



Ugochukwu v P.C. Diba & 3 others; Independent Policing Oversight Authority (Interested Party) (Petition E053 of 2022) [2023] KEHC 21947 (KLR) (21 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E053 OF 2022
OA SEWE, J
AUGUST 21, 2023
IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION
OF KENYA, 2010
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27(1),
27(4), 27(5), 28, 29, 31, 40, 49 OF THE CONSTITUTION OF
KENYA**

BETWEEN

ANAMONYE ANTHONY UGOCHUKWU PETITIONER

AND

P.C. DIBA 1ST RESPONDENT

THE OCS, MTWAPA POLICE STATION 2ND RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

**INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED
PARTY**

JUDGMENT

- (1) The petitioner, Anamonye Anthony Ugochukwu, described himself as a university student and a Nigerian citizen who has been living in Kenya since 2018. He averred that he obtained his



undergraduate and master's degrees in Philosophy while in Kenya; and is currently pursuing a second master's degree in Political Science. He complained that on June 11, 2022 at around 12.30 p.m., while walking along the road towards Mtwapa Mall with his friend, one Mr. Okorare Emmanuel Tobore, they were discriminately targeted, stopped, unlawfully arrested and detained by the 1st respondent who was in the company of other police officers from Mtwapa Police Station.

- (2) The petitioner averred that they were stopped for no reason other than that they were Nigerian citizens; and that the intention of the police officers was to extort money from them. According to him the 1st respondent was acting on the instructions and command of the 2nd and 3rd respondents; and that he had been targeted solely because he had lodged a complaint with the Independent Policing Oversight Authority (the interested party) against their colleagues stationed at Bamburi Police Station. He further averred that, in spite of properly identifying himself by producing his valid original Alien Card, he was nevertheless arrested along with his friend and placed in custody at Mtwapa Police Station; and that while his friend was later released, he was detained in filthy conditions for 3 days and 2 nights without any charges being brought against him.
- (3) He also mentioned that before being taken to the police station, the police officers unlawfully searched his residence at Global Africa Apartments in his absence and compelled him to disclose his phone password. He further deposed that, upon his release on Monday June 13, 2022 at around 2.19 p.m. after posting cash bail of Kshs. 30,000/= the police declined to give him back his Foreigner Certificate also known as Alien Card. He brought the matter to the attention of the interested party on June 14, 2022, but the Alien Card was yet to be released to him despite the intervention of the interested party. He added that he is greatly inconvenienced without his Alien Card as he has suffered missed opportunities and is exposed to further harassment by other police officers.
- (4) Hence, at paragraphs 38 to 53 of his Petition, the petitioner alleged violations of his rights and fundamental freedoms pursuant to the following provisions of the Constitution:
 - (a) Articles 27(4) and (5): in that he was discriminated against simply because he is a Nigerian citizen; and in being detained for 3 days even after presenting his identification documents, while his friend was released;
 - (b) Article 28: in that he was unjustly arrested and detained for 3 days and 2 nights in the filthy cells of Mtwapa Police Station thereby violating his inherent dignity;
 - (c) Article 29(a) and 29(b): for arbitrary arrest and denial of bail for no reason, thereby infringing his right to freedom and security;
 - (d) Article 29(f): in that the 1st and 2nd respondents jointly with other police officers treated him in a degrading and inhuman manner by locking him up in filthy cells for 3 days and 2 nights.
 - (e) Article 31: in that the 1st and 2nd respondents jointly with other police officers infringed and violated his privacy by searching his residence without a warrant and/or lawful cause; and in compelling him to reveal passwords for his phones and proceeding to browse through his phones for two days without his consent;
 - (f) Article 40(3): in that the 1st and 2nd respondents jointly with other police officers attempted to extort and/or deprive him of his property by menacingly demanding for money from him in the form of bribes so as to secure his freedom;
 - (g) Article 49(1)(c): in that while he was under lawful arrest and detainment, the 1st and 2nd respondents jointly with other police officers and/or individually denied him a chance to use his phone for purposes of calling anyone to come to his assistance;



- (h) Article 49(1)(f): in that the respondents jointly with other police officers and/or individually failed to present the petitioner before a court of law as soon as reasonably possible;
- (i) Article 49(1)(h): in that the respondents jointly with other police officers and/or individually declined to grant the petitioner cash bail;
- (5) The petitioner further averred that the 1st and 2nd respondents failed to perform their duties in compliance with the law but, to the contrary, did so with utmost disrespect for the rule of law, human rights, and fundamental freedoms contrary to Articles 238(1)(b) and 244(c) of the Constitution as well as the mandatory provisions of the National Police Service Act, and therefore all the respondents ought to be held liable for the constitutional violations committed. He also blamed the interested party for his woes, contending that despite lodging his complaint, the interested party slackened in its constitutional duty to hold the officers concerned accountable for their misconduct.
- (6) In the premises, the petitioner prayed for the following reliefs against the respondents:
- (a) A declaration that the conduct of the police officers and the respondents herein violated, infringed and/or threatened the petitioner's rights and fundamental freedoms provided for under Articles 27(1), 27(4), 27(5), 28, 29(a), 29(b), 29(f), 31, 40(3), 49(1)(a), 49(1)(c) 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 petitioner's human rights and fundamental freedoms;
- (c) An order directing the 1st respondent and 2nd respondents to forthwith return to the petitioner his Alien Card No. 1xxxxxx2;
- (d) An order of Mandamus directing the 3rd respondent and the interested party to take disciplinary action against the 1st and 2nd respondents and against all culpable police officers who took part in the violation of the petitioner's 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) In support of the Petition, the petitioner relied on his affidavit sworn on September 30, 2022 in which he reiterated his averments in the Petition in connection with his arrest on Saturday June 11, 2022 at 12.30 p.m. by the 1st respondent in the company of other police officers. He annexed to his affidavit several documents, including a photocopy of his Alien Card, Cash Bail Receipt and a letter dated July 20, 2022 from Mtwapa Police Station to the Regional Quartermaster, Coast Region, for the release of the cash bail paid by him. The petitioner also annexed to his affidavit a copy of the receipt for court fees paid and 1st page of his earlier Petition in respect of his complaint against certain police officers attached to Bamburi Police Station to demonstrate that his arrest in this instance had a bearing on that first incident and his complaint to the interested party against the OCS, Mtwapa Police Station for failing to record his complaint against those police officers. The documents were marked Annexures "AA-1" to "AA-5".
- (8) On behalf of the respondents, two Replying Affidavits were filed herein, sworn by the investigating officer, PC Diba Halake, who is the 1st respondent and by Ms. Biberone Umanzi, the OCS, Mtwapa Police Station, who is also the 2nd respondent herein. Both affidavits were sworn on December 16, 2022. On behalf of the 3rd 4th and 5th respondents, PC Diba Halake, an officer attached to the Directorate of



Criminal Investigation, Mtwapa Police Station stated that he was the investigating officer in the matter; and that on Saturday June 11, 2022, he arrested two Nigerian nationals, namely Okorare Emmanuel Tabore and Anamonye Anthony Ogochukwu, for the offence of being unlawfully present in Kenya. He added that they had received public complaints that the two individuals 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 for their stay in Kenya. PC Halake further stated that upon producing his passport on June 12, 2022 through his girlfriend, Okorare Emmanuel Tabore was released vide OB No. 35.

- (9) PC Halake further deposed that, on June 13, 2022, Anamonye Anthony Oguchukwu, availed a Police Abstract vide report No. 48/8/6/2022 and an Alien Identification Card No. 10146682 issued on May 26, 2021 with an expiry date of October 4, 2022. He was accordingly instructed by the Deputy DCIO, CI Joshua Shoka, to release and did release the petitioner on cash bail of Kshs. 30,000/= for which an official receipt was issued. He thereafter continued with his investigations and sent the petitioner's Alien Identification Card to the Registrar of Persons, Nairobi, for verification.
- (10) PC Halake further deposed that he later got to learn that the 1st petitioner had made a complaint against him to the Independent Policing Oversight Authority (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 October 6, 2022, indicating that the letter of inquiry ought to have been directed to the 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.
- (11) On his part, the 2nd respondent averred that she is the custodian of cash bail both for the station and the office of the DCI. She confirmed that on June 11, 2022, the petitioner was arrested by officers attached to DCI's office, Kilifi South, and was booked vide OB No. 45/11/6/2022 for the offence of being illegally in Kenya contrary to Section 13(2) of the Immigration Act. He further confirmed that the petitioner was released on cash bail of Kshs. 30,000/= for which a cash bail receipt no. 1696299 was issued; and that when the petitioner went back to the station on July 20, 2022 for refund of the cash bail, she wrote a letter to the Coast Region Quartermaster for refund.
- (12) Ms. Umanzi further averred that she did everything in accordance with the established procedures and without any malice; adding that she was not privy to the allegations raised in the Petition since the investigations were being carried out by the office of the DCI, Mtwapa, which is a separate department from hers. She annexed extracts of the relevant OB entries and the letters to the Regional Quartermaster in connection with the petitioner's cash bail and concluded her affidavit by asserting that the petitioner's allegations and prayers are not merited and therefore ought to be dismissed with costs.
- (13) With the leave of the Court, the petitioner filed a Supplementary Affidavit in response to the respondents' affidavits. He refuted the assertions by Ms. Umanzi at paragraphs 6 and 11 of her Replying Affidavit, and asserted that she was involved in his initial complaint against certain police officers attached to Bamburi Police Station; and therefore could not feign ignorance of the circumstances surrounding his second arrest on June 11, 2022. Likewise, the petitioner considered false the assertion by PC Halake that there were public complaints against him contending that there was no record of any such complaint anywhere. He controverted the other averments in PC Halake's affidavit and reiterated his contention that he was arrested for no apparent reason, and in disregard of the fact that he availed his Alien Card to PC Halake.



- (14) In response to the Petition, the interested party filed Grounds of Opposition dated March 3, 2023 contending that:
- (a) the interested party has been wrongfully enjoined in this Petition;
 - (b) the petitioner has not clearly demonstrated the violation or threatened violation of his fundamental rights and freedoms or the manner in which his rights have been violated by the interested party;
 - (c) The order of Mandamus sought against it, namely, to take disciplinary action against the 1st and 2nd respondents, is not within its mandate.
- (15) In addition to the Grounds of Opposition aforesated, the interested party relied on the Replying Affidavit sworn on its behalf on March 6, 2023 by one of its senior investigating officers, Mr. Joshua Kakundi. At paragraphs 4 to 8 of that affidavit, Mr. Kakundi set out the objectives and functions of the interested party. He also confirmed that the petitioner lodged a complaint with the interested party on June 17, 2022 against particular police officers based at Mtwapa Police Station; and that the interested party conducted preliminary investigations and presented its report to the Regional Criminal Investigations Officer, Coast Region.
- (16) Mr. Kakundi further deposed that, through the intervention of the interested party, the petitioner was refunded his cash bail and given back his Police Abstract for a lost passport. Hence, it was the assertion of Mr. Kakundi that the interested party took appropriate action on the petitioner's complaint; and therefore that the Petition was prematurely filed. He annexed to his affidavit a copy of the petitioner's complaint as well as a copy of the interested party's letter to the Regional Criminal Investigations Officer.
- (17) In its Further Affidavit sworn on March 23, 2023, the petitioner denied the assertions by Mr. Joshua Kakundi sworn on March 6, 2023. He deposed that he wrote to the interested party seeking for information vide an email and a letter dated September 12, 2022 but that his letter was ignored by the interested party.
- (18) The Petition was canvassed by way of written submissions, pursuant to the directions were given on March 16, 2023. Accordingly, on behalf of the petitioner, Mr. Situma filed his written submissions dated April 13, 2023. He reiterated the factual background of the Petition as set out in the petitioner's affidavits and proposed the following issues for determination:
- (a) Whether the petitioner's rights and fundamental freedoms were violated;
 - (b) Whether the interested party is a proper party in this Petition; and,
 - (c) Whether the petitioner is entitled to the reliefs sought.
- (19) Mr. Situma submitted that the Petition has been brought in accordance with the provisions of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and has been pleaded with the requisite particularity. He relied on *David Gathu Thuo v Attorney General & Another* [2021] eKLR to support his assertion. He further submitted that the petitioner has availed sufficient evidence to demonstrate that his rights under Articles 27, 28, 29, 31, 40(3) and 49 of the Constitution were violated by the respondents.
20. Mr. Situma further submitted that IPOA is a proper party to this Petition for the reason that it has an interest in the reliefs sought. He made reference to the interested party's Replying Affidavit, and in particular paragraph 5 thereof where Mr. Kakundi set out the mandate of IPOA of, inter alia, holding



police officers accountable to the public in the performance of its functions. He therefore submitted that the petitioner's prayer for Mandamus falls within that mandate. He further pointed out that the interested party's letter dated July 22, 2022, if anything, supports the petitioner's case.

- (21) Accordingly, Mr. Situma urged the Court to grant the petitioner the prayers sought in the Petition. In terms of compensation, counsel proposed an award of Kshs. 5,000,000/= on the authority of 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 present case.
- (22) Mrs. Waswa filed her written submissions dated June 8, 2023 which, in effect is a replication of the written submissions filed by her in Mombasa High Court Petition No. E052 of 2022: Anamonye Anthony Ugochukwu v Esther Kombo and Others. Thus, on behalf of the 3rd, 4th and 5th respondents, she proposed the following issues for consideration:
 - (a) Whether the petitioner's rights and fundamental freedoms were indeed violated;
 - (b) Whether the Petition passes the test of burden of proof;
 - (c) Whether the petitioner is entitled to the reliefs sought.
- (23) Mrs. Waswa submitted, on the authority of Anarita Karimi Njeru v Republic [1976-1980] KLR 1272, that the petitioner was under duty to plead with reasonable precision the manner in which his constitutional rights were violated. She argued that, although the petitioner relied on various provisions of the Constitution, no evidence was adduced by him to back up his 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 petitioner. 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 petitioner's arrest was lawful.
- (24) 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 it is within the discretion of the OCS to release a suspect on cash bail or not; and that in this instance, the petitioner was 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 petitioner utterly failed to prove his allegations of torture, or his assertion that his 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 ought not be made in a factual vacuum, as that would have the effect of trivializing the Constitution.
- (25) On whether the petitioner is 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 petitioner, having failed to demonstrate that the police officers concerned were actuated by malice, is not entitled to the reliefs sought. Thus, Mrs. Waswa urged for the dismissal of the Petition.
- (26) On behalf of the interested party, written submissions dated April 26, 2023 were filed herein by Ms. Oyosi in response to the petitioner's allegation that the interested party slackened in its constitutional duty to hold the respondents accountable for their misconduct. She likewise adopted the written



submissions filed by her in Petition No. E052 of 2022 aforementioned and proposed the following issues for determination:

- (a) Whether the petitioner 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.
- (27) Ms. Oyosi submitted that, having joined IPOA to these proceedings as an interested party and not as a respondent, it is impermissible for the petitioner 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, 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.
- (28) Ms. Oyosi further submitted that the petitioner failed to discharge the burden of proving his 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 Affidavit 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 preliminary investigations were conducted by the interested party and a report forwarded to the RCIO, Coast Region. She therefore urged the Court to find no truth in the petitioner’s allegations, granted the acknowledgment at paragraph 8 of the petitioner’s written submissions that the interested party conducted investigations into his complaint.
- (29) 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 submitted 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 *Kenya National Examinations Council v Republic, Ex Parte Gathenji Njoroge & 9 Others*, [1997] eKLR, and *Republic v Kenya Vision 2030 Delivery Board & Another, Ex Parte Eng. Judah Abekah* [2015] eKLR in support of her arguments and prayed for the dismissal of the Petition with costs to the interested party.
- (30) From the foregoing summary, it is not in dispute that, the petitioner is 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 by the 1st respondent and his colleagues on June 11, 2022. He was then in the company of a fellow Nigerian by the name Okorare Emmanuel Tobore who was similarly arrested. At paragraphs 4 and 5 of his Supporting Affidavit, the petitioner stated that the policemen addressed them as “Oga”, a word commonly used in Nigeria to refer to a man. He therefore concluded that the police officers knew beforehand that they were Nigerians.
- (31) It is also common ground that the petitioner and his compatriot were arrested on suspicion of being unlawfully present in Kenya. At paragraph 7 of the petitioner’s Supporting Affidavit, the petitioner deposed that the officer, who he came to know as PC Diba (the 1st respondent herein), asked them to produce their documents. He added that the 1st respondent introduced himself as a DCI officer from Mtwapa Police Station. They were thereafter arrested and taken to his house for a search before being taken to Mtwapa Police Station.



(32) While PC Diba averred that the petitioner and his compatriot were arrested on the suspicion of being unlawfully present in Kenya and were released in accordance with the applicable procedural law, the petitioner took the stance that his constitutional rights were violated in more ways than one by the respondents. He added that upon release after spending three days in custody, PC Diba declined to give him the original copy of his Alien Card or to refund his cash bail. He was accordingly constrained to make a complaint to IPOA to have his cash bail refunded as demonstrated vide the interested party's affidavit.

(33) As correctly pointed out by learned counsel, it is now settled that a litigant alleging violation of constitutional rights or freedoms, must plead his case with reasonable precision. This principle was enunciated in Anarita Karimi Njeru Case, thus:

“...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.”

(34) It is manifest from the Petition that the petitioner complied with this requirement in that he set out the names of the parties and the respective positions in Part A of the Petition; while in Part B he set out the legal foundation of his 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 by him at Part D thereof as well as the prayers sought at Part F. I am therefore satisfied that the petitioner pleaded his case with the requisite specificity expected. 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.”

(35) In the premises, the issues that emerge herein for determination, as correctly pointed out by learned counsel are:

- (a) Whether the petitioner has discharged the burden of proving that his rights and fundamental freedoms were violated as alleged; and,
- (b) Whether the petitioner is entitled to the reliefs sought.

A. On the burden of proof:



(36) Needless to stated that the legal burden of proof, in this matter, rested on the petitioner. 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.”

(37) Moreover, in *Leonard Otieno v Airtel Kenya Limited* (supra) it was emphasized 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 the Petition and noted the alleged violations vis-à-vis the evidence in support as deposed to in the petitioner’s Supporting Affidavit. The first violation alleged by the petitioner was discrimination. He alleged that he was profiled and targeted by the respondents for arrest for no reason other than for being a Nigerian. According to him, this was in violation of Articles 27(4) and (5) of the Constitution, which state:

(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) According to Black’s Law Dictionary, discrimination is defined to mean:

“Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

40 Thus, in *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR it was held that:

“...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”



- (41) In this instance, it has been explained by the respondents that the petitioner was arrested for the purpose of ascertaining whether or not he was lawfully present in Kenya. That is a lawful purpose; a purpose effected by the 1st respondent and his colleagues pursuant to a constitutional mandate given to the National Police Service under Articles 244 and 247 of the Constitution. The petitioner having conceded that his arrest was on the suspicion that, being a Nigerian, he was unlawfully present in Kenya, his contention that he was discriminated against has no basis.
- (42) Indeed, at paragraph 7 of his Supporting Affidavit, the petitioner averred that he was asked to identify himself and present his documents and that he immediately produced his Alien Card. He further conceded that he did not have his passport at the time and had been issued with an Abstract in that regard, which was not readily available. He further conceded that his compatriot Emmanuel did not have any documents with him either and had to send for them; and that they were both arrested and taken to the police station with his friend. It is plain then that there was no differential treatment between him and his friend in terms of their arrest and the reason for arrest.
- (43) It is instructive that 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 petitioner 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, it cannot be said that the petitioner was deprived of his freedom and detained for no apparent reason as to constitute a breach of Article 29(a) and 29(b) of the Constitution.
- (44) The petitioner's second ground for complaint was that his right to inherent dignity under Article 28 of the Constitution was grossly violated in that he was unjustifiably detained for 3 days and 2 nights in filthy cells at Mtwapa Police Station. Article 28 states that:
- “Every person has inherent dignity and the right to have that dignity respected and protected.”
- (45) In this regard counsel for the petitioner urged the Court to take into account that the police declined to release the petitioner on cash bail at the earliest opportunity and that ultimately no charge was preferred against him. Needless to mention that mere arrest and placement in custody is not a violation of the constitution. What Constitution does in this regard is to place a limit to the period of incarceration before a suspect's arraignment. Hence Article 49(1)(f) of the Constitution provides that:
- “An arrested person has the right ... to be brought before a court of law as soon as reasonably possible, but not later than-
- i. twenty-four hours after being arrested; or
 - ii. if the twenty-four hours ends outside ordinary hours, or on a day that is not an ordinary court day, the end of the next court day;”
- (46) Thus, having been arrested on Saturday June 11, 2022 the police had up to Monday June 13, 2022 to either take the petitioner to court or release him. He explained, at paragraphs 16 and 17 that in spite of presenting his Alien Card, the 1st respondent insisted on seeing his passport; and that, while his friend was released on Sunday after he presented his passport, he remained in custody because he was unable to avail his passport or the original abstract to prove its loss.
- (47) I note that the petitioner alleged extortion on the part of the 1st respondent and averred that this could be the reason why he was held in custody for longer. He further alleged that his friend was released after



he bribed the police officers. There was however no averment by his friend to support the allegations of extortion or bribery; such that the petitioner's averment in that regard are reduced to mere suppositions and hearsay. I therefore find no basis for forming the conclusion that the petitioner was discriminated against or that his rights to freedom and dignity under Articles 28 and 29(a), (b) and (f) were violated by reason of his incarceration from June 11, 2022 to June 13, 2022.

- (48) Regarding the allegations that the 1st and 2nd respondents jointly with other officers and/or individually infringed the petitioner's right to privacy contrary to Article 31 of the Constitution by searching his residence without any lawful cause; and in going through/browsing his phones 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 petitioner to demonstrate that in this instance, the 1st respondent went beyond what is permitted in law; and in my view, this burden was not discharged, granted the assertion by PC Diba that they had received public complaints that the petitioner and his companion were allegedly involved in the circulation of fake currency.
- (49) Allegations were also made by the petitioner that there was a threatened violation of his right to property under Article 40(3) of the Constitution. He alleged in this regard that the 1st respondent attempted to extort money from him in the form of a bribe so as to secure his release. Having found that this allegation was not proved, it follows that the assertion is baseless. Moreover, 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.”

- (50). 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 transmute into a constitutional issue. It is noteworthy that the petitioner has already lodged a complaint with IPOA and in the affidavit of Mr. Kakundi, IPOA conducted its preliminary investigations and prepared a report to the RCIO, Coast Region. Since the response of the RCIO is yet to be communicated, I would agree that the Petition was prematurely filed.
- (51) More importantly, the complaint itself does not warrant consideration under Article 40(3) of the Constitution, which in my view, contemplates far more serious violations than what has been alleged herein by the petitioner. The petitioner alleges an attempt to extort money from him as amounting to a threat to his right under Article 40(3) of the Constitution, yet that Article 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.”

(52) 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”.

(53) 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.”

(54) 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.”



- (55) In the premises, it is manifest that the petitioner has failed to demonstrate any violation of Article 40(3) of the Constitution.
- (56) Lastly, the petitioner complained that he was denied the chance to use his phone for purposes of calling anyone to come to his assistance, thereby violating his right under Article 49(1)(c) of the Constitution, yet at paragraph 15 of his Supporting Affidavit, he averred that one of the police officers assisted him by sending a motorcyclist to his residence to notify his landlady of his whereabouts; and that as a result his landlady went to the police station and brought along his original Police Abstract and his friend's passport. Indeed, the petitioner was able to communicate with his advocate and thereafter post bail for his release. Clearly, his complaint in this regard is unwarranted.

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

- (57) In the light of my conclusions and findings hereinabove, it is manifest that the petitioner's prayers are untenable. As for the prayer for an order of Mandamus against the interested party, I need only add that, as correctly pointed out by counsel for the interested party, since the petitioner 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 petitioner 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.”

- (58) The petitioner was accordingly in agreement with the interested party that it has no statutory mandate to take disciplinary action against the 1st, 2nd or 3rd respondents. In the circumstances 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.”

- (59) 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.”

60 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

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PETITION NO. E053 OF 2022 JUDGMENT

