Gacheru & another v Attorney General & 5 others (Petition 443 of 2019)
[2022] KEHC 15461 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 443 OF 2019

HI ONG'UDI, J

NOVEMBER 18, 2022

BETWEEN

MAGARET WAIRIMU GACHERU ..... 1ST PETITIONER

ELIAS MAINA NG'ANG'A ..... 2ND PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE ..... 3RD RESPONDENT

PC PATRICK MUSYOKA (PC NO. XXXX) ..... 4TH RESPONDENT

MARGARET W.JOHN MATHENGE ..... 5TH RESPONDENT

BETA HEALTHCARE INTERNATIONAL LTD ..... 6TH RESPONDENT

JUDGMENT

1. The petition dated 4th November 2019 was filed under Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 47, 48, 49, 159 and 165(3)(d) of *the Constitution* for the alleged violation of the petitioners right to human dignity, fair administrative action, protection of their freedom and liberty and security of person. They also allege abuse of office and court process by the 4th, 5th and 6th respondents. Accordingly, the petitioners seek the following orders:

    i. An order for compensation as provided under Article 23(3) (e) of *the Constitution*.

    ii. Any other order that this honourable Court deems fit to meet the ends of justice and the protection of the constitutional rights of the petitioners.

iii. Costs of this petition.

The Petitioners' Case

2. The crux of the instant petition is that sometime in April 2014, the 5th respondent caused the petitioners to be arrested owing to her complaint which is stated was malicious in nature. This was premised on old private emails between the petitioners while at work. According to the 5th respondent the content of these emails amounted to a threat on her life.

3. In reaction to the emails, it was claimed that the 5th respondents and 6th respondent convened an internal committee referred to as 'The Grievances Committee' to adjudicate the matter as influenced by the 5th respondent. Thereafter the Committee in a record of one hour and a half made its decision overlooking the principles of natural justice and petitioners right to be heard. The Committee in its findings concluded that the email chats were 'genuine, hate speech, misuse of company privileges and amounted to character assassination.' The effect of the Committee's determination and recommendation was the summary dismissal of the petitioners from employment.

4. It is asserted that the Committee also recommended to the 5th respondent that she lodges a complaint with the police over the matter, and she proceeded to do so. This complaint was lodged on 25th April 2014 at the Industrial Area police station before the 4th respondent under O.B. No.OB24/14/5/2014.

5. The petitioners were arraigned at the Makadara Court vide the cases Republic v Margaret Wairimu Criminal case No.3375/2014 and Republic v. Elias Maina Ng'ang'a Criminal Case No.3698/2014 which were later consolidated. The charges were the improper use of a licensed telecommunications system contrary to Section 29(4) of the Telecommunications Act of 1994 and use of abusive language in a manner likely to cause a breach of the peace contrary to Section 95(1)(a) of the Penal Code. The petitioners went through the full trial and were eventually acquitted of the offense under Section 215 of the Criminal Procedure Code on 14th June 2019.

6. According to the petitioners the 5th and 6th respondents' actions were malicious without any probable cause in the end leading to the loss of their employment, causing public shame, ridicule and embarrassment. Moreover it is alleged that the 5th respondent violated the petitioners' right to privacy by intercepting their private conversations. Similarly that the 5th respondent urged the 6th respondent to victimize the petitioners on the private chats when there was clearly no ICT policy to that effect which was the basis for their dismissal.

7. The petitioners with regard to the 4th respondent noted that he had ensued to investigate the petty complaint hence became a corroborator of the 5th and 6th respondents' malicious scheme. They as a result had to endure 5 years of private prosecution in the criminal proceedings without any recourse to livelihood. They added that the criminal proceedings were conducted with malice and premised on improper and wrongful evidence so as to settle workplace differences using the legal process.

8. The petitioners also noted that the 5th respondent in the presence of witnesses proclaimed that "Am going to make sure, Margaret and Elias will rot in jail for the next 3 years. They will not joke with me again". Moreover, all attempts to settle the matter amicably with the 5th respondent were futile.

9. The petitioners in view of that brought the petition against the 4th, 5th and 6th respondents for violation of their fundamental rights and freedoms as provided under Articles 27, 28, 29, 31 and 47 of *the Constitution*.

The Respondents' case

10. The 1st respondent filed grounds of opposition dated 19th July 2020 on the grounds that:

    i. The petitioners other than making allegations that their constitutional rights have been violated, have not with clear precision demonstrated the manner in which his rights have been infringed.

    ii. *The Constitution* and the *National Police Service Act*, No. 11A of 2011, mandates the 1st Respondent to investigate any complaint brought to their attention and enforcing all laws and regulations with which it is charged.

    iii. It is apparent that the petition herein does not meet the threshold of a constitutional petition as it does not disclose the rights allegedly infringed upon and how those rights have been infringed.

    iv. The petition is frivolous and an abuse of the court process and should be dismissed for seeking to raise pure a civil dispute and presenting it as constitutional issues.

    v. By virtue of the grounds above, the present proceedings are incompetent and a blatant abuse of the Court's processes and the same does not warrant the intervention of this Court.

11. In response the 2nd and 3rd respondents correspondingly filed their grounds of opposition dated 11th December 2019 on the basis that:

    i. The petition lacks clarity and precision in setting out the alleged directives in relation to the 2nd and 3rd respondents.

    ii. The 2nd and 3rd respondents acted with reasonable cause as the criminal proceedings against the petitioners were justified.

    iii. Article 157 of *the Constitution* is to the effect that the 2nd respondent shall institute criminal proceedings only where a criminal offence has been committed; indeed the petitioners were charged and put on their defence.

    iv. The petitioners were accorded a fair trial in compliance with Article 50 of *the Constitution* by the trial court.

    v. It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes charged and prosecuted.

    vi. The petitioners have not adduced any reasonable evidence to show that criminal proceedings are mounted for an ulterior purpose and have not demonstrated how the 2nd and 3rd respondents acted without or in excess of the powers conferred upon them by law.

12. The petitioners unable to locate the 4th respondent asked the Court to strike him off the suit on 19th July 2022. He did not therefore participate in these proceedings.

13. The 5th respondent vide its replying affidavit dated 2nd March 2020 deposed that contrary to the petitioners allegation, the 6th respondent's telecommunications manager conducted an audit of its communication and hardware platform in line with its IT policy. She informed that it is the 6th respondent's audit report that revealed the stream of abusive and derogatory messages between the petitioners.

14. She deponed that she felt threatened by the abuses and registered her discomfort vide her complaint at the 6th respondent's Grievance Committee. She averred that the findings of the Committee were vindicated by the High Court in ELRC Cause No.1940 of 2014 where the 1st petitioner filed a suit against the 6th respondent for her dismissal.

15. She deposed that in addition to this complaint she in her own volition lodged a criminal complaint at the Industrial Area Police Station on 25th April 2014 against the petitioners afraid that they would cause her bodily harm. She denied colluding with the 4th respondent to arrest and charge the petitioners.

16. She averred that her complaint as picked up by the 4th respondent and later prosecuted by the 2nd respondent disclosed a criminal offense and so the case had probable cause. In view of this, she noted that the trial Court found that there was a prima facie and so placed the petitioners on their defence. There was therefore no malice involved.

17. In response to the constitutional violations allegations, she deposed that the actions of the 6th respondent were in line with the Company's policy and employment laws which the petitioners had failed to adhere to. This is because the impugned messages were exchanged on the 6th respondent's platform who pursuant to its IT policy, reserves the right to intercept, monitor, review or disclose all messages sent or received making the chats not private as alleged. Similarly, she noted that the 6th respondent in summarily dismissing the petitioners had followed the procedural requirements under the employment law as affirmed by the Employment and Labour Relations Court.

18. In conclusion she deposed that the petition lacked merit and evidence to support its claim. She noted also that a claim of malicious prosecution was a civil matter.

19. The 6th respondent filed a replying affidavit dated 6th March 2020 sworn by Dr. Robert Nyatangi, the production manager and chairman of the Grievance Committee. He informed that this Committee had always been in existence prior to the petitioners' case. He made known that the 5th respondent's claim was in relation to a stream of abusive and derogatory message exchanges between the petitioners. The messages through the telecommunications manager were retrieved from the Company's communication and hardware platform whilst carrying out an audit of the system as per their IT policy.

20. He deposed that the Grievance Committee's pronouncement was based on a fair assessment of the complaint. He denied that the Committee had recommended to the 5th respondent to lodge a complaint with the police. She did so out of her own volition. He averred that the 6th respondent's role was only to assist the authorities by providing the requisite evidence. He as such averred that the petitioners' assertion of malicious prosecution on the part of the 2nd, 3rd, 4th and 5th respondent was baseless and without any evidence, as there was a reasonable and probable cause for her to be charged.

21. He deposed furthermore that the petitioners' assertion that the Committee's decision was influenced by the 5th respondent was declined by the Court in ELRC Cause No.1940 of 2014 where it was found that the 6th respondent had adhered to the procedural requirements owing to its IT policy and ownership of the system by the 6th respondent. It was also noted that the dismissal was for a justifiable reason. It was concluded by the Court hence the action taken was in line with employment laws. To this end he deposed that the petition had no merit and was an attempt to extort the Company money and should be dismissed.

The Parties Submissions

22. The petitioners through their advocates P.M. Karanja & Associates Advocates filed written submissions dated 14th July 2021 and further supplementary submissions dated 5th October 2021. Counsel submitted with reference to ELRC Cause No.1940 of 2014 which the respondents had relied on that the 1st petitioner had filed an appeal against the decision under Civil Appeal No.E359 of 2020 which is yet to be determined.

23. It was submitted that the petitioners' rights under Article 27(1) of *the Constitution* were violated when the 5th and 6th respondents relied on their private chats to make out a case against them yet there was no policy that prohibited such discussions. Counsel noted that the audit report and ICT policy was not attached to the 5th and 6th respondents' replying affidavits.

24. With regard to Article 28 of Constitution Counsel submitted that their right to inherent dignity was violated by the 4th, 5th and 6th respondents who jointly ensured that the petitioners were arrested in public and in front of neighbours and family members including their minor children, for an alleged crime causing them to be shamed and stigmatized as thieves. He added that the petitioners were frog marched and locked up, in a police container for hours at the Donholm petrol station. It was submitted further that the petitioners were never summoned to the police station by the 3rd and 4th respondents.

25. Counsel submitted further that the 5th and 6th respondents failed to respect and protect the inherent dignity of the petitioners by their undignified summons, the treatment they meted to them by keeping them waiting in the corridors, failing to provide representatives or provide the time or issue advice to the petitioners on their right to representation in the Grievance Committee.

26. Moreover counsel submitted that the petitioners rights under Article 29(a) of *the Constitution* were violated by the 4th, 5th and 6th respondents, who caused them to be detained for several hours before their release for crimes they never committed. In support Counsel attached to the submissions the applicable ICT policy, dated 2nd May 2014 which he noted contained a different shade of ink on the numerals 2010 which was a grave insertion since it was an attempt to doctor the document. Furthermore he submitted that the petitioners had stated that they had never been aware of the ICT Policy as relied on by the 5th and 6th respondent.

27. Counsel submitted that the 1st petitioner was on medical leave and on medication when she was summoned and confronted with the allegations presented at the 6th respondent's Grievance Committee. He submitted that the petitioners were never given time to prepare their case. He noted similarly that the apology letter submitted by the 1st petitioner was later retracted after she regained calmness.

28. Counsel submitted that the 6th respondent's assertion that the petitioners aim was to extort money from the company was a serious allegation and the petitioners reserved the right to take legal action on it. He argued that the petitioners who have been unemployed since 2014 continue trying to prove their innocence from the respondents unconstitutional actions against them and so the accusation is callous. In support of the above submissions Counsel relied on the cases of Republic v Chuka University Exparte Kennedy Omondi Waringa & 16 others (2018) eKLR and James Njenga Kihato v DPP & 4 others (2018) eKLR. He contended that the petitioners were entitled to the reliefs spelt out under Articles 22(1) and 23(3)(e) of *the Constitution*.

29. In the supplementary submissions, Counsel submitted that the 3rd and 4th respondents failed to undertake proper investigations and were used to harass, intimidate and embarrass the petitioners throughout the five year period the trial took. He noted that it was a blatant misuse of the powers

granted to the 1st respondent together with the 3rd and 4th respondents to act as an agent of private entities and individuals and proceed to initiate criminal proceedings.

30. Counsel opposed the argument that the submissions introduced new issues stating that what had been highlighted as new material was information within the pleadings, only in a more detailed fashion within the submissions.

The Respondents' submissions

31. The 1st respondent through State Counsel, Betty Mwasao filed written submissions dated 23rd August 2021. She identified the issues for determination to be:

    i. Objection to the Petitioners' introducing new issues.

    ii. Whether the Petitioner's rights were violated by the 1st Respondent.

    iii. Whether the Petitioners are deserving of the relief sought.

32. Counsel on the first issue opposed petitioners' action of introducing new facts/issues in their submissions at paragraphs 8, 9, 10, 11, 12, 15, 16, 19, 20, 23, 29, 30, 31, 35, 36, 42 and 43 which were never raised in their pleadings. She argued that the cited paragraphs introduced material facts that were not pleaded and it was the petitioners' advocate who was testifying on behalf of his clients by refuting the 5th and 6th respondent's evidence and that the same is not captured in the petitioners' evidence on record. Furthermore it was argued that the respondents were not accorded an opportunity to address the introduced averments in essence amounting to a trial by ambush. Owing to this, Counsel urged this Court to dismiss the submissions.

33. In support reliance was placed on the case of Fibre Link Limited vs. Star Television Production Limited [2015] eKLR where the Court observed that there is absolutely no material in the applicant's affidavit that refers to those facts which are submitted in the written submissions. Submissions are not evidence. There is no affidavit evidence showing the need for the new additional evidence and demonstrating that after due diligence, the evidence could not be accessed.

34. On the second issue, Counsel submitted that the petitioners had not demonstrated how the 2nd, 3rd and 4th respondents had exercised their mandate under the *National Police Service Act*, No.11A of 2011 and Article 157 of *the Constitution* for arbitrary or ulterior motives other than for advancing the ends of justice. It was further submitted that the Court can only be moved to interfere with the 2nd respondent's discretion if it is shown that it acted under the control of any person or body, or that it acted in a manner that was not consistent with the public interest or the interests of the administration of justice when it decided to prefer charges against the Petitioners as held in the case of Diamond Hasham Lalji & another vs. Attorney General & 4 others [2018] eKLR.

35. Counsel submitted that after the 4th respondent had carried out his mandate to investigate the matter the 2nd respondent instituted the proceedings against the petitioners and presented the evidence submitted. She noted that the trial court opined that the petitioners had a case to answer and observed in its judgement that the relationship between the petitioners and the 5th respondent qualified as persons contemplated under Section 95 (1)(a) as charged owing to the abusive chats clearly directed at the 5th respondent. In view of this Counsel submitted that the 2nd, 3rd and 4th respondents had a reasonable suspicion that the petitioners had committed a cognisable offence as also appreciated in the case of Kenya Power & Lighting Co Ltd v Maurice Otieno Odeyo & 2 others [2017] eKLR.

36. On the final point Counsel submitted that the petition did not meet the threshold of a constitutional petition as it did not substantiate the alleged violation of the petitioners' rights under Article 28, 29

(a), 31(d) and 47(1) & (2) of *the Constitution* and so there was no basis for this Court to grant the orders sought. In support reliance was placed on the case of Abdiwahab Ibrahim Ali & another vs. Inspector General of the National Police Service & 3 others [2017]eKLR where it was held that it is only if infringement has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice developed in constitutional matters is to award damages for violation of constitutional rights, but it cannot be over emphasized that this is after proof of the infringement.

37. Counsel Allan Wanjohi filed written submissions on behalf of the 2nd and 3rd respondents dated 25th February 2022. He commenced by submitting that the petitioners had failed to set out with precision the particulars and manner in which the 2nd and 3rd respondents violated their rights. To buttress this argument he argued that the petitioners were under a legal obligation to prove that their rights and freedoms were violated and show how this provisions were breached as held by the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR, among many others.

38. It was submitted on the second point that the allegations of breach of the petitioners' rights by the 2nd and 3rd respondents were not proven. Counsel contended that any party seeking justice is required to place before Court all material facts and evidence to enable the Court arrive at a decision. He noted that this had not been done by the petitioners. That although allegations could be true the Court was enjoined by law to go by the evidence on record as was held in the case of Harrison Njuguna Kariuki v Inspector General National Police Service & 2 others (2021)eKLR.

39. Moving on to the next point, Counsel submitted that the allegations of malicious prosecution on the part of the respondents was illusory and unverified. He noted that the law on malicious prosecution was settled in the case of Bethwel Omondi Okal v Attorney General & another [2018] eKLR to wit for one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him.

40. Counsel relying on the Court of Appeal case of James Karuga Kiiru v Joseph Mwamburi & 3 others NRB. CA.No.171 of 2000 submitted that prosecution of a person is not a prima facie tortious, but to do so dishonestly or unreasonably is so. Similar dependence was placed on the case of Susan Mutheu Muia v Joseph Makau Mutua (2018) eKLR, Republic v Commissioner of Police & another ex parte Michael Monari & another(2012)eKLR and Philemona Mbete Mwilu v DPP & 3 others HCCK Petition No.295 of 2018. Counsel in view of this submitted that the 2nd and 3rd respondents had not acted out of spite or ill will or unreasonably investigated the matter.

41. In closing Counsel submitted that an award of damages is contingent upon proof of infringement of constitutional rights and so cannot be awarded where the petitioner has failed to prove such an infringement as held in the case of Kariithi & another v Attorney General & another (2021) KEHC 308 (KLR).Additional reliance was placed on the case of Abdiwahab Ibrahim Ali & another v Inspector General of the National Police Service & 3 others (2017) eKLR. It was his submission taking all this into consideration that the petitioners had not proved infringement of their rights by the 2nd and 3rd respondents and the petition ought to be dismissed with costs.

42. The 5th and 6th respondents filed joint submissions dated 6th October 2021 through the Firm of Soita and Associate Advocates who outlined the issues for determination as:

    i. Whether the abusive, derogatory and demeaning email chat exchanges between the Petitioners were directed at the 5th respondent;

    ii. Whether the petitioners were unfairly and wrongfully dismissed from employment by the 6th respondent;

    iii. Whether the petitioners were maliciously prosecuted;

    iv. Whether the petitioners' rights and/or fundamental freedoms were breached; and

    v. Who should pay costs of this Petition.

43. Counsel on the first issue submitted that a cursory look at the contents of the chats together with the graphic way they were referring to the subject of their conversation, left little doubt as to who they were referring to. To support this argument he relied on the two judgments that have been rendered and confirmed in these matters. First is, Criminal Case No. 3698 of 2014 R. vs. Elias Ngang'a & Another and ELRC Cause No. 1940 of 2014 Margaret Wairimu Gacheru vs. Beta Healthcare International Limited.

44. Counsel further submitted that the impugned email chats were neither private chats nor private between two adults within their constitutional right to free speech. He stressed that Article 33 (2) (c) (d) (i) and (3) of *the Constitution* on freedom of expression does not cover hate speech and incitement. In exercise of this right persons are to respect the rights and reputation of others. This fact Counsel submitted was also affirmed by the two courts.

45. Turning to the second issue, Counsel reminded the Court that the Employment and Labour Relations Court which deals with employment matters had already pronounced itself in this regard in ELRC Cause No. 1940 of 2014 Margaret Wairimu Gacheru vs. Beta Healthcare International Limited. He submitted that the Court found that the petitioners were not only summarily dismissed for a justifiable reason by the 6th respondent but also that the 6th respondent had adhered to the procedural requirements of labour laws. He argued that the judgment had neither been set aside nor stayed by any court of law hence still stands. He noted moreover that the said Appeal No. E359 of 2020 had not been served on them. He in view of this urged the Court to take judicial notice of the Employment and Labour Relations Court judgment under Section 60 of the *Evidence Act*.

46. On top of this Counsel submitted that the petitioners' conduct was not only in breach of *the Constitution* but the same also amounted to gross misconduct warranting summary dismissal as per the provisions of Section 44 of the *Employment Act*, 2007. On the question on whether the petitioners had been accorded due process prior to their summary dismissal, Counsel answered in the affirmative. This is because as from the 5th and 6th respondents account, the 6th respondent received a complaint from the 5th respondent after which it set up the Committee to evaluate the matter. The Committee then invited the petitioners to the disciplinary meeting where they were heard and a decision made. Article 47 was therefore not violated. In support of this view reliance was placed on the case of Lillian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & another [2020] eKLR.

47. It was submitted on the third issue that the petitioners were not maliciously prosecuted since the 2nd and 4th respondents had reasonable and probable cause in arresting and charging them. Moreover Counsel submitted that it is trite law that in cases such as this, an acquittal alone in terms of Section 15 of the CPC does not demonstrate ill will, spite or unreasonableness on the part of persons such as

the 1st, 2nd, 3rd and 4th respondents in this case as held in the case of James Kahindi Simba v Director of Public Prosecution & 2 Others [2020] eKLR. He submitted that the 2nd, 3rd and 4th respondents had carried out their mandate as spelt out in the law and emphasized in the cases of Susan Mutheu Muia vs. Joseph Makau Mutua [2018] eKLR and James Kahindi Simba case (supra).

48. On the fourth issue, Counsel submitted that the right to equal protection of the law is not absolute. It can and is usually limited when and where it is necessary. In the instant case, it was argued that the petitioners' conduct of exchanging derogatory and unfathomable insults at the 5th respondent on the 6th respondent's company telecommunications platform cannot be protected under the guise of Article 27 (1), 28 and 31 of *the Constitution*.

49. On the final issue, Counsel submitted that it is trite law that costs should follow the event. In support reliance was placed on the case of Cecilia Karuru Ngayu -Vs- Barclays Bank of Kenya & Another (2016) eKLR. He therefore prayed for costs.

Analysis and Determination

50. I find it prudent to first address an issue that was raised by the 1st respondent in its submissions. The 1st respondent asserted that the petitioners' advocate while presenting their case in the written submissions introduced new facts and issues under paragraphs 8, 9, 10, 11, 12, 15, 16, 19, 20, 23, 29, 30, 31, 35, 36, 42 and 43 of the written submissions that were not pleaded in the petition and affidavits in support.

51. A perusal of the stated paragraphs as in the petition and supporting affidavits reveals this to be accurate. It is discernable that the written submissions introduced new facts that were not presented in the petition. Moreover, Counsel for the petitioners went ahead and attached annexures in the written submissions in support of the stated facts. These issues were obviously not responded to by the respondents.

52. It is worth emphasizing that a party is bound by their pleadings and an advocate cannot be deemed to plead the case on behalf of the clients vide submissions. For avoidance of doubt a party's pleadings contains the facts and evidence it wishes to rely on in its case while the submissions present the law and supporting authorities in support of the party's case. In effect this Court will is hereby expunging the said paragraphs form these proceedings.

53. Considering this, I find myself in agreement with the opine in the case of Philmark Systems Co. Ltd v Andermore Enterprises [2018] eKLR where while citing the cases of Malawi Supreme Court of Appeal in Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3 and Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC S.C. 91/2002 the Court stated as follows:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision

given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.

..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

54. I have perused the pleadings, submissions, cited cases and the law and I find the issues for determination to be as follows:

i. Whether the 2nd, 3rd and 4th respondents acted within their legal mandate in light of the malicious prosecution claim;

ii. Whether the petitioners' rights under Articles 27, 28, 29, 31 and 47 of *the Constitution* were violated by the respondents; and

iii. Whether the petitioners are entitled to the reliefs sought.

Whether the 2nd, 3rd and 4th respondents acted within their within their legal mandate in light of the malicious prosecution claim

55. The petitioners submitted that these respondents in carrying out their legal mandate acted outside their mandate. According to the petitioners the 4th respondent corroborated in the 5th and 6th respondents malicious scheme as they chose to investigate a trivial compliant, premised on improper and wrongful evidence in order to settle workplace differences using the legal process.

56. The respondents opposed this allegation arguing that they had acted with reasonable cause since the criminal proceedings against the petitioners were justified and never actuated by malice or ill motive on their part.

57. Evidently, malicious prosecution is a tortious claim that is designed to provide redress for losses flowing from an unjustified prosecution under civil law. In addition to the cited authorities by the respondents, this Court in the case of Calvin Ouma Magare & 18 others v Director of Public Prosecutions & 4 others [2022] eKLR citing the case of Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 others [2020] eKLR with approval observed as follows:

> " 103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was unjustified.
>
> 104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in Murunga vs. Attorney General (1979) KLR, 138 as follows: -
>
> a. The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;
>
> b. The Plaintiff must show that the prosecution terminated in his favour;

c. The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;

d. He must also show that the prosecution was actuated by malice."

46. Accordingly, a party who claims that he was unlawfully arrested and falsely imprisoned and or maliciously prosecuted, bears the burden of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. Similarly, an acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of Nzoia Sugar Company Limited supra, the Court of Appeal observed:

"It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company."

58. It is worthy to note that these respondents starting with the 2nd respondent derives his powers from Article 157(6) of *the Constitution* which is recapped in the *Office of the Director of Public Prosecutions Act*, 2013(ODPP Act) under Section 5.This sub-Article provides as follows:

The Director of Public Prosecutions shall exercise State powers of prosecution and may--

a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority.

59. The 3rd respondent on the other hand obtains his power from Article 245 of *the Constitution* which establishes the *National Police Service Act*, 2011 that creates his office. This Article 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

c. .....

60. As an officer of the 3rd respondent the functions of the 4th respondent are accordingly provided under Section 35 of the Act as follows:

a. collect and provide criminal intelligence;

b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

c. maintain law and order;

d. detect and prevent crime;

e. apprehend offenders;

f. maintain criminal records;

g. conduct forensic analysis;

h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;

i co-ordinate country Interpol Affairs;

j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and

k. perform any other function conferred on it by any other written law.

61. Similarly, the Courts have addressed their mind on these respondents' mandate in a plethora of cases. One such case Republic vs. Commissioner of Police & another Ex-Parte Michael Monari & another [2012] eKLR stated as follows:

> " It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

62. It is palpable that the courts in such matters as those raised by the petitioners are not concerned with the merits of the case being investigated but the decision making process and whether the petitioners have proved that the criminal process was flawed. In essence, the determination focuses on whether the process adhered to the constitutional and statutory principles of carrying out the procedure not whether the decision is merited or not. This is for the trial Court to decide. It follows therefore that where a petitioner shows that the criminal investigation and prosecution constituted an abuse of the process, the Court will not hesitate to issue redress to him/her.

63. The facts of this matter indicate that based on the intercepted conversations between the petitioners that were deemed hateful and scandalous a compliant was lodged with the 4th respondent as an officer of the 3rd respondent. This complaint was duly recorded in the occurrence book and an investigation commenced. This led to the instigation of criminal proceedings by the 2nd respondent against the petitioners. The case Cr. Case No. 3698 of 2014 (supra) has since been heard and determined.

64. Owing to the material placed before this Court in support of this claim, it is my considered view that nothing was out of the ordinary as regards the mandate of the 2nd, 3rd and 4th respondent in dealing with this matter. The petitioners' evidence actually details the 2nd, 3rd and 4th respondents mandate as was required to be done by the law. The petitioners do not demonstrate extrinsic factors in conducting of their duty. They essentially fail to prove the elements of malicious prosecution in this matter as alleged other than saying the matter was instigated by the respondents and terminated in their favour. They were never acquitted under section 210 but section 215 of the Criminal Procedure Code which means there was a prima facie case established against them.

65. In light of these circumstances, I am certain that the petitioners have failed to prove to the required standard that the conduct of the respondents was contrary to the law amounting to malicious prosecution. They further did not demonstrate that the exercise of the police and prosecutorial power appears to a reasonable man to have been deployed for an ulterior or collateral motive other than for advancing the ends of justice.

66. I find that the criminal proceedings and investigation against the petitioners by the 2nd, 3rd and 4th respondents cannot therefore be condemned as it was both procedural and lawful. In fact failure by the respondents to carry out the investigations and prosecution would have amounted to violation of their constitutional mandate.

Whether the Petitioners' rights under Articles 27, 28, 29, 31 and 47 of *the Constitution* were violated by the Respondents

67. The petitioners argued that the respondents' actions to wit exposure of the conversations between them by the telecommunications officer, the proceedings before the 6th respondent Grievance Committee, the lodging of the complaint before the police being the 4th respondent and prosecution of the matter by the 2nd respondent violated their constitutional rights. According to them the conversations were private thus their exposure violated their right to privacy. Likewise, that the proceedings before the Grievance Committee were commenced without the existence of such company policy. Further that the decision arrived at by the Committee was influenced by the 5th respondent who incited the 6th respondent to commence the proceedings. It was asserted that the proceedings violated the dictates of Article 47 of *the Constitution*. As a result of the same it was noted that the petitioners following their job loss, arrest and prosecution endured public shame and a long criminal trial which they deemed was malicious.

68. These allegations were denied and opposed by the respondents who noted that all had been done in accordance with the law. Heavy reliance was placed on the Criminal cases and Employment and Labour Relations suit filed in the Courts. In addition it was submitted that the petitioners had failed to demonstrate how these rights were violated since no evidence was adduced to that effect.

69. In a constitutional suit a party that alleges violation of his or her rights must demonstrate the manner in which the claimed rights were violated. This principle was established in the pronouncement in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272.The Court of Appeal while citing this authority in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR observed as follows:

> "...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
>
> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

70. Evidently, as can be appreciated from this authority and others the mere citing of constitutional provisions is not enough. A petitioner must with some reasonable degree of precision identify the

constitutional provisions that are alleged to have been violated and the manner in which the said provisions have been violated. As already established, the petitioner is required to demonstrate the manner of infringement by laying a factual basis for the allegation by way of evidence.

Also see Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR where the Court stated:

> "74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

71. I have perused the pleadings of the petitioners and observe that their affidavit in support contains evidence of the termination letter received from the 6th respondent, the proceedings before the Grievance Committee and the criminal investigation and proceedings record and attendant judgment therein. I note that the petitioners did not adduce documentary evidence or other evidence to the effect that the conversations between them were private in view of the 6th respondents' assertion that the same were conducted on its telecommunications platform which it has the rights to as the employer.

72. Similarly, no witnesses were called to ascertain the alleged threat issued by the 5th respondent or effect of the public shame on the petitioners. The petitioners averred that no policy existed in line with the Grievance Committee yet they did not adduce documentary evidence or other evidence to support the claim.

73. Furthermore, no evidence was adduced to demonstrate as noted in the first issue that the respondents worked together to achieve settling of company disputes as alleged rather than criminal justice. Nothing extraordinary stood out from the criminal investigations and proceedings conducted to wit consideration of irrelevant or unreasonable factors. Suffice to say production of such evidence would have guarded this Court in coming to a definitive conclusion.

74. From the foregoing analysis and the material placed before this Court it is my humble view that the petitioners did not discharge their burden of proof in this matter. This is because although the petitioners asserted violation of various provisions of *the Constitution*, they failed to demonstrate how these rights were violated by the respondents by adducing the necessary evidence. I therefore find myself in agreement with the holding in the case of Edward Akong'o Oyugi & 2 others (supra) where it was stated that:

> "...Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

75. I am accordingly compelled to find that the respondents in this matter did not violate the petitioners' rights as envisaged under Articles 27, 28, 29, 31 and 47 of *the Constitution*.

76. My finding is that the respondents carried out their duties, investigations as is expected of them. They presented their evidence before the court, which was considered alongside that of the petitioners. The

mere fact that they were acquitted under Section 215 CPC is not proof in itself that the prosecution was malicious. Even the suit filed at the ELRC exonerated the 5th & 6th respondents.

77. In light of the circumstances discussed above, I am of the opinion that the petitioners are not entitled to the reliefs sought in this petition. The upshot is that the petition fails and is dismissed with costs.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT