



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CONSTITUTIONAL PETITION NO. E003 OF 2020

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 28, 58, 73, 165, 232 AND 259 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 27, 29 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF:

KENYA NATIONAL POLICE SERVICE ACT CAP 84 LAWS OF KENYA

AND

IN THE MATTER OF:

INDEPENDENT POLICING OVERSIGHT AUTHORITY

ACT NO. 35 OF 2011

AND

IN THE MATTER OF:

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF:

ARTICLES 73, 74, 75, 76, AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF:

SOLICITATION FOR A BRIBERY UNDER SECTIONS 6 AND 18 OF THE BRIBERY

ACT NO. 47 OF 2016

AND

IN THE MATTER OF:
SUSPENSION OR DISQUALIFICATION OF A PERSON IN THE PUBLIC SERVICE ON ACTION OF
SECTION 62,63,64,65 AND 66 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF:
SECTIONS 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 OF THE LEADERSHIP AND
INTEGRITY ACT NO. 19 OF 2012

AND

IN THE MATTER OF:
UNLAWFUL HARASSMENT, EXTORTION AND INTIMIDATION AND COERCION BY
THE PUBLIC OFFICER

AND

IN THE MATTER OF:
VIOLATION OF PETITIONERS RIGHTS AND FREEDOMS

BETWEEN

COMMISSION FOR HUMAN RIGHTS & JUSTICE (CHRJ).....PETITIONER

-VERSUS-

1. VICTORIA MUTUKU, CHIEF INSPECTOR OF
POLICE (OFFICER COMMANDING STATION KIJIPWA POLICE STATION)
2. INSPECTOR GENERAL OF POLICE
3. NATIONAL POLICE SERVICE COMMISSION
4. INDEPENDENT POLICING OVERSIGHT AUTHORITY
5. THE HON. ATTORNEY GENERAL
6. THE ANTI-CORRUPTION COMMISSION..... RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Mr. Munga for the Attorney General

J U D G M E N T

Introduction

The petitioner herein brought a petition dated 20th October 2020 against the respondent's herein seeking constitutional determination of the following;

- a) *Whether the 1st respondent has violated the provisions of article 10, 73 and 232 of the constitution, Public Officer Ethics Act (Act No. 4 of 2003) and the Leadership and Integrity Act no. 9 of 2012.*
- b) *Whether the 1st respondent has violated Article 10,73 and 232 of the Public Officers Act and Leadership and Integrity Act is still for to continue serving the police service. (sic)*

In the light of above questions, the petitioner seeks that this court does not make a declaration and issue the following orders;

- a) Declaration that the continued service and employment of the 1st respondent as police officer (public officer and/or state officer) is has become untenable as by her conduct acts of omission and commission violated the constitution Public Officer Ethic and Leadership and Integrity Act. (sic).**
- b) Declaration that the 1st respondent is unfit to hold public office/police service in service of the general public of Kenya.**
- c) An order to issue revoking her appointment and/or cancellation for appointment in the police service.**
- d) An order of restitution as all the property the 1st respondent has taken from the petitioner.**
- e) Mesne profit from the above (c)**
- f) That the honourable court be pleased to order the 1st respondent to pay the costs of the petition.**
- g) Any orders that the court may deem fit to grant.**

The petition is supported by the annexed affidavit of Julius Ogogo the Executive Director of the petitioner who states as follows;

“That a complaint was made to the petitioner (the Commission) on 7th September 2020. The complaint was on diverse occasions the 1st respondent had been making unreasonable demands to the members of the public soliciting for bribes and material benefit from them contrary to the code of conduct of a state officer. In support of the averments, he annexed a letter marked J.O-1 written by a member of the public.”

That in the same month, another member of public made a complaint to the petitioner alleging that the 1st respondent in collusion with a group of land agents had alienated his land and subdivided it and caused it be transferred to third parties illegally as he had not sold or authorized the same be transferred. The 1st respondent had been frustrating the genuine owner of the land together with the family through arbitrary arrests and arraignments in court on flimsy charges which were never prosecuted.

That the 1st respondent has been using her office to harass intimidate members of the public and to engage in the aforementioned illegal activities thus eroding public confidence in the office and station she is commanding.

He further states that the 1st respondent has been in perpetual violation of the general code of conduct and leadership and integrity as required by the constitution and the leadership and integrity act no. 19 of 2012 as is demonstrated by the events that led to her transfer from Eldama Ravine police station.

That the petitioner wrote to the 2nd respondent demanding that the 1st respondent's conduct be investigated and appropriate disciplinary action be taken against her to which the 2nd respondent has failed, ignored and or refused to make good the petitioners demand thus necessitating this suit.

The 1st respondent filed a replying affidavit stating that he first point of contact with one Osman Erdinc Elsek was on 17th July 2018 while she was discharging her duties at Kijipwa police station when a report of sudden death was made by one Shame Aziz Mwidani of Elsek and Elsek group of companies where the deceased was an employee and the said Osman sought a letter from her in order to preserve the body at the mortuary.

She states that she has never made demands for donations at Kijipwa police station and any donations to the police station are well documented and her superiors well informed.

That the allegation that she had received a bribe of Kshs. 18,000 is untrue. She states that the same was a donation to the station for purchase of paint.

That on 23rd January 2019, one Osman Erdinc Elsek was escorted to the station by an officer from the Directorate of Criminal Investigation on allegations of committing indecent acts with children and engaging in child pornography and was booked in vide O.B No. 26/23/1/2019 and was later arraigned at Shanzu law courts and she was the investigating officer.

That on 31st August 2020 a report was made against Osman Elsek Erdinc on allegations of defilement which report was booked vide O.B No. 27/31/8/2020 and the matter has since been taken over by the Kilifi County Criminal Investigation.

She states that the allegations that she was transferred from Eldama Ravine on account of misconduct are untrue since there are no adverse comments from her employer

She further states that on 8th September 2019 a report was made at the station in a case of assault of one Muzamil Yassin allegedly by Tsuma Tezi. A case file 312/89/2020 was opened pending his arrest. Further a report of robbery with violence was made by one David Ngoro vide OB. No. 27/12/09/2019 against Tsuma Tezi and his son Amani Tezi. However, on 16th September 2019, the complainant voluntarily

withdrew the charges against the accused persons. The said Amani Tezi was charged with the offence of stealing contrary to section 268(1) of the penal code and currently there is a warrant of arrest in force against him for failing to attend court.

She states that on 10th October 2020 she was informed by officers from the Internal Affairs Unit that there were investigating a complaint from the Commission for Human Rights and Justice and thus allegations that the 2nd Respondent has failed to act on the said complaint is false since investigations have commenced.

She states that for the 13 years she has been in service she has upheld the rule of law and abided by the constitution, the law and the Service standing orders in discharge of her duties and that the application lacks merit and ought to be dismissed with costs.

The 2nd Respondent filed a replying affidavit sworn by one Samwel Gathirwa a superintendent of Police deployed as the staff officer IX in the Personnel Directorate at the Kenya Police Service headquarters.

He states that the 2nd Respondent exercises independent administrative and operational command of the national Police service as provided under Article 245(4) of the constitution and may not take instructions from any quarters with respect to: -

- a) The investigation of any particular offence or offences;**
- b) The enforcement of the law against any particular person persons or;**
- c) The employment, assignment, promotion, suspension or dismissal of any member of the National police Service.**

That the 2nd respondent is also vested with the primary function of Criminal investigations by dint of Article 254(4) (a), 157(7) of the constitution and section 35 of the national police service act and other enabling legislation through the Directorate of Criminal Investigations.

That further the 2nd respondent by virtue of section 87 of the National Police Service act mandated to conduct inquiries in disciplinary and police personnel misconduct and may in appropriate circumstances collaborate or refer cases and vice versa to other investigative agencies and in the present case; the independent Police Oversight Authority under Section 87(4) (e) of the National police Service Act or the Ethics and Anti-Corruption Commission under Section 62 of the Ethics and Anti-Corruption Commission Act.

In respect to the matter, the 2nd respondent avers that they received a complaint from the petitioner vide a letter ref Chrij/vol 01/09/08/2020 dated 08/09/2020 for alleged misconduct of the 1st respondent and due to the paucity of the presented evidence, the 2nd Respondent could not interdict the 1st respondent as contemplated in paragraph 47 of the Service Standing orders (SSO) Chapter 30.

The 2nd respondent instructed the director of internal affairs unit vide a letter ref NPS/SEC/4/3VOL.V/61 dated 15/09/2020 to conduct immediate investigations and submit the enquiry file for perusal and directions in accordance with section 87 of the National Police Service Act. Further the director of IAU directed Mr. Wilhelm Kimutai, SP and CI Michael Boiyo to investigate the complaint and submit the resultant inquiry file with recommendations to the 2nd respondent for perusal and directions.

The 2nd respondent states that they are aware that investigations are complete save for the evidence in respect of M-pesa transactions between the 1st respondent and Osman Erdinc Elsek have been delayed by Mr. Osman Elsek's failure to honour a request to surrender his phone for forensic analysis.

That the petitioner has not made any follow up as to the progress of the investigations but has otherwise elected to file the present petition in complete ignorance and contemptuous of the laid down procedures for conducting criminal investigations into complaints against a police officer. Further, the current petition undermines the independence of the 2nd respondent and is brought in bad faith and the court should not find in favour of the petitioner.

The submissions

I have looked at the petitioner's submissions and I do not find anything of value to convince me of the orders they seek. The submissions are just but a reiteration of their entire petition.

The 1st, 2nd and 5th respondents filed their submissions through the attorney general. They raise the following issues for determination;

- a) Whether the petitioner's right to equality and freedom from discrimination, freedom and security and fair administrative action have been infringed.**
- b) Whether the petitioner is entitled to the reliefs sought.**

As to whether the petitioners afore stated rights have been infringed, the 1st, 2nd and 5th respondents submitted that the petitioner had not proved any of the grounds provided under article 27 (4) for any alleged infringement. They placed their reliance on the case of **Mohamed Abduba Dida v debate Media limited and Another [2018]eKLR**.

As to whether the petitioner is entitled to the reliefs sought, the 1st, 2nd and 5th respondents submit that the petitioner has not utilized the

provided hierarchy of complaint against the 1st respondent and therefore the reliefs sought through the instant petition are not available to the petitioner. They placed their reliance in the case of *Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others [2015] eKLR* and *Beekey supplies Limited & Another v Attorney General & Another [2017] eKLR*.

Analysis and Determination

Issues for determination

- a) *Whether the petition is frivolous, vexatious, unmeritorious, an abuse of the court process, premature and incompetent.*
- b) *Whether the petitioner has proved that the respondents acted in a manner that breached the constitution.*
- c) *Whether the petitioner is entitled to compensation, or any other appropriate remedy.*

In respect of the 1st issue, the jurisdiction of the High Court of Kenya in constitutional matters derives from the provision of Article 23 of the 2010 Constitution; which states as follows:

"23. Authority of courts to uphold and enforce the Bill of Rights

- (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*
- (2) *Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*
- (3) *In any proceedings brought under Article 22, a court may grant appropriate relief, including—*
 - (a) *a declaration of rights;*
 - (b) *an injunction;*
 - (c) *a conservatory order;*
 - (d) *a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
 - (e) *an order for compensation; and*
 - (f) *an order of judicial review."*

The import of the above constitutional provision is that the jurisdiction of the Constitutional Court is limited to the interpretation or construction of provisions of the Constitution; and determining whether a person, or institution has acted in a manner that violates a provision of the Constitution. In this regard in as far as this court is tasked to determine whether the actions of the respondent violated named provisions of the constitution, this court has jurisdiction to entertain the petition.

In the case of *Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) eKLR* the Court said:

"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 infringed."

In *Mumo Matemu Case*, the Court said:

"...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. 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"

The burden to prove each of the grounds raised in the Constitutional Petition, that an impugned action offends some provision of the Constitution, rests on the person challenging the validity of the action. Have the impugned actions of the respondents of solicitation of a bribe and extortion and coercion by a police officer, contravened the respective provisions of the Constitution, as are alleged by the petitioner? There is only a shift of evidential burden onto the Respondent upon the Petitioner either raising a prima facie case necessitating adverse proof by the Respondent; or where the evidence required to determine the matter before Court is either in the possession, or only within the knowledge, of the Respondent. This is in accordance with the provisions of section 107 of the Law of Evidence Act which states

as follows: –

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

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

I have seen that the evidence that the petitioner seeks to rely upon are the charge sheet and the M-pesa transactions extract. With respect to the M-pesa transaction extract, I find difficulty in believing the truth of the same. This is because there is no chain of events that connects the extract with the claims and this court is expected to suspect that the monies were used to fulfil a bribe that was procured. Secondly there is no certificate of electronic evidence.

Electronic Evidence is any evidence stored in a digital form. It is a settled position that for electronic evidence to be admitted in evidence it ought to determine whether the same is relevant, whether it is authentic, or hearsay or whether a copy is acceptable or the original is required. There must be a degree of certainty that the evidence being presented was handled in such a way that it has not compromised the integrity of its content. This means that where the source of digital evidence has been established and no tampering has been shown by the opposite party it would be admissible like any other documentary evidence.

The points to be considered while laying foundation so as to rely on electronic evidence are set out in Section 78A of the Evidence Act and 106B of the same Act.

In determining the authenticity of the electronic or automated documentary evidence and resulting document, the following 6 considerations are key:-

- a) **whether the computer was working properly;**
- b) **whether the programme in use with regard to the evidence was faulty;**
- c) **whether the secondary media (disks, usb keys) upon which the information was stored have been damaged or interfered with in any way;**
- d) **whether proper record management procedures were in operation;**
- e) **whether error checking mechanisms existed with respect to the original creation of the programme, and;**
- f) **whether proper security procedures were in place to prevent the alteration of the information contained in the drive file or secondary storage device prior to the information being reproduced in permanent legible form through a printout.**

(See R v Shephard(1991) 93 Cr App Rep 139, R v Governor of Brixton Prison and Another, ex parte Levin[1997] 3 WLR 117 and Article 8 of the United Nations Model Law on Electronic Commerce.

The court record does not indicate any attempt to establish the authenticity or to explain why the court chose to believe the evidence that was tendered in view of the 6 steps highlighted above.

In addition, Section 65, 78 as read with 106B of the Evidence Act provides for the non-technical conditions being the requirement of a certificate of electronic evidence. The purpose of the certificate is to satisfy the conditions laid out by sub-section (3) of Section 78A as well as Section 106B(4) of the Evidence Act. The certificate is to be executed/signed by a person occupying a responsible position in relation to the device through which the data has been produced. The certificate must identify the electronic record containing the statement, describe the manner in which it was produced and also give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. The certificate by dint of Section 78A must also deal with any of the matters to which the conditions for admissibility relate. The entire idea behind the certificate is also to ensure the integrity of the source and authenticity of the data, so that the Court may be able to place reliance on it. This is important because electronic data is more prone to tampering and alteration and also to give technical assistance to the court.

Courts in Kenya have indicated willingness to accept such evidence to be admissible in evidence upon filing of the record along with the certificate under Section 78A and 106B of the Evidence Act. **See Idris Abdi Abdullahi v Ahmed Bashane & 2 Others (2018) eKLR.** This would mean that in the absence of the same, then the court ought not to give much relevance to the evidence. I find that it would be an error for me to accept the evidence of the annexure marked E0-001. I am not satisfied that the same meets the test of Section 65(8), 78A and 106B of the Evidence Act.

With regard to the charge sheet, it is trite law that parties should not constitutionalize simple processes which should be addressed by the appropriate forum; in this case the criminal justice system.

I would therefore associate myself with the dictum by the court of Appeal in the case of **Francis Gathungu v Kenyatta University [2018] eKLR**, where the learned justices observed that **"We think, with respect, that a willy-nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed. This is by no means a manifestation of hostility towards upholding the Bill of Rights or fundamental of freedoms but rather a pragmatic approach to adjudication. The courts must be vigilant to confine constitutional determination to disputes that raise and invoke authentic and genuine constitutional questions."**

The court went ahead to cite the South African decision of *Carmichele Vs. Minister of Safety and Security [2001] [4] Sa 938, 2001 [10] Bclr*, where the court gave guidance on the demarcation between constitutional grievances and contractual or common-law grievances, with which the court respectfully agreed;

“Where the Court determines rights asserted by a Party do not relate directly to the Bill of Rights, it may still apply the Bill of Rights to the dispute. It must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The Court is not confined by the Pleadings filed by the Parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common-law. Simply because an interpretation of a statute, or common law rule, would in the abstract raise some kind of constitutional issue does not mean Parties adopt constitutional argument in every dispute. The Court likewise need not provide a constitutional analysis of the status of common-law or piece of legislation in every case which such rule is dispositive.”

David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others (2017) eKLR that spoke to the concern of filing suits as constitutional petitions in the High Court when they ought to have been filed in specialized courts and the court observed that the net effect of such stunts was a multiplicity of suits in various registries, possibility of duplication of judicial efforts and wastage of courts time. The court also counseled advocates to advise their clients candidly

In *Republic v the Commissioner of Lands, ex parte Lake Flowers Limited (Number HC Misc. Application No. 1235 of 1998)* it was held that the availability of other remedies can be an important factor in exercising whether or not to grant the relief. The petitioners claim is premised on a matter clearly provided for under article Section 87 of the National Police Service Act. The mode of resolving the dispute is provided to be done through the processes given under section the said provision. In addition, as it is, I have not been availed with the records of what happened at the police station that led to the petitioner being charged of the offence and I do not know if the matter has gone to trial; I would therefore be hesitant to interfere with a matter that is at its infancy in the criminal justice system.

The doctrine of exhaustion requirement rests on the principle that remedies which are of a criminal nature be adequately submitted to the relevant constitutional and statutory agencies for investigation and thereafter in the event of sufficient evidence a prosecution be initiated by the director of public prosecution. Whether a remedy is available under the leadership and integrity framework depends on the criteria specific to the circumstances of an individual case, including the personal circumstances of the complainant and the legal context in which the remedy exists. Thus, before a criminal complaint can be dealt under the leadership and integrity test the required exhaustion mechanism must be demonstrated to the extent that the complainant was unable to secure the category of remedies sought in that other forum of convenience. There is no requirement under our system of laws for a complainant to pursue multiple ways to seek reliefs from a Court of law through different legal agencies on the same subject matter or cause of action. It is only when it is shown that there are compelling reasons that a remedy has been applied for in the alternative legal avenue but proved unsuccessful, one can move to another avenue for redress. This case is unique in the sense that the proceedings touching on the 1st Respondent are active and on going and afford to be pursued in those other agencies like the National Police Commission, Independent Policing Oversight Authority, The Honourable Attorney General, The Anti-Corruption Commission and the Office of the Director of Public Prosecution. Generally, a complaint of this magnitude premised under the Constitution is inadmissible if other judicial or quasi-judicial body is considering or has an inquiry as to the merits of the making of the decision on the same matter.

The central issue relating to the facts of this case constitutes an element of crime, the Kenyan Constitution recognizes the principle of presumption of innocence and there is no limitation to this right under Article 50 (2) (a). This Constitutional principle dictates that the Public Prosecutor in the event a prosecution is initiated each element of that Crime so complained of be proved beyond reasonable doubt. This Petition if decided in favour of the Petitioner deprives the 1st Respondent the right to be presumed innocent until proved guilty. The Constitution under Article 50 on the right to a fair hearing focuses on the fairness of the process balancing it with the rule of law relating to the administration of the Criminal justice system in our Country. In this regard from the crime perspective the Constitution embodies provisions to deal with circumstances being pleaded in this petition. Likewise, if a person commits an unlawful act with full knowledge and intent to achieve a given result, he or she should be pursued first within the standard of proof constituting the crime. Here too, there is little dispute that the 1st Respondent if found culpable should face the full force of the law. I disagree with the petitioner that there is a blanket policy by the agencies tasked with crime investigation and prosecution to shield the 1st Respondent in having her day in court. Precisely there is a real need to disclose the subject matter of this crime if indeed it has been committed to the Director of Public Prosecution pursuant to Article 157 (6) (10) and (11) of the Constitution. There is no reason in principle why those who are deemed to have committed crimes against the Republic should not be prosecuted in the interest of justice.

Reverting to whether there exist exceptional circumstances to warrant this Court grant the declaration sought by the Petitioner the Court in *Krystalline Salt Limited V Kenya Revenue Authority [2019] Eklr* expressed its view on the definition of “exceptional circumstances” as follows; -

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a Court may permit a litigant to approach the Court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. The fair Administrative Action Act does not define “exceptional circumstances.” However, this Court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the Court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as the immediate intervention of the Court rather than to resort to the applicable internal remedy.”

One of the issues the petitioner’s raises is whether the 1st respondent could be declared unfit and unsuitable serve as a state officer in matters of **Leadership and Integrity Act No. 19 of 2012**. In response to this issues I reiterate that there are different perspectives touching on culpability of offences having been committed by the 1st respondent. It is clear the complaint is being investigated by the various Constitutional Agencies with a view to either prosecute or take disciplinary action against the 1st respondent. The presumption of innocence until the contrary is proved under the principle of fairness in the Criminal Law under Article 50 of the Constitution means the current petition has to wait the doctrine of exhaustion on the side of the agencies probing into the issues at hand. A distinction arises in this petition between

the factual guilt as a matter of fact and the suspicion of a criminal act with the requisite mensrea and actus reus. The corollary of labelling the 1st respondent as a person of questionable integrity with a likelihood she may have committed a crime renders this process unripened to issue sanctions against the 1st appellant thereby enhancing a threat or a violation of Article 52 (a) of the Constitution on the right to presumption of innocence. Content courtesy in terms of this petition demands entirely an appropriate stance for the police to take and perhaps if the Director of Public Prosecution approves the ongoing inquiry to take remedial measures to prosecute the 1st respondent.

For this reasons I disagree with the arguments of Counsel for the court to make the declarations which in my opinion are clearly designed to provide a remedy conditioned upon the occurrence of one or more of a number of events as adverted to in the respective affidavits. As a consequence, the petition is dismissed with no orders to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling/judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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