



**Karanja v Director of Public Prosecutions & 3 others (Petition 186 of 2019)
[2022] KEHC 11095 (KLR) (Constitutional and Human Rights) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11095 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 186 OF 2019
HI ONG'UDI, J
MAY 31, 2022
**IN THE MATTER OF ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 159(2),
165(3), 258 AND 259 OF THE CONSTITUTION OF KENYA 2010**
AND
**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 24, 25, 27, 28, 29, 31,
39, 47, 48, 49(1) (A), (F), (G), AND 50(1) (2)**
AND
**IN THE MATTER OF ALLEGED CONTRAVENTION OF
CONSTITUTIONAL PROVISIONS UNDER ARTICLES 73, 75, 157(4),
(6) (9), (10), (11), 232, 243, 244 AND SIXTH SCHEDULE OF THE
CONSTITUTION OF KENYA 2010**
AND
**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015,
SECTIONS 9 & 10 OF NATIONAL POLICE SERVICE ACT 2011,
SECTIONS 8, 9, 10, 12, 18 & 19 AND SECTIONS 5 & 23 OF OFFICE
OF DIRECTOR OF PUBLIC PROSECUTION ACT 2013**
AND
**IN THE MATTER OF MALICIOUS PROSECUTION AND ABUSE OF
LEGAL POWER AND DISCRETION BY AN OFFICER IN THE OFFICE
OF THE DIRECTOR OF PUBLIC PROSECUTION**
BETWEEN



BETWEEN

SYLVIA WAMBUI KARANJA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

PRINCIPAL MAGISTRATE'S COURT AT ENGINEER 3RD RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The petitioner through her petition dated 20th May 2019 seeks the following reliefs: -

1. A declaration that

- a. The investigation, arrest, charging, arraignment and prosecution of the petitioner was irregular, un-procedural, unlawful, unconstitutional and an infringement of the petitioner's rights as stated under paragraphs 42 to 46 of the petition thus malicious.
- b. The search warrants to investigate Bank account given to 2nd respondent's office PC Odhiambo of DCI Kinangop Police Station on 2nd day of November 2018 in the Principal Magistrate's Court at Engineer in Miscellaneous Criminal Application No. 22 of 2018 DCI Nyandarua South vs CEO Equity Bank, CEO Co-operative Bank and CEO Safaricom Ltd, breached the petitioner's rights and fundamental freedoms under the provisions of articles 27(1), 27(4), 27(5), 31, 40(1), 40(2), 47(1), 47(2) and or 50(1) of *the Constitution* of Kenya, hence void for all intents and purposes.
- c. The charging and prosecution of the petitioner herein was selective and as such discriminative and infringed on the Constitutional rights of the petitioner under Article 27 of *the Constitution* of Kenya 2010.

2. Judicial Review by way of:-

- a. An order of certiorari to remove into the court and quash the decision of the 1st respondent to charge the petitioner in the principal Magistrate's Court at Engineer in Criminal Case Number 1309 of 2018; Republic vs Sylvia Wambui Karanja;
- b. An order of certiorari to remove to the Honourable Court to be quashed the charge sheet by the 1st and 2nd respondents in Criminal Case No. 1309 of 2018- Republic vs Sylvia Wambui Karanja before the principal magistrate's Court at Engineer.
- c. An order of prohibition directed at the 3rd respondent- principal Magistrate's court at Engineer or any other court from hearing, determining or in any manner whatsoever dealing with Principals Magistrate's Court at Engineer Criminal Case No. 1309 of 2018 (Republic vs Sylvia Wambui Karanja) or any variation thereof or any charge or charges in substitution thereof or akin to the same in Criminal Case Number 1309 of 2018.



- d. An order of prohibition directed at the 1st and 2nd respondents barring them from further prosecuting or preferring the prosecution of Principals Magistrate's Court at Engineer Criminal Case No. 1309 of 2018 (Republic vs. Sylvia Wambui Karanja) in its present form or in any intended variation of the charges therein or any variations thereof or any charge or charges in substitution thereof or akin to the same in Criminal Case No. 1309 of 2018
3. An order for general and aggravated damages including exemplary damages for the contravention of the fundamental rights and freedoms of the petitioner and for the mental anguish suffered due to the unconstitutional acts of the respondents to be assessed by the court.
4. Costs of the petition to be jointly borne by the 1st and 2nd respondents.

The Petitioner's Case

2. The petition is supported by the petitioner's supporting and supplementary affidavits sworn on 20th May 2019 and 25th October 2021 respectively. The petitioner has set out a comprehensive background of how the issue began. What is of interest to this court is the circumstances surrounding her arrest and arraignment at the Principal Magistrate's Court at Kinangop in Criminal Case N0. 1309 of 2018 (Republic vs Wambui Karanja) where she was charged with the offence of forgery.
3. In summary, the petitioner was a director of Bebadis Company Limited, a private company registered and incorporated under the Laws of Kenya. Other directors were Daniel Kimani Kariuki and Ruth Wanjiru Maigua, both prosecution witnesses in the criminal case.
4. Prior to the formation of the said company, the petitioner and Daniel Kimani were involved in a love and romantic relationship bordering on betrothal for marriage. It is in the subsistence of this relationship that the idea of formation and registration of the company was hatched and Daniel Kimani introduced Ruth Wanjiru as a party to this business plan being the formation of a company for purposes of advancing an online marketing platform.
5. Besides the company, the petitioner was operating her family business which she took over from her father; Ridgeways Inn and which had a till number operated through her personal line with Safaricom but did not have a pay bill number. Their incorporated company failed to pick up and Daniel suggested that the petitioner takes over the pay bill number for the company. Henceforth all the family business transactions were channelled through the pay bill number.
6. Sometime in August 2018, the petitioner and Daniel decided to purchase and acquire an apartment from Qwanza Homes Ltd for Kshs. 16.5 Million which was to be financed by Equity Bank. In order to consider her creditworthiness, she attached the bank statements for the company through which her family business pay bill account was operating and all payments into the said pay bill account were from her family business. The bank further advised that she gets consent of all directors which she duly obtained.
7. The bank informed her that Daniel Kimani Kariuki had a bad credit history and had been blacklisted by the Metropol Credit reference with debts in excess of Kshs. 187, 146,886.08 and was therefore advised that her application would be successful if Daniel would be removed from being a director to which he was agreeable. Further due to the unavailability of the other director Ruth Wanjiru and after seeking legal advice, the directors settled on effecting transfer of their shares in the company to the petitioner and enlisted the services of an advocate.



8. The resolution was actualized by David Kimani Kinyanjui a first cousin to Daniel Kimani practising in the name and style of Messrs Kimani Wakimaa & Company Advocates who prepared all the necessary documents and share transfer instruments and caused the transfer of shares of the other directors to the petitioner. After preparing the said documents (statutory declaration, their resignation letters, share transfer forms and Minutes of the Meeting of the Directors resolving for the said transfer of shares) the advocate delivered them to the directors for execution, and he was paid his legal fees of Kshs.50,000/=.
9. She averred that her woes started soon after their relationship broke up. Daniel claimed that she had forged the share transfer certificate (a non-existent document) as it was yet to be acquired and that she had fraudulently removed the other two directors from directorship of the company. The investigations into that issue were initiated in a civil case Nairobi Milimani HCC 115 of 2018 *Bebadis Co. Ltd, Daniel Kimani and Ruth Wanjiru Waigwa vs Sylvia Wambui Karanja and The Ridgeways Yard Co. Ltd*. It was found that the other director had consented to the share transfer by executing the documents of transfer as a forensic audit of their specimen signatures marched with those in the transfer forms.
10. Upon the realization that the investigations were not in his favour, Daniel Kimani approached Njihia Njoroge the advocate whose commissioning stamp was used to commission the documents and caused him to make a report in Kinangop despite there being similar investigations in Nairobi. Consequently, she was arrested in Eldoret on 2nd November 2018, bundled up in a police vehicle and transported to Kinangop Police Station on account of a complaint reported on 1st November 2018 at 18.45 hours. Subsequently, the 1st respondent preferred criminal charges against her at the Principal Magistrate's Court at Kinangop in Criminal Case No. 1309 of 2018 Republic vs. Wambui Karanja for forgery.
11. The 2nd respondent without any probable cause detained her for three days up to 5th November 2018 before arraigning her in court wherein they requested for more time to conduct independent investigations and bring in more accomplices for purposes of taking plea. Consequently, she was detained for another eight days after which she took plea. Despite the 1st respondent at Kinangop one Mr. Maroro Jeremiah Mokuia SPPC being informed by the 1st respondent at Nairobi of similar investigations happening in Nairobi where the alleged forgery had happened and the need to halt charging the her, she was still charged.
12. A letter from the DPP dated 27th February 2019, revealed that there as no basis for such charges. Further, the 1st respondent at Nairobi expressly and specifically directed the 1st respondent at Kinangop to withdraw the charges against her pending conclusion of investigations at Nairobi. The same was done causing the 3rd respondent to allow the application for withdrawal of the charges.
13. In her supplementary affidavit sworn on 25th October 2021, she reiterated the contents of her petition and affidavit in support of the petition. She further indicated that the matter was withdrawn on 9th March 2021, under Section 87(a) of the Criminal Procedure Code (CPC). Her motor vehicle registration number KBQ 200 G and Passport Number B011828, were also released to her.
14. She depend that the failure by the 2nd respondent to carry out proper investigations before arresting her violated Articles 24, 25, 29, 39, 47, 48, 49 (1) (h) and 50 of *the Constitution*. Further that her detention for three (3) days was unwarranted and violated Articles 27, 28, 29, 39, 49(1) (f) & (h) of *the constitution*.

The 1st & 2nd respondents' response

15. The 1st & 2nd respondents filed grounds of opposition dated 2nd November 2021. The grounds raised are that:-



- i. Pursuant to Article 157 (6) (c) subject to clause (7) and (8), the DPP may discontinue at any stage before judgment is delivered any criminal proceedings instituted by it or taken over by it.
- ii. Pursuant to section 87 of the *Criminal Procedure Code* the 1st respondent in a trial before a subordinate court a public prosecutor, may with the consent off the court or under the instructions of the DPP, at any time before judgment withdraw from the prosecution of any person.
- iii. The petitioner has not adduced reasonable evidence to show that the criminal proceedings were mounted for an ulterior purpose and have not demonstrated how the 1st respondent acted without or in excess of powers conferred upon them by law.
- iv. The substratum of the petition has been dispensed with therefore an abuse of the court process.
- v. The petitioner has failed to demonstrate substantial injustice caused by the withdrawal of the criminal proceedings by the 1st respondent.

The 3rd & 4th respondents' response

16. The 3rd and 4th respondents filed grounds of opposition dated 15th July 2019. The grounds are that:-
 - i. The petition as drawn and filed offends and seeks to curtail the authority and exercise of powers and functions of the offices of the 1st to 3rd respondents as provided for under Articles 157, 245(4), 259(3)(a) of *the constitution* and sections 34 and 35 of the *National Police Service Act*.
 - ii. The petitioner filed this petition purely to frustrate and evade further investigations and subsequent prosecution facing her. She ought to face her accusers, prove his innocence or otherwise and submit to the consequences of the law should she be found culpable.
 - iii. The petitioner is merely apprehensive having failed to provide a concrete demonstration that the trial magistrate is or will be biased, not accord her a fair hearing or has acted contrary to *the constitution* and the judicial code of conduct thereby making it impossible to dispense justice accordingly.
 - iv. No evidence has been adduced before court to show that prejudice will be occasioned and irreparable harm suffered if the reliefs sought are not granted.
 - v. The petitioner has failed to demonstrate that the circumstances of the impugned process render it impossible for her to have a fair trial. The High Court therefore ought not to interfere with the trial simply on the basis that the petitioner's chances of being acquitted are high.
 - vi. The petition offends section 6 of the *Judicature Act* Cap 8 Laws of Kenya.
 - vii. If the orders sought are granted, it will be tantamount to the determination of investigations and any likely or probable prosecution of the petitioner.
 - viii. The instant petition is frivolous, without merit and an abuse of the court process and ought to be dismissed.

The Petitioner's submissions

17. The petitioner filed submissions and supplementary submissions dated 10th November 2020 and 15th November 2021 respectively through Otwal & Manwa associates. On the arrest and detention without conducting independent investigations, she submitted that the arrest was instigated by Daniel Kimani



- who approached Njoroge Njihia. Relying on *Hicks vs Fawkers* (1878), 8 Q. B.D 167 at 171 she argued that there have to be investigations conducted by the police independent of the complainant.
18. According to her, she was arrested just few hours after the complaint had been lodged. Thus, no investigations were conducted. The alleged offence happened in Nairobi outside the jurisdiction of the police in Kinangop. She was denied police bond and even after detaining her for 3 days, they stated that they needed time to conduct investigations into the matter. The Court granted them a further 8 days. Relying on the cases of; [Kenya Fluorspar Company Limited v William Mutua Maseve & Another](#) [2014]eKLR; [Kasio Matuku & Kenya Post Office Savings Bank v James Kipkemboi Cheruiyot; Inspector General of Police & Attorney General \(Interested Parties\)](#) [2019] eKLR; and [Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecutions & Another](#) [2019] eKLR she submitted that the court frowns upon arrests, detentions and prosecutions commenced and continued in the absence of independent investigations into the complaints. Further that the mere lodging of a complaint does not automatically lead to a criminal prosecution.
 19. It's her submission that the impugned prosecution was initiated to settle scores against herself and Daniel Kimani. Had the police dug into the complaint, they would have established that there were active investigations in Nairobi where the offence alleged to have been committed by the petitioner had been expressly admitted by the advocate who commissioned the documents said to be forged. She relied on *Kuria & 3 others vs Attorney General* [2002] 2KLR to show that the courts have frowned upon prosecutions initiated to settle personal scores. Relying on [Republic vs Attorney General Exparte Kipngeno Arap Ngeny](#) HC Civil Application 406/2001 and [Gulam & Anor vs Chief Magistrate's Court & Anor](#) [2006] eKLR, she argued that the action by the 2nd respondent breached her constitutional rights as pleaded in the petition and were actuated by ulterior motives.
 20. On the claim that the investigations, arrest and prosecution were selective and maliciously instigated for selfish ends, she submitted that the alleged offence was that Mr. Njihia's stamp used to commission the share transfer documents had been forged. This was despite the transfer documents having been executed by all three directors of the company; there being no formal complaint made by the company or the directors; the impugned documents having been admittedly processed, witnessed and commissioned by David Kimani Kinyanjui. The said advocate was not asked to record a statement with the police at Kinangop over the allegations.
 21. She relied on *Republic v Director of public Prosecutions & 2 others Exparte Zablon Agwata Mabea* [2017] eKLR and [Bitange Ndemo vs DPP & 4 others](#) [2016] eKLR for the argument that courts have severally impeached prosecutions that have been instigated through such selective and discriminatory processes. Further, the advocate who prepared and processed the transfer documents had on two occasions formally admitted commissioning the said documents of transfer. She contends that on that basis alone the charge of forgery of the commissioner's stamp against the petitioner could not stand and the whole process of investigations was malicious, an abuse of the court process and infringed upon her constitutional rights. She relied on [Republic v Director of Public Prosecution & 2 others Exparte Joseph Gathuku Kamuiru & another](#) [2014] eKLR and Agnes Ngenesi case (supra) to support this submission.
 22. She further submits that the prosecution at Kinangop charged her against the advice of the DPP Nairobi vide letter dated 12th November 2018. This prompted another letter dated 27th April 2019 directing the 1st respondent at Kinangop to withdraw the case on the basis of inconclusive investigations. Relying on Kenya Fluorspar case (supra) and Kasio Matuku case (supra) she maintained that without conclusive evidence there would be no probable cause for continuing prosecutions of the petitioner. She further relied on [Republic vs Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Exparte George Saitoti](#) [2006] eKLR for the proposition that she had legitimate expectation



- that the decisions to prosecute her over any offence would be dictated by the existence of a probable cause after conclusive independent investigations.
23. She further submits that her being charged was uncalled for, and demonstrated bad faith, bias, unfairness and malice against the petitioner. She further submits that failure by the respondents to file a replying affidavit demonstrates that the averments in her affidavits remain uncontroverted. She referred to the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR among others.
 24. It is her contention that having alleged and brought evidence in support of the allegations, she had discharged her evidential obligations and burden of proof. The burden of proof therefore shifted to the respondents to controvert her evidence. She relied on Daniel Kibet Mutai case (supra) for that argument. Thus to invite the court to question her evidence would be unfair to her.
 25. Contrary to the 3rd and 4th respondents' assertions that, granting the order sought is akin to interfering with the constitutional mandate of the DPP she argues that her contention is on how this mandate is meant to be exercised. She submits that supervising of the actions of the 1st and 2nd respondents does not amount to curtailing their mandate. See Alfred Nyandieka v Director of Public Prosecution & 3 others (supra); *Joram Mwenda Guantai vs The Chief Magistrate* [2007] 2 E.A 170; Republic vs DPP & 2 others Exparte Zablon Agwata Mabea (supra).
 26. She argues that the withdrawal was based on the various gaps and omissions in the prosecution case. According to her this was an admission that her constitutional rights had been violated. Relying on Article 157, Rule 2 (11) of Chapter 22 of the National Police Standing Orders (Standing Orders); and the case of *Republic vs Director of Public Prosecutions & another Exparte Justus Ongera* [2019]eKLR, she argued that the officers of the 2nd respondent were guilty of dereliction of duty, as they exercised the powers conferred upon them arbitrarily as such their actions were unconstitutional and unlawful.
 27. She submits that the investigations were done in a shoddy manner and unprofessionally. That they were conducted to settle scores between her and the former director of the company. She relied on *Rosemary Wanja Mwangi & 2 others v Attorney General* & 2 others and *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others* for that argument.
 28. She argues that her rights under Article 27(4) of *the Constitution* was violated as she was the only one charged and arrested and not the other directors. Her rights under Article 39 were violated by the 1st and 2nd respondents' by being arrested and detained for several days on the basis of flimsy evidence as stated in the letter withdrawing the matters by the ODPP.
 29. It is her submission that prayers 2B, 2C and 2D of the petition be retained. She argues that she suffered agony and her rights are in further danger of being violated. She relied on *Joram Mwenda Guantai vs The Chief Magistrate*, Nairobi Civil Appeal No. 228 of 2008[2007] 2 EA 170. Relying on *Ezekiel A. Omollo v DPP & 2 others* Pet No. E002 of 2020, counsel argues that they are seeking an order prohibiting further prosecution of the petitioner by the 1st and 2nd respondents. This is because pursuant to section 87 of the CPC, there is no bar on the police continuing with the investigations or even receiving new evidence once the accused has been charged and put to trial.
 30. Her concern was the illegality, impropriety and illegality of the actions by the offices of the 1st and 2nd respondents in Kinangop that may cause further violation of the petitioner's rights. She relied on Republic v Secretary of the Firearms Licensing Board & 2 others Exparte; Senator Johnston Muthama [2018] eKLR. Further, relying on Republic v Hasmukh Meghji Shah [1984] eKLR, she urged the court to quash the charge sheet in the criminal case as vide the DPP letter of 28th May 2020 the withdrawal of the case was not absolute.



31. Finally she urged the court to grant her aggravated, exemplary and general damages while relying on *MWK v another v Attorney General & 3 others* [2017] eKLR she urged the court to grant the said orders.

The 1st & 2nd respondents' submissions

32. The 1st & 2nd respondents filed submissions dated 9th November 2021 through office of the Director of Public Prosecution. Relying on Articles 157, 157(10), 157 (6) (c) subject to clause (7) and (8), section 6 of the Office of the Director of Public Prosecution Act (ODPP), section 87 of the *Criminal Procedure Code* (CPC) and the case of Nairobi High Court Petition number 81 of 2014 George Taitumu v Chief Magistrate's Court Kibera & 2 ors and Kisii High Court Moses Nyabuto Moreka vs AG & 2 ors, counsel argued that the 1st respondent is mandated to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed; it is free from the control and direction of any person or authority in the commencement of criminal proceedings; it may discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP; and it may in a trial before a subordinate court, with the consent of the court and on the instructions of the DPP, at any time before judgment is pronounced withdraw the prosecution of any person.
33. Its counsel's submission that the petitioner had failed to prove the violation of her rights and freedoms. They relied on *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272; *Meme vs Republic & another* (2004) eKLR and the burden of proof as described by Halsbury's Laws of England, 4th Edition, volume 17, paragraph 13 and 14.

The 3rd & 4th respondents' submissions

34. The 3rd & 4th respondents filed submissions dated 15th July 2019 through learned senior state counsel Grace Mutindi raising two issues. They submitted that the allegations by the petitioner were without merit, and they relied on Sections 24 and 35 of the National Police Act Cap 84 Laws of Kenya on the functions and statutory duty of the 2nd respondent; Section 29 of the CPC and Section 58 of the NPS on the arrest without warrant; Chapter 15 of the National Police Service Standing Orders on arrest for recognizable offences, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) on the deprivation of liberty being done within the confinement of the law; Article 49(1) (f), (g), (h) on the rights of the accused and submitted that all the while the petitioner's continued detention was within the maxims of the law.
35. They dismissed the petitioner's allegation on the breach of her right to privacy and property under Articles 31 and 40 of *the constitution* and argued that pursuant to section 118 of the CPC a search warrant can be issued any day and may be executed any time; in this case the 2nd respondent obtained a search warrant against the petitioner.
36. Counsel submitted that pursuant to Article 157 of *the Constitution* the 1st respondent has all the powers to discharge its mandate under sub Articles 6, 6b, 7, 8, (10). This is coupled with Sections 5, & 6 of the ODPP Act. She contends that the arrest, detention, search and seizure are all legal action by virtue of the authority vested upon the 1st and 2nd respondents.
37. Further, relying on *Thuita Mwangi & 2 others v Ethics & Anti- Corruption Commission and 3 others* [2013] eKLR and *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, they submitted that the petitioner's alleged violations of her rights under Articles 24, 25, 27, 31, 40, 47, 48 and 50 of *the constitution* were false and misleading.



38. Regarding the allegation on selective and discriminative investigation and intended prosecution as alleged by the petitioner, they submitted that pursuant to Article 157(10) of *the constitution* and Section 6 of the ODPP Act, the 1st respondent is insulated from direction and control of any person or authority. Further Article 245 (4) (b) confers the 2nd respondent with independence in exercising its investigative mandate the exception being under Article 245 (5) of *the constitution*. Relied on is Godfrey Mutahi Ngunyi vs Director of Public prosecutions and 4 others Petition No. 428 of 2015 and Stephen Ndambuki Muli & 3 others v Director of Public Prosecutions & another [2016]eKLR.
39. Counsel while relying on Section 107 of the *Evidence Act*, Republic vs Minister for Home Affairs and Others Ex parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 submitted that the petitioner had not made a proper demonstration of the alleged constitutional violations by the 1st and 2nd respondents to warrant the intervention of this court.
40. Concerning the failure to file a replying affidavit, they submitted that pursuant to Rule 15(1) (2) of *the constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the 3rd respondent on whose behalf they act, did not fall under that category hence its grounds of opposition on behalf of the 3rd and 4th respondents were proper and an indication that the petition is opposed.
41. Further relying on *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR and *Margaret Wanjiru Ndirangu & 4 others v Attorney General* [2020] eKLR, she contended that even where the factual issues are not rebutted by way of a replying affidavit, the burden to prove the existence of those facts / allegations still rests on the person so alleging and in this case the petitioner.

Analysis and determination

42. Having carefully considered the petition, the respondents' responses, the parties' submissions, cited authorities and the law I find the following issues to arise for determination: -
 - i. Whether the petitioner's rights under Articles 24, 25, 27, 28, 29, 31, 39, 40, 47, 48, 49 (1) (f) (h) and 50 of *the constitution* were violated
 - ii. The effect of failing to file replying affidavit to the petition
 - iii. Whether the reliefs sought should be granted
 - i. Whether petitioner's rights under Articles 24, 25, 27, 28, 29, 31, 39, 40, 47, 48, 49 (1) (f) (h) and 50 of *the constitution* were violated:
43. The petitioner submitted that, the 2nd respondents arrested her without conducting independent investigations over a matter that was outside their territorial jurisdiction. She gave a summary of all that had happened to her both in her pleadings and submissions. She argued that the 1st and 2nd respondents exercised their power arbitrarily, and that she was not challenging the constitutional and statutory mandate of the respondents but rather how the same was exercised.
44. The 1st and 2nd respondents submitted that they were exercising their constitutional mandate which is not subject to the control of any person. Counsel also outlined the full mandate of the DPP.
45. The 3rd and 4th respondents supported the argument by the 1st and 2nd respondents and argued that the petitioner's continued detention was within the maxims of the law. They dismissed the petitioner's allegations on breach of Articles 31 and 40 of *the Constitution* and argued that pursuant to section 118 of the CPC a search warrant can be issued any day and may be executed any time; the 2nd respondent had obtained a search warrant against the petitioner. They argued that the petitioner had not demonstrated



how her rights had been infringed upon and that the court cannot direct on how the 1st and 2nd respondents were to discharge their mandate neither could it determine with certainty the allegations on selective and discriminative investigations and prosecutions by the petitioner.

46. In emphasizing the mandate of the Director of Public Prosecution, the court in *Republic vs DPP Exparte Victory Welding Works and Another* High Court Misc. No. 249 of 2020 stated;

“The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision-making process... It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.”

47. In *Mohamed Ali Swaleh v The Director of Public Prosecution & Another – Petition No. 2 of 2017* it was held;

“The decision whether or not to institute criminal proceedings is made based on the evidence collected. Once the investigations establish reasonable suspicion that a person committed a crime he ought to be charged in a court of law.”

Also see *Republic v Director of Public Prosecution & 2 others Ex-parte Stephen Mwangi Macharia* [2014] eKLR.

48. The grounds upon which the prosecution may be prohibited were considered in *Director of Public Prosecutions V Martin Maina & 4 others* [2017] eKLR, wherein the Court cited, with approval, the decision by the Supreme Court of India in *State of Maharashtra & Others V Arun Gulab Gawali & Others*, Criminal Appeal No. 590 of 2007. The grounds are as follows:-

- “(i) Where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;
- (ii) Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, e.g. want of sanction;
- (iii) Where the allegations in the First Information Report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged; and
- (iv) Where the allegations constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fails to prove the charge.”

49. The court went further to state that:-

“The power of quashing criminal proceedings has to be exercised very sparingly with circumspection and that too in the rarest of rare cases.”



50. As noted on the mandate of the director of public prosecution, it is not unfettered, and the court will not hesitate to act where it has acted contrary to the law as elucidated in the cited authorities. But generally the court is required to restrain itself from usurping the mandate of the 1st respondent.
51. On the mandate of the 2nd respondent, Article 245 (1) of *the Constitution*, establishes the office of the Inspector- General of the National Police Service. Sub-Article (4) provides for mandate and autonomy of the Inspector- General of Police with regards to, the investigation of any particular offence or offences, the enforcement of the law against any particular person or persons and the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. Article 157 (3) of *the Constitution*, empowers the Director of Public Prosecution to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and he is required to comply.
52. Section 28 of the *National Police Service Act* establishes the Director of Criminal Investigation. Section 34 of the said Act provides for the functions of the Director and Section 35 provides for the functions of the directorate among them, collecting and providing criminal intelligence; undertaking investigations on serious crimes; maintaining law and order; detecting and preventing crime; apprehending offenders; maintaining criminal records; conducting forensic analysis; executing the directions given to the Inspector General by the Director of Public Prosecution etc.
53. In the case of *Dr. Alfred N. Mutua v The Ethics and Anti- Corruption Commission & Others*. Misc. Application No. 30 of 2016, the court held as follows-

“Is threat of arrest or arrest with reasons given a violation or threatened violation of fundamental rights and freedoms? We think not. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue...”

Also see (i) *Republic v The Commissioner of Police & Director of Public Prosecution Ex parte Michael Monari & Another* Misc. Application No. 68 of 2011;

- (ii) *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR;
- (iii) *HICKS VS FAWKERS* (1878), 8 Q.B.D. 167 at pg 171 .

54. The case of *Kenya Fluorspar Company Limited v William Mutua Maseve & another* [2014] eKLR, was instrumental on the need to conduct independent investigations. The court stated:-

“Given the above guidelines by the case law, it is my view that there was totally nothing wrong with the police re-arresting the 1st Respondent after he was frog-matched to the police station. However, they ought to have commenced their independent investigations forthwith and if they found that he was not culpable, released him forthwith. In lieu thereof, the police ought to have given him a bond pending their independent investigations. Instead, they detained him in the cells for five (5) days on mere allegations that he had stolen. That, to me was an unwarranted detention. There was no probable cause to do it and the conclusion I make is that it was actuated by malice as the police intended to please their master, the Appellant.”



Also see in (i) R vs. Attorney General exp Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001.

(ii) In Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR.

55. What is evident from the cited provisions of the law and the cases, is that similarly, the mandate of the 2nd respondent is not subject to anyone's control and should not be interfered with unless there is reasonable reason to do so. Further, there has to be an objective justification shown to validate arrest of any individual and the court will not hesitate to intervene where the arrest is unmerited. They have to establish probable and reasonable cause before conducting any arrest. Independent investigations have to be done before an arrest is made.
56. The question for this court to consider is whether there was reasonable and probable cause to arrest and detain the petitioner and whether the same amounted to an infringement of her constitutional rights. The petitioner has clearly stipulated why she states that there was no reasonable and probable cause and that the same was actuated by ulterior motive and arbitrary. I agree with the petitioner that the 2nd respondent did not conduct any independent investigations before arresting her, otherwise they would have established that the document alleged to have been forged was non-existent. This is because the advocate who commissioned the documents admitted to the commissioning, it was also selective.
57. Being that there were three directors of the company who executed the documents, how come she was the only one who was arrested and charged in court? This was clear discrimination. Further, neither of the directors nor the company lodged a complaint as to the alleged forgery. This exhibited ulterior motive and laxity on the constitutional mandate on the part of the 1st and 2nd respondents. This is also what informed the withdrawing of the charges by the 1st respondent, proof that investigations were not conducted.
58. Regarding the constitutional violations, the petitioner has set out a number of provisions of *the constitution* that she alleges were violated. The respondents on the other hand stated that the petitioner did not adduce any evidence to prove that the said constitutional provisions were breached by the 1st and 2nd respondents. Where there is a claim of violation of constitutional rights the same must be clearly set out as enunciated Anarita Karimi Njeru vs Republic (1979) eKLR where the court stated that:-
- “...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be ingrained.” (Emphasis added)
59. The case of Memo Matemu vs Trusted Society of Human Rights Alliance [2013] eKLR also reaffirmed the position in Anarita Karimi Njeru (supra).
60. Article 24 (1) of *the Constitution* provides;
- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right or fundamental freedom;



- (b) the importance of the purpose of limitation;
- (c) the nature and extent of limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purposes and whether there are less restrictive means to achieve the purpose.

61. Article 24(3) of *the Constitution*, makes it clear that the state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied. It is thus evident that the onus of proving the limitation or the justification for the limitation is on the party who wants the fundamental right or freedom limited. This was well echoed in *R vs. Oakes [1986] I R. CS* where the supreme Court of Canada stated;

“The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guaranteed unless the party...can bring itself within the exceptional criteria justifying their being limited....two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting, a Charter right, must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure the trivial objectives or those discordant with the principle of a free and democratic society gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Secondly, the party invoking it must show the means to be reasonable and demonstrably justified...”

62. The respondents have not adduced evidence to justify the arrest and detention of the petitioner. All they have stated is that they were exercising their constitutional mandate which is not subject to control by anybody. In view of the petitioner’s evidence this court expected the respondents to justify the reason for handling the petitioner the way they did.

63. Article 25 of *the Constitution* provides for the Fundamental Rights and Freedoms that may not be limited. One such right is the right to a fair trial. In my view, the petitioner has not demonstrated how this right was violated or is threatened with violation.

64. Regarding Article 27 of *the Constitution*, Discrimination was defined in *Peter K. Waweru v Republic [2006] eKLR* as follows;

“Under Section 82 (3) of *the Constitution* of Kenya, “discriminatory” means “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.



65. The court in the above case further while referring to the Black's Law dictionary 11th Edition on the meaning of discrimination stated;

“Discrimination” In constitutional law is the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

66. In the case of *Mbona v Shepstone and Wylie* [2015] ZACC11, the court therein laid down the factors to be considered in determining whether the conduct complained of amounts to discrimination. It stated thus:-

“(26) The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of *the Constitution*, it is presumed to be unfair... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair”

67. In *Bitange Ndemo vs Director of Public Prosecutions & 4 others* [2016] eKLR, the court stated;

“142. It is not in doubt that one who shields a suspected criminal is himself culpable for aiding and abetting crime. It therefore follows that the decision to charge the applicant with a criminal offence(s) when on the face of it the key (star) prosecution witness exonerates him from blame is in itself an abuse of discretion and an exercise of discretion for an improper purpose meant to achieve nothing but playing to the public gallery.

143. By such conduct, I find that the Director of Public Prosecutions is also in breach of the duty to act fairly; he has failed to exercise statutory discretion reasonably; has acted in a manner to frustrate the purpose of *the Constitution* and the Act donating the power; he has impeded his discretion; has failed to exercise discretion and has acted irrationally and unreasonably. (See Republic Vs Minister for Home Affairs and Others *Ex parte Sitamze Nairobi HCC 1652/2004* [2008] 2 EA 323.”

Also see (i) *James Nyasora Nyarangi & 3 others vs. Attorney General* [2008] eKLR;

(ii) *John Harun Mwau vs. IEBC & another* [2013] eKLR;

(iii) *Republic vs. Director of Public Prosecutions & 2 others Ex parte Zablun Agwata Mabea* [2017] eKLR.

68. The petitioner was singled out of the three directors of the company for charging for no reason. The Advocate whose commissioning stamp was used was not called to the police station to record a statement. The conduct of the 2nd respondent was discriminatory. Even after being investigated in Nairobi he still went ahead and charged her.



69. Article 29 of *the constitution* provides

29. Every person has the right to freedom and security of the person, which includes the right not to be-
- (a) deprived of freedom arbitrarily or without just cause;
 - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
 - (c) subjected to any form of violence from either public or private sources;
 - (d) subjected to torture in any manner, whether physical or psychological;
 - (e) subjected to corporal punishment; or
 - (f) treated or punished in a cruel , inhuman or degrading manner.

70. In my view, having demonstrated that her arrest albeit being the mandate of the 1st and 2nd respondents, was done arbitrarily, with an ulterior motive and without probable and reasonable cause in the absence of independent investigations. There is no explanation given for this kind of conduct.

71. The petitioner has also alluded to Articles 31, 39 & 40 of *the Constitution* on the right to privacy freedom and residence and protection of the right to property. She was in police custody following a complaint made against her by her ex- lover. She failed to explain how any of these rights was violated. The 2nd respondent was simply discharging his mandate.

72. Article 48 of *the Constitution* provides that the state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The petitioner has not demonstrated how this right was violated.

73. Article 47 of *the Constitution*, provides:-

“ 47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

The petitioner has not demonstrated how this right was violated.

Article 49(1) (f) & (h) of *the Constitution* generally talks of an arrested person’s right to be arraigned in court as soon as possible and not later than 24 hours. It explains the conditions for release on bond or bail which should be reasonable pending a charge or trial, unless there are compelling reasons not to be released.

74. *The Constitution* under Article 49 (1) (f) provides for the accused person “ to be brought before a court as soon as reasonably possible , but not later than- twenty-four after being arrested ; or if twenty-four hours ends outside ordinary court hours , or on a day that is not an ordinary court day , the end of the next court day.” When the petitioner was arrested it was 2nd November 2018 a Friday. She has not stated what time the arrest was effected. In my view, her right was not violated as stated in the case of *Michael Kungu Kigia v Lydia Gatwiri & 6 others* [2018] eKLR where Mrima J, while dismissing the petitioner’s assertion therein stated;

“ 6. The Petitioner avers that he was arrested on 25/03/2011 and released on 27/03/2011 on police bond. The 25/03/2011 was on a Friday and 27/03/2011 was on a Sunday. The



confinement was hence within the confines of Article 49(1)(f)(ii) of *the Constitution* since the Petitioner could not be arraigned in court before 28/03/2011.”

75. Regarding Article 49 (1) (h) of *the Constitution, the constitution* provides for an accused person to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released, this right was not violated as the petitioner was released by the Court pending trial before the case was withdrawn. There is no evidence that her request for release on bond was declined by the police.

76. On fair hearing, Article 50(1) of *the Constitution* provides

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal.”

The petitioner has not demonstrated how this right was violated.

77. Article 28 of *the Constitution*, provides:

“every person has inherent dignity and the right to have that dignity respected and protected. Mativo J. stressed on the importance of human dignity in the case of *M W K v another v Attorney General & 3 others* [2017] eKLR where he cited with approval the South African case of *S v Makwanyane* {1995} ZACC 3; 1995 (3) SA 391(CC) in para [328], where O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity.

78. The court in the case of *Mutuku Ndambuki Matingi v Rafiki Microfinance Bank Limited* [2021] eKLR held that:

“50. As regards the right to dignity, in *Ahmed Issack Hassan vs. Auditor General* [2015] the Court held that:

“...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516.”

Also see: (i) *Francis Mulomba Nguyo v Nation Media Group Limited & 2 others* [2021] eKLR,

ii. In *Moses Tengeya Omweno v Commissioner of Police & another Civil Appeal 243 of 2011* [2018] eKLR ;

79. The petitioner’s right against discrimination was violated. Had this not been the case, she would not have been placed in the cells. She was humiliated for reasons beyond her control.

In a nutshell, the petitioner’s rights under Articles 27 & 28, of *the Constitution* were violated.

ii. The effect of failing to file replying affidavit to the petition

80. According to the petitioner, the failure by the respondents to file replying affidavit to the petition meant that it was uncontested and unchallenged. That the respondents admitted to the factual circumstances and evidence. The 1st and 2nd respondents did not address this issue. The 3rd and 4th



respondents submitted that the 3rd respondent on whose behalf they were acting fell under the category envisaged under rule 15 (1) (2) of the Mutunga Rules hence its grounds of opposition were proper and an indication that the petition was opposed.

81. Rule 15 on reply to a petition provides as follows:-

15. (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

(2) (a) A respondent not in category of sub rule (1) shall within seven days file a memorandum of appearance and either a-

(i) replying affidavit; or

(ii) statement setting out the grounds relied upon to oppose the petition.

(b) after filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide other written document as a respond to the petition within fourteen days.

(3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).

82. The Attorney – General has been sued as the 4th respondent. Going by the Provisions of Rule 15(1) of the Mutunga Rules, the 4th Respondent ought to have filed a replying affidavit to the petition but instead chose to file grounds of opposition. That notwithstanding, the 4th respondent has stated that it is acting and has responded to the petition on behalf of the 3rd respondent. Further that the 3rd respondent falls under the category envisaged under Rule 15(2) (a) of the Mutunga Rules and that the grounds of opposition suffice.

83. Rule 15 (1) refers to the Attorney General and to a state organ and the question is, what is a state organ? Who qualifies to be a state organ and are the respondent's state organs? Article 260 of *the Constitution* defines a state organ to mean a commission, office, agency or other body established under *the constitution*.

84. In the case of *Council of Governors v Attorney General & 7 others* [2019] eKLR the Supreme court stated as follows as regards to a state organ:-

“(53) Hence in interpreting Article 260 of *the Constitution*, this Court is not to re-write *the Constitution* but to declare what the drafters stated and intended. It is clear what the drafters intended and achieved in stating with precision what constitutes a State Organ. This Court will not expand that meaning by defining what ‘under’ is used in Article 260, for its meaning is plain in English. State organs are those commissions, offices, agencies or bodies established under *the Constitution*. That is, those institutions that are established in *the Constitution*. For emphasis, it is important that we refer to some of the Institutions which have been expressly established under *the Constitution*, namely the Constitutional Commissions which include... The establishment of any state organ must be traceable to *the Constitution*. There are other independent offices whose establishment can be traced to *the Constitution* e.g. The Office of Auditor General and that of the Controller of Budget.”

85. From the above definition of *the constitution* and the advisory opinion by the Supreme Court, it is explicit that the 1st, 2nd and 3rd respondents are state organs. Therefore the respondents ought to have



filed their responses within fourteen days of service of the petition and in this case, the response is a replying affidavit.

86. What then is the impact of filing grounds of opposition instead of a replying affidavit? In the case of *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR it was held as follows:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”

Also see; (i) *Mustano Rocco v Aniello Sterelli* [2019] eKLR,

(ii) *Phillip Tirop Kitur v Attorney General* [2018] eKLR,

ii. *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR.

iii. *Alfred Nyandieka v. Director of Public Prosecutions & 3 others* [2019] eKLR.

iv. *Daniel Kibet Mutai & 9 others vs. Attorney General* [2019] eKLR.

87. Based on the above case law and the provisions of *the constitution*, it is clear that the facts of the petitioner’s case were not rebutted following the respondents’ failure to file a replying affidavit. The petitioner’s case was therefore admitted, but still she had a duty to prove her case to the required standard.

ii. Whether the reliefs sought should be granted

88. The lower court case having been withdrawn under Section 87 (a) of the CPC, the petitioner retained prayers 2(b), 2(c) and 2(d) of the petition plus general and exemplary damages. These are clearly set out at paragraph 1 of this judgment. The petitioner dismissed the 3rd and 4th respondents assertion that granting the orders sought would be akin to interfering with the constitutional mandate of the DPP. She argued that there were no justifiable grounds to the constitutional rights violations to warrant this court to decline the orders sought. The matter being withdrawn under the Section 87(a) Criminal Procedure Code does not bar the police continuing with investigations or even receiving new evidence once the accused has been charged and put to trial.

89. The 1st and 2nd respondents submitted that the issue is now moot and the petitioner did not demonstrate the violation of the constitutional rights. The 3rd and 4th respondents submitted that the petitioner did not make a proper demonstration of the alleged constitutional violations by the 1st and 2nd respondents to warrant the intervention of this court. They urged the court to dismiss the prayers on exemplary damages.



90. Judicial review orders of certiorari and prohibition as sought by the petitioner were discussed in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. The court stated;

“...that now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

91. In *Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi* [2007] eKLR, the Court of Appeal held:-

“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. See *Kenya National Examinations Council vs Republic Ex-parte G.G. Njoroge & 9 Others* 1996 LLR 483 (CAK. See also Halsbury’s Laws of England 4th Edition Vol. 1 p 37 para. 128.

Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. It was succinctly put in *Stanley Munga Githunguri vs Republic* [1985] KLR 91 that if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious the Judge has the power to intervene and that the High Court has an inherent power and a duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court. This dictum is now an everyday edict in our courts and we are indeed surprised that the learned Judge was shy to so declare.”

92. This court has only found that the Petitioners arrest was discriminatory considering that the other 2 directors were not arrested. From her own evidence the complainant was one of the 2 directors who was her former boyfriend. I also found a violation of her human dignity and no more. Would this be good reason for this court to bar the DPP from charging her considering that there was an investigation in Kinangop and in Nairobi? The police had reason to arrest and charge as there was a complaint. The



charge was only withdrawn and she was discharged under Section 87(a) Criminal Procedure Code. This court has not been given sufficient reason why it should interfere with the Director of Public Prosecution's powers, on this aspect.

93. I have ground that some two constitutional rights of the Petitioners were violated. Regarding the claim for general damages, by dint of Article 23 (3) (e) of *the Constitution*, this court may grant appropriate relief including an order for compensation. The principles applicable to award of damages for constitutional violations under *the Constitution* were explained exhaustively by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004 wherein it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An Additional award, not necessarily of Substantial size, may need to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches.(emphasis) All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.” (Emphasis)

94. It suffices to add that an award of damages is purely discretionary and should be exercised judicially. We have a number of cases expounding on this.
95. The Court of Appeal while stating the principles of assessment of this damage in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR held as follows:

“it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions....”

96. The Court went on further to state that:

“On the purpose of awards of damages, the Supreme Court of Uganda in *Cuossens v Attorney General*, (1999)1 EA 40, noted that the object of an award of damages is to give an



injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.”

97. The other cases which have addressed this issue are:

- i. Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR;
- ii. Zipporah Seroney & 5 others v Attorney General [2020] eKLR;
- iii. Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR.

98. I am satisfied that owing to what the petitioner went through for no fault of hers she is entitled to an award of exemplary and general damages. I therefore find that:-

- i. The arrest, charging and prosecution of the Petitioner was selective and as such discriminative and infringed on her right under Articles 27 & 28 of *the Constitution*.
- ii. The judicial Review Orders are declined.
- iii. The Petitioner is awarded general damages of Kshs.150,000/= plus exemplary damages of Kshs.150,000/=.
- iv. Each party to bear its own costs.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

