



Onyango v Emacar, Director of Criminal Investigations Mtwapa & 5 others; Bruce & 2 others (Interested Parties) (Constitutional Petition E069 of 2021) [2022] KEHC 11935 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E069 OF 2021
JN ONYIEGO, J
AUGUST 19, 2022**

BETWEEN

JANE ONYANGO PETITIONER

AND

**FIDELIS EMACAR, DIRECTOR OF CRIMINAL INVESTIGATIONS
MTWAPA 1ST RESPONDENT
BIBERONE GANGUMA, OFFICER IN CHARGE OF STATION,
MTWAPA 2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT
INSPECTOR GENERAL OF POLICE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 6TH RESPONDENT**

AND

**CRICKMORE STEPHEN BRUCE INTERESTED PARTY
GREAT KINGS AND QUEENS PRIMARY SCHOOL LTD INTERESTED PARTY
LINET WAWUDA MASGHA INTERESTED PARTY**

JUDGMENT

1. The Petitioner is an advocate of the High Court of Kenya. Her grievance against the Respondents as unveiled by her Petition dated 19th December 2021 is that the Director of Criminal Investigations (DCI), with the connivance of the 3rd Interested Party summoned her to appear before Shanzu



Magistrates Court on Monday 20th December 2021 to answer to a fabricated charge of housebreaking. She states that in August 2021, she represented the 1st Interested Party in the sale of plot number Kilifi/Mtwapa/1005 to the 2nd Interested Party for a sum of Kshs 12,000,000/=, and, under the agreement, the property was sold free from encumbrances and subject to vacant possession upon completion of the transaction period of 90 days expiring on 5th November 2021.

2. It's her case that the 1st Interested Party had accommodated the 3rd Interested Party in the said premises on a charitable and friendship basis documented in a Memorandum of Understanding dated 18th August 2020. Further, at the request of the 3rd Interested Party, the 1st Interested Party sent to the 3rd Interested Party Kshs. 225,000/= through the Petitioner to enable her to find alternative accommodation and she promised to move out as soon as the sale was complete. But the 3rd Respondent failed to move out, so the 1st Interested Party instructed the Petitioner to serve her with an Eviction Notice dated 12th October 2021. Further, the 3rd Interested Party removed her items from the house including the 1st Interested Party's furniture, she vacated but refused to surrender the keys. She filed CMCC No. E107 of 2021, at Malindi against the 1st and 2nd Interested Party and obtained an interim injunction.
3. However, her case was dismissed on 1st December 2021 with costs after and the Petitioner advised the 2nd Interested Party to secure vacant possession, but first to report at the Mtwapa Police Station to whom the eviction Notice had been copied. On 9th December 2021, she accompanied the 2nd Interested Party to Mtwapa Police Station and showed both the DCI and the OCS the suit documents and the outcome of aforesaid suit and they told them that since there was no order directed to the Police, they should enter the premises and report any resistance back to them.
4. The Petitioner states that the 2nd Interested Party pushed the gate to his house open, and being its house, the offence of house breaking cannot arise. Her contestation is that she was arrested even though she was at the scene in her professional capacity as an advocate for the 1st and 2nd Interested Party. Further, she states that before and after arrest, the DCI refused to inform her the reasons for her arrest or her right to remain silent and she only learnt that the 3rd Respondent was the complainant after she was asked to write a statement. Further, despite copying the police the eviction notice, they still arrested her and intend to arraign her in court which shows malice. Further, the DCI and OCS's conduct is indicative of an unholy alliance between the DCI and the 3rd Interested Party.
5. The Petitioner contends that her arrest and detention and the threatened arraignment in court violates Article 47, 28, 29, 39, 10, 48, 49 (1) (a), 50, 157 (11) and 244 of the Constitution. As a consequence, she prays for: -
 - a. A declaration that the 1st and 2nd Respondents alongside the other Respondents violated her rights under Articles 28, 29, 47 and 49 (1) (a) of the Constitution.
 - b. Certiorari to quash the proceedings in Mtwapa DCI Case File No. 317 of 2021 concerning the decision to arrest, arraign and prosecute her over the dispute on Kilifi/Mtwapa/1005.
 - c. A permanent injunction prohibiting the Respondents from harassing her in the course of her professional engagement as an advocate and from arraigning or prosecuting her in Mtwapa DCI Case File No. 317 of 2021 over the dispute on Kilifi/Mtwapa/2005.
 - d. General damages.



- e. Exemplary and aggravated damages to deter repetition of the Respondents' conduct.
 - f. Costs against the Respondents.
6. The suit against the 6th Respondent, the Director of Public Prosecutions (the DPP) was marked as withdrawn with no orders as to on 9th March 2022. It will serve no purpose to consider the DPP's grounds filed on 18th February 2022.
 7. The 1st to 5th Respondent filed the Replying Affidavit of Phydalis Emacar, an Assistant Superintendent of Police working under the DCI. The salient points are:- a report on alleged house breaking was made at the police station on 9th December 2021 by the 3rd Interested Party and investigations were commenced; that at the police station the Petitioner was treated courteously; that the Petitioner's cash bail was refunded and the investigation file was forwarded to the DPP for review and advise as evidenced by the letter dated 7th January 2022; that in undertaking the investigations, the Respondents were undertaking their statutory mandate; that the Petition is pre-mature.
 8. The 1st Interested Party filed the Replying affidavit dated 19th January 2022. The crux of the affidavit is that he met the 3rd Interested Party on 31st December 2019 at a club in Nairobi; thereafter they met at a club in Nairobi and she requested to him help her to apply for a passport; that he gave her Ksh. 4,000/=; on 7th January 2020, he flew to Mombasa from Nairobi with her and his other girlfriend; and, he gave her Kshs. 20,000/= to settle her rent arrears in Nairobi to avert eviction.
 9. Other key averments are: -that the 3rd Interested Party did not know about his plan to buy a house at Mtwapa; on 26th February 2020, he flew to Mombasa with the 3rd Interested Party and he told her he had bought a house at Mtwapa; that he agreed to her request to stay in the house with his friend Ann and Carol; that in early July 2020 he learnt of a fraud on his six credit cards involving about Kshs. 4,000,000/= and he lodged a complaint at Mtwapa Police Station; that he was in possession of audio recording involving three people among them the 3rd Interested Party stating that she is the one who stole his 4 ATM cards and she had mastered all his pass words and together with a one Trump, she withdrew a substantial amount from ATM machines; that as at July 2020, she was aware he was selling the house and on 18th October 2021 he instructed the 2nd defendant to visit the premises and confirm that the 3rd Interested Party had vacated; that together with Hamisi they visited the premises and found it vacant after which the Petitioner notified the 2nd Interested Party to arrange for handing over but later he learnt that the 3rd Interested Party had filed a suit at Malindi and obtained an injunction; that but the suit was dismissed with costs.
 10. Additionally, he states that on 9th December 2021, he authorized the Petitioner and the 2nd Interested Party to visit the premises and confirm whether the 3rd Interested Party had vacated; that she took all his furniture; that the 2nd Interested Party's mother together with the Petitioner reported the visit to Mtwapa Police Station where they showed the 1st and 2nd Respondent the court order dismissing the suit at Malindi; and, on reaching the premises a care taker refused to open after being served with the court order; and later he learn that the Petitioner was arrested for house breaking.
 11. The 2nd Interested Party filed the Replying affidavit sworn on its behalf by Mercy Wangare dated 22nd December 2021. The key highlights of the affidavit are essentially a replication of the 1st Interested Party's affidavit. It will add no value to rehash the same here.
 12. The 3rd Interested Party filed the Replying affidavit dated 29th December 2021. Its salient points are: (a) the Petitioner did not go into the premises in her capacity as an advocate; (b) that she lives in the house



- as a wife and she was not aware of the sale agreement; (c) she never received the sum of Kshs. 225,000/= as alleged; (d) that she was blackmailed to sign a handwritten eviction notice before receiving the money to cover expenses; (e) She never vacated the premises, but it's the Petitioner who was threatening to evict her; (f) that she cannot vacate the house before her appeal in the High Court at Malindi is determined; (g) that the Petitioner's agent was arrested for attempting to break all the locks and replace them; (h) that on 16th December 2021, goons descended into the premises and stole mattress and the incident was reported to the police and that the Petitioner is implicated in the crime; (i) that she has no alliance with the police.
13. The 3rd Interested Party also filed a Notice of a Preliminary Objection dated 5th January 2022 objecting to this court's jurisdiction on grounds that the subject property is located at Mtwapa within Kilifi County; that the application is defective; that the objection be allowed to save costs and judicial time.
 14. In his submissions, the Petitioner's counsel cited Hesbon Ongetta Momany t/a OH Momanyi & Co advocates v Director of Public Prosecutions OCS in support of the proposition that the power conferred to the DPP is not absolute. He argued that this court under Article 165(3) of the Constitution is empowered to interpret and apply Article 25(c) and 50 (4) of the Constitution and to determine the constitutionality of the Petitioner's arrest and her threatened arraignment in court. He cited the principles for reviewing a prosecutorial decision laid down in DPP v Maina Martin & 4 others and argued that the criminal proceedings against her amounts to abuse of court process and lack proper factual foundation. (Republic v Attorney General ex parte Kipngeno Arap Ngeny cited). He submitted that the DCI's conduct is egregious, unreasonable, unfair and it violates the obligations of the National Police Service under Article 244 of the Constitution.
 15. Additionally, the Petitioner's counsel submitted that the Petitioner's arrest, threatened arraignment and prosecution violated her rights. In support of this line of argument, he submitted that the police targeted and arrested the Petitioner who was present at the scene in her professional capacity as an advocate of the vendor and the purchaser. He argued that the Police never arrested the purchaser because she could not be arrested for breaking her own gate. He submitted that the Petitioner was at the scene in her professional capacity, so the arrest and threat to prosecute her interferes with her professional duties and independence of the bar which is a threat to the rule of law under Article 10 of the Constitution. He termed the action as a threat to the 2nd and 3rd Interested Party's right to access justice under Article 48, the right to counsel and the right to a fair hearing under Article 50 of the Constitution. He relied on Republic v Director of Public Prosecutions & 4 others ex parte Ashford Gerrard Riungu which held that it is in the interests of justice that advocates are not harassed in the course of doing their duties.
 16. Additionally, he argued that it would be unfair to subject the Petitioner to prosecution on frivolous charges and relied on Republic v Attorney General Ex parte Kipngeno Arap Ngeny (*supra*). He submitted that her arrest and prosecution were undertaken with an ulterior motive calculated to prejudice her and her client. He faulted the Respondents for failing to inform the Petitioner the reasons for her arrest as required by Article 49(1) of the Constitution. He cited Mohammed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party). Lastly, counsel cited Article 23 of the Constitution and referred the court to Gitobu Imanyara v Attorney General in which the court followed Rudul Shah v State of Bihar which defined an appropriate relief as a relief required to protect and enforce the Constitution depending on the circumstances of each case.
 17. Counsel for the 1st and 2nd Interested Party supported the Petition and urged the court to allow it.



18. Counsel for the 1st to 5th Respondents submitted that the investigation file was forwarded to the DPP who upon reviewing the evidence concluded that the issue is more of illegal eviction and advised that the matter be dealt with in the Environment and Land Court. He emphasised that the police have a duty to investigate crime once reported as provided by sections 24 and 51 of the National Police Service Act. In support of the proposition that the police have a duty to investigate crime once reported, he relied on Republic v Commissioner of Police & another ex parte Michael Monari & another. He also referred to section 304(1) of the Penal Code which provides for the offence of illegal or unlawful eviction and argued that it cannot be argued that the investigations were malicious.
19. Lastly, counsel submitted that the Petitioner failed to prove breach or rights or violation of the cited Articles of the Constitution. (Citing Anarita Karimi Njeru v Republic No.1. He submitted that the Petition was filed pre-maturely in that it was filed before the DPP had arrived at a decision to charge. He submitted that upon reviewing the investigation file, the DPP *vide* a letter dated 17th January 2022 made a decision not to charge the Petitioner. He submitted that the Petitioner having failed to establish breach of his rights, she is not entitled to the damages sought and relied on Benedict Munene Kariuki and 14 others v The Attorney General.
20. First, I will address a pertinent issue raised by the 1st to 5th Respondent's counsel. On record is a list of documents filed by the 1st to 5th Respondents on 8th March 2022 during the pendency of this Petition. Only one document was introduced to the court record by the said notice, which is a letter dated 17th January 2022 from the ODPP addressed to the Inspector General of Police. The said letter was in response to a letter dated 7th January 2022 from the DCI to the ODPP forwarding the investigation dossier in respect of the investigations in the complaint against the Petitioner seeking the DPP's advice. The DPP's advise is captured in the following paragraph of his aforesaid response: -

“From the evidence in the file, it is clear that: -

1. The complainant does not own the premises in question.
2. That, apparently there was a stay order stopping the eviction of the complainant. However, the same has not been put in the file.
3. That, the suspects forced their way in. There is no evidence that they stole or had any intention to steal or commit any other felony.

I recommend the following;

From the facts and the evidence in the file, the issue seems to be more of illegal and/or unlawful eviction. Considering there is already an application before the Environment and Land Court in Malindi, I will recommend that the same be dealt with at the same court. In the alternative, the complaint can also seek any other civil remedy available according to the law.

Be advised accordingly.

Tammima B. Swaleh

Prosecution Counsel

For: Director of Public Prosecution.

21. Clearly, *vide* the said letter, the DPP exercised his constitutional mandate and made a decision not to prosecute the Petitioner. The import of the said communication is that the Petitioner cannot be arrested or prosecuted premised on the same complaint. The finality and constitutional validity of the



DPP's decision raises a pertinent question, which is its impact (if any) on this Petition. This scenario brings into sharp focus the law of mootness which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. Interestingly, the Petitioner did not address this pertinent issue at all. This is an important point of law which this court cannot ignore. Simply put, the question is whether prayers (b) and (c) of the Petition have been rendered moot by the said development. I have in several previous decisions addressed the doctrine of mootness. Inevitably, I will replicate much of what I said in the said decisions.

22. Mootness issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.
23. Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small. Put differently, the presence of a "collateral" injury is an exception to mootness. As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot. Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.
24. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
25. As a general principle, the rights and liabilities of parties to any judicial proceedings pending before court are determined in accordance with the law as it was at the time when the suit was instituted and by applying the facts to the law and circumstances. Time and again, it has been expressed that a court should not act in vain. No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity.
26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.

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



27. Furthermore, a case will be moot-
- “...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.”
28. Barron and Dienes put it succinctly when they observed: - "a case or controversy requires present flesh and blood dispute that the courts can resolve." Loots, a South African constitutional commentator, endorses these sentiments and points out that a case- "...is moot and therefore not justiciable if it no longer presents an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists." However, a court will decide a case despite the argument of mootness if to do so would be in the public interest.
29. Cases are determined on the basis of facts presented before the court and the evidence. The Petitioner moved to this court challenging a decision to arrest her and seeking to stop an imminent prosecution. The DPP's decision contained in the said letter has eliminated any possibility of arrest or prosecution. By stroke of the pen, prayers (b) and (c) of the Petition have been rendered moot. Courts generally only have subject-matter jurisdiction over live controversies. When a case becomes moot during its pendency, the appropriate first step is a dismissal of the case. On this ground alone, prayers (b) and (c) have been rendered moot by the DPP's decision. They cannot issue and the court will be engaging in an academic exercise if it were to consider and grant the said orders.
30. The only issue I need to address is whether the said development also renders prayers (a), (d) & (e) of the Petition moot. Earlier in my analysis, I observed that claims for damages cannot be rendered moot unless there is evidence of compensation. Prayer (a) upon which prayers (d) and (e) stands cannot be said to have been rendered moot because if the court finds that in the course of the arrest, the police overstepped their mandate or violated the Petitioner's rights or breach of the Constitution, then the court will be perfectly entitled to inquire into the question of damages.
31. In addressing the said prayers, it is necessary to bear in mind the scope and ambit of the constitutional and statutory mandate of the 1st, 2nd and 3rd Respondents and determine whether they acted *ultra vires* their constitutional and statutory mandate. This is because if a public body in performing its functions remained within the area assigned to it by the Constitution and Parliament in the enabling statute and it exercised its discretion properly, then a finding for breach of fundamental rights or constitutional or statutory provisions cannot arise. It is therefore necessary for me to examine the constitutional and statutory mandate of the Police and the DCI.
32. Article 245 (4) of the Constitution provides that the Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector General with respect to— (a) the investigation of any particular offence or offences; (b) the enforcement of the law against any particular person or persons; or... These provisions are meant to guarantee the independence of the National Police Service in the performance of its functions.
33. The functions of the National Police Service enumerated in section 24 of the National Police Service Act include (e) investigation of crimes; (g) prevention and detection of crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged; and (j) performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.



34. Section 35 of the *National Police Service Act* provides the functions of the DCI include—undertaking investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others; maintaining law and order; detecting and preventing crime; apprehend offenders; and performing any other function conferred on it by any other written law.
35. A reading of the above provisions leave no doubt that the police are legally obligated, once they witness or are informed of a crime, to investigate the offence. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law. As I have stated in several previous decisions, these obligations arise from the Constitution and are affirmed by the *National Police Service Act*. In terms of the above provisions, the functions of the police is to investigate crimes. Any other answer would give rise to indignation.
36. Investigation of the crime is a solemn duty imposed by law on the police officers. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the courts to record convictions but to bring out the real unvarnished truth. However, courts have insisted on the observance of certain principles – a code of investigation ethics – to be observed by the investigating officers. Observance of these rules is essential to protect life and liberty of the people and create public confidence in the criminal investigatory process. One would have expected a clear allegation that the police breached the Code of Ethics in the manner in which they received and processed the complaint. None has been suggested in this case.
37. Undisputedly, a police’s position is different from that of ordinary citizens in that they cannot simply walk away from a criminal offence that has been reported to them or has been brought to their attention. As was held in *S v Williams and Others*: -
- “Although mere failure to report the crime to the authorities would not render a member of the public guilty of being an accessory after the fact of that crime ... a police officer is in a different position as it is his legal duty to bring criminals to book.”
38. Its common ground that a complaint was made at Mtwapa Police Station. It would be an affront of the law to suggest that the police had no duty to investigate. Inarguably, the legislative intent in that the investigating officer records statements of persons acquainted with the facts of the case promptly to preserve the best evidence and to check any manipulation on the part of witnesses. There is no allegation this was not done. In fact, the Petitioner has annexed her statement signed by her which confirms that the police took this essential step in undertaking investigations. There is no evidence or allegations of coercion or duress or torture while recording the said statement. Spontaneity in recording statements ensures the truth of details of incident and participants therein and delay generally occasions manipulations and colouring. There is nothing to suggest that there was delay in recording the statement. The investigating officers are required to record statements of persons acquainted with the facts promptly and failure to do so is a serious matter. It is prudent for an investigator to give precedent to the examination of witnesses who are easily available at scene of crime in natural order of priority. Delay in recording statements may not by itself amount to be a serious infirmity but may assume such a character if there are concomitant circumstances to suggest the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case. Delayed recording of statements by the investigating officer of the material witnesses renders their evidence unreliable.



39. It is the duty of the investigating officer to take into possession any document which has a bearing on the case. The reason for such a necessity is that such document may have effect on the culpability or innocence of the accused. It is the duty of the investigating officers to ensure that the law is observed not only in letters but in spirit during the investigations and arrest and to ensure that they observe the provisions of law scrupulously and do not exceed their powers. It is the duty of the police to investigate the case with utmost impartiality and fairness, both to the suspect as well as to the aggrieved person. If the police adopt an impartial attitude, it will further the cause of justice. If police adopt partial attitude and in conducting investigation malice is apparently reflected, then this will be a ground for the court to intrude.
40. The Petitioner claims to have been arrested. Interestingly, she has annexed a cash bail receipt dated 9th December 2021 at 16:40 hours, the same day the offence is said to have been committed. This means that if at all she was arrested, she was released the same day on cash bail. If at all there was any detention in the cell, (and there is no evidence to suggest that), it must have been for a short time. The date the Petitioner recorded her statement is not clear from the copy provided, but there is nothing to show it was recorded later or after undue delay. Arrest and investigations are lawful process so long it is undertaken within the law. It is not enough to say the Petitioner was at the scene as an advocate. The test is whether a complaint was made against her and whether the police were acting pursuant to a complaint.
41. As for the allegation that there is no basis for the arrest, it must be recalled that the process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The police did forward the investigation file to the DPP who evaluated the evidence and independently decided not to prosecute. Importantly, it has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of the DPP's discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.
42. It is not for this court to weigh the veracity of the evidence. The Petitioner's argument that she was at the scene as an advocate is essentially her defence if she were to be charged. There is no evidence that the police impeded the Petitioner from performing her duty as an advocate. This court can only intervene where there is proven breach of the Constitution or the law before arrest, during arrest or after arrest. I am afraid, a review of the material presented before me does not suggest that the police exceeded their mandate as the alleged or broke the law. A complaint had been made to the police. They had a legal duty to investigate. Failure to do so would amount to abdication of duty. The police investigated and forwarded their file to the ODPP as the law requires. The DPP pronounced himself and found no offence had been committed. To me, there is truth in the argument that the Petitioner came to court too early. She should waited for the DPP to make his recommendations.
43. Moreover, the onus on the Petitioner to establish violation of Articles 28, 29, 47 and 49(1)(a) of the Constitution is not a mere formality; it is important. Section 107 (1) of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
44. The recitation of Articles of the Constitution or statutory provisions or statutory language is not sufficient nor are mere ipse dixit affidavits as proffered in this case. The Petitioner must not only



provide sufficient evidence to prove breach of the Constitutional or statutory provisions or abuse or neglect of duty. A petitioner must prove the allegations to the required standard. In the minimum, it is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of the Constitution should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of the Constitution is essential to a proper consideration of constitutional issues. Decisions on violation of the Constitution cannot be based upon the unsupported hypotheses. There must be clear and proven breach of the Constitution or fundamental rights. I am not persuaded that the Petitioner has surmounted the test of discharging the onus of prove to demonstrate breach of fundamental rights. The claim for breach of rights of constitutional provisions fails and with it the claim for damages. In view of my analysis of the issues discussed herein above, the conclusion becomes irresistible that this Petition fails. I dismiss the Petitioner's Petition dated 19th December 2021 with no orders as to costs.

Orders accordingly

SIGNED, DATED AT MOMBASA THIS 18TH DAY OF AUGUST 2022.

JOHN M. MATIVO

JUDGE

SIGNED, DATED, DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF AUGUST 2022.

J. N. ONYIEGO

JUDGE

