



**Independent Medico-Legal Unit & another v Attorney General & 4 others (Petition 209 of 2015)
[2023] KEHC 21858 (KLR) (Constitutional and Human Rights) (15 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21858 (KLR)

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

PETITION 209 OF 2015

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

**INDEPENDENT MEDICO-LEGAL UNIT 1ST PETITIONER
EARNEST NGWARA NYAMOTI 2ND PETITIONER**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT 2ND RESPONDENT
INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 3RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
JAMAL HUSSEIN ALIAS WORIA 5TH RESPONDENT**

JUDGMENT

1. The petition dated 20th May 2015 was filed under Articles 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 47, 48 and 51 of *the Constitution*. The petitioners seek the following orders:
 - i. A declaration that this is a public interest case.
 - ii. A declaration that the petitioners have all rights and guarantees as provided for under *the Constitution* and as specifically referenced herein.
 - iii. A declaration that the 2nd petitioner is entitled to adequate reparations including just compensation.



- iv. An order for reparation, including compensation under Article 23 of *the Constitution*.
- v. A declaration that the respondents have failed and or abdicated their duty to protect the 2nd petitioner.
- vi. A declaration that the respondents have violated the 2nd petitioner's human rights in that they have failed to adequately and or effectively record ,investigate, prosecute and or remedy a well-documented instance of assault under the Penal Code amounting to torture and ill- treatment contrary to Articles 25(a),28 and 29 of *the Constitution*.
- vii. An order and directions or both, in relation to the institution and conduct of the prosecution of the 5th respondent herein the perpetrator of the physical violence.
- viii. A declaration that the respondents have jointly and or severally acted or failed to act in such a way as to contravene their constitutional statutory and international obligations.
- ix. An order that the state take immediate steps to adopt measures as may be necessary to ensure prevention, punishment and eradication of all forms of institutionalized violence by public officers and especially police officers.
- x. Where appropriate, sanctions and remedies provided for under the Police Act.
- xi. Where appropriate sanctions and remedies provided for under the Penal Code.
- xii. Costs.
- xiii. Such other orders as this Honourable Court shall deem just and expedient to grant.

The Petitioners' case

2. The petition was supported by the 2nd petitioner's affidavit of even date and the 1st petitioner's witness statement dated 16th February 2018 that underscored the facts of this case.
3. The 2nd petitioner informs that he is a matatu driver by profession. He states that on 29th July 2013 while driving a Nissan matatu registration No. KAP 246U Nairobi - Thika road, he was informed by his conductor, Jones Fundi Munyolo that a police Land Cruiser registration No. GK A396S was trailing them. He depones that soon after, the vehicle blocked and stopped them.
4. He avers that four police officers alighted from the vehicle and slapped him. Further that the 5th respondent commonly referred to as Worja kicked him in his groin area, and continued kicking and beating even as he fell to the ground. One of the officers, nicknamed Mjaka proceeded to handcuff him and put him in the police car whereupon he was taken to Kasarani Police station.
5. He avers that his employers came to visit him at the Station and he told them that he had been injured and beaten during his arrest. He was presented before the Court the next day under Traffic Case No.11491 of 2013 (Republic v Earnest Nyamoti). He was charged with seven counts being: obstruction of traffic; failing to stop after being lawfully stopped; picking passengers at a non – designated are; driving a motor vehicle without a handbrake; driving a PSV vehicle in a non-designated area for PSV's; using reflective material on the PSV vehicle. He states that his employer's advised him to plead guilty, which he did save for one.
6. He informs that since his employers could not raise the cash bail he was taken to Industrial Area remand prison. He makes known that his wife, Florence Moraa Mairula made a report of his beating at Kasarani Police Station vide OB No.57/06/08/2013.



7. At the prison he informed the police officers that due to the 5th respondent's beating, his testicles had become swollen and painful. The remand clinic after examining him referred him to Kenyatta National Hospital (KNH) on 31st July 2013. He was admitted at the Hospital where he stayed for the next 7 days. Since the operating doctor was not available at the time of his discharge on 8th August 2013 he was asked to return at a later date.
8. After collapsing at the Prison on 24th August 2013 he was returned to the KNH where he was operated on and returned to the remand. With the support of well-wishers he was able to secure cash bail.
9. He avers that after his release he went to Kikuyu Mission Hospital because he had not been able to walk since his surgery. The test revealed that he had developed a blood clot after the initial operation. As a result surgery was required to remove the blood clot. Despite the surgery being done he informs that the blood clots kept developing at the area where he had been operated on, and it became paralyzed for a while. Around April 2014, the doctor recommended removal of the remaining testicle in an effort to curb the blood clots.
10. The overall effect of the 2nd petitioner's grievances in the end is that he is unable to walk normally. Furthermore, his marital and sex life has been affected. Likewise, he is unable to engage in gainful employment. These factors have caused him immense psychological torture and created a strain on his family of four.
11. It is asserted that upon his discharge, the 2nd petitioner went to Kasarani Police Station to record a statement and obtain the P3 form. He avers that the police declined to record his statement owing to his wife's initial report. It was only after the intervention of the 3rd respondent that the OCS Kasarani Police Station agreed to record the 1st petitioner's statement vide OB No.100/21/07/2014 and issued the P3 form.
12. The petitioners have brought this petition on the premise that the State and its officials are responsible through their acts and omissions for the assault and torture visited upon the 2nd petitioner. This is because the State is responsible for failing to take appropriate legal action, upholding and protecting the 2nd petitioner's constitutional rights.

The Petitioners' case viva voce evidence

13. The petitioners' called two witnesses, i.e. the 2nd petitioner and the doctor (PW1). The 2nd petitioner in his testimony relied on his witness statement as filed on 25th November 2019 (reiterated contents of his supporting affidavit) which he adopted as his evidence. Additionally, he relied on the documents that he filed in support of his case.
14. On cross examination, he confirmed that he had been charged in the traffic Court. He informed that thereafter a criminal case against the 5th respondent was filed. He asserted that the court file in respect of this criminal case had gotten lost and so was unaware of the Criminal Court's Ruling in the matter.
15. He testified that on the day of the arrest he had been handcuffed, thrown to the ground and kicked before being taken to the police station. He stated that there were 5 officers at the time of arrest but he could only identify the 5th respondent. He made known that it was the Independent Policing Oversight Authority (IPOA) which charged the 5th respondent.
16. On the surgery, he noted that he was unconscious when the surgery at KNH was conducted. He asserted that a foreign object had been left in his body following the operation at KNH. He on this point stated that he did not file a complaint against KNH over the foreign object. He as well informed



that once the criminal case was concluded he did not file an appeal since the lower court file had disappeared.

17. PW 1 – (Dr. David Kaburu) testified that he attained a Bachelor of Medicine and Surgery degree from the University of Nairobi and has been practicing for 20 years. He however did not produce any documentation to verify this.
18. He deposed that he first attended to the 2nd petitioner on 23rd September 2013 when he was admitted at PCEA Kikuyu Hospital. He informed that the 2nd petitioner had, had pain in the pubic area for about a month. He noted that the patient had initially been attended to at KNH on the issue. He stated that when he examined him, he found a mass in the right spermatic cord which was surgically removed and he was discharged on 27th September 2013.

The 2nd petitioner came back soon after with a swelling in his scrotum. The ultra sound revealed blood clots which were drained. Soon after, the blood clot reoccurred again. It was discovered that the clots were at the left testis which was corrected.
19. In cross examination, he deposed that at the time when they were treating the 2nd petitioner, they did not have the medical reports which had originally been done at KNH. He noted that he had also testified in the criminal case against the 5th respondent. He stated that his examination indicated that the injury had been caused by blunt force.
20. PW 1 also made known that the 2nd petitioner's condition could have been caused by some other factor other than an injury for instance hernia. He noted that the petitioner's right testis was missing while the left one was undescended which could have been a condition that occurred before the injury. He as well stated that there was no documentation of a foreign body found in the 2nd petitioner's body as a result of the operation done at KNH.

The Respondents' Case

The 1st, 2nd and 3rd Respondent's case

21. These respondents indicated that in response they had filed grounds of opposition dated 27th August 2015 although the same was not found in the court file or CTS.

The 4th Respondent's case

22. In response the 4th respondent filed the following grounds of opposition dated 21st September 2015:
 - i. Under Article 157 (10) of *the Constitution* and Section 6 of the Office of the Director of Public Prosecution Act (2013) the 4th respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction or control of any person or authority.
 - ii. Section 24 of the Police Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
 - iii. Since investigations are made in good faith, the petitioner has failed to demonstrate that the 4th respondent violated any of his rights as enshrined in *the Constitution* while in fact they are ensuring administration of justice has been done.
 - iv. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.



- v. The petition is premature as investigations are still ongoing and hence the police should be allowed to complete investigations and 4th respondent allowed to make the appropriate decision based on the evidence on record.
- vi. The petition is without merit and should be dismissed with costs to the 4th respondents.

The 5th Respondent's case

23. The 5th respondent filed a relying affidavit dated 25th July 2018. He informs that at the time he was on interdiction owing to a charge flowing from the 2nd petitioner's complaint under Nairobi Criminal Case No.1292 of 2016.
24. He deposes that on 29th July 2013, he was on duty at the General Service Unit/Baba Dogo Area when he spotted the 2nd petitioner picking passengers at the pedestrian crossing opposite the GSU gate. He notes that this is an undesignated pick up point and so the 2nd petitioner was causing traffic snarl up. He tried to stop the 2nd petitioner but failed to do so, and was almost hit as the matatu sped off. Police officers, PC Njambiru, PC Ogot and PC Nzangi who were coming from the City Centre saw this and stopped to pick him, and they pursued the 2nd petitioner's vehicle.
25. On spotting the police Land Cruiser, around the Roasters area, the 2nd petitioner took a left turn towards Garden Estate, and then took a rough road opposite Naivas Supermarket where he kept driving until he found a dead end. He deposes that at this point the 2nd petitioner came out of the vehicle and attempted to climb a perimeter wall in a bid to escape, but fell down in the process. He was arrested and taken to Kasarani Police Station. The 2nd petitioner was subsequently charged under Traffic case No.11491 of 2013. On the flipside due to the assault allegations the 5th respondent was subsequently charged under Criminal Case No.1292 of 2016.
26. The 5th respondent denies the allegation, stressing that Dr. Kiongi Mwaura in his testimony (at the Trial Court) clearly indicated that the loss of the 2nd petitioner's testicles was as a result of hernia which was a pre-existing condition long before their encounter. He further relied on the witness statements of fellow officers recorded by IPOA on what transpired on the material day. (annexed and marked in his affidavit as 'JH -3'). To that end, he asserted that he had executed his duties as a police officer professionally while observing the law.
27. The respondents did not call any witnesses during the oral hearing of the matter.

The Parties' Submissions

The Petitioner's submissions

28. The petitioners through the firm of Gichuru and Gichuru Advocates filed written submissions and a list of authorities dated 8th March 2023 where Counsel highlighted the issues for determination as:
 - i. Whether the 2nd petitioner's human rights and freedoms as enshrined in *the Constitution* were violated;
 - ii. What is the evidentiary weight (if any) of a criminal ruling in a civil matter;
 - iii. What are the appropriate reliefs (if any) to grant the petitioners?
29. On the first issue counsel commenced by stating that in relation to the threshold set in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154 the petitioners were only required to create a link between the provisions violated and the facts of the case which had been done by the 2nd petitioner in his affidavit.



- It was hence submitted that the 2nd petitioner's arrest was without due regard to the law and in blatant violation of his rights under Articles 25 (a), 28 and 29 (c), (d) & (f) of *the Constitution*. Similar reliance was placed on the dictates of Articles 1 and 5 of the Universal Declaration of Human Rights, 1949.
30. In essence Counsel submitted that any acts or omissions that contravene the physical and/or psychological integrity and dignity of the individual will be deemed to be in violation of Human Rights and Freedoms. To buttress this point reliance was placed on the case of *Chege Kuria Mwere & 6 others Vs Attorney General (2017) eKLR* where it was held that actions that amount to inhuman and degrading treatment are out rightly unconstitutional. Related reliance was placed on the case of *Gitau Njau & 9 others V. Attorney General [2013] eKLR*.
 31. Counsel thus submitted that the 2nd petitioner's grievances began after the torture and cruelty meted out during his arrest on 29th July 2013. This was marred with cruelty, inhuman and degrading treatment. He stated while relying on the case of *Republic v Titus Ngamau Musila Katitu [2018] eKLR* that one of the objectives of the *National Police Service Act* is to give effect to among others, Article 238 of *the Constitution* and Article 244, which sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms which the respondents failed to do.
 32. Counsel further submitted that the acts of omission and commission by the respondents in this matter were done in the course of their official duty which was clearly in violation of the values espoused in Article 10 of *the Constitution*.
 33. On the second issue, counsel while citing Section 45 of the *Evidence Act* submitted that such judgments, orders or decrees are not conclusive proof of that which they state. It was asserted that the ruling given in Criminal Case No. 1292 of 2016 is not conclusive proof of that which they state in civil suits because the standard of proof in criminal suits and civil suits is not similar. In support, reliance was placed on the case of *Mwaura Ndegwa –Vs- Isaiah Njuguna (2007) eKLR* where it was held that the acquittal of the appellants is not a bar to civil proceedings against them. Further that the judgment or ruling containing the acquittal is not binding on the court seized of the civil proceedings. A civil court faced with evidence similar to that of the criminal proceedings is entitled to make its own assessment of the same and then arrive at its own conclusion. Further the standard of proof required is different. This being the case it is not surprising that evidence that fails to secure a conviction can secure a finding of a liability.
 34. Counsel submitted that this matter proceeded by way of viva voce hearing and the respondents chose not to call any witness, denying the petitioner an opportunity to test the evidence of the respondents. Likewise, the 5th respondent opted not to testify and did not call any witnesses. In view of this he submitted that the probative value of the witness statements as contained in the 5th respondent's replying affidavit was highly diminished as it did not satisfy the mandatory circumstances contemplated under Section 35 of the *Evidence Act*.
 35. On the final issue, counsel relied on Article 23(3) of *the Constitution* submitted that the 2nd petitioner was entitled to the reliefs sought owing to violation of his rights under Articles 25, 28 and 29, of *the Constitution*. To buttress this point reference was made to the case of *Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR* where it was held that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements.
 36. Counsel in view of the 2nd petitioner's injuries sought an award of Kshs 20,000,000/= as was awarded in the case of *Otieno mak'onyango v Attorney General & another [2012] eKLR*.



The 1st, 2nd and 3rd Respondent's Submissions

37. Principal State Counsel, Thande Kuria on behalf of these respondents filed written submissions dated 27th February 2023. Counsel begun by submitting that the 5th respondent had duly executed his duty. Besides the 2nd petitioner had admitted that he was charged with traffic offences arising out of the said arrest. He admitted the same and was fined as affirmed under Section 45 of the [National Police Service Act](#) No.11A of 2011. In such situations therefore an officer is absolved from personal liability under Section 66 of the Act.
38. On the flipside Counsel stressed that to the extent that the officer executed his duties lawfully the 1st, 2nd and 3rd respondents are only liable for any infractions arising therefrom but done bona fides and within the confines of the law. In view of this, he submitted that anything done in excess of police powers as permitted by [the Constitution](#), the National Police Act and the Police Standing Orders are not actions where government can be held to be vicariously liable.
39. Counsel went on to submit that it is settled in law that allegations of violations of the bill of rights ought to be raised at the earliest opportunity during the trial process. Where the claims arise from investigations or ongoing proceedings, a party ought to raise the issue of the allegation before the presiding judge in the course of the proceedings before it as stated by the Court of Appeal in the case of Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 [2010] eKLR. He noted that this was not done by the 2nd petitioner and so the allegations were an afterthought. This is since the allegations were never raised at the Magistrate Court where he was tried for the traffic offences or with the 5th respondent's superiors.
40. On the nexus between the arrest of the petitioner and the injuries sustained following the alleged assault by the 5th respondent, Counsel refuted this claim based on the testimony of Dr. Kiongi Mwaura who initially examined the 2nd petitioner at KNH (found at page 25 of the 5th respondent's replying affidavit). He deposed that neither a kick from the rear anus nor a kick in the scrotal area can cause inguinal hernia. His testimony was that hernia occurs naturally and later in life.
41. He noted that the doctor who testified on behalf of the petitioner maintained that the condition of the 2nd petitioner was caused by a blunt trauma to the scrotal area yet did not treat him at the primary level. It is stated that the initial medical reports did not make a finding that the said swelling was a result of blunt trauma as alleged later on.
42. Counsel went further to state that the 2nd petitioner's consistent medical interventions that led to the surgery occurred once the 2nd petitioner consulted a different hospital. He noted that when the 2nd petitioner was taken to Kikuyu Mission Hospital, it emerged that a foreign item had been abandoned in his body during the previous operation. As a result, the area on which he had been previously operated had started to decompose. On conclusion of the second operation he became paralyzed. In view of all these grave components, Counsel submitted that nothing had been said of the doctors' negligence in the matter.
43. Counsel thus submitted that there was no nexus between the arrest of the petitioner herein and the injuries allegedly inflicted by the 5th respondent. Further that there was no connection between the 2nd petitioner and the 5th respondent in the initial medical report by KNH when the 2nd petitioner was still at Industrial Area Remand Prison.
44. Counsel in closing submitted that the damages claimed for violation of the 2nd petitioner's fundamental rights and freedom were too remote to be entertained by this Court. In support reliance was placed on the Court of Appeal case of Catecna Inspection S.A Vs. Items Group Training Company



Ltd (2007) eKLR where it was held that there must be a link between the action complained of and the loss incurred. It underlies the doctrine of remoteness of damages.

The 4th Respondent's Submissions

45. This respondent did not file written submissions.

The 5th Respondent's Submissions

46. The 5th respondent filed written submissions and a list of authorities dated 14th February 2023 through the firm of Paul Mungla and Company Advocates.
47. On whether the petitioners' have made out a case to warrant grant of the sought orders, counsel submitted that they had failed to do so in line with the threshold set out in Anarita Karimi Njeru (supra) and upheld in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. He further pointed out that the burden of proof lies with the petitioners to demonstrate the nexus between the alleged injuries suffered and the role of the 5th respondent which they failed to do.
48. Additionally counsel faulted the petitioners for being guilty of material non-disclosure. This is since they failed to inform the court that the 5th respondent had been charged and arraigned in court with reference to the petitioner's complaint and subsequently acquitted in the ruling dated 11th April 2018; furthermore IPOA was seized of the matter and lastly that the 2nd petitioner had a previous medical condition called hernia which existed before his encounter with the 5th respondent. Considering this, counsel submitted that the petitioners were not entitled to the orders sought because they had not approached the court with clean hands and good faith.
49. In support reliance was placed on the case of Kenya Planters Cooperative Union LTD v Kenya Commercial Bank Limited & 4 others (2016) eKLR where it was held that the effect of material non-disclosure amounts to abuse of the court process and court ought to protect and prevent abuse of the process. Comparable reliance was placed on the case of Sceneries Limited v National Land Commission, Miscellaneous Constitutional Application No.1 of 2016.
50. Speaking to the 2nd petitioner's oral testimony counsel pointed out that the testimony was marred with discrepancies and contradictions. In a nutshell, he asserted that the 2nd petitioner alleged that the criminal file containing the 5th respondent's proceedings got lost yet he did not adduce any evidence to support the claim; gave contradictory testament on the fact that led to his injuries. Likewise, Dr .David Kaburu failed to prove he was a licensed medical practitioner hence his expert testimony was questionable. He noted that the Court of Appeal in the case of Kagina V Kagina & 2 others (Civil Appeal 21 of 2017) (2021) KECA 242 (KLR) (3 December 2021) (Judgement) held that an expert witness must first demonstrate and adduce evidence of his expertise before proceeding to give such expert evidence.
51. Counsel further faulted the admissibility of the evidence adduced for the reason that the documents sought to be relied upon in the instant petition were not produced by the people who made them hence their authenticity cannot be ascertained. In effect admission of the same will be prejudicial to the 5th respondent and other respondents.
52. Turning to the issue of abuse of the court process, counsel submitted that, the petition was being used as a personal vendetta against the 5th respondent. This was premised on the fact that the petitioner proceeded to bring the instant action against the 5th respondent while being aware that the matter was being tried by a court of competent jurisdiction and failing to disclose the same. To buttress this point



counsel cited the case of *Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others*, Petition 82 of 2016 where the court held that an abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.

53. On the remedies sought, counsel submitted that the same were not only ambiguous but unenforceable. This is since the prayers were couched in broad and vague terms and so the same could not be granted. For instance while the petitioners sought orders against the State, they were not clear on the actions that had been undertaken by the State that amounted to the alleged claim. This was despite the fact that a criminal case was instigated against the 5th respondent.
54. Counsel further stressed that courts have been reluctant to interfere and encroach on their mandate where the relevant organs have taken the necessary action in prosecuting a matter as seen in the cases of *Republic v Commissioner of Police and another Ex parte Michael Monari & another* (2012) eKLR and *Kipoki Oreu Tasur v Inspector General of Police & 5 others* (2014) eKLR. Additional reliance was placed on the *Mumo Matem* case (supra). To this end counsel submitted that the petitioners had failed to prove their case hence not entitled to the orders sought.

Analysis and Determination

55. I find it prudent to address a preliminary issue before commencing on the determination of the issues raised by the parties. The instant suit was filed on 20th May 2015, and the respondents opposed the petition as the criminal proceedings against the 5th respondent had not commenced as investigations were ongoing. Plainly, the petitioners' grievance at the time of filing this suit was the alleged 5th respondent's unlawful actions against the 2nd petitioner and the respondents' responsibility with reference to its officers.
56. As submitted, charges were brought against the 5th respondent vide Nairobi Criminal Case No.1292 of 2016 before the Criminal Court. The case has since been heard and determined as pointed out by the parties. It was stated that the trial court in its Ruling dated 11th April 2018 acquitted the 5th respondent on the petitioner's allegations finding that he did not have a case to answer. It is imperative to state that this Ruling was not submitted to this court or in the court file for this court's perusal and validation. What essentially is clear is that the claim against the 5th respondent with reference to whether of not he is culpable has since been overtaken by events and as such moot.
57. The Court in the case of *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR speaking to the effect of mootness opined as follows:

“

- “26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.



27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.

“...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.”

58. It is my considered view that this Court should refrain from re-examining or re-trying the issue. I say so because the petitioners' case against the 5th respondent is an invitation to re-try the matter which has already been determined by a competent court. This court is reminded that constitutional petitions challenging the criminal process do not deal with the merits of the case but only with the process.
59. In essence the court in such proceedings is mainly concerned with the question of fairness to the petitioner in the institution and continuation of the criminal proceedings and once the court is satisfied that the same are bona fides and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the accused. (See: Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR).
60. What is notable however is that the petitioners did not fault the criminal process that tried the 5th respondent owing to the facts of this case. Secondly, while the petitioners invite this court not to place heavy reliance on the said Ruling, it is apparent that the petitioners did not appeal the pronouncement of the trial court with reference to the 5th respondent's acquittal. In light of this, it is my humble view that entertaining the petitioners call to re –try the 5th respondent's culpability in the circumstances of this case would be an abuse of the court process.
61. I find guidance in the Court of Appeal case of Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] eKLR, where it observed as follows:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

- i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- ii Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
- iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.”



62. What is therefore left is a determination as to whether the 2nd petitioner's constitutional rights based on the facts presented herein were violated and whether the respondents' executed their mandate lawfully. That said, I have considered the pleadings and submissions of the parties herein and I find the key questions in controversy that are pending determination to be as follows:
- i. Whether the respondents violated their constitutional and statutory mandate in the circumstances of this case;
 - ii. Whether the 2nd petitioner's constitutional rights were violated by the respondents; and
 - iii. Whether the 2nd petitioner is entitled to the reliefs sought.

Whether the respondents' violated their constitutional and statutory mandate in the circumstances of this case

63. The petitioners herein took issue with the manner in which the 2nd petitioner's case was handled from the beginning. To begin with it was stated that the 5th respondent assaulted the 2nd petitioner during the arrest thus violating his rights. It was argued since the State is responsible for the acts and omissions of its officers, the respondents were responsible for failing to take the appropriate legal action and upholding the 2nd petitioner's constitutional rights.
64. This was opposed by the respondents, in particular the 4th respondent who submitted that the law mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed as it makes a decision as to whether or not to prosecute the case. In view of this the 5th respondent submitted that the 2nd petitioner was arrested having been found to be in violation of various traffic laws.
65. The respondents mandate is clearly spelt out in *the Constitution* and the law. One of the organs charged with the maintenance of national security in Kenya in Article 239 (1) (c) of *the Constitution* is the National Police Service which is established under Article 243. The National Police Service is commanded by the Inspector General as provided in Article 245(1) (b). Article 245(4), (a) of *the Constitution* provides one of the functions of the Inspector General as follows:
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - a. The investigation of any particular offence or offences;
 1. The *National Police Service Act*, 2011 which gives effect to the operations of the National Police Service under *the Constitution* provides under Section 24 the functions of the Police as:
 - a. provision of assistance to the public when in need;
 - b. maintenance of law and order;
 - c. preservation of peace;
 - d. protection of life and property;
 - e. investigation of crimes;
 - f. collection of criminal intelligence;



- g. prevention and detection of crime;
- h. apprehension of offenders;
- i. enforcement of all laws and regulations with which it is charged; and
- j. performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

67. Turning over to prosecution in Kenya, the 4th respondent derives his powers from Article 157 of *the Constitution*. On the relevant provisions Article 157(4), (6),(10) &(11) of *the Constitution* provides as follows:

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

68. This Article is operationalized by The Office of the Director of Public Prosecutions, 2013. Act. Section 5 (1) of the Act states as follows:

Pursuant to Article 157 of *the Constitution* the Director shall—

- a. have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;
- b. exercise State powers of prosecution;
 - 1. From the foregoing, the 3rd and 5th respondents have a constitutional mandate to investigate any crimes and offenses suspected to have been done by any person. Upon concluding the investigations the information is submitted to the 4th respondent whose constitutional mandate is to prosecute the matter.



2. The Court in the case of Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019] eKLR while discussing the 3rd respondent's powers noted as follows while highlighting a number of authorities that had opined likewise:

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

71. Similarly, in the case of Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR it was held that:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers *inter alia* to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

72. On the 4th respondent, the Court in the case of Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others [2014] eKLR observed that:

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

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

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed.”

73. The account of this case in a nutshell is that the 2nd petitioner was arrested on 29th July 2013 for violating traffic laws. He was charged *vide* Traffic Case No.11491 of 2013 (Republic v. Earnest Nyamoti). The 2nd petitioner pleaded guilty to five of the seven charges. On the other hand the 5th respondent was charged under Criminal Case No. 1292 of 2016, for causing grievous harm to the 2nd petitioner contrary to Section 234 of the Penal Code.
74. It is discernible from the facts of this case that the operation of the law was applied both ways. While the petitioners assert that the respondents failed to take appropriate legal action, it is clear that criminal



charges were brought against the 5th respondent who was even suspended from work while the criminal process was on going.

75. In light of these circumstances, I am certain that although the petitioners assert that no action was taken, the material adduced before this court tells a different story. The petitioners further fail to show whether the conduct of the respondents was contrary to that which is stipulated in law. Basically, the petitioners have not adduced evidence to show the unconstitutional exercise of police power and prosecutorial power which may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice. (See: *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR and *Philomena Mbeti Mwilu vs Director of Public Prosecutions & 3 others*; *Stanley Muluvi Kiima (Interested Party)*; *International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR).
76. In a nutshell the simultaneous arrest and investigations of the 2nd petitioner and the 5th respondent as carried out by the 3rd respondent and prosecuted by the 4th respondent cannot therefore be condemned as was both procedural and lawful. In fact failure by the 3rd, 4th and 5th respondents to carry out the investigations and prosecution would have amounted to violation of their legal mandate.

Whether the petitioners' constitutional rights were violated by the respondents

77. It was submitted that the 2nd petitioner's arrest was without due regard to the laws and in blatant violation of his rights under Articles 25 (a), 28 and 29 (c), (d) & (f) of *the Constitution* after the torture and cruelty meted out on him during his arrest on 29th July 2013.
78. The respondents refuted these allegations stating that the petitioners' case and testimony was marred with discrepancies rendering it unreliable. The 1st, 2nd and 3rd respondents besides this argued that the petitioners had failed to demonstrate the manner in which these rights had been violated. It was further noted that the petitioners had also failed to show the nexus between the injuries sustained by the 2nd petitioner and the alleged assault by the 5th respondent in view of the existing medical condition called hernia.
79. The threshold for proving constitutional petitions is now well settled and reiterated in law. In the case of *Meme v Republic* [2004] eKLR the court restated the position as follows:
- “Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.
80. My understanding of the above threshold is that for a constitutional petition to succeed the petitioner must show the manner in which the said constitutional provisions are deemed to have been violated from the facts and evidence of the case. The court in the case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR described this component in the following way:
- “72. Section 107 (1) of the *Evidence Act* [36] provides 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." Sub-section (2) provides that "when a person is bound to prove the existence of any



fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not)..."

81. The Court went on to state that:

“

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

82. From the preceding analysis the undeniable deduction is that the 2nd petitioner attributes the loss of his testicles to the alleged assault meted out on him by the 5th respondent during his arrest, and this left him unable to walk normally, affected his marital and sex life and made him unable to engage in gainful employment. He alleges that these factors have caused him immense psychological torture. Considering this, it was the petitioner’s duty to prove that it was the injury he sustained at the hands of the 5th respondent that led to these losses.

83. From the 2nd Petitioner’s evidence, he was with his matatu conductor when this incident took place. The conductor must have been a person well known to him. Getting him as a witness could not therefore have been a problem. The petitioner ought to have called him as a witness to give support to his claims. They elected not to call him yet the 2nd petitioner’s claim of grievous harm against the 5th respondent had been dismissed under Section 210 Criminal Procedure Code in Chief Magistrate’s Court Nairobi Criminal Case No. 1292 of 2016.

84. From the supporting affidavit of the 2nd petitioner, he was first attended to by a doctor at the Nairobi Area Remand Prison who was unable to handle him and referred him to Kenyatta National Hospital (KNH). KNH tests were done and he was admitted and even surgery performed on him. He was in and out of KNH for some time. Upon his release by the court on bond he was taken to Kikuyu Mission Hospital, Aga Khan Hospital (for a scan) and finally admitted to Kikuyu Mission Hospital. None of those who attended to him at the Nairobi Area Remand Prison, KNH and Aga Khan Hospital testified yet their evidence on the 2nd petitioner’s condition was very crucial.

85. An examination of the material placed before this Court and testimonies adduced, demonstrates that the 2nd petitioner did not show that indeed the injuries he suffered were as a result of his encounter with the 5th respondent during his arrest as alleged. The account of the 2nd petitioner’s injury as seen from the 5th respondent’s attachments during the trial case was indicated to have been a pre-existing condition in the initial report.



86. Similarly the 2nd petitioner did not come out clearly as to whether it was indeed the alleged assault that led to the injury. He as well admitted that based on his examination the injury could have been caused by a condition that had been pre – existing although the injury in his examination might have been caused by blunt force.
87. In essence, the 2nd petitioner did not demonstrate that the detected pre- existing condition was not the cause that led to loss of his testicles. He does not also divulge whether he was aware of the condition or had been managing it prior, to this incident. The 2nd petitioner further deposed that a foreign object had been left in his body during surgery. Correspondingly he did not show how this did not contribute to his loss and that it was not related to his alleged injury. Basically there was nothing availed to prove his claim. Due to the vagueness of this circumstance the petitioners ought to have adduced evidence to ascertain that indeed it was the alleged assault that led to the injury resulting in the losses and not the other factors. This was not done.
88. From the foregoing analysis and the material placed before this Court it is my humble finding that the 2nd petitioner failed to discharge his burden of proof against the 5th respondent. Despite stating that his constitutional rights were violated, he failed to demonstrate the manner in which these rights were violated by the 5th respondent while carrying out his legal mandate and that the alleged afflicted injury led to the loss of his testicles.
89. In the same manner I do not find that the 1st, 2nd, 3rd and 4th respondents violated the 2nd petitioner’s constitutional rights since as discussed above and the facts of this case, these respondents carried out their mandate in accordance with the law.
90. The upshot of the foregoing and for the reasons set out above, I come to the conclusion that the petition dated 20th May 2015 lacks merit and is dismissed. Each party to bear his own costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

