



**IW & another v Omondi & 3 others (Constitutional Petition E416 of 2021)
[2023] KEHC 26907 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E416 OF 2021**

AC MRIMA, J

DECEMBER 15, 2023

BETWEEN

**IW 1ST PETITIONER
CENTRE FOR RIGHTS EDUCATION AND AWARENESS
(CREAW) 2ND PETITIONER**

AND

**MICAH OTIENO OMONDI 1ST RESPONDENT
SERGEANT EDITH MUKIRI 2ND RESPONDENT
THE INSPECTOR GENERAL OF POLICE - NATIONAL POLICE
SERVICE 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

Out-of-court settlement agreements in sexual violence cases declared unconstitutional

The petition interrogated whether the police had powers to facilitate out of court settlements for victims of sexual offences. The court held that police neither had powers to enter into out-of-court settlements in sexual offences nor were they permitted in law to sanction such arrangements. The court further held that out-of-court settlement agreements in sexual offences, apart from infringing on the victims' rights and fundamental freedoms guaranteed under articles 27, 28 and 29(c) of the Constitution, contravened section 40 of the Sexual Offences Act and international instruments in which Kenya was a State party.

Reported by Kakai Toili

Constitutional Law – alternative dispute resolution (ADR) mechanisms – ADR mechanisms in sexual offences matters – claim that out-of-court settlement agreements in sexual offences cases infringed on the victims' rights - whether out-of-court settlement agreements in sexual offences cases resulting in the non-prosecution of those likely to be culpable were unconstitutional for infringing on the victims' rights - whether the police had powers to enter



into out-of-court settlements or sanction such arrangements in sexual offences matters – Constitution of Kenya, 2010, articles 27, 28 and 29(c); Sexual Offences Act, Cap 63A, section 40.

Jurisdiction – *jurisdiction of the Independent Policing Oversight Authority (IPOA) and the Internal Affairs Unit of the Kenya Police Service (IAU) – jurisdiction to adjudicate matters seeking orders of declaration of violation of human rights - whether IPOA and the IAU were appropriate forums for adjudication of a matter seeking among other orders declarations of violation of human rights - Independent Policing Oversight Authority Act, Cap 86, section 3; National Police Service Act, Cap 11a, section 87.*

Brief facts

The petitioners sought to challenge constitutionality of the actions of the respondents. The petitioners pleaded that the actions of the 2nd and 3rd respondents constituted failure to protect and uphold the 1st petitioner's freedom and security of the person, the right to equality and not to be subjected to any form of violence from either public or private sources. The 1st petitioner claimed that the 1st respondent raped her and that, in the company of her boyfriend she reported the incident to Mlolongo Police Station and her case was assigned to the 2nd respondent to conduct investigations.

The 1st petitioner further claimed that the 2nd respondent asked her to make changes in her written statement to the effect that the incident happened at Syokimau, not Madaraka where it actually happened. Further, the 2nd respondent advised the 1st petitioner that the easiest way out was for the 1st respondent to pay her so that the police would not forward the case to the Director of Public Prosecutions (DPP). To that end, the 1st petitioner stated that out of frustration she conceded to be paid the sum of KShs 130,000 in four instalments. The petitioner averred that the agreement was put down in paper and she signed it, with her sister as the witness and the 1st respondent also signed it. It was claimed that the 2nd respondent took a photograph of the agreement and did not allow anyone to take a copy or photograph of it.

Issues

- i. Whether out-of-court settlement agreements in sexual offences cases resulting in the non-prosecution of those likely to be culpable were unconstitutional for infringing on the victims' rights.
- ii. Whether the police had powers to enter into out-of-court settlements or sanction such arrangements in sexual offences matters.
- iii. Whether the Independent Policing Oversight Authority and the Internal Affairs Unit of the Kenya Police Service were appropriate forums for the adjudication of a matter seeking among other orders declarations of violation of human rights.

Held

1. Where there were alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues were fully adhered to or unless it was adequately demonstrated that the matter under consideration fell within the exception to the doctrine of exhaustion.
2. The Independent Policing Oversight Authority Act (IPOA Act) was an Act of Parliament to provide for civilian oversight of the work of the police, to establish the Independent Policing Oversight Authority, to provide for its functions and powers and for connected purposes. Section 3 of the Act established the Independent Policing Oversight Authority (the Authority) as a body corporate with perpetual succession and a common seal. The objectives of the Authority were threefold.
 1. to hold the police accountable to the public in the performance of their functions;
 2. to give effect to the provision of article 244 of the Constitution that the police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and
 3. to ensure independent oversight of the handling of complaints by the police service.
3. Section 87 of the National Police Service Act established the Internal Affairs Unit (the Unit). The functions of the Unit were to receive and investigate complaints against the police, to promote uniform



- standards of discipline and good order in the service and to keep a record of the facts of any complaint or investigation made to it. In finding an officer culpable, the Unit may recommend to the Inspector-General the interdiction of an officer, the suspension of an officer, the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer or any other lawful action which may include the prosecution of the officer.
4. The Inspector-General may in exceptional cases and in the interest of the service, authorise the Unit to undertake disciplinary proceedings against any officer who had been a subject of its investigations, and may for that purpose direct a Deputy Inspector-General or the Director of the Unit to appoint an officer to preside over such proceedings.
 5. By placing the prayers sought in the petition against the functions and powers of the Authority and the Unit, the petitioners would not get the redress they wished before the Authority and the Unit since such entities did not have the mandate to grant such reliefs. As such, the petitioners would not be accorded an appropriate forum with the quality of audience which was proportionate to the interests they wished to advance in the matter. In other words, given the nature of the reliefs sought in the petition, the Authority and the Unit were inappropriate forums for adjudication of the dispute therein. Therefore, the petition presented the exceptions to the doctrine of exhaustion. The jurisdictional claim raised by the respondents failed. The court had the requisite jurisdiction over the petition.
 6. The police neither had powers to enter into out-of-court settlements in sexual offences nor were they permitted in law to sanction such arrangements. Section 40 of the Sexual Offences Act accorded the Attorney-General (the DPP) the absolute power to decide whether police investigations on sexual offences should be discontinued. That power was anchored under article 157 of the Constitution.
 7. Section 7(1)(f) of the IPOA Act only allowed the Authority to engage in mediation and reconciliation in matters which were not of serious nature. Out-of-court settlement agreements in sexual offences resulting in the non-prosecution of those likely to be culpable had far-reaching effects on the victims. Apart from infringing on the victims' rights and fundamental freedoms guaranteed under articles 27, 28 and 29(c) of the Constitution, the agreements contravened section 40 of the Sexual Offences Act and international instruments in which Kenya was a State party.
 8. Parties were bound to prove what they alleged. The matter before court was a constitutional petition. Like other disputes, the conduct of constitutional petitions was generally governed by the Constitution and the law. Article 159(2)(d) of the Constitution called upon courts and tribunals to administer justice without undue regard to procedural technicalities. The practice and procedure in constitutional petitions was further provided for under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the *Mutunga* Rules).
 9. Rule 20(1) of the *Mutunga* Rules was on the manner in which constitutional petitions ought to be heard. Such petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the *Mutunga* Rules provided that a court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the *Mutunga* Rules provided for the summoning and examination of witnesses. The conduct of constitutional petitions was also guided by various laws. For instance, the Evidence Act applied to matters generally relating to evidence.
 10. Although article 22(1) of the Constitution gave every person the right to initiate proceedings claiming that a fundamental right or freedom had been denied, violated or infringed or threatened, a party invoking that article had to show the rights said to be infringed, as well as the basis of his or her grievance. The petition was heard by way of reliance on the pleadings, affidavit evidence and the exhibits thereto. Therefore, apart from the contents of the pleadings and affidavits, there was no more to that.
 11. The existence of the out-of-court settlement agreement was hotly contested. There were allegations that the agreement was in writing, but the parties were not given copies after signing it. Either



- way, whether the alleged agreement was in writing or otherwise, the nature of that matter called for examination of the parties and witnesses over the existence of the agreement. Therefore, the evidence at hand seemed inadequate and did not enable the court to make a positive finding on the existence of such an agreement. The existence of the out-of-court settlement agreement was, hence, not proved.
12. Having failed to prove the existence of the out-of-court settlement agreement, coupled with the fact that the 1st respondent was accordingly charged in court over the 1st petitioner's complaint, then the allegations of infringement of the 1st petitioner's rights and fundamental freedoms were rendered unsustainable. Such allegations lacked any legal leg to stand on. In the event the petitioners had any issues over the criminal proceedings against the 1st respondent, then that could only be subject of other distinct proceedings.

Petition partly allowed.

Orders

- i. *A declaration was issued that out-of-court settlement agreements in sexual violence cases resulting in the non-prosecution of those likely to be culpable infringed the victim's rights and fundamental freedoms as guaranteed in articles 27, 28 and 29(c) of the Constitution. Further, such agreements infringed the provisions of international instruments in which Kenya was a State party including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Declaration on the Elimination of Violence against Women (DEVAW), the famous Maputo Protocol, the Committee on the Elimination of Discrimination against Women (CEDAW), the African Charter on Human and People's Rights. Such agreements also contravened section 40 of the Sexual Offences Act.*
- ii. *A declaration issued that out-of-court settlement agreements in sexual violence cases resulting in the non-prosecution of those likely to be culpable were unconstitutional and should not be entered into by the police or otherwise except under the direction of the Director of Public Prosecutions while acting within the Constitution and the law.*
- iii. *The rest of the prayers in the petition were dismissed.*
- iv. *Parties shall bear their respective costs.*

Citations

Cases

1. *CK (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others* Petition 8 of 2012; [2013] KEHC 3114 (KLR) — Explained
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] KESC 53 (KLR) — Applied
3. *Fleur Investments Limited v Commissioner of Domestic Taxes & another* Civil Appeal 158 of 2017; [2018] KECA 341 (KLR) — Explained
4. *Gitau, William Kabogo v Ferdinand Ndung'u Waititu* Petition 93 of 2016; [2016] KEHC 8436 (KLR) — Explained
5. *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Civil Appeal 166 of 2018; [2019] KECA 305 (KLR) — Explained
6. *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* Petition 14 of 2013; [2014] KESC 29 (KLR) — Explained
7. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] KEHC 10266 (KLR)— Explained
8. *Sawe, Patricia Cherotich v Independent Electoral & Boundaries Commission (IEBC) & 4 others* Petition 8 of 2014; [2015] KESC 7 (KLR) — Explained



9. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22; (1990-1994) EA 546 — Explained

Regional Court

1. *Egyptian Initiative for Personal Rights & Interights v Arab Republic of Egypt* ACHPR Communication No 323/2006 - (Explained)
2. *González et al. ("Cotton Field") v Mexico* Inter-American Court of Human Rights (IACrtHR), 16 November 2009 - (Explained)

Statutes

1. Constitution of Kenya articles 19; 20; 27 (4); 28; 29(c); 157; 159(2)(c); 244; 245(4)(c) — Interpreted
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rules 20 (1), (3), (4), (5) — Interpreted
3. Evidence Act (cap 80) sections 2, 107, 109 — Interpreted
4. Independent Policing Oversight Authority Act (cap 86) sections 3, 6, 7 — Interpreted
5. National Police Service Act (cap 84) section 87 — Interpreted
6. Sexual Offences Act (cap 63A) section 40 — Interpreted

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. CEDAW General Recommendation No 19: Violence against Women paragraph 9
3. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979 article 24 (a)
4. Declaration on the Elimination of Violence against Women, 1993
5. International Covenant on Civil and Political Rights (ICCPR), 1966
6. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
7. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 2003
8. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 2003 article 4
9. Universal Declaration of Human Rights (UNDHR), 1948

Advocates

Miss. Odali for Petitioners

JUDGMENT

Introduction:

1. The petition herein raises a salient issue relating to how the police handle victims of sexual offences in Kenya. It interrogates whether the police have powers to facilitate out of court settlements for victims of sexual offences. In essence, the petition seeks to ascertain the constitutionality of such actions.
2. The petition looks at the domestic law as well as international instruments on the rights of such victims and the resultant processes.

Background:

3. At the time of institution of this suit, IW, the 1st petitioner herein, was a third year Computer Science student at Laikipia University.



4. When learning institutions were shut down in March 2020 due to the dreaded Covid-19 pandemic, the 1st petitioner sought and got employed as a Sales and Marketing Agent by one Micah Otieno Omondi, the 1st respondent herein, who was the proprietor of Pata Tunda Groceries Co Ltd.
5. The 1st petitioner was designated to work at the Kitengela Branch. By then the 1st petitioner used to stay with her sister in Mlolongo area.
6. In the morning of August 9, 2020, the 1st respondent directed the 1st petitioner to instead report to the enterprises' Madaraka Branch. The 1st petitioner obliged.
7. The 1st petitioner worked as usual until at about 5 pm when she sought for permission to leave for the day. The 1st respondent asked her to wait for him close the premises so that he would drop her off at Mlolongo, where she stayed.
8. The 1st petitioner waited for the 1st respondent in his car.
9. At about 7pm the 1st respondent came to the car and raped the 1st petitioner. He then drove off and dropped her at Mlolongo.
10. On arriving home, the 1st petitioner disclosed what had happened to her boyfriend, one SN. She was advised not to take a shower or tamper with the clothes she had on.
11. The following day, the 1st petitioner, in the company of her boyfriend reported the incident to Mlolongo Police Station. Her case was allocated No OB/30/10/8/2020 and was assigned to Sergeant Edith Mukiri, the 2nd respondent herein to conduct investigations.
12. The 2nd respondent interviewed the 1st petitioner. On mentioning the name of the 1st respondent, the name appeared familiar to the 2nd respondent. Upon showing her the 1st respondent's photo, she acknowledged knowing him as a former police officer at Industrial Area Police Station.
13. The 2nd respondent subsequently directed the 1st petitioner to go to Nairobi Women's Hospital Kitengela for a Medical Report.
14. The 2nd respondent told the 1st petitioner to tell the staff at the hospital that the incident happened at Syokimau and not Madaraka because if she failed to do so, the Police Station would not be able to help her in the investigations.
15. At the hospital, the 1st petitioner underwent counselling and testing. The report confirmed presence of semen in her vagina. She was asked to leave clothes and her undergarments for forensics.
16. Back at the Police station, the 1st petitioner was asked to come to the following day. While leaving, she saw and recognized the 1st respondent's car.
17. The following day the 1st respondent showed up at the Police Station and had a meeting with the 1st petitioner and the 2nd respondent.
18. The 1st respondent had a private conversation with the 2nd respondent, and despite admitting that he raped the 1st petitioner, the 2nd respondent suggested that they settle the dispute out of court.
19. The 2nd respondent asked the 1st petitioner to make changes in her written statement. She did so in the presence of the 2nd respondent and another police officer to the effect that the incident happened at Syokimau, not Madaraka.



20. The 2nd respondent further asked the 1st petitioner to write in the statement that the Police took her to Nairobi Women's Hospital when she first reported the incident and that the police went to the crime scene to investigate.
21. The 1st petitioner was further asked to collect the clothes they had left at Nairobi Women's Hospital to the Police Station the following day.
22. Returning to the Police station, the 2nd respondent advised the 1st petitioner that the easiest way out was for the 1st respondent to pay her so that the Police would not forward the case to the Director of Public Prosecutions.
23. To that end, the 1st petitioner, out of frustration, conceded to be paid the sum of Kshs 130,000/- in four instalments. The agreement was put down in paper. The 1st petitioner signed it, with her sister as the witness and the 1st respondent also signed it.
24. The 2nd respondent took a photograph of the agreement and allowed no one to take a copy or photograph of it.
25. Subsequently, the 1st respondent paid the 1st petitioner Kshs 30,000 and cleared that instalment a few days later. The 2nd Respondent demanded Kshs 10,000 which she the 1st petitioner complied by sending via M-Pesa.
26. The following month, the 1st respondent sent the petitioner Kshs 25,000. The 2nd respondent demanded another Kshs 10,000, but the 1st petitioner refused to send.
27. The foregoing series of events precipitated the instant petition.
28. With the help of The Centre for Rights Education and Awareness, the 2nd petitioner herein, a feminist organization driving change for equal societies in Kenya, the petitioners approached this court.

The Petition:

29. Through the petition dated October 8, 2021, supported by the affidavit and further affidavit of IW deposed to on October 8, 2021 and March 3, 2022 respectively, the 1st and 2nd petitioners sought to challenge constitutionality of the actions of the respondents.
30. The petitioners pleaded that the actions of the 2nd and 3rd respondents of falsifying evidence, coercing the 1st petitioner to enter into a settlement agreement with the 1st respondent and taking a percentage of the money constituted failure to protect and uphold the 1st petitioner's freedom and security of the person, the right to equality and not to be subjected to any form of violence from either public or private sources.
31. The petitioners pleaded that the failure by the 2nd and 3rd respondents to protect her from sexual violence and to provide redress by conducting proper investigations, nullifying the settlement and agreement and initiation of prosecutions against the 1st respondent entitled her to compensation.
32. The petitioner pleaded that under articles 19 and 20 of the Constitution, the application of the Bill of Rights bind all State organs and persons.
33. The 1st petitioner posited that she was discriminated upon on the basis of her sex and subjected to indignity in violation of articles 27(4) and 28 of the Constitution respectively.
34. As regards impropriety of the 2nd and 3rd respondents' conduct, the petitioners pointed out that under section 40 of the Sexual Offences Act, the decision as to whether the prosecution or investigation by



- any police officer of a complaint of a sexual offence be otherwise terminated rests with the Attorney General.
35. The petitioners further pleaded that the respondents were under an obligation as provided for by the National Police Officers Standing Orders to ensure that while dealing with a witness or a victim of an offence, they shall protect the victim of the witness from further victimization.
 36. The 1st petitioner posited that her right to be free from cruel, inhuman or degrading treatment, as provided for under article 4 of the *Maputo Protocol*, which Kenya is a signatory, had been violated.
 37. The petitioner further claimed that there had been abdication of duty by the respondents to take appropriate measures to overcome all forms of gender-based violence, an entitlement under article 24(a) of the *Convention on the Elimination of all forms of Discrimination Against Women*.
 38. The petitioners pleaded that the 2nd respondent ceased to investigate and prosecute the 1st respondent and instead misadvised the 1st petitioner to settle the dispute out of court.
 39. It was the petitioners' case further that, the 2nd respondent abused powers by altering fundamental facts of the witness statement of the 1st Petitioner and her witnesses so that she could mishandle it to her detriment.
 40. Based on the foregoing set of facts and law, the petitioners prayed for the following reliefs: -
 - i. A declaration that the 1st respondent violated the fundamental rights of the 1st petitioner as provided on articles 27, 28 and 29(c) of the *Constitution*.
 - ii. A declaration that the failure by the 2nd, 3rd and 4th respondents to adequately respond to the 1st petitioner report of sexual violence in accordance with the required standard of due diligence was a violation of the fundamental rights and freedoms of the 1st petitioner as provided in article 27, 28 and 29(c) of the *Constitution*.
 - iii. A declaration that out of court settlement in sexual violence cases is contrary to section 40 of the *Sexual Offences Act* of 2006, a violation of the right to equality before the law and a violation of the right to access to justice, therefore unconstitutional and should be null and void.
 - iv. An order quashing the validity of the out of court settlement entered into by the 1st petitioner and the 1st respondent under the coercion of the 2nd respondent.
 - v. An Order compelling the 3rd respondent to conduct fresh and proper investigations against the 1st respondent and to institute criminal proceedings against him.
 - vi. An order compelling the 3rd respondent to impose appropriate legal and administrative sanctions against the 2nd respondent for mishandling the report of sexual violence made by the 1st petitioner against the 1st respondent.
 - vii. The honourable court do hold the 1st, 2nd, 3rd and 4th respondents jointly and severally liable for violating the 1st petitioner's fundamental rights and freedoms.
 - viii. The honourable court awards the 1st petitioner Kshs 10,000,000/- being damages for physical and psychological pain and suffering caused by the respondents.
 - ix. The honourable court be pleased to issue and hereby issues an order that the respondents do jointly and severally bear the costs of this petition.



- x. Consequent to the grant of the prayers above, the honourable court be pleased to issue any other remedy (directions and orders) that the honourable court shall deem fit and necessary to give effect to the foregoing orders, and/ or favour the cause of justice.

The Submissions:

41. In their written submissions dated March 24, 2022, the petitioners contended that, whereas the Constitution promotes alternative dispute resolution under article 159(2)(c), it is to the extent that it does not contravene the Bill of Rights and is not repugnant to justice and morality.
42. It was submitted that the coercion to agree to an out of court settlement was contrary to the Constitution and section 40 of the Sexual Offences Act as read with section 10(a) of the Victim Protection Act which provides that a victim has a right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse.
43. The petitioners submitted that the trickle effect of such “agreements” is that perpetrators of violence against women are allowed to manipulate and escape the criminal justice system.
44. In reference to General Recommendation 19 of 1992 in paragraph 9 of The Committee on the Elimination of Discrimination against Women, the petitioner submitted that States may be responsible for private acts if they fail to act with due diligence to prevent violation of rights or to investigate and punish acts of violence.
45. To buttress the obligation of the state on due diligence in investigating violence against women, the decision in Egyptian Initiative for Personal Rights & Interights v Arab Republic of Egypt, ACHPR Communication No 323/2006, a case before the African Commission on Human and People’s Rights where the Commission faulted the Prosecutor for failing to obtain additional evidence and instead focusing on supposed “discrepancies” in the victims’ testimony and relied on those “discrepancies” to conclude it could not continue the investigation.
46. The petitioners further relied on the case of Gonzalez et al v Mexico (“the Cotton Field case”), where the Inter-American Court of Human Rights found Mexico as having violated the obligation to investigate and thereby failed to guarantee the rights to life, personal integrity, and personal liberty of the complainant.
47. Closer home, the petitioner relied on the decision in CK (A Child) through Ripples International as her guardian and Next friend) & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2013] eKLR where it was observed that it is the responsibility of the State to ensure that the police investigate claims of sexual violence by not only arresting sexual offenders, but conducting effective investigations and prosecutions.
48. In the conclusion, the petitioner submitted that they were entitled to the prayers sought in the petition. They rebutted the 3rd and 4th respondents’ position that court could not compel the 3rd respondent to conduct proper investigating by referring to the decision in CK v Commissioner of Police/Inspector General of Police where the court made a declaration that the neglect, omission, refusal and/or failure of the police to conduct prompt, effective, proper and professional investigations into the first eleven petitioners’ respective complaints violated the petitioners’ rights and fundamental freedoms under the Constitution.
49. In the said case, the court further issued an order of mandamus directing the Inspector General of Police to conduct prompt, effective, proper and professional investigations into the complaints of defilement and other forms of sexual violence of the petitioners.



50. In the end, the petitioner submitted that they were entitled to an award of damages to vindicate the 1st petitioner's rights that had been contravened.

The 1st Respondent's Case:

51. The 1st respondent did not participate in these proceedings despite proper service.

The 2nd Respondent's case:

52. Sergeant Edith Mukiri Kimathi responded to the petition through her replying affidavit deposed to on February 4, 2022.

53. She deposed that on August 10, 2020, the 1st petitioner, in the company of her boyfriend, reported the incident at Mlolongo Police Station.

54. She deposed that the 1st petitioner stated that the 1st respondent lured her into his car from her working station at Madaraka.

55. It was her case that the 1st petitioner reported that she resisted the 1st respondent's advances as the 1st respondent drove for about 15 minutes along Mombasa Road. The 1st petitioner further reported that on reaching Syokimau, the 1st respondent parked his car on the road side and once again forcefully kissed and removed her sweat pants and raped her without using a condom.

56. From the foregoing, the 2nd respondent deposed that the 1st petitioner's allegations that she advised her to falsify her statement were not true.

57. To that end, the 2nd respondent referred to the written statements, (EMK1) of the 1st petitioner where she stated that the incident happened in Syokimau area.

58. It was further her case that she recorded the 1st petitioner's report in Occurrence Book as No 30/10/08/2020 and immediately escorted her, alongside her boyfriend to Kitengela Nairobi Women's Hospital for treatment and examination.

59. She deposed that while at the hospital, a vaginal swab was taken and her pants taken as exhibits since she had not showered. She stated that she thereafter filled her P3 Form and continued with investigations.

60. Further to the foregoing, she deposed that she obtained the 1st respondent's number from the 1st petitioner and summoned him to the Police Station. That, the 1st respondent honoured the summons on August 13, 2020 and that was when she discovered that the 1st respondent was a Police Officer.

61. It was her case that she requested one Sergeant Kubai to escort her and the 1st petitioner to the crime scene but the 1st petitioner could not remember the exact place because the incident happened at night.

62. She deposed that she released the 1st respondent on Cash Bail of Kshs 10,000/- having sought advice from the OffiCer Commanding Station.

63. The 2nd respondent deposed further the on August 25, 2020, the 1st petitioner, her sister one MNM and the 1st respondent went to the station indicating that they wished to settle the case. To that end, she deposed that she informed them that she could not be involved since she was the investigating officer.

64. The 2nd respondent rebutted the allegation that she demanded and received money from the 1st petitioner. Instead, she deposed that it was the 1st petitioner who sent the money on her own motion without her knowledge. She further deposed that she requested the 1st petitioner to reverse the money which she did.



65. The 2nd respondent also deposed that the 1st petitioner's claim that she had refused to carry out investigations was false and premature. She stated that following her investigations, the 1st respondent was arrested and charged at Mavoko Law Courts vide Criminal Case No 44E/384/2020 and Court File No E048 of 2021. That, the 1st respondent denied the charges and was granted cash bail of Kshs 200,000/ with alternative surety bond of Kshs 300,000/-.
66. The 2nd respondent deposed that the agreement to settle the dispute out of court was squarely with themselves and no Police officer initiated the negotiations.
67. In conclusion, the 2nd respondent deposed that the petition was fatally defective, an abuse of court process and failed to demonstrate with reasonable precision alleged constitutional violations. she urged the court to dismiss it.

The 3rd Respondent's Case:

68. The Inspector General of the National Police Service, responded to the petition through the replying affidavit of one Titi J Ayiera, a Commissioner in the rank of Director of Legal Affairs deposed to on February 16, 2022.
69. The 3rd respondent deposed that pursuant to article 245(4)(c) of the Constitution, no person can give direction to the 3rd respondent and as such this court lacks jurisdiction to issue orders directing the 3rd respondent to take disciplinary actions against the 2nd respondent.
70. He deposed further that any disciplinary action against Police Officers ought to be addressed to Independent Policing Oversight Authority in the first instance.
71. Further to the foregoing, the deposed that the 3rd respondent had no knowledge of any out of court settlement.
72. He deposed further that the petitioners had failed to outline specific instances of violation of rights and no cogent reasons had been adduced to warrant the grant of declarations against the 3rd respondent.
73. The 3rd respondent reiterated the failure of the petition to abide by precision requirement in constitutional petitions.
74. He urged the court not to set a dangerous precedent for allowing the prayers where gullible victims, their families and friends engage in secret negotiations outside the confines of law.
75. In the end, Mr Ayiera urged the court to disallow the petition as it was brought in bad faith.
76. The 4th respondent did not file any response to the petition.

The 2nd, 3rd and 4th Respondents' Submissions:

77. The respondents filed joint written submissions dated June 7, 2022.
78. On the claim of lack of jurisdiction, the respondents submitted that the dispute was premature and ought to have been lodged before The Independent Policing Oversight Authority.
79. Correspondingly, the respondents stated that under section 87 of the National Police Service Act there was an established and operational Internal Affairs Unit whose mandate is to receive and investigate complaints against police by members of the public.



80. The respondents drew support from the decision in *William Kabogo Gitau v Ferdinand Ndung'u Waititu* [2016] eKLR where it was observed;

" I hold the view that the petitioner's contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this court cannot at this juncture usurp the powers of such authorities. This court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the petitioner and neither can the court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant court has made a finding as to the innocence or otherwise of the respondent on those allegations..."

81. On the issue whether the 1st petitioner's constitutional rights had been violated, the respondents submitted that the petition is marred with mere allegations which were refuted by the respondents.

82. It was their case that the petitioners did not put forth any of evidence, a requirement in sections 107 and 109 of the *Evidence Act*, to prove allegations of being misadvised or coerced to settle the matter or pay a bribe.

83. The respondents asserted that there is no basis in law for the 3rd respondent to take responsibility for the alleged actions of an officer who has acts outside his or her authority and out of illegal action.

84. In the end, the respondents submitted that the petition was an abuse of court process and bares no merit for failing to substantiate alleged constitutional violations. They urged this court to dismiss it.

Analysis:

85. This court has carefully considered the petition, the responses, the parties' written submissions and the decisions referred thereto. The following issues arise for determination: -

- (i) Whether the court lacks jurisdiction on account of the doctrine of exhaustion.
- (ii) In the event issue (i) above is answered in the negative, whether the police have powers to enter into or to allow parties involved in allegations of sexual offences to enter into out-of-court settlement agreements.
- (iii) Whether the 1st petitioner's rights and fundamental freedoms were infringed.

86. This court will now deal with the issues in seriatim.

Whether the Court Lacks Jurisdiction on Account of the Doctrine of Exhaustion:

87. The respondents impugned the jurisdiction of this court contending that there were alternative dispute resolution mechanisms created in law and that the petition was a non-starter. The avenues are allegedly provided for in the *Independent Policing Oversight Authority Act, 2011* (hereinafter referred to as 'the IPOA Act') and the *National Police Service Act, 2011* (hereinafter referred to as 'the Police Act').

88. In addressing this issue, this court will first look at the doctrine of exhaustion briefly.

89. The doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional



52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring



that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

90. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.
91. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from article 165(3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of article 189 of the *Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under article 165(5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted.

92. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions



ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. the court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

93. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
94. In ascertaining whether the doctrine of exhaustion applies in this matter, a look at the IPOA Act and the Police Act follows.
95. The IPOA Act is an Act of Parliament to provide for civilian oversight of the work of the police, to establish the Independent Policing Oversight Authority, to provide for its functions and powers and for connected purposes. Section 3 establishes the Independent Policing Oversight Authority (hereinafter referred to as ‘the Authority’) as a body corporate with perpetual succession and a common seal.
96. The objectives of the Authority are threefold. One, to hold the Police accountable to the public in the performance of their functions, two, to give effect to the provision of article 244 of the Constitution that the Police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and three, to ensure independent oversight of the handling of complaints by the police service.
97. Under Section 6, the IPOA Act enumerates the functions of the Authority as follows: -
 - (a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;
 - (b) receive and investigate complaints by members of the Service;
 - (c) monitor and investigate policing operations affecting members of the public;
 - (d) monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;
 - (e) conduct inspections of Police premises, including detention facilities under the control of the Service;
 - (f) co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;
 - (g) review the patterns of Police misconduct and the functioning of the internal disciplinary process;



- (h) present any information it deems appropriate to an inquest conducted by a court of law;
- (i) take all reasonable steps to facilitate access to the Authority's services for the public;
- (j) subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;
- (k) make recommendations to the Service or any State organ;
- (l) report on all its functions under this Act or any written law; and
- (m) perform such other functions as may be necessary for promoting the objectives for which the Authority is established.

98. In discharging the above functions, section 7 of the IPOA Act provides for the powers of the Authority as under: -

- (1).
 - (a) to investigate the service on its own motion or on receipt of complaints from members of the public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by—
 - (i) requisition of reports, records, documents or any information from any source, including from the Police, irrespective of whether that source is located within or outside Kenya and irrespective of whether any other person or body, other than a court of law, has already instituted or completed a similar investigation or similar proceedings;
 - (ii) entering upon any establishment or premises, including Police premises, on the strength of a warrant, and subject to any relevant law, where the premises are a private home or dwelling;
 - (iii) seizing and removing any object or thing from any premises, including Police premises, which may be related to the matter under investigation, and in respect of which a receipt shall be given to the owner or person apparently in control of the object or thing;
 - (iv) interviewing and taking statements under oath or affirmation from any person, group or members of organizations or institutions and, at its discretion, to conduct such interviews in private;



- (v) summoning any person to meet with its staff, or to attend any of its sessions or hearings, and to compel the attendance of any person who fails to respond to its summons;
 - (vi) administering oaths or affirmations before taking evidence or statements where necessary;
 - (vii) summoning any serving or retired Police officer to appear before it and to produce any document, thing or information that may be considered relevant to the function of the Authority;
 - (viii) ensuring that where necessary, the identities of complainants or witnesses are not disclosed to their detriment;
 - (ix) recommending to the Director of Public Prosecutions the prosecution of any person for any offence;
 - (x) investigating any death or serious injury occurring or suspected of having occurred as a result of police action.
- (b) to take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;
- (c) where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil proceedings for compensation in respect of injuries, damages and loss of income;
- (d) require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body;
- (e) require the service to within a specified, reasonable time, provide it with information on issues relating to policy, its implementation and its effectiveness, and its response to any recommendation made to it by the Authority;
- (f) subject to the approval of a complainant, and only if it is not a serious complaint, reconcile or mediate on any matter within its mandate; and
- (g) exercise any other power provided for in this Act or any other law which is necessary for the effective performance of its functions.
- (2) The Authority may in the exercise of its powers under this Act, request and receive such assistance from the or any other governmental or international body or person as may in its opinion be necessary in the exercise of its powers.



- (3) The Authority may in exceptional circumstances regarding matters of national importance submit a report simultaneously to the National Assembly and the Cabinet Secretary if such a matter requires urgent consideration for the well-being of the people of Kenya.

99. Turning to the *Police Act*, section 87 establishes the Internal Affairs Unit (hereinafter referred to as 'the Unit'). The functions of the Unit are to receive and investigate complaints against the police, to promote uniform standards of discipline and good order in the Service and to keep a record of the facts of any complaint or investigation made to it.
100. In finding an officer culpable, the Unit may recommend to the Inspector-General the interdiction of an officer, the suspension of an officer, the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer or any other lawful action which may include the prosecution of the officer.
101. Further, the Inspector-General may in exceptional cases and in the interest of the service, authorise the Unit to undertake disciplinary proceedings against any officer who has been a subject of its investigations, and may for that purpose direct a Deputy Inspector-General or the Director of the Unit to appoint an officer to preside over such proceedings.
102. Returning back to the matter at hand, the prayers sought in the instant petition have been captured above. They include declarations among them those on the infringement of the 1st petitioner's rights and fundamental freedoms, declaration of the unconstitutionality and invalidity of out-of-court settlement agreements in sexual offences, compensatory damages, among others.
103. By placing the prayers sought in the petition against the functions and powers of the authority and the unit, it is apparent that the petitioners will not be able to get the redress they wish before the Authority and the Unit since such entities do not have the mandates to render such reliefs. As such, the petitioners will not be accorded an appropriate forum with the quality of audience which is proportionate to the interests they wish to advance in the matter. In other words, given the nature of the reliefs sought in the petition, the Authority and the Unit are inappropriate forums for adjudication of the dispute herein. Therefore, the petition presents the exceptions to the doctrine of exhaustion.
104. Having found as such, this court affirms that the jurisdictional claim raised by the respondents herein fails and is for rejection. The court has the requisite jurisdiction over the petition herein.
105. With such a finding, a consideration of the rest of the issues follow.

Whether the police have powers to enter into or to allow parties involved in allegations of sexual offences to enter into out-of-court settlement agreements:

106. This issue seems to have been settled by the respondents. In their dispositions, they have distanced themselves from involvement in such conduct. They were categorical that the police neither have powers to enter into out-of-court settlements in sexual offences nor are they permitted in law to sanction such arrangements.
107. The respondents' position is the correct one in law. Further, section 40 of the *Sexual Offences Act* accords the Attorney-General [read the Director of Public Prosecutions] the absolute power to decide whether police investigations on sexual offences should be discontinued. That power is anchored under article 157 of the *Constitution*.



108. The same thread is seen in section 7(1)(f) of the *IPOA Act* where it only allows the Authority to engage in mediation and reconciliation in matters which are not of serious nature.
109. To briefly re-affirm the above position, this court asserts that out-of-court settlement agreements in sexual offences resulting in the non-prosecution of those likely to be culpable have far-reaching effects on the victims. Apart from infringing on the victims' rights and fundamental freedoms guaranteed under articles 27, 28 and 29(c) of the *Constitution*, the agreements contravene section 40 of the *Sexual Offences Act* and international instruments in which Kenya is a State party.
110. Some of the international instruments include the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Declaration on the Elimination of Violence against Women* (DEVAW), the famous *Maputo Protocol*, the Committee on the Elimination of Discrimination against Women (CEDAW), the *African Charter on Human and People's Rights*, among many others.
111. With the foregoing, the issue is answered in the negative.

Whether the 1st petitioner's rights and fundamental freedoms were infringed:

112. The petitioners vehemently contested that the respondents' actions infringed the 1st petitioner's rights and fundamental freedoms which are guaranteed under articles 27, 28 and 29(c) of the *Constitution*.
113. On the flipside, the respondents deny the said averments. with such a response, the issue is for determination by this court.
114. There is no doubt that a resolution of the issue at hand majorly revolves around the facts as adduced by the rival parties. In that case, parties were bound to prove what they alleged.
115. The matter before court is a constitutional petition. Like other disputes, the conduct of constitutional Petitions is generally governed by the *Constitution* and the law.
116. Article 159(2)(d) of the *Constitution* call upon courts and tribunals to administer justice without undue regard to procedural technicalities.
117. Speaking of the essence of article 159(2)(d) of the *Constitution*, the Supreme Court of Kenya in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others*, Petition No 14 of 2013 held that: -

Article 159(2)(d) of the *Constitution* is not a panacea for all procedural shortfalls.

118. And, in *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by article 159....

119. The practice and procedure in constitutional petitions is further provided for under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as 'the Mutunga Rules').
120. Rule 20(1) of the *Mutunga Rules* is on the manner in which constitutional petitions ought to be heard. Such petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the *Mutunga Rules* provide that a court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the *Mutunga Rules* provide for the summoning and examination of witnesses.



121. The conduct of constitutional petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional petitions and affidavits in section 2 thereof. The provision provides as follows: -

1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

122. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows:

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- (1) 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

123. The burden of proof on a petitioner in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 others* [2014] eKLR as follows: -

Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

124. Turning back to this matter, the petition was heard by way of reliance on the pleadings, affidavit evidence and the exhibits thereto. Therefore, apart from the contents of the pleadings and affidavits, there is no more to that.

125. The 2nd and 3rd respondents denied the existence or knowledge of any out-of-court settlement agreement in respect to the 1st petitioner's complaint. The 2nd respondent contended that it was the 1st petitioner, her sister and the 1st respondent who wanted to settle the matter out-of-court, a request which she declined and went ahead to prefer charges against the 1st respondent.



126. The existence of the out-of-court settlement agreement was, hence, hotly contested. There were allegations that the agreement was in writing, but the parties were not given copies after signing it. Either way, whether the alleged agreement was in writing or otherwise, the nature of this matter called for examination of the parties and witnesses over the existence of the said agreement. Therefore, the evidence at hand seems to be inadequate to enable this court to make a positive finding on the existence of such an agreement. The existence of the out-of-court settlement agreement was, hence, not proved.
127. Having failed to prove the existence of the out-of-court settlement agreement, coupled with the fact that the 1st respondent was accordingly charged in court over the 1st petitioner's complaint, then the allegations of infringement of the 1st petitioner's rights and fundamental freedoms are rendered unsustainable. Such allegations lack any legal leg to stand on.
128. In the event the petitioners have any issues over the criminal proceedings against the 1st respondent, then that can only be subject of other distinct proceedings.
129. In the end, the issue is answered in the negative.

Disposition:

130. The petition has largely been unsuccessful. with an exception of a declaration on the powers of the police over out-of-court settlement agreements in sexual offences, the petitioners were unable to prove the rest of the petition.
131. Deriving from the foregoing, the following final orders do hereby issue: -
- a. A declaration do hereby issue that out-of-court settlement agreements in sexual violence cases resulting in the non-prosecution of those likely to be culpable infringes the victim's rights and fundamental freedoms as guaranteed in articles 27, 28 and 29(c) of the Constitution. Further, such agreements infringe the provisions of international instruments in which Kenya is a state party including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Declaration on the Elimination of Violence against Women (DEVAW), the famous Maputo Protocol, the Committee on the Elimination of Discrimination against Women (CEDAW), the African Charter on Human and People's Rights. Such agreements also contravene section 40 of the Sexual Offences Act.
 - b. A declaration do hereby issue that out-of-court settlement agreements in sexual violence cases resulting in the non-prosecution of those likely to be culpable are unconstitutional and should not be entered into by the police or otherwise except under the direction of the Director of Public Prosecutions while acting within the Constitution and the law.
 - c. The rest of the prayers in the petition are hereby dismissed.
 - d. Being a public interest litigation, parties shall bear their respective costs.

Orders accordingly.

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

A. C. MRIMA

JUDGE

