



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 370 OF 2019

IN THE MATTER OF ARTICLES 22, 165, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 27, 28, 29, 35 AND 49 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

VIRGINIA NTHENYA.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

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

THE DIRECTOR OF CRIMINAL INVESTIGATIONS (On behalf of the Anti-Banking Fraud Unit).....4TH RESPONDENT

RAFIKI MICROFINANCE BANK LTD.....5TH RESPONDENT

JUDGMENT

PETITION

1. The Petitioner through an Amended Petition dated 14th September 2020 seek the following reliefs:-

- i) A declaration that the Petitioner’s rights under Articles 27, 38, 29, 35, 45 and 49 were violated, denied and or infringed by the Respondents in the matter.*
- ii) An order do issue directing the Respondents jointly and severally to compensate the Petitioner for violation of her rights and damages suffered as provided in Articles 23(3)(e).*
- iii) Any other Order that this Honourable Court demes fit to meet the Ends of justices and the*

protection of the constitutional rights of the Petitioner.

iv) Costs of this Petition.

THE 1ST RESPONDENT'S RESPONSE

2. The 1st Respondent filed ground of opposition setting out 3 main grounds of opposition as follows:-

a) That the Petition as drawn and filed offends the authority and exercise of powers and functions of the offices of the 2nd to 4th Respondents as respectively provided for under Articles 157, 245(4), 259(3)(a) of the Constitution of Kenya 2010, and Sections 34 and 35 of National Police Service Act.

b) That the Petitioner has failed to demonstrate how the arrest by the 4th Respondent and subsequent charge by the 2nd Respondent was malicious, illegal, ultra-vires, and contrary to their established mandate as provided for under the Constitution, and all other written relevant laws.

c) That not each and every alleged violation of the law must be raised as a constitutional issue. The Petition does not disclose any constitutional issues and/or violations for determination by this Honourable Court but seeks to enforce a claim for alleged malicious prosecution whose remedy can be obtained in an ordinary civil suit.

d) That the Petition as presented before this Honourable Court is misguided, unmerited and an abuse of this Honourable Court's process. It ought to be dismissed with costs to the Respondents.

THE 2ND RESPONDENT'S RESPONSE

3. The 2nd Respondent filed ground of opposition raising 5 grounds as follows:-

a) That the Petition lacks clarity and precision in setting out the alleged directives in relation to the 2nd Respondent.

b) That the Petition discloses no cause of action as against the 2nd Respondent as the matter relates to the conduct of the 3rd, 4th and 5th Respondents and not prosecutions.

c) That the orders sought are therefore not tenable against the 2nd Respondent as the Petitioner does not show how the 2nd Respondent has a duty in the matter raised.

d) 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.

e) Section 24 of the national Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

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

THE 5TH RESPONDENT'S RESPONSE

4. The 5th Respondent is opposed to the Petitioner's Petition and in doing so proceeded to file a Replying Affidavit by Dennis Nderitu sworn on 31st January 2020 negating the facts pleaded in the Petition.

THE PETITIONER'S CASE

5. The Petitioner's case is that on 8th November 2018 the Petitioner herein was arrested by the 5th Respondent's Investigation Manager, one Elijah Njeru and held incommunicado at the Security Offices, and at the same period the reason for arrest was not immediately explained to her.

6. It is contended by the Petitioner that hours later, an officer from the Banking Fraud Unit of the 3rd Respondent, one Mr. Epara arrived and purported to re-arrest the Petitioner, and informed her she was accused of modifying the 5th Respondent's core banking system to facilitate fraud.

7. The Petitioner contended that she was shown the account changes report (See VN-6 in the further Affidavit of Virginia Nthenya). Upon reviewing it, the Petitioner explained to the said officer that document was inaccurate and doubtful for reasons that:-

a) It showed that the account was modified on 7th November 2019 at midnight whereas the Bank is normally closed at that time, systems shut down and the same is heavily secured.

b) The Petitioner was alleged to have modified the system by introducing a new number, 0716xxxxxx and removing a purported number. However, a close perusal of the same report, the alleged new number already existed in the system whereas the number purported to have been removed was nowhere in the system.

c) The above (b) also applied for the email address.

8. The Petitioner urge that the facts became clear when the Petitioner was furnished with witness Statements recorded by the investigator from the complainant one Zacchaeus Syengo. who alleged that on the material date, he had received notifications on his email concerning changes to his account. He reported the matter to one Leonard Rotiken; the head of alternate channel which supports the mobile banking. It was then unearthed that a sum of Kshs.70,000/= had been withdrawn through mobile banking to "his old mobile number" 254723xxxxxx. He denied knowledge of an application for mobile banking which had been the basis of the account changes.

9. Upon perusal of the application for mobile banking, the Petitioner noted that the same had been received, KYC carried out and implemented in the system done by one Rebecca N. Maina. The Petitioner had only supervised the transaction after the application had been approved by Mr. Rotiken.

10. The Criminal Proceedings were eventually withdrawn by the 5th Respondent on 13th February 2019. The Court was informed that the money lost had been recovered after Safaricom reversed the transaction. However, upon perusing the statements which had been furnished to the Court, the Petitioner realized that the money had been redeposited in the account by Mr. Syengo.

THE RESPONDENTS CASE

11. The Respondents contend that the Petitioner is a former employee of the 5th Respondent, who in the course of employment was implicated in a case of suspected fraud directly linked to her duties and obligation at work. The 5th Respondent as mandated by virtue of being a banking institution entrusted with the safekeeping and use of the public's deposits, reported the matter to the 3rd Respondent's Banking Fraud and Investigation Department. Upon investigations by the 3rd Respondent, the Petitioner was arrested by the office of the 3rd Respondent in relation with the fraudulent transfer of Kshs.70,000/= from a customer account and subsequently charged with stealing by servant under Section 281 of the Penal Code. The course of the criminal proceedings against the Petitioner was steered by the relevant investigating and prosecuting authorities.

ANALYSIS AND DETERMINATION

12. I have carefully considered the parties pleadings; the submissions filed by the Petitioner, 1st and 5th Respondents and from the aforesaid, I find that the following issues arise for consideration:-

a) What is the proper forum in respect of this matter.

b) Whether the Petitioner's constitutional rights under Articles 27(1), 28, 29(a) and 49(a) (1) and (c) were violated.

c) What relief can be granted.

A. WHAT IS THE PROPER FORUM IN RESPECT OF THIS MATTER.

13. The 5th Respondent contention is that the Petition is purely civil claim disguised as a Constitutional Petition. As elucidated at paragraph 11 of the 5th Respondent's Replying Affidavit, the Petitioner has contemporaneously filed a claim at the Employment and Labour Relations Court (ELRC) at Nairobi, vide Cause Number 629 of 2019. The issues between the Petitioner and the 5th Respondent arise from their employment relationship, in which the jurisdiction of the ELRC Court has been invoked. This Petition it is urged is a devise by the Petitioner to unjustly gain double compensation, should the separate claims be successful, from the 5th Respondent. It should be appreciated such an eventuality would only be a travesty to justice and prejudice the 5th Respondent if it happens as the 5th Respondent would be subjected to parallel claims arising out of the same facts. In any event, it is stated that this Petition is an abuse of the process of this Court as it depicts the Petitioner is forum shopping across the separate Courts. The 5th Respondent further state there are no constitutional issues raised in the Petition, capable of being determined by this Honourable Court.

14. It is further stated by the 5th Respondent that at any event the Petitioner's claim as is evident throughout her pleadings is premised on the tort of malicious prosecution, a purely civil claim with civil remedies. It is further urged that the Petitioner has however tactfully avoided pleading malicious prosecution so as to camouflage this claim as an alleged 'violation of constitutional rights'.

15. To buttress the above proposition the 5th Respondent sought reliance in the case of *Uhuru Muigai Kenyatta v. Nairobi Star Publications Limited (2013) eKLR*, cited by Githua J in *Veronica Sum v National Bank of Kenya Ltd (2016) eKLR*, where Lenaola J (as he then was) applied the holding in the Re application by *Bahadur (1968) LR C (Cost) 297* and held that;

"Where there is remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (Supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction..."

In the Re-application by Bahadur case (supra), the Court in Trinidad and Tobago held as follows:-

"The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution."

16. Further reliance is placed in the case of *Maggie Mwauki Mtaleki v Housing Finance Company of Kenya Ltd (2015) eKLR* where it was held as follows:-

"Secondly and this is of paramount importance to litigants and counsel, the Constitution is not to be used as a general substitute for litigating ordinary civil disputes. The Petition herein is disguised as a constitutional Petition for the redress of violation of fundamental rights when it is in fact an ordinary civil dispute elevated into a constitutional issue. There is no single

constitutional issue raised in the Petition. The question of social-economic right of housing and sanitation is a smokescreen for denial of contractual liability and is therefore both misconceived and misguided as argued by the Respondent....”

17. The Petitioner in response contend that the issue regarding the proper forum has been raised by the 5th Respondent apparently due to the fact that the Petitioner has preferred a claim for unfair dismissal in the ELRC. It is contended by the Petitioner that the 5th Respondent’s argument is baseless as the Petition concerns violations of rights and freedoms relating to arrest and subsequent charges in Court. It is further urged that the ELRC case deals with unfair termination of employment, which is entirely different cause of action. I find that the ELRC Court’s jurisdiction is limited to employee-employer issues and violations arising out of the employee-employer relation but not to entertain Constitutional Petitions on violations not related or arising outside the employee-employer relationship.

18. **Article 23(1) of the Constitution** on authority of Courts to uphold and enforce Bill of Rights provides that the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine application for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights.

19. Further **Article 23(3) of the Constitution** states the Court may grant the appropriate relief which include the following:-

“23(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.”

20. Additionally **Article 165 (3)(b)** provides that subject to clause (5), the High Court shall have **(a) (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**”

21. Looking at the Petitioner’s, Petition, it is clear that she is seeking a declaration, that her rights under various Articles were violated, denied and/or infringed by the Respondents. The reliefs sought are reliefs which the High Court has jurisdiction to determine. I therefore agree with the Petitioner that this Petition is properly before this Court for hearing and determination.

B. WHETHER THE PETITIONER’S CONSTITUTIONAL RIGHTS UNDER ARTICLES 27(1), 28, 29(a) and 49(a) (1) and (c) WERE VIOLATED.

22. The Petitioner contend that her arrest and prosecution violated her rights as enshrined under **Article 27(1), 28, 29, 35, 45 and 49 of the Constitution.**

23. The Petitioner contend that she was discriminated against when she was charged alone for the alleged offences. From the evidence, it is urged that two other persons; Rebecca N. Maina and Mr. Rotiken bore greater responsibility for the alleged offence. It is contended that Ms Rebecca Maina was the Customer Relationship Officer. She was charged with the Responsibility of receiving documents from the 5th

Respondent's customers, carry out the necessary KYC to ascertain that she was dealing with the right customer and witness the customer's signature. It is urged that she would then implement the customer's instructions and forward the documents to the Petitioner for approval/supervision.

24. The Petitioner urge she was at the back office and was responsible for supervising the work; among others, of Ms. Rebecca Maina. While supervising, the Petitioner had a duty to confirm and be satisfied that the Customer Relationship Officer had complied with the bank policy; i.e. check the stamp to confirm that the document had been properly received and ensure that the customer's signature had been verified. It is further asserted that Mr. Edward Rotiken was the head of the alternate channel that supported mobile banking and that it was his duty to approve all application relating to mobile banking before the same could be accepted in the system.

25. It is averred by the Petitioner that according to the investigation report by the 5th Respondent, Ms. Maina stated that she had found customer instruction forms on her desk upon return from washrooms. She did not see the customer who brought it yet she proceeded to stamp it and made entries in the system. It is stated that according to the Petitioner, Ms. Maina experienced some challenges and sought help from Mr. Toriken who enabled her to connect the number. Finally, the transaction was supervised by the Petitioner.

26. It is Petitioner's case that the owner of the account, one Zacchaeus Syengo, denied ever issuing the instructions acted upon by Rebecca Maina.

27. The 5th Respondent on the issue raised on discrimination terms the averment as false as responded to in the Replying Affidavit. It is urged the Petitioner did not meet the conditions set out in Check and Lindsell, to show that the 5th Respondent played a role other than reporting the suspicion of crime.

28. The 1st Respondent contend that the Petitioner alleges selective and discriminative investigation and prosecution for being arrested, charged and prosecuted alone, it is 1st Respondent's contention that **Article 157(10)** and **Section 6 of the ODPP Act** insulate the 2nd Respondent from the direction and control of any person or authority. The 2nd Respondent, cannot be directed on who to charge or not to charge. In addition, **Article 245(4)(a)(b)** confers the 3rd and 4th Respondents with independence in exercising their investigative mandate.

29. The Petitioner aver that the arrest, charge and prosecution of the Petitioner over other parties, to which the Petitioner alleges the Respondents to have acted illegally and that amounts to discrimination, that the mandate to investigate is exercised by the 3rd and 4th Respondents either on their own initiative or on a complaint lodged by a person or authority. The mandate to examine an investigative report recommending prosecution, the evidence gathered and the authority to make an independent decision on whether to prosecute or not to prosecute can only be exercised by the 2nd Respondent in discharge of its mandate.

30. To buttress the above reliance is placed in the case of **Geoffrey Mutahi Ngunyi s. Director of Public Prosecutions and 4 others, Petition No. 428 of 2015**, where the Court observed as follows in acknowledging the independent investigative and discretionary prosecutorial liberties of the 2nd to 4th Respondents:-

***“[52] I am not aware of any law that dictates that all participants in a twitter trail must be charged together. In the absence too of any specifics and particulars of those selectively not prosecuted, I am not satisfied that the Applicant has, on a prima facie basis, demonstrated any favouritism or discrimination.*”**

[53] Besides, the 1st Respondent only has the liberty to prefer charges against a party in respect of whom he finds sufficient evidence. (Emphasis added).

31. Similarly in **Stephen Ndambuki Muli & 3 others vs. Director of Public Prosecutions & another**

[2016] eKLR Nairobi Constitutional Petition No. 39 of 2016 at para. 50, the Court reaffirmed the 2nd Respondent's discretionary power to prosecute as follows:-

“In my view, and as the cases set out above illustrate, it is within the mandate of the DPP to elect whom to prefer charges against, and this Court has no jurisdiction to direct him with respect thereto. More importantly, the decision to prefer charges against one person as opposed to another is not of itself, without more, sufficient to lead to an order of prohibition against a prosecution.”

32. I find that other than the Petitioner allegation that the Respondent discriminated against her by choosing or charging her alone, the Petitioner did avail evidence to support the allegation of being discriminated. The Petitioner only left that to conjecture in the hope that this Honourable Court, will make the speculative inference that because the colleagues, the Petitioner alleges to have been responsible for the theft were not arrested and charged, she was discriminated against.

33. It is now trite that the law does not prohibit discrimination but rather unfair discrimination as held in ***Nyarangi & 3 others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688***. I find that the Petitioner ought to have demonstrated methodically the manner and foundation of such discrimination as well as the unfair impact of such alleged discrimination.

34. The Petitioner further urge her rights under ***Article 28 of the Constitution*** to inherent dignity were violated. The Petitioner contend that her right to dignity was grossly violated by the Respondents and more so the 5th Respondent. The Petitioner urge that this was after she was arrested publicly in her place of work in full glare of her colleagues, juniors and members of the public who held her in high esteem and without any basis whatsoever. She further asserts her dignity was disrespected when she was held incommunicado at the security office with her phone having been confiscated and whereof she was denied a right to even go to the washroom. The Petitioner assert that the 5th Respondent had a duty to ensure that her dignity was respected and protected even during the purported arrest.

35. On the question of violation of the Petitioners inherent dignity in the manner in which she was arrested in front of her colleagues, the 1st Respondent urges that arrests are legally provided for in law and can be effected anywhere in any manner that does not violate the Petitioner's safeguards as provided for under ***Article 49 of the Constitution***. I find the Petitioners' admission that the 4th Respondent arrived at the 5th Respondent's office and re-arrested her absolves the 4th Respondent from any wrong doing or actions the Petitioner may have been subjected before being re-arrested by the 4th Respondent

36. On the Petitioners right under ***Article 35(1)(b) and (2) of the Constitution*** the 5th Respondent contend that the Petitioner has not demonstrated how she was denied information by the 5th Respondent. She has not demonstrated that she made a request for information, which request was not granted. She has also not illustrated which information is in the possession of the 5th Respondent. In view wherefore I find has not demonstrated that she requested for information and the request has not been met.

37. The 1st Respondent counters the Petitioner's allegation of violation of her right to access information, urging that such allegation are baseless and untrue in the absence of evidence substantiating the same. It is contended that the Petitioner has not demonstrated how the 2nd to 4th Respondents violated this right as the Petitioner has not identified the documents and/or information sought from the 2nd to 4th Respondents which documents and/or information were denied. In fact, the Petitioner's annexures marked "VN-1" and "VN-2" of the supporting affidavit properly demonstrate that any information held by the 2nd to 4th Respondents was supplied to her.

38. On the alleged violation of the Petitioner's right to family under ***Article 45***, it is noted that save for identifying Constitutional provisions alleged to have been violated by the Respondents, the Petitioner has failed to provide a proper demonstration of how the 2nd to 4th Respondents violated her rights.

39. On violation of Petitioner's rights under **Article 49(1)(a) (i) and (c) of the Constitution** the Petitioner has pleaded that she was detained incommunicado by the 5th Respondent's employee who denied her use of her own mobile phone and denied her chance to call and speak to a lawyer or her family. She averred that she was not told of the reason for her arrest. The reason was first revealed to her by the police officer.

40. The Petitioner contend that her evidence has not been controverted by the 5th Respondent in its Replying Affidavit and the same is deemed to be true and correct and proved.

41. **Article 49(1)(a) and (c)** clearly provides as follows:-

“49(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b).....

(c) to communicate with an advocate, and other persons whose assistance is necessary;”

42. It is Petitioners contention that she was entitled to an opportunity to speak to a lawyer of her choice or even to her parent which opportunity was denied by the 5th Respondent.

43. It is urged that the Officer of the 3rd and 4th Respondents equally denied the Respondent a chance to speak to her family and lawyer thus violating her right under **Article 49**, aforesaid.

44. The 5th Respondent in response contend that the Petitioner failed to demonstrate the alleged violation by the 5th Respondent. The 5th Respondent aver that the Petitioner was at her usual work premises when the 5th Respondent consulted her on the issue of suspected fraud. It is urged that being at her work premises on her own volition, the Petitioner had access to her usual channels of communication and information and no evidence to the contrary has been adduced. The 5th Respondent it is urged did not arrest the Petitioner as it had no power to do so. It is stated that it was after the investigations conducted by the 3rd Respondent that the 3rd Respondent made the decision to arrest her and the 2nd Respondent prosecuted the matter.

45. It is further contended by the 5th Respondent that its involvement in this matter was limited to notifying the 3rd Respondent of the suspected fraud, which notification/reporting I find is not a violation of the Petitioner's rights under **Article 49(1)(a) and 49(1)(c) of the Constitution**. Therefore, the claim of violation of the rights enshrined in **Article 49 of the Constitution** cannot lie against the 5th Respondent.

46. The 5th Respondent sought reliance in the case of **Douglas Odhimbo Apel & another vs. Telkom Kenya Limited, Civil Appeal No. 115 of 2006**, where the Court of Appeal affirmed the finding of the trial Judge who stated as follows:-

“The Plaintiffs were arrested and charged by the police, and the prosecution was undertaken by the Attorney-General as public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police. It was left to police to investigate the complaint and decide whether or not to charge the plaintiffs.”

47. The 1st Respondent on its part contend that the Petitioners claim under **Article 49(1)(a)(i) and (c)** is unsubstantiated. The 1st Respondent state the Petitioner was informed of the reason for her arrest and contend the arrest was not arbitrary or without probable cause. The Petitioner in her pleadings admitted the 3rd Respondent informed her of the reason for her arrest. It is noted the Petitioner's claim in basically on the violation of **Article 49(1)(a)(i) and (c)** directed at the 5th Respondent, as it is alleged she was held incommunicado by the 5th Respondent's employee who denied her use of her phone and denied her chance to call and speak to a lawyer or family. She averred she was not told the reason for her arrest but the reason was finally revealed to her by police officer.

48. The Petition was initially filed on 19th September 2020, the same was supported by affidavits of five (5) paragraphs. The amended Petition was subsequently filed on 15th June 2008 together with verifying affidavit. Looking at the Amended Petition under paragraph 5 it is clearly pleaded that:-

“Despite the clearer inconsistencies, the said officer of the 4th Respondent failed, refused and or neglected to carry out any investigations, in addition, the 5th Respondent refused to listen to the Petitioner's reasonable suggestions to investigate and rebuffed all queries she attempted to make, further denying her access to vital information she had requested; so as to clear her name and assist in tracing the culprits involved in the transfer of the said monies. The 5th Respondent further denied the Petitioner Access to vital information from the ICT Computer Network Administrator which would have unequivocally cleared of any wrong doing.”

49. A party is bound by its pleadings. The Petitioner's submission are in conflict with the pleadings. In the submission the Petitioner seeks to shift the blame for violation of her rights under **Article 49** to the 5th Respondent's employee yet in the Petition she seeks to attribute the violation to the 3rd and 4th Respondents. Further it is noted what Petitioner filed a verifying affidavit, which has stated nothing as regards the violation of **Article 49**. I agree with the Respondents submission that the Respondents did not violate Petitioner's rights under **Article 49 of the Constitution**. In addition I find that there is no evidence substantiating the alleged violation of the Petitioner's rights under **Article 49 of the Constitution**.

C. WHAT RELIEF CAN BE GRANTED.

50. I am alive to the fact that violation of human rights cannot be commercially valued. There cannot in addition be sufficient redress for violation of human rights and fundamental freedoms through monetary compensation as no court can correctly place commercial value on violation of human rights. However it should be noted that courts merely only guess-work on some-monetary compensation as a consequence of violation of human rights and fundamental freedoms which may deter further violations, but not adequately compensate for infringed rights and fundamental freedoms. The courts are however guided as regards the appropriate reliefs by provisions of **Article 23(3) of the Constitution** and in awarding compensation seeks to send a message to would be violators of Human Rights and Fundamental Freedoms.

51. The Petitioner herein sought a global sum of Kshs.4,000,000/=.

52. The 1st Respondent prayed that the Petitioner be dismissed in tis entirely with no order for costs against 1st to 4th Respondents.

53. The 5th Respondent urged that the Petitioner had failed to prove her claim against the 5th Respondent. It urged none of the remedies sought lie against the 5th Respondent and prayed the Petition against the 5th Respondent be dismissed with costs.

54. I find that had the Petitioner's case succeed, I would have awarded general damages for violation of her rights to the tune of Kshs.3.5 million.

55. The upshot is that the Petitioner has failed to prove her claim. The Petition is accordingly dismissed. However I direct each party do bear its own costs. This being a Constitutional Petition the award of costs is at the discretion of the Court. In exercising the discretion to award or not to award costs, I have taken into account that every person has the right to access Court and seek its determination of violation that infringe on his/her rights and fundamental freedoms and that costs should not be used to bar parties who feel aggrieved from seeking redress in Constitutional related Petitions.

56. In determining that each party bears its own costs I am guided by Rule 26 of the Mutunga Rules, 2013, which allows Court to exercise discretion in matters of this nature, taking into account that each person has right to get access to the Court on matters related to violation of Bill of Rights.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF NOVEMBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA