mandate. He pointed out that the only reason that the petitioners sought for an order of Mandamus is that both the 4th respondent and the interested party did nothing to hold the culpable officers accountable, yet they had all the information that would have enabled them to act for the ends of justice to be met.
- (19) Thus, on the basis of the foregoing, Mr. Situma submitted that the petitioners had proved their case on a balance of probabilities and that they deserve to be granted all the prayers set out in their Petition. In terms of compensation, counsel submitted that Kshs. 5,000,000/= would suffice for each of the petitioners. He relied on *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR wherein



an award of Kshs. 504,000,000/= was made for unlawful arrest and detention; and Akusala A. Boniface v OCS Langata Police Station & 4 Others [2018] eKLR in which the petitioner was awarded Kshs. 2,000,000/= for violation of his rights. Counsel pointed out that in the latter case, the circumstances were not as serious as the case at bar.

20. On behalf of the 3rd, 4th and 5th respondents, written submissions dated 8th June 2023 were filed herein by Mrs. Waswa in which she proposed the following issues for consideration:
- (a) Whether the petitioners' rights and fundamental freedoms were indeed violated;
 - (b) Whether the Petition passes the test of burden of proof;
 - (c) Whether the petitioners are entitled to the reliefs sought.
21. Mrs. Waswa submitted, on the authority of Anarita Karimi Njeru v Republic [1976-1980] KLR 1272, that the petitioners were under duty to plead with reasonable precision the manner in which their constitutional rights were violated. She argued that, although the petitioners relied on various provisions of *the Constitution*, no evidence was adduced by them to back up their allegations. She pointed out that, by virtue of Section 24 of the *National Police Service Act*, the respondents are mandated to maintain law and order, among other duties; and that it was within their mandate to arrest the petitioners. She further submitted that arrest without warrant is provided for under Section 29(a) and (b) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and Section 58 of the *National Police Service Act*; and therefore that the petitioners' arrests were lawful.
- (22) Regarding the allegations of assault, counsel submitted that the police are permitted by law to use reasonable force in effecting arrests where there is resistance. She similarly argued that, while it is within the discretion of the OCS to release a suspect on cash bail or not, the petitioners had no cause for complaint seeing as they were released before the expiry of the period provided for in Article 49(1) (f) of *the Constitution*. Accordingly, Mrs. Waswa urged the Court to find that the petitioners did not prove their allegations of torture, or that their arrest and detention was unjustified. She relied on Leonard Otieno v Airtel Kenya Limited [2018] eKLR for the proposition that decisions on violation of constitutional rights should not be in a factual vacuum, as that would yield the undesirable outcome of trivializing *the Constitution*.
- (23) On whether the petitioners are entitled to the reliefs sought, Mrs. Waswa made reference to Section 66(1) of the *National Police Service Act*, which protects police officers from personal liability where the act complained of is done in good faith for the performance and execution of the functions, powers or duties of the service. She accordingly submitted that the petitioners, having failed to demonstrate that the police officers concerned were actuated by malice, are not entitled to the reliefs sought. Thus, Mrs. Waswa urged for the dismissal of the Petition.
- (24) On behalf of the interested party, written submissions dated 26th April 2023 were filed herein by Ms. Oyosi in response to the petitioners' allegation that the interested party slackened in its constitutional duty to hold the respondents accountable for their misconduct. She accordingly proposed the following issues for determination:
- (a) Whether the petitioners can seek adverse orders against IPOA in its capacity as an interested party;
 - (b) Whether the interested party slackened in its constitutional duty to hold the police officers accountable for their misconduct as alleged;
 - (c) Whether the reliefs sought against the interested party should be granted.



- (25) Ms. Oyosi submitted that, having joined IPOA to these proceedings as an interested party and not as a respondent, it is impermissible for the them to turn round and ask for substantive reliefs against IPOA. She made reference to the definition of a “respondent” and “interested party” as set out in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, as well as the case of *Marigat Group Ranch & 3 Others v Wesley Chepkoimet & 19 Others* [2014] eKLR to buttress her submission that adverse orders can only be made against a respondent.
- (26) Ms. Oyosi further submitted that the petitioners failed to discharge the burden of proving their allegations against the interested party as required by Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. She was of the posturing that nowhere in the Supporting Affidavits was it demonstrated that the measures taken by the interested party had any shortcomings, particularly with regard to the issues raised in the Petition. She urged the Court to believe the assertion by the interested party’s investigation officer that the investigations were commenced promptly, but were frustrated by the 1st petitioner due to lack of cooperation on his part.
- (27) Counsel noted that the only relief sought against the interested party is the prayer for Mandamus. She accordingly discussed the scope of the remedy and urged the Court to find that the mandate of IPOA does not include taking disciplinary action against particular police officers; and therefore it would be acting ultra vires were it to do so. She relied on *Republic v Kenya Vision 2030 Delivery Board & Another, Ex Parte Eng. Judah Abekah* [2015] eKLR and *Republic v Kenya National Examinations Council, Ex Parte Gathenji & Others*, Civil Appeal No. 266 of 1996 in support of her arguments and prayed for the dismissal of the Petition with costs to the interested party.
- (28) It is manifest from the foregoing that, the 1st petitioner is indeed a Nigerian citizen and that he has been living in Kenya as a university student since 2018. There is further no dispute that he was arrested on 19th March 2022 by police officers attached to Bamburi Police Station; and there appears to be no dispute that the 1st petitioner was arrested on suspicion of being unlawfully present in Kenya and for engaging in the circulation of fake currency. At the time of his arrest, the 1st petitioner was then in the company of the 2nd petitioner who was similarly arrested. They were taken to Bamburi Police Station but were later released without being booked in, placed in cells or arraigned before court.
- (29) Being aggrieved by the manner in which they were arrested and treated by the police officers from Bamburi Police Station, the 1st petitioner, upon release, went straight to Mtwapa Police Station and filed a complaint against the said officers but was referred back to the OCS of Bamburi Police Station. Ultimately, the 1st petitioner resorted to IPOA, the interested party, in the hopes that action would swiftly be taken against the concerned police officers. In his view, no action was taken by IPOA; and that is why they approached the Court for redress.
30. As correctly pointed out by Mrs. Waswa, it is now settled that a litigant alleging violation of constitutional rights or freedoms, must plead his/her case with reasonable precision in line with the principle laid in *Anarita Karimi Njeru Case*, in which it was held:
- “...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
- (31) That the petitioners complied with this edict is not in doubt in that they set out the names of the parties and their respective positions in Part A of the Petition, while in Part B the petitioners set out the legal foundation of their Petition and the specific provisions of *the Constitution* relied on. It is



noteworthy too that after setting out the facts of the case at Part C of the Petition, the petitioners specified the contraventions and violations alleged at Part D thereof and their prayers at Part F. I am therefore satisfied that the petitioners pleaded their case with the requisite specificity expected of them. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR the Court of Appeal expressed the view that:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

- (32) That said, the issues that emerge herein for determination, as correctly pointed out by learned counsel are:
- (a) Whether the petitioners have discharged the burden of proving that their rights and fundamental freedoms were violated; and,
 - (b) Whether the petitioners are entitled to the reliefs sought.

A. On the burden of proof:

- (33) The petitioners identified Esther Kombo and David Mungai, the 1st and 2nd respondents as two of the four police officers who arrested them. Neither of them responded to the Petition, though served. In the Replying Affidavit sworn by PC Halake on behalf of the 3rd, 4th and 5th respondents, he was explicit, at paragraph 12 thereof, that he was not privy to most of the allegations Petition touching on malice and torture. No affidavit was taken from the 3rd respondent as the OCS to refute the assertion that the 1st and 2nd respondents were police officers under his command, or that they were out on duty as alleged by the petitioners. In effect, all the averments set out in the affidavits of the petitioners are uncontroverted, save for the feeble assertion by PC Halake that “...all particulars of malice and Torture are hereby denied and the Petitioners are put to strict proof thereof...”
- (34) Nevertheless, it is now trite that, even where no pleadings are filed, the burden of proof remains on the petitioners to prove all their allegations on a balance of probabilities, for Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is explicit that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

- (35) Indeed, in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

“...“proof” is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a



presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

(36) And, in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal held:

“...It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

(37) This is more so in constitutional petitions; and therefore, I agree with the position taken by Hon. Mativo, J. in *Leonard Otieno v Airtel Kenya Limited* (supra) that:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be in a factual vacuum. To attempt to do so would trivialize *the Constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.”

(38) Accordingly, I have given consideration to the averments set out in Part D of the Petition and noted the alleged violations vis-à-vis the evidence in support as deposed to in the petitioners’ Supporting Affidavits. The 1st petitioner’s first ground for complaint was that he was discriminated against simply because he is a Nigerian, and therefore that the police officers acted in contravention of Articles 27(4) and (5) of *the Constitution*. The two sub-articles provide that:

- “(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

(39) It is noteworthy however that, in the same vein, the 1st petitioner conceded that the 2nd petitioner, who was described at paragraph 1 of the Petition to be a Kenyan female adult, was similarly arrested; and that they were subjected to the same treatment and were released at the same time. In her affidavit, the 2nd petitioner confirmed those averments, particularly that they were set free at the same time and thereupon went their separate ways. The 1st petitioner having conceded that one of the reasons for his arrest was the suspicion that, being a Nigerian, he was unlawfully present in Kenya, his contention



that he was discriminated against has no basis. At paragraph 17 of his Supporting Affidavit, the 1st petitioner averred that:

“While at the police station, the 1st respondent – Esther Kombo told me that she had managed to confirm that my passport, visa and Kenya alien card were indeed valid. Meaning that my stay in Kenya was legal...”

40. In the premises, my considered view is that it was not an act of discrimination for the police to have arrested the 1st petitioner on account that he was a Nigerian if, as has been demonstrated and conceded, the intention was to ascertain whether or not he was lawfully present in the country. The same averment by the 1st petitioner also confirms that he was informed of the reason for his arrest for purposes of Article 49(1)(a) of *the Constitution* and therefore it cannot be true for him to assert that his Article 49(1)(a) rights were infringed. Indeed, Article 247 of *the Constitution* gives the National Police Service the mandate to perform all the functions set out in the *National Police Service Act*. Hence, it is plain that the arrest of the petitioners was pursuant to Sections 24 of the *National Police Service Act* which mandates the police to maintain law and order, preserve peace, investigate crimes and apprehend offenders among other functions. In the circumstances, I am far from convinced that the petitioners were deprived of their freedom and detained for no apparent reason as to constitute a breach of Article 29(a) and 29(b) of *the Constitution*.

(41) The petitioners’ further alleged that their right to inherent dignity under Article 28 of *the Constitution* was grossly violated in the manner of their arrest and the insults hurled at them before and after their arrest. Article 28 states that:

“Every person has inherent dignity and the right to have that dignity respected and protected.”

(42) In this regard the petitioners complained that they were insulted, tortured and forced to kneel down in full view of neighbours before being thrown in the boot of a car and forced to ride to the police station in a stuffy boot, among other allegations. It is noteworthy however that the 1st petitioner conceded that he declined to open the door when the police officers arrived and that the door had to be pulled down with the help of a technician who cut the door’s hinges from outside using a machine. All this is indicative of resistance on the part of the petitioners, which must be looked at in the light of Section 61 of the *National Police Service Act*. That provision permits the police to apply reasonable force and use firearms in the course of duty within the limits circumscribed by the Sixth Schedule.

(43) As to whether the force applied amounts to gross violence for purposes of Article 29(c) of *the Constitution*; or torture and inhuman treatment in contravention of Articles 29(d) and (f) of *the Constitution*, it is instructive that in Section 2 of the *National Police Service Act*, “torture” is defined as hereunder:

“torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of—

- i. obtaining information or a confession from the person or from a third person;
- ii. punishing the person for an act which that person or a third person has committed or is suspected of having committed;
- iii. intimidating or coercing the person or a third person; or



- iv. for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity:

Provided that torture does not include any pain or suffering arising from, inherent in or incidental to lawful sanctions.

- (44) A look at the medical documents attached to the 1st petitioner's Supporting Affidavit shows that he suffered no cut, bruise or swelling; and that he presented pain on the right eye and right hand. The burden of proof was on the 1st petitioner to demonstrate that the injuries were of the kind contemplated by Section 2 of the [National Police Service Act](#), which burden he failed to discharge.
- (45) Regarding the allegations that the 1st and 2nd respondents jointly with other officers and/or individually infringed the 1st petitioner's right to privacy contrary to Article 31 of [the Constitution](#) by breaking into and searching his residence without any lawful cause; and in seizing the 1st petitioner's property and going through/browsing his phones and laptop computer without his consent, it is noteworthy that Sections 57 of the [National Police Service Act](#) gives the police the power to enter premises and conduct a search without a warrant if the police officer has reasonable cause to suspect the premises or equipment is being used in the commission of, or to facilitate the commission of an offence. It was therefore incumbent on the petitioners to demonstrate that in this instance, the 1st and 2nd respondent went beyond what is permitted in law; which, again, they failed to do.
- (46) Allegations were also made by the petitioners that the 1st and 2nd respondents together with other police officers from Bamburi Police Station took away the 1st petitioner's money and new mobile phone and failed to return the same, thereby depriving him of his property in contravention of Article 40(3) of [the Constitution](#). This, to my mind, appears to an allegation of theft and ought to have been treated as such. I say so because Section 49(4) of the [National Police Service Act](#) is explicit that:

“A police officer who performs an official duty or exercises police powers shall perform such duty or exercise such power in a manner that is lawful.”

- (47) Where a police officer deviates from the bounds imposed by law, such a complaint ought to be pursued in accordance with the applicable law and does not necessarily become a constitutional issue. Article 40(3) of [the Constitution](#) contemplates loftier violations than what has been alleged herein by the 1st petitioner; for it provides that:

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- a. Results from an acquisition of land or an interest in land or conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person, and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”



- (48) It is now a cardinal principal that where there exists an alternative remedy through statutory law, then such a remedy should be pursued instead. For instance, in *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Hon. Lenaola, J. (as he then was) held:

“I should only say this as I conclude; in *Francis Waithaka -vs- Kenyatta University Petition No. 633 of 2011*, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang -vs- Ariong (1987) LRC (const.) 517* where it was held as follows: -

“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owned by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

- (49) Hon. Lenaola, J. further stated, and I entirely agree with him on this: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

[50] Hon. Chacha, J. was of a similar view in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR, thus:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

- (51) In the premises, it is manifest that the 1st petitioner has failed to demonstrate any violation of Article 40(3) of *the Constitution*.

B. On whether the petitioners are entitled to the reliefs sought:

- (52) As indicated hereinabove, the petitioners prayed for the following reliefs:



- (a) A declaration that the conduct of the police officers and the respondents violated the petitioners' rights and fundamental freedoms provided for under Articles 27(4), 27(5), 28, 29(a), 29(b), 29(c), 29(d), 29(f), 31, 40(3), 49(1)(a) and 49(1)(h) of *the Constitution*;
 - (b) An order of compensation in general damages of Kshs. 5,000,000/= against the respondents jointly and severally for violating the 1st petitioner's human rights and fundamental freedoms;
 - (c) An order of compensation in general damages of Kshs. 5,000,000/= against the respondents jointly and severally for violating the 2nd petitioner's human rights and freedoms;
 - (d) An order directing the 1st respondent to refund to the 1st petitioner a sum of Kshs. 21,500/=;
 - (e) An order directing the respondents to return to the 1st petitioner his Nigerian passport no. A11502311 and all his possessions listed in paragraph 45 of the Petition;
 - (f) An order of Mandamus directing the 4th respondent and the interested party to take disciplinary action against the 1st, 2nd and 3rd respondents and against all culpable police officers who took part in the violation of the petitioners' rights and fundamental freedoms.
 - (g) Interest at court rate;
 - (h) Costs of the Petition;
 - (i) Any other relief as the Court may deem fit to grant.
- (53) In the light of my conclusions and findings hereinabove, it is manifest that the petitioners' prayers are untenable. As for the prayer for an order of Mandamus against the 4th respondent and the interested party, I need only add that, as correctly pointed out by counsel for the interested party, since the petitioners opted to enjoin IPOA as an interested party, it was presumed from the start that no substantive orders would issue against it. Indeed, at paragraph 7 of the Petition, the petitioners set out the role of the interested party as follows:

“...It is responsible for holding police officers accountable to the public in the performance of their duties. Its functions include inter alia investigating any complaints related to disciplinary or criminal offences committed by any police officer.”

- (54) The petitioners were accordingly in agreement with the interested party that it has no statutory mandate to take disciplinary action against the 1st, 2nd or 3rd respondents; and therefore that an order of Mandamus in that regard would be misplaced. The scope of the remedy is well-captured in Halsbury's Laws of England, 4th Edition, Volume 1 thus:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual...The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves a discretion as to the mode of performing the duty in the hands of the



party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

- (55) Hence, in Republic the Commissioner of Lands and Another Ex-Parte Kithinji Murugu M’agere, Nairobi High Court Misc. Application No. 395 of 2012, Hon. Odunga, J. (as he then was) explored the circumstances under which an order of mandamus can issue and had the following to say which I find persuasive:

Mandamus is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law... Thirdly, mandamus may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of mandamus against an authority, the affected person, or persons, must have demanded justice, which must be refused.”

- (56) It is in the light of the foregoing that I find no merit in the Petition. The same is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF AUGUST 2023

OLGA SEWE

JUDGE

