



**Havi v Director of Public Prosecution & 2 others (Constitutional Petition E273 of 2021)
[2023] KEHC 26399 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E273 OF 2021
AC MRIMA, J
DECEMBER 15, 2023**

BETWEEN

NELSON ANDAYI HAVI PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Background:

1. When the dispute herein was instituted, the Petitioner, Nelson Andayi Havi, was the president of the Law Society of Kenya (hereinafter referred to as 'the LSK'). At that point in time, the leadership of LSK was facing tremendous unprecedented discord from within.
2. In a synopsis, on July 13, 2021, officers from the Directorate of Criminal Investigations, the 2nd respondent herein, stormed into the petitioner's office and whisked him away while attending a virtual court session.
3. The petitioner was taken to the Directorate of Criminal Investigations headquarters where he was isolated in Block B Room 70. He was neither informed of the reasons for his arrest nor given access to his Advocate until after 8 hours when the offices told him that he was being held for assaulting Mercy Kalondu Wambua, the then Chief Executive Officer of LSK on July 12, 2021.
4. At about 6 p.m., the petitioner was taken to Muthaiga Police Station where he was booked.
5. The foregoing events precipitated the instant petition.



6. It was only the 1st respondent who vehemently challenged the petition.

The Petition:

7. Through the petition dated July 1, 2021, supported by the affidavit of Nelson Andayi Havi deposed to on a similar date, the petitioner sought to claim various constitutional infractions visited at him by the 1st and 2nd respondents.
8. The petitioner pleaded that the decision to arrest him was arbitrary and deprived him of the entitlement in article 29(a) of the Constitution which guarantees the freedom and security of the person guaranteed.
9. The petitioner further pleaded that his arrest denied him equal protection and benefit of the law as he was never informed of the reason for detention and neither was he accorded an opportunity to clarify on questions touching on the investigation, in violation of article 27 of the Constitution.
10. The petitioner posited that the conduct of the 1st and 2nd respondents together with other state agencies monumentally failed to adhere to various constitutional requirements.
11. He claimed that the 1st respondent in satisfaction of its duties has an obligation under article 157(11), article 10(1) and article 239(a) of the Constitution to have regard to public interest, the interest of administration of justice and to adhere to national values and principles of governance.
12. The petitioner averred that the investigation of assault of and the intended prosecution was in relation to the termination of the contract of employment of Mercy Kalondu Wambua, his quest for the audit for the LSK funds and his active role in pursuing public interest litigation.
13. It was the petitioner's case that the 1st and 2nd respondents were attempting to criminalize matters that were otherwise private and contractual since the 2nd respondent did not summon him to record any statements and that none of the council members present during the alleged assault had been summoned to record their statements.
14. It was the petitioner's further case that his seizure on July 13, 2021 without being informed promptly of the reasons, getting access to an Advocate of choice and the failure to release him on bond and bail on reasonable conditions pending a charge was a derogation of his right under article 49(1)(a)(i),(c) and (h) of the Constitution.
15. Linked to the foregoing, the petitioner asserted that the failure by the respondents to inform him of the charges he was to face at the point of seizure was in violation of his right to fair administrative action and the right to fair hearing guaranteed under article 47 and 50(2)(a) of the Constitution respectively.
16. As regards the manner of his arrest, the petitioner claimed that since it happened while he was on his feet before the Court of Appeal Judges in Civil Appeal No E129 of 2021 as consolidated with Civil Appeal No E292 of 2021, Civil Appeal No E293 of 2021 and Civil Appeal No E294 of 2021 with IEBC & others v David Ndii & 81 others, it violated his right to dignity as it was calculated to demean his standing in the society.
17. On the foregoing factual and legal backdrop, the petitioner prayed for the following reliefs: -
 - a. A declaration be and is hereby made that the investigations undertaken by the 2nd respondent as against the petitioner in respect to the alleged assault of Mercy Kalondu Wambua, culminating in the recommendations made by the 1st respondent for the petitioner's prosecution violated the petitioner's constitutional rights as set out under articles 27, 28, 29(a), 31, 47, 49(1)(a)(i),



- (c) & (h) of the Constitution, are an abuse of administrative power, are an abuse of the Court process and therefore unlawful, null and void *ab initio*.
- b. A declaration be and is hereby made that the 2nd respondent's arrest and detention of the petitioner without a warrant of arrest on July 13, 2021 to the time of his release violated his constitutional right as set out under article 27,28,29(a), 31, 47, 49(1)(a)(i), (c) & (h) and 157(11) of the Constitution.
 - c. A declaration be and is hereby made that the investigations on and the intended prosecution of the petitioner in respect of the alleged assault of Mercy Kalondu Wambua is an abuse of power and the court process, is unconstitutional and therefore unlawful, null and void *ab initio*.
 - d. An order of *mandamus* be and is hereby issued directing the 1st and 2nd respondents to release the petitioner forthwith.
 - e. An order of certiorari be and is hereby issued to bring before the High Court and quash the decision made by the 1st Respondent on July 13, 2021 to prosecute the petitioner for the alleged offences of assault causing actual bodily harm contrary to section 251 of the Penal Code.
 - f. An order of prohibition be and is hereby issued prohibiting the 1st and 2nd respondents from arraigning the petitioner in court for the alleged offences of assault causing actual bodily harm and further, prohibiting the said 1st and 2nd respondents from requiring the petitioner to take plea before any subordinate court in Kenya in respect of the said charges.
 - g. An order of prohibition be and is hereby made prohibiting the 1st and 2nd respondents from commencing any further criminal investigations against the petitioner, from recommending the prosecution of the petitioner, from arresting the petitioner, from questioning of the petitioner, from conducting any searches on the petitioner's offices and homes in respect of the alleged assault occasioned against Mercy Kalondu Wambua.
 - h. The 1st and 2nd respondents be and are hereby directed to pay the petitioner damages in the sum of Kenya shillings one hundred million (Kes 20,000,000/- sic) for the violation of the Petitioner's rights and fundamental freedom in respect to the Petitioner's seizure, unlawful detention, intimidation, hindrance, harassment and improper interference with the Petitioner's performance of his professional functions as an Advocate of the High Court of Kenya and the President of the Law Society of Kenya in accordance with recognized professional duties, standards and ethics.
 - i. The 1st and 2nd respondents be and are hereby directed to pay the petitioner the costs of his (sic) petition.

The Submissions:

18. In his written submissions dated October 6, 2021, the petitioner argued that the decision to arrest and criminally prosecute him did not meet the evidence test provided for in paragraph 4B(1) and (2) of the National Prosecution Policy as well as the principles developed in the case of Tom Ojienda SC v Director of Public Prosecutions & 3 others (2020) eKLR. In the latter was established that;

.... An individual must not only rely on inculpatory evidence but also look at the exculpatory evidence available. Where the DPP has failed to do so the court is outrightly permitted to step in and review the evidence in order to determine whether the DPP made the decision in a fair and just manner and in line with evidential test.



19. The Petitioner further cited the decision Petition No 207 of 2014, in *Gordon Ngatia Muriuki v Director for Public Prosecutions & 2 others* where it was observed that: -

The purpose of a warrant is to protect the right of a person from unreasonable searches and seizures and unnecessary arrests in light of the protections conferred by article 29 and 31 of the *Constitution*.

20. The petitioner submitted further that the discretion of the DPP to prosecute criminal cases must be properly exercised and where the court finds discretion to be abused or is being used to achieve some collateral purposes which is not geared towards vindication of the commission of a criminal offence, the court will not hesitate to bring such proceedings to a halt.
21. To buttress the authority of the Court in ensuring prosecutorial powers are not abused, the Petitioner relied on the Court of Appeal decision in *Njuguna S Ndung'u v Ethics and Anti-Corruption Commission (EACC) & 3 others* (2018) eKLR.
22. In urging this Court to prohibit the continuation of the criminal prosecution, the Petition drew support from the decision in *Kuria & others v Attorney General* (2002) KLR 69 where it was observed *inter alia* that: -
- The court has power prohibit continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation.
23. In conclusion, the petitioner maintained that the 1st and 2nd respondents had no justification for initiating criminal proceedings against him but were only motivated by the objective of blocking forensic audit on the bank accounts of the LSK.
24. It was urged that the reliefs in the petition be granted as prayed.

The 1st Respondent's case:

25. The Director of Public Prosecutions challenged the petition through grounds of opposition dated August 31, 2021.
26. It was its case that the petition lacked clarity and precision in setting out the alleged violations in relation to the 1st respondent.
27. It further was its case that the petition disclosed no cause of action as against the 1st respondent as the matter related to the conduct of the police and not prosecutions and as such the orders sought were not tenable against the 1st respondent
28. It was its case that under article 157 of the *Constitution* as appreciated alongside section 24 of the *National Police Service Act*, it is in public interest that complaints made to the police are investigated.
29. It, therefore, was the 1st respondent's case that the petition is premature since investigation were still on going.
30. It urged the court to dismiss the case with costs to the 1st respondent.

The Submissions:

31. The 1st respondent filed written submissions dated October 21, 2021.



32. At the outset the 1st respondent submitted that the petition was not pleaded with reasonable precision on how the claimed rights and fundamental freedoms were violated.
33. It was further its case that according to article 24 of the Constitution, limitation of certain rights is allowed provided it is reasonable and justified in an open and democratic society based on human dignity, equality and freedom.
34. It further asserted the position that the court is an independent and impartial institution as constituted under article 161 of the Constitution and shall not be subject to the control or discretion of any person or authority.
35. The 1st respondent submitted further that the circumstances of case did not warrant an order of certiorari since the decision to prosecute was not in excess of jurisdiction and that the rules of natural justice were observed.
36. To buttress the foregoing, the Court of Appeal decision in *King'ori & 4 others v Mwangi & another* (1994), eKLR 297, was relied on where the English case of *R v Epping and Harlow General Commissioners ex parte Goldstraw* (1983) 3 All ER 257 was cited with approval in the following manner;

... to the effect that it is a cardinal principle that the jurisdiction to grant judicial review will not be exercised save in the most exceptional circumstances and further that the same will not be granted where other remedies are available and have not been used"
37. To drive the point further home, the 1st respondent referred to the decision in *Wainaina v Attorney General* (2008) KLR p.621 where it was observed;

To sustain his claim, the application must show that the DPP's decision was so manifestly wrong as to amount to an unreasonable, irregular or improper exercise of his power, in Wednesbury terms and further that no AG properly directing himself, could on the evidence reasonably or regularly or properly have formed a decision not to direct a prosecution.
38. The 1st respondent, in reference to article 157(10) of the Constitution, submitted that it is an independent office exercising constitutional powers and unless it is proved to be unfairly exercised, courts should not check its prosecutorial powers.
39. As to whether the petitioner was entitled to compensation, the 1st respondent submitted that the petitioner had not met the threshold for failing to identify with precision constitutional violations.
40. In conclusion, it was its case that the petition was premature since the decision to charge had not been made. It also was its case that prayer (d) had been overtaken by events since the petitioner had been released.
41. In the end, it urged that the petition be dismissed with costs.

The 2nd and 3rd Respondents' Case:

42. The 2nd and 3rd respondents did not take part in this matter.

Analysis:

43. Having carefully considered the petition, the response by the 1st respondent, the written submissions and the decisions referred to, what comes to the fore is mainly a challenge on the constitutionality of



the actions of the 2nd respondent on the petitioner. That is so since the 1st respondent has disclosed that, as at the time the instant petition was filed, the investigations were still ongoing and the 1st respondent was yet to review the matter and to decide on the way forward.

44. However, the 2nd respondent opted not to take part in this matter. On its part, the 1st respondent only filed grounds of opposition. In such a case, the petition is undefended as against the 2nd and 3rd respondents.
45. There is no doubt that the Constitution and the law vests the criminal investigative role and the power to arrest those culpable on the National Police Service of which the 2nd respondent is part of.
46. Article 239 of the Constitution provides for the national security organs. They include the National Police Service. The primary object of the national security organs and security system is to promote and guarantee national security in accordance with the principles mentioned in article 238(2).
47. Article 243 of the Constitution establishes the National Police Service. Under article 244, the Constitution provides the objects and functions of the National Police Service as follows: -
 - (a) strive for the highest standards of professionalism and discipline among its members;
 - (b) prevent corruption and promote and practice transparency and accountability;
 - (c) comply with constitutional standards of human rights and fundamental freedoms;
 - (d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
 - (e) foster and promote relationships with the broader society.
48. The National Police Service is under the command of the Inspector-General of Police. The manner in which the Inspector-General of Police is to carry out its mandate is provided for under article 245(2) (b) and (4) of the Constitution as follows: -
 1. The Inspector General –
 - a.
 - b. shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
 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;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
 5. Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under article 157(4), shall be in writing.



49. Article 157(4) of the Constitution provides that: -

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.

50. The independence of the Inspector-General of Police is constitutionally-insulated from any form of interference or directional command. Apart from the Director of Public Prosecutions and only to the extent so provided, no other person, body or entity has the power to give any form of directives to the 2nd respondent on how to discharge its functions. The position is further ring-fenced in that even the power donated to the cabinet secretary under article 254(4) of the Constitution to issue any directives to the Inspector-General of Police is only limited to policy issues.

51. Pursuant to the provisions of article 239(6) of the Constitution, the National Police Service Act, No. 11A of 2011 (hereinafter referred to as ‘the Police Act’) was enacted on August 30, 2011. It is an Act of Parliament to give effect to articles 243, 244 and 245 of the Constitution; to provide for the operations of the National Police Service; and for connected purposes.

52. Sections 24, 27 and 35 of the Police Act variously provide for the functions of the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations respectively as follows: -

24. The functions of the Kenya Police Service

The functions of the Kenya Police Service shall be the—

- 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.

27. The functions of the Administration Police Service

The functions of the Administration Police Service shall be the—

- (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) provision of border patrol and border security;
- (f) provision of specialized stock theft prevention services;
- (g) protection of Government property, vital installations and strategic points as may be directed by the Inspector-General;
- (h) rendering of support to Government agencies in the enforcement of administrative functions and the exercise of lawful duties;
- (i) co-ordinating with complementing Government agencies in conflict management and peace building;
- (j) apprehension of offenders;
- (k) 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.

35. Functions of the Directorate

The Directorate shall —

- a. collect and provide criminal intelligence;
- b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
- c. maintain law and order;
- d. detect and prevent crime;
- e. apprehend offenders;
- f. maintain criminal records;
- g. conduct forensic analysis;
- h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to article 157 (4) of the *Constitution*;
- i. co-ordinate country Interpol Affairs;
- j. investigate any matter that may be referred to it by the Independent
- k. Police Oversight Authority; and perform any other function conferred on it by any other written law.

53. The above is the constitutional and statutory regime within which the National Police Service, and by extension, the 2nd respondent must exercise its various powers. Suffice to say that the manner in which the 2nd respondent ought to exercise such powers has been, over time, subject of many court decisions.

54. For instance, the Court of Appeal in *Commissioner of Police & The Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others* [2013] eKLR dealt with the role of the police in undertaking investigations and instances where such investigations could be stopped by the Court.



55. The court had the following to say: -

.... Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.

56. The learned Judges of Appeal went ahead and stated that: -

It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The Court has inherent power to interfere with such investigation or prosecution process. See *Ndarua v R* [2002] 1EA 205. See also *Kuria & 3 others v Attorney General* [2002] 2 KLR 69.

57. It is, therefore, imperative to understand the background of this matter. That has plainly been rendered by the petitioner. As stated, the petitioner's arrest happened when he was the president of the LSK and at a time when there were serious wrangles within the Society's leadership. According to the Petitioner, the then CEO and a group of the council members opposed an audit of certain Bank accounts. The Petitioner and his team were so convinced that in undertaking the audit, massive misappropriation of funds would have been revealed, a situation which the other side would not countenance. There was also a protracted employment dispute between the CEO and LSK which had been characterized with the removal and reinstatement of the CEO.

58. The petitioner further deposed that it was also a time when he was actively involved in handling public interest litigation against the State and that at the time of his arrest, he was on his feet representing his clients in the famous BBI case before the Court of Appeal. That, the police would not even allow him to conduct the matter first.

59. On the basis of the foregoing, the petitioner deposed that a scheme had to be hatched that he was to be stopped on his tracks. To him, the police came in handy, hence, his arrest.

60. The above facts remain uncontroverted.

61. From the foregoing, five issues for highlighting arise. First, the 1st respondent stated that the police were still carrying out investigations into allegations of the assault of the CEO. One, therefore, wonders why the Petitioner was never summoned to at least record his statement over the allegations. Further, the Petitioner was held in an isolated room at the DCI headquarters for over 8 hours without any interrogation. He was also denied access to counsel. Later in the evening, and without any word from the police, the petitioner was booked into a police station.

62. Second, the petitioner was arrested while virtually addressing the Judges of the Court of Appeal in Civil Appeal No E129 of 2021 as consolidated with Civil Appeal No E292 of 2021, Civil Appeal No E293 of 2021 and Civil Appeal No E294 of 2021 with [*IEBC & others v David Ndii & 81 others*](#). The Petitioner is an advocate of the High Court of Kenya.



63. Discussing the status of an Advocate as an officer of the Court, the Supreme Court in *Petition No 39 of 2018 Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR, stated as follows: -
- (7) The status of an Advocate as an Officer of the Court, is expressly provided for in section 55 of the *Advocates Act*. An advocate, consequently, bears an obligation to promote the cause of justice, and the due functioning of the constitutionally-established judicial process by ensuring that the judicial system functions efficiently, effectively, and in a respectable manner. In that context, advocates bear the ethical duty of telling the truth in Court, while desisting from any negative conduct, such as dishonesty or discourtesy. The overriding duty of the Advocate before the Court, is to promote the interests of justice, and of motions established for the delivery and sustenance of the cause of justice.
 - (8) These principles are underlined also in the *Law Society Act*, which charges the Advocate with certain obligations (section 4):
 - (e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;
 - (f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya.”
 - (g) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent.”
 - (9) So clear, then, is the position of the statute law, regarding the integrity of the Advocate, as a vital player in the cause of justice, as this manifest itself within the court system.
64. The petitioner explained to the police that he was in a court session and sought for sometime to complete the session. That was not heeded to. This court takes judicial notice of the immense public interest that was generated by the famous BBI cases in which the petitioner was appearing for some of the parties. By arresting the petitioner while he was addressing the court, that was not only dishonorable to the Court of Appeal, but was also meant to derail the hearing of the cases.
65. Court sessions are conducted with high degree of decorum and in line with the standards of professional practice and ethical conduct. Unless in cases of unprecedented attacks, a police officer intending to arrest any advocate who is in a court session must, either wait for the counsel to finish conducting his/her matter before that court or, with courtesy, draw the attention and seek the permission of the presiding officer of the court to effect the arrest otherwise such disruption may result to a contemptuous conduct or criminal culpability on the part of the police.
66. In this case, the police settled for none. They neither waited for the Petitioner to complete the Court session nor did they seek the permission of the Judges of the Court of Appeal to arrest him. In such circumstances, the arrest was meant to settle an ulterior motive.
67. Third, the alleged complaint lodged by the CEO was an assault. That complaint was lodged at the DCI Headquarters. Section 35(b) of the *Police Act* obligates the DCI to ‘... undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others...’
68. An assault is not among such offences that are classified as serious crimes. It, therefore, raises one’s antennae for officers from the DCI headquarters to pursue an assault complaint which would ordinarily be handled by even junior officers in a police station. One cannot hesitate to wonder the motive behind the move.



69. Fourth, the deliberate intention by the 2nd respondent in not taking part in the instant proceedings.
70. Fifth, the petitioner was not informed of the reason for his arrest either at the point of arrest or otherwise. It was the 1st respondent who disclosed the reason in these proceedings.
71. Drawing from the foregoing, it is apparent that the criminal process was employed to otherwise settle ulterior motives. Such may include those raised by the petitioner. There was no justification at all as to why the petitioner was handled the way he was. The criminal justice system should never be abused for whatever reason. It should only be used in the interest of the administration of justice. Using the criminal justice system to settle scores is not in public interest and must be frowned at.
72. In the words of the Learned Judges in *Commissioner of Police & the Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others case (supra)*: -
..... The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control...
73. The conduct of the police in this matter is highly wanting. The business of the court must be respected and be handled within the permissible limits. It cannot be the order of the day for advocates who are addressing Courts to be arrested while on their feet. It cannot also be normal for the police to be used as agents of injustice on the advocates since an injustice to one Advocate is an injustice to all advocates.
74. There is, therefore, no doubt that articles 10 and 244(c) of the *Constitution* and section 6(1) of the *National Police Service Act* as well as the petitioner's rights and fundamental freedoms guaranteed under articles 27, 28, 29(a), 31, 47 and 49(1)(a)(i) & (c) of the *Constitution* were variously infringed by the 2nd respondent.
75. Having said as much, this court is also convinced that the petitioner is deserving of compensatory damages. This is a case in which mere declarations and like orders will not suffice. The petitioner deserves to be compensated for the manner in which his rights and fundamental freedoms were infringed.
76. As the Court comes to the end of this matter, it is important to state that the *Constitution* provides in very clear terms the manner in which public officers, and of course the rest, must conduct themselves while discharging their duties. the *Constitution* and the law do not allow office holders to act in contravention of the very *Constitution* and the law and to otherwise act illegally.
77. Courts must now step up the fight against those officers who, for whatever reasons, choose to act contrary to the *Constitution* and the law. The consequences of such unconstitutional, illegal, unlawful and unwarranted actions should no longer end up burdening the State or the institutions for recourse. The fight must be taken to the doorsteps of the individual officers. Such officers must bear personal liability. In this case, had the officers who dealt with this matter been enjoined in these proceedings, this Court would have made specific findings and orders against them including bearing the compensatory damages and costs.
78. In the end, this court hereby makes the following final orders: -
- a. A declaration be and is hereby issued that the investigations undertaken by the 2nd respondent herein as against the Petitioner in respect to the alleged assault of Mercy Kalondu Wambua, violated articles 10 and 244(c) of the *Constitution* and section 6(1) of the *National Police Service Act*. As such, the investigations are unconstitutional, unlawful, null and void *ab initio*. They are hereby quashed.



- b. A declaration be and is hereby issued that the arrest and confinement of the Petitioner by the 2nd respondent on July 13, 2021 to the time of his release violated the Petitioner's constitutional right as set out under articles 27, 28, 29(a), 31, 47, 49(1)(a)(i) and (c) of the *Constitution*.
- c. The 2nd and 3rd respondents be and are hereby directed to pay the petitioner damages in the sum of Kenya Shillings five million (Kshs. 5,000,000/-) for the violation of the petitioner's rights and fundamental freedom in respect to the petitioner's arrest, intimidation, hindrance, harassment and improper interference with the petitioner's performance of his professional functions as an advocate of the High Court of Kenya and the President of the Law Society of Kenya in accordance with recognized professional duties, standards and ethics.
- d. The 2nd and 3rd respondents shall also bear the costs of the Petition.
- e. The rest of the prayers in the petition are hereby disallowed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Mwando, Learned Counsel for the Petitioner.

Miss. Achichi, Learned Counsel for the 1st Respondents.

