REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 133 OF 2020

-BETWEEN-

1. SCION HEALTHCARE LIMITED

2. AUGUSTINE KINYUA

3. CAUNDESIA NJOKI

4. PETER GATHENDU.....PETITIONERS

-AND-

1. NATIONAL DIRECTORATE OF CRIMINAL INVESTIGATIONS

2. DIRECTOR GENERAL - NAIROBI METROPOLITAN SERVICE

3. PETER MAINA NJUGUNA

4. KENNETH WAWERU

5. JANE MBURUGU

6. ANNE MNGOLA

7. GRACE WAWERU

8. JUSTUS MATEI

9. JAMES KINYUA MUGO

10. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT

Introduction:

1. The Petition subject of this judgment is yet another attempt by persons facing a criminal trial in challenging the constitutionality of the trial and the powers of the National Directorate of Criminal Investigations**,** the Director General Nairobi Metropolitan Service and the Director of Public Prosecutions in the criminal justice process.

2. *Augustine Kinyua, Caundesia Njoki* and *Peter Gathendu,* the 2nd, 3rd and 4th Petitioners respectively are charged with two counts before

the Chief Magistrates Court at Makadara in Nairobi in *Criminal Case No. 1327 of 2020* (hereinafter referred to as '*the Criminal Case*').

3. The 2nd, 3rd and 4th Petitioners pleaded not guilty to the charges. The trial in the criminal case is ongoing. The Petitioners hope to terminate their prosecution in the criminal case through these proceedings.

Background:

4. The 1st Petitioner herein, *Scion Healthcare Limited,* filed a Petition dated 09/04/2020 on 14/04/2020. The Petition was against *National Directorate of Criminal Investigations* as the 1st Respondent, the *Director General Nairobi Metropolitan Service* as the 2nd Respondent and *Peter Maina Njuguna* as the 3rd Respondent.

5. Together with the Petition, the 1st Petitioner filed an evenly dated Notice of Motion (hereinafter referred to as '*the application'*). The Petition and the application were both supported by an Affidavit sworn by Augustine Kinyua. The Affidavit was also sworn on 09/04/2020.

6. On 04/05/2020 the 1st Petitioner filed an Amended Petition and an Amended Notice of Motion. They were both amended on 28/04/2020. The Amended Notice of Motion (hereinafter referred to as '*the amended application'*) was supported by a Supplementary Affidavit sworn by Augustine Kinyua on 28/04/2020.

7. The amendment of the Petition and the application were necessitated by the arrest and arraignment before Court of 2nd, 3rd and 4th Petitioners herein where they were charged in the criminal case. The amendment therefore brought into the proceedings the 2nd, 3rd and 4th Petitioners as well as the 4th to 10th Respondents herein.

8. The Petitioners thereafter abandoned the amended application for the expeditious hearing and determination of the amended Petition hence this judgment.

The Parties:

9. The 1st Petitioner is a limited liability company. It is duly registered in Kenya. It operates a hospital known as Scion Healthcare – Kwa Njenga in Nairobi (hereinafter referred to as *'the hospital'*).

10. The 2nd, 3rd and 4th Petitioners are adults, working and residing within Nairobi County. They are currently employed by the 1st Petitioner as the hospital's Chief Executive Officer, Administrator and Accountant respectively.

11. The 1st Respondent is an office established under Articles 243 and 244 of the Constitution and the National Police Service Act, No. 11A of 2011.

12. The 2nd Respondent administers the functions of the Nairobi City Council transferred to the National Government by the Deed of Transfer of Functions from the Nairobi City County Government to the National Government dated 25/02/2020.

13. The 3rd Respondent is a male adult. He owns the premises in which the 1st Petitioner operates the hospital from.

14. The 4th, 5th, 6th, 7th, 8th and 9th Respondents are adults. They are employees of the 2nd Respondent.

15. The 10th Respondent is a creation of Article 157 of the Constitution. It is the institution in charge of all public prosecutions.

The Petitioners' cases and submissions:

16. The Petitioners' case rests on the Amended Petition and the three Affidavits sworn by Augustine Kinyua on 09/04/2020, 28/04/2020 and 11/08/2020 respectively. The Affidavits were the Supporting Affidavit, the Supplementary Affidavit and the Further Affidavit.

17. The 1st Petitioner posited that it operates the hospital within the 3rd Respondent's premises on Plot No. 1/22 along Catherine Ndereba Road off North Airport Road in Nairobi (hereinafter referred to as '*the premises'*). Accordingly, the 1st Petitioner and the 3rd Respondent had a tenancy relationship. It was further posited that the hospital is duly licensed by the Medical Practitioners and Dentists Board.

18. It was averred that there were three cases between the 1st Petitioner and the 3rd Respondent on the occupation and purported termination of the tenancy between them in the premises. The cases were **Nairobi Business Premises Tribunal Case No. 52 of 2018, No. 52A of 2018** and **669 of 2018** (hereinafter referred to as '*the Tribunal cases*').

19. It was the 1st Petitioner's contention that the 3rd Respondent vowed to evict the 1st Petitioner from the premises. The mission had however been curtailed by the Tribunal cases. It was contended that the 3rd Respondent then crafted and instigated a scheme to frustrate and gain an undue advantage over the Tribunal cases. The plan was to unlawfully and unfairly terminate the tenancy relationship between the 3rd Respondent and the 1st Petitioner. The 3rd Respondent hence aimed at obtaining vacant possession of the portion of the premises from which the hospital operated from. The eviction would effectively terminate the Tribunal cases.

20. The scheme was to use the 2nd Respondent's Health Services Department. The 1st Petitioner further averred that the 3rd Respondent then formally laid a complaint to the 2nd Respondent *vide* his letter dated 18/03/2020. The complaint was on the alleged health hazards by the hospital to the public. Resulting from the said complaint, the 2nd Respondent dispatched its officers to the hospital on 30/03/2020. The officers were the 4th, 5th, 6th, 7th, 8th and 9th Respondents (hereinafter referred to as '*the County officers'*).

21. The Petitioners contended that the County officers instead stormed the hospital. To the Petitioners' utter shock and surprise, the County officers neither carried out any inspection nor raised any health-related issue over the hospital. Instead, the County officers demanded the Petitioners to produce the 2nd Respondent's change of user alleging that the hospital was a business enterprise yet it operated from residential premises. The County officers made it clear that unless the said approval was availed by the Petitioners the hospital would not be allowed to continue operating.

22. The Petitioners attempted to explain to the County officers that the said change of user could only be sought and obtained by the 3rd Respondent who was the owner of the premises. No one heeded to their explanation.

23. The Petitioners further contended that the demand by the County Officers was unreasonable, arbitrary, unfair and vindictive and that it was instigated by the 3rd Respondent. According to the Petitioners the premises was predominantly commercial and aside from the hospital there were other businesses in the premises including a 24-Hour restaurant, a wholesale and retail store, a photo studio cum cyber café, a betting and gaming casino, a wines and spirits shop, a dental clinic, a barber shop and a dry cleaner.

24. The 1st Petitioner then formally wrote to the 3rd Respondent informing him of the demand by the 2nd Respondent and requested him to provide the relevant change of user documentation. The 3rd Respondent never availed the documents and instead held that he had nothing to do with any disputes between the Petitioners and the 2nd Respondent.

25. The Petitioners posited that there was yet another unwelcome visit to the hospital a day after the visit by the County officers. The second visit was on 01/04/2020. It was a joint visit by the County officers and officers of the 1st Respondent from Embakasi Police Station. According to the Petitioners the visit marked the real execution of a well-choreographed and combined vicious, illegal, unfair and unprecedented attack by the Respondents on the Petitioners. To the Petitioners, the 1st and 10th Respondents and their officers were carefully drafted into the scheme of an illegal pursuit of the 3rd Respondent's personal vendetta against the 1st Petitioner initially pursued through the 2nd Respondent.

26. The Petitioners further stated that the joint visit by officers of the 1st and 2nd Respondents was clearly aimed at tarnishing the name and image of the hospital, destroying the 1st Petitioner's business and indignifying the patients. It was contended that the officers instead participated in a savagery acts involving ejecting and turning away patients who had come to the hospital for medical treatment and attention. The 1st Respondent's officers then arrested Caundesia Njoki, the 3rd Petitioner who was the hospital administrator on false allegations of operating a clinic without a licence. The 3rd Petitioner was taken to custody at the Embakasi Police Station.

27. The 4th Petitioner who was the hospital Accountant later went to Embakasi Police Station to pay a cash bail for the 3rd Petitioner. He was likewise arrested and placed in custody on like allegations of operating a clinic without a licence. On 06/04/2020 the said officers of the 1st Respondent from Embakasi Police Station arrested the 2nd Petitioner who was the hospital's Chief Executive Officer on similar allegations. The 2nd, 3rd and 4th Petitioners were eventually charged in the criminal case.

28. The Petitioners posited that the Respondents' actions were illegal and were tinctured with oppression and vilification of the 1st Petitioner and its officers with akin ambition to obliterate its business. As a result, the Petitioners contended that many clients commenced changing from the hospital NHIF Capitation list for fear that the hospital will no longer be available to them at the point of need. The Petitioners deponed that the allegation that the 1st Petitioner did not properly-manage the hospital's waste was untrue as the 1st Petitioner had contracted an entity known as *Infection Prevention and Control Association (IPCA) Limited*, a NEMA approved medical waste management company, to manage the hospital waste and that there had been no complaint on the manner in which the entity carried out its work.

29. The Petitioners filed written submissions dated 21/04/2020. The submissions were adopted as part of the Court record. It was submitted that the Respondents' actions in sending away the 1st Petitioner's customers adversely affected the hospital business. The 1st Petitioner lost its clientele and business thereby being deprived of its property in the form of income and business. It was further submitted that the 1st Petitioner's right in Article 40 of the Constitution was trampled upon.

30. Further submissions were made to the effect that the Respondents were all bound to observe the national principles as set out in Article 10 of the Constitution.

31. The Petitioners also submitted that the Respondents variously breached the national values and principles of equity, social justice, human rights, non-discrimination, good governance, transparency and accountability by ignoring the Petitioners' complaints. They further submitted that by participating in a scheme to destroy the Petitioners' business the Respondents were in breach of the national values and principles of human rights, good governance and integrity.

32. It was the Petitioners' submission that their right to equal protection and benefit of the law as guaranteed in Article 27 of the Constitution was breached. It was further submitted that Petitioners' right to administrative actions which were expeditious, lawful, reasonable and procedurally fair under Article 47 of the Constitution was as well breached. In so doing, the Respondents ignored and vilified the Petitioners' complaints and instead took sides with the 3rd Respondent by dealing with peripheral matters in pursuit of an illegal cause based on a personal vendetta.

33. The actions by the Respondents were further described as biased and an impediment to the Petitioners' quest for justice. The actions as well infringed on the right to a fair trial in the Tribunal cases and the criminal case. It was hence submitted that the Respondents failed to uphold their respective constitutional and statutory mandates. As such it was submitted that Articles 48, 50, 232, of the Constitution, the objects of the National Police Service Act and The Nairobi City County Inspectorate Act, 2017 were breached.

34. The Petitioners were thus apprehensive that the Respondents' actions will subject them to premeditated frustration of the 1st Petitioner's business and amounts to abuse of power, abuse of court process and were oppressive. It was further submitted that the whole process was marred with ulterior motive and intended to achieve extraneous purposes. The Respondents' actions were hence submitted to be contrary to public interest and aimed at advancing and championing of the 3rd Respondent's interests in the Tribunal cases.

35. The Petitioners drew the Court's attention to ***Lalchand Fulchand Shah v. Investments & Mortgages Bank Limited & 5 Others (2018) eKLR*** in which the Court frowned upon the conduct of determining a pending case through another forum. Further reference was made to ***Commissioner of Police & the Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 Others (2013) eKLR*** where the Court of Appeal observed that *'…It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court.'*

36. This Court was urged to find that the criminal trial was based on tramped up charges, the process was actuated with malice and meant to harass the Petitioners and that the proceedings in the criminal case have no basis in law or in fact. The Petitioners pointed out that the Court of Appeal in ***Commissioner of Police & the Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 Others*** (supra) held that *'…where there is serious abuse of power the court should not hesitate to express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution.'*

37. The decisions in ***Githunguri v Republic (1985) KLR 3030, Francis Kirima M'ikunyua & Others vs. Director of Public Prosecutions*** *and* ***Kuria & 3 Others vs. Attorney General (2002) 2 KLR 69*** *were* variously referred to in urging this Court to find for the Petitioners and allow the Amended Petition.

The 1st Respondent's case and submissions:

38. The 1st Respondent opposed the Amended Petition. It relied on the Replying Affidavits of *Anderson Miriti* and *Abdullatif Ali* sworn on 18/05/2020 and 02/06/2020 respectively.

39. Anderson Miriti was the Divisional Criminal Investigating Officer (hereinafter referred to as '*the DCIO'*) stationed at Embakasi Police Station. He deponed that on 31/03/2020 officers from the 2nd Respondent requested the police to accompany them to the hospital to conduct an inspection as the Petitioners were operating an illegal nursing home in a residential building amid violation of the Public Health Act. The 2nd Respondent further informed the DCIO that the hospital was endangering the lives of the people living around as it had no proper waste disposal system thereby emitting dangerous fumes and bad smell. The 2nd Respondent also informed the DCIO that it intended to carry out an inspection of the hospital and as such required police assistance.

40. The DCIO further deponed that his officers accompanied the 2nd Respondent's officers aforesaid for the sole reason of ensuring that there was law and order during the intended inspection. The police did not take part in the said inspection.

41. It was posited by the DCIO that the 2nd Respondent's officers conducted the inspection and informed the police that the hospital operated in a residential building without a change of user, that it was not licensed, that there was no proper waste disposal system and did not have a valid health inspection report.

42. The DCIO further posited that the 2nd Respondent issued a close order to the hospital on 01/04/2020 after the Petitioners failed to comply with the conditions given during the inspection. According to the DCIO the participation of the officers of the 1st Respondent was to enforce the close order which had been issued by a competent public body and in public interest. He contended that the 1st Respondent had no interest at all in the affairs of the hospital save when it is operated against the law and denied ever infringing on any of the rights of the Petitioners.

43. It was confirmed that the 2nd to 4th Petitioners were truly arrested and charged in the criminal case. The DCIO contended that the Petitioners had an opportunity to defend themselves in the criminal case and that the issues raised in the Amended Petition could as well be dealt with in the criminal case. The DCIO denied all the allegations of acting contrary to the Constitution and the law as alleged against the 1st Respondent's officers. To the DCIO, the officers acted in a transparent manner and acted within the law. The 1st Respondent had not received any complaint from the Petitioners in the manner they carried out their mandate in the matter. It was deponed that even if any such complaints arose then the right forum for such interrogation would be at the trial.

44. The DCIO further deponed that a public body ought not to be stopped from discharging its constitutional mandate unless there was outright abuse of power or the public body's actions are *ultra vires*, which was not the case with the 1st Respondent herein.

45. The DCIO posited that the Petitioners availed the hospital's license which they embarked on investigating its authenticity.

46. Abdullatif Ali swore the Affidavit in his capacity as the Registrar of the Kenya Medical Laboratory Technicians and Technologists Board. I will henceforth refer to him as 'the Registrar' and the Kenya Medical Laboratory Technicians and Technologists Board as '*the Board'*.

47. The Registrar deponed that the Board was a creation of the Medical Laboratory Technicians and Technologists Act (hereinafter referred to as '*the Technicians Act*'), that it was a body corporate with statutory mandate to exercise general supervision, regulatory oversight and control over the training, practice, business and employment of medical laboratory professionals and that it also advised the Government on all aspects of medical laboratory.

48. It was deponed by the Registrar that on 26/08/2014 the hospital was visited and inspected by officers from the Board. The inspection revealed that the hospital operated a medical laboratory in a residential area which laboratory was both unregistered and unlicensed. Further, the officers working in the laboratory were not registered by the Board as qualified Medical Technicians and Technologists. The Board inspectors issued an immediate closure notice of the laboratory which notice was posted on the door of the laboratory.

49. The Registrar further deponed that on 27/08/2014 the Board inspectors in company of officers of the then Special Crime Prevention Unit made a follow up visit to confirm compliance. They found that the 2nd Respondent herein had removed the closure notice and illegally resumed operations. The 2nd Petitioner was arrested and charged accordingly.

50. The Registrar contended that the 1st Petitioner did not then operate any valid and licensed laboratory and so currently.

51. The 1st Respondent submitted that the Petitioners were variously in contravention of the Public Health Act including Sections 13, 36 and 38 thereof. It was also submitted that the Petitioners contravened the 2nd Respondent's Building By-laws for it operated a hospital in a residential place without obtaining a valid change of user.

52. It was further submitted that the Respondents acted within the law in requiring the Petitioners to uphold the required health standards more so in the wake of the Covid-19 pandemic and on the public need to a clean environment under Article 21 of the Constitution. The decision in ***R vs. Nairobi City County & Another*** *exparte* ***Kwach Ltd*** was referred to in support of the submission.

53. Further submissions were made that there was no evidence that the 1st Respondent initiated the arrest of the 2nd to 4th Petitioners with an intention to forestall the Tribunal cases. Instead, it was submitted that the arrest and subsequent prosecution of the 2nd, 3rd and 4th Petitioners was purely undertaken on the basis of evidence of infringing the law. This Court was reminded that Courts have generally declined to interfere with the prosecution of criminal cases as that was the purview of the trial courts. The decision in ***Philomena Mwilu vs. The Director of Public Prosecution*** was cited in support.

54. The 1st Respondent vehemently submitted that there was no evidence of breach of any of the rights and fundamental freedoms of the Petitioners and that the Amended Petition be dismissed with costs.

The 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents' cases and submissions:

55. Like the 1st Respondent, the 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents as well opposed the Amended Petition. They jointly relied on the Replying Affidavits of *Hitan Majevdia* and *Enosh Momanyi Onyango* sworn on 26/06/2020 and 18/05/2020 respectively.

56. Hitan Majevdia (hereinafter referred to as '*Hitan*') was then the County Executive Committee Member in charge of the Health Department for Nairobi County Government. He deponed that on 18/03/2020 he received a complaint from the 3rd Respondent, who was the owner of the premises, on behalf of some tenants against the hospital regarding the poor disposal system which exposed the other tenants to health risks.

57. On 31/03/2020 Hitan dispatched a team of public health officers to inspect the hospital. The inspection team found that the hospital operated without a change of user, had no proper access and exit for patients, was located on the first floor of the premises with a very narrow stair case, the maternity wing was not well lit and was poorly ventilated coupled with very strong and foul smell hence completely inhabitable. Further, there was no proper waste disposal system of waste and that surgical gloves and used swabs were littered within the premises and outside. That caused a health risk to the other occupants in the premises.

58. The team prepared a report and handed it over to Hitan. In turn Hitan issued a 24-hour statutory notice for the hospital to stop further operations until some set out minimum operational requirements were met. On 01/04/2020 the 2nd Respondent's officers revisited the hospital to confirm compliance. The hospital had not complied yet it continued operations. The County Officers sought the intervention of the DCIO, but the Petitioners still continued with the hospital operations. On 03/04/2020 Hitan issued an enforcement notice to the Petitioners to close the hospital until full compliance.

59. According to Hitan the hospital ought not to operate without complying with the public health directives since any such continued use remain a health hazard to the general public. Hitan also deponed that the Petitioners had committed fraud.

60. Enosh Momanyi Onyango (hereinafter referred to as '*Enosh*') was the Deputy Director General and Accounting Officer of the 2nd Respondent. He vouched the signing of a Deed of Transfer of Functions between the National Government and the County Government of Nairobi on 25/02/2020. Pursuant to the signing of the Deed of Transfer the 2nd Respondent was established by the Public Service Commission of Kenya.

61. Enosh mainly reiterated what Hitan deponed to. He confirmed that the 2nd Respondent issued a Closure Notice against the hospital on 03/04/2020 requiring the hospital to cease operations until such a time that it will fully comply. Enosh reiterated that the 2nd Respondent acted lawfully and in public interest and on the strength of Section 13 of the Public Health Act which empowered the 2nd Respondent to take all necessary and practical measures to *inter alia* safeguard and promote the public health.

62. It was deponed that the complaint was made and that the Respondents acted in the normal course of duty without any malice whatsoever. The 2nd Respondent issued an appropriate and reasonable written Notice with requirements and timelines in order to protect the public especially during this period of highly infectious Covid-19 disease. Enosh posited that the 2nd Respondent and the County Officers were unknown to the parties and that all their actions were informed by the relevant regulatory laws.

63. The Court was urged to disallow the Amended Petition with costs.

64. The 2nd, 4th, 5th, 6th, 7th, 8th and 9th Respondents re-emphasized their positions in their submissions. They denied any wrong-doing and maintained acting within the law. Relying on ***Equity Bank Ltd vs. Gerald Wang'ombe Thuni (2015) eKLR*** and ***Lucy Njeri Ngunjiri & 6 Others vs. Anthony Kimeu & 3 Others (2018) eKLR*** the Respondents prayed that the Amended Petition be dismissed with costs.

The 10th Respondent's case and submissions:

65. The 10th Respondent also opposed the Amended Petition. It filed submissions which were styled as Grounds of Opposition dated 21/09/2020.

66. The 10th Respondent denied the Petitioners' allegations that any of their rights were contravened by their prosecution in the criminal case. According to the 10th Respondent the prayers sought in the Amended Petition were unconstitutional to the extent that they curtailed the 10th Respondent from discharging its constitutional and statutory duties. That, it was submitted, was an affront to the criminal justice system and contrary to public interest. On the basis of ***Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272***, ***Leonard Otieno vs. Airtel Kenya Limited (2018) eKLR*** *and* ***Matiba vs. AG (1990) KLR 666*** the 10th Respondent submitted that the Amended Petition was devoid of clarity of the constitutional provisions allegedly infringed and the manner in which they were allegedly infringed.

67. The constitutional and statutory powers of the 1st Respondent were revisited. It was submitted that the law imposed a duty on the 1st Respondent to investigate any complaint or matter of public interest and that such mandate cannot be curtailed unless in very clear instances. The decisions in ***Dr. Alfred N. Mutua vs. The Ethics and Anti-Corruption Commission & Others, Murang'a High Court Petition No. 7 of 2014 Cascade Company Limited vs. Kenya Association of Music Production (KAMP) & Others*** and ***Republic vs. The Commissioner of Police & The Director of Public Prosecutions exparte Michael Monari & Another Misc. Appln No. 68 of 2011*** were referred in support of the submission.

68. Submitting on the independence of the 10th Respondent the decisions in ***Hon. James Ondicho Gesami vs. Attorney General & Others Nairobi High Court Constitutional Petition No. 376 of 2011, Mombasa High Court Petition No. 2 of 2017 Mohammed Ali Swaleh vs. The Director of Public Prosecutions, Republic vs. Commissioner of Police & Another (2012) eKLR, Pauline Raget Adhiambo Agot vs. DPP & 5 Others (2010) eKLR, AG vs. AG & 3 Others (2014) eKLR, Republic vs. Attorney General & 4 Others (2014) eKLR, Thuita Mwangi & 2Others vs. Ethics and Anti-Corruption Commission & 3 Others (2004) eKLR*** and ***Total Kenya Limited & 9 Others vs. Director of Criminal Investigation Department & 3 Others (2013) eKLR*** were variously referred to.

69. The Court was also urged to uphold the doctrine of separation of powers so as not to render other arms of Government dysfunctional.

70. Holding that the Amended Petition was an abuse of Court process, the 10th Respondent prayed that the same be dismissed with costs.

Issues for Determination:

71. Having carefully considered the Amended Petition, the responses thereto, the parties' submissions and the decisions referred to the following issues are for determination: -

> *(a) Whether the Petitioner's right or fundamental freedom has been infringed or is threatened with infringement by the Prosecutor or the investigator, or*
>
> *(b) Whether the Petitioner has demonstrated that the Prosecutor's or investigator's conduct regarding the case is either unlawful, unreasonable, procedurally unfair, contrary to public interest, is an abuse of power, is against the interests of the administration of justice or is in abuse of the legal process.*

72. I will deal with both issues together.

Analysis and Determination:

73. The Petitioners pleaded the manner in which the Respondents jointly and variously infringed their rights and fundamental freedoms as guaranteed by the Constitution. The said rights and fundamental freedoms and the manner in which they are alleged to have been constricted have been captured in detail in the foregoing part of this decision.

74. The Petitioners are all Kenyan citizens. They are hence entitled to the rights and fundamental freedoms provided for in the Bill of Rights of the Constitution among others which are either recognized or conferred by law. Such rights and fundamental freedoms are an integral part of Kenya as a democracy and are the cornerstone of our social, economic and cultural policies. As such they must be recognized and protected.

75. In the wording of Article 19(2) of the Constitution '*the purpose of recognising and protecting human rights and fundamental freedoms is*

to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings'. It is, therefore, for such reasons that the rights and fundamental freedoms are inherent, to the extent that they are not granted by the State, and can only be limited as provided for by the Constitution.

76. The Respondents are either State organs, state officers or public officers. They all discharge various mandates under the Constitution and the law. As such they are bound by the national values and principles of governance enumerated in Article 10(2) of the Constitution. The provision itemizes them as under: -

> *(2) The national values and principles of governance include—*
>
> *(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
>
> *(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*
>
> *(c) good governance, integrity, transparency and accountability; and*
>
> *(d) sustainable development.*

77. The first salvo in this matter was a preliminary issue. It was by the 10th Respondent. It was contended that the Amended Petition was devoid of clarity of the rights and fundamental freedoms allegedly contravened and that the manner in which those rights and fundamental freedoms were allegedly infringed. Counsel for the 10th Respondent referred to several decisions on the submission.

78. Since the parties did not highlight on their respective written and filed submissions, I did not have the advantage of the Petitioners' rejoinder on the issue. Nevertheless, I shall deal with the issue as raised.

79. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (commonly referred to as '*the Mutunga Rules*') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

> *Form of petition.*
>
> *10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*
>
> *(2) The petition shall disclose the following—*
>
> *(a) the petitioner's name and address;*
>
> *(b) the facts relied upon;*
>
> *(c) the constitutional provision violated;*
>
> *(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*
>
> *(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*
>
> *(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and*
>
> *(g) the relief sought by the petitioner.*

80. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

> *(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.*
>
> *(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.*

81. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

82. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** had the following on Constitutional Petitions: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

83. A perusal of the Amended Petition in this case will no doubt reveal that the Petition fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in ***Communications Commission case*** (supra). I must therefore find and hold, which I hereby do, that the submission that the Amended Petition is devoid of clarity cannot be maintained. The same is for rejection.

84. I will now deal with the main issues for determination. I have captured the respective parties' cases above. I need not rehash the same. There is a plethora of decisions on the manner in which state organs and officers ought to discharge their constitutional and statutory mandates.

85. Regarding the exercise of prosecutorial discretion by the Director of Public Prosecutions, the Court of Appeal in ***Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR*** stated as follows: -

[41] Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in Mohit v Director of Public Prosecutions of Mauritius [2006] 5LRC 234:

these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP's decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all…

*In **Regina v. Director of Public Prosecutions ex-parte Manning and Another** [2001] QB 330, the English High Court said partly at para 23 **page 344:***

At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.

Although the standard of review is exceptionally high, the court's discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

[42] The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.

In Ramahngam Ravinthram v Attorney General (supra) the Court of Appeal of Singapore said at p. 10. Para 28:

however, once the offender shows on the evidence before the court, that there is a prima facie breach of fundamental liberty (that the prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At this stage the prosecution will not be able to rely on its discretion under Article 35(8) of the Constitution without more, as a justification for its prosecutorial decision.

86. The High Court in ***Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR*** had the following to say about the role of the Director of Public Prosecutions in prosecuting criminal offences: -

25. It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this Court cannot shirk its Constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this Court would be an abhorrent affront to judicial conscience and above all, the Constitution itself. I associate myself with the sentiments expressed in Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 to the effect that:

the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system…In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of **Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003** *is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book,* **Constitution of the World***: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time…….. In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right.*

87. Long before the advent of the Constitution of Kenya, 2010 the High Court in ***R vs. Attorney General exp Kipngeno arap Ngeny Civil***

Application No. 406 of 2001 expressed itself as follows: -

> ***….*** *Although the state's interest and indeed the constitutional and statutory powers to prosecute is recognized, however in exercise of these powers the Attorney General must act with caution and ensure that he does not put the freedoms and rights of the individual in jeopardy without the recognized lawful parameters...The High Court will interfere with a criminal trial in the Subordinate Court if it is determined that the prosecution is an abuse of the process of the Court and/or because it is oppressive and vexatious...A prosecution that is oppressive and vexatious is an abuse of the process of the Court: there must be some prima facie case for doing so. Where the material on which the prosecution is based is frivolous, it would be unfair to require an individual to undergo a criminal trial for the sake of it. Such a prosecution will receive nothing more than embarrass the individual and put him to unnecessary expense and agony and the Court may in a proper case scrutinize the material before it and if it is disclosed that no offence has been disclosed, issue a prohibition halting the prosecution. It is an abuse of the process of the Court to mount a criminal prosecution for extraneous purposes such as to secure settlement of civil debts or to settle personal differences between individuals and it does not matter whether the complainant has a prima facie case...A criminal prosecution will also be halted if the charge sheet does not disclose the commission of a criminal offence...In deciding whether to commence or pursue criminal prosecution the Attorney General must consider the interests of the public and must ask himself inter alia whether the prosecution will enhance public confidence in the law: whether the prosecution is necessary at all; whether the case can be resolved easily by civil process without putting individual's liberty at risk. Liberty of the individual is a valued individual right and freedom, which should not be tested on flimsy grounds….*

88. It has also been well and rightly argued that on the basis of public interest and upholding the rule of law Courts ought to exercise restraint and accord state organs, state officers and public officers some latitude to discharge their constitutional mandates. The Court of Appeal in ***Diamond Hasham Lalji & another v Attorney General & 4 others*** *(supra)* stated as follows: -

> *The elements of public interest and the weight to be given to each element or aspect depends on the facts of each case and in some cases, State interest may outweigh societal interests. In the context of the interest of the administration of justice, it is in the public interest, inter alia, that persons reasonably 'suspected of committing a crime are prosecuted and convicted, punished in accordance with the law, that such a person is accorded a fair hearing and that court processes are used fairly by state and citizens.*

89. The Court of Appeal in ***Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR*** referred to the Supreme Court of India in **State of Maharashtra & Others v. Arun Gulab & Others, Criminal Appeal No. 590 of 2007, where the Court** stated:

> ***The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R./Complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction to the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor can it soft-pedal the course of justice at a crucial stage of investigation/proceedings.***
>
> ***The provisions of Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.P.C.") are a device to advance justice and not to frustrate it. The power of judicial review is discretionary, however, it must be exercised to prevent the miscarriage of justice and for correcting some grave errors and to ensure that esteem of administration of justice remains clean and pure. However, there are no limits of power of the Court, but the more the power, the more due care and caution is to be exercised in invoking these powers.***

90. The High Court in ***Bernard Mwikya Mulinge case*** (supra) expressed itself as follows: -

> ***14. As has been held time and time again the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions (DPP) to investigate and undertake prosecution in the exercise of the discretion conferred upon that office under Article 157 of the Constitution. The mere fact therefore that the intended or ongoing criminal proceedings are in all likelihood bound to fail, is not ipso facto a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. An applicant who alleges that he or she has a good defence in the criminal process ought to ventilate that defence before the trial court and ought not to invoke the same to seek the halting of criminal proceedings undertaken* bona fides *since judicial review court is not the correct forum where the defences available in a criminal case ought to be minutely examined and a determination made thereon…..***

91. In ***Meixner & Another vs. Attorney General [2005] 2 KLR 189*** the Court stated as follows: -

> *The Attorney General has charged the appellants with the offence of murder in the exercise of his discretion under section 26(3)(a) of the Constitution. The Attorney General is not subject to the control of any other person or authority in exercising that discretion (section 26(8) of the Constitution). Indeed, the High Court cannot interfere with the exercise of the discretion if the Attorney General, in exercising his discretion is acting lawfully. The High Court can, however, interfere with the exercise of the discretion if the Attorney General, in prosecuting the appellants, is contravening their fundamental rights and freedoms enshrined in the Constitution particularly the right to the protection by law enshrined in section 77 of the Constitution.…*

92. **Mumbi Ngugi, J** in ***Kipoki Oreu Tasur vs. Inspector General of Police & 5 Others (2014) eKLR*** stated that: -

> *The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts,*

except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated…

93. In ***Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR*** the Court held that:

> ***…*** *the police have a duty to investigate on any complaint once a complaint is made. Indeed 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...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....*

94. It is hence the position in law that whenever a Petitioner sufficiently demonstrates the stifling of or threats of infringement of rights, fundamental freedoms, the Constitution and/or the law by the investigative and prosecutorial agencies, a Court should not hesitate to intervene and stop such a prosecution. Such intervention by the Courts should however be in the clearest of circumstances.

95. In Kenya the Constitution establishes the Office of the Director of Public Prosecutions. It also stipulates the scope of his mandate as follows: -

> *Article 157(4), (6), (10) and (11): -*
>
> *(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*
>
> *(6) 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; and*
>
> *(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*
>
> *(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*
>
> *(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*
>
> *Article 245(4)(a): -*
>
> *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.*

96. In this matter the investigators in the criminal case were the members of the National Police Service who were attached to the Directorate of Criminal Investigations. Articles 243 to 245 of the Constitution provide for the National Police Service as well as the National Police Service Act, No. 11A of 2013.

97. The Petitioners contended that the 3rd Respondent vowed to evict the 1st Petitioner from the premises, the pendency of the Tribunal cases notwithstanding. To that end, the Petitioners further contended that the 3rd Respondent variously used the other Respondents to achieve the intended goal. The sustenance of the criminal case was therefore a means to compromise the Tribunal cases and to otherwise gain vacant possession of the premises by using the criminal justice system. To the Petitioners, the criminal case is used to aid the settlement of what is purely a civil dispute being litigated before the Tribunal and as such that amounts to abuse of power and the legal process. The Petitioners posited that such a prosecution ought to be terminated.

98. Speaking on the existence of concurrent criminal and civil proceedings the Court of Appeal in ***Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others*** (supra) held that: -

> *47. In terms of* ***Section 193A*** *of the* ***Criminal Procedure Code****, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings does not bar the commencement of criminal proceedings. However, where the criminal proceedings are oppressive, vexatious and an abuse of the court process or amounts to a breach of fundamental rights and freedoms, the High Court has the powers to intervene. But this power has to be exercised very sparingly as it is in the public interest that crime is detected and suspects brought to justice.*

99. In ***Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Limited & 4***

others [2013] eKLR the Court of Appeal held as follows: -

> *Clearly, the company and the guarantor through their directors were employing criminal process to assist them in resolving their civil dispute. While the law (**Section** 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.*

100. **Further, the Court of Appeal in *Commissioner of Police & The Director of Criminal Investigation Department & Another v Kenya Commercial Bank Ltd & 4 Others [2013] eKLR*** pronounced itself thus:

> *Whereas there can be no doubt that the field of investigation of criminal offences is exclusively within the domain of the police, it is too fairly well settled and needs no restatement at our hands that the aforesaid powers are designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law. That is why courts in this country have consistently held that it would be an unfortunate result for courts to interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. The courts must wait for the investigations to be complete and the suspect charged.*
>
> *By the same token and in terms of Article 157 (11) of the Constitution, quoted above, in exercising powers donated by the law, including the power to direct the Inspector General to investigate an allegation of criminal conduct, the DPP is enjoined, among other considerations, to have regard to the need to prevent and avoid abuse of the legal process. The court on the other hand is required to oversee that the DPP and the Inspector General undertake these functions in accordance and compliance with the law. If it comes to the attention of the court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice, and restrain abuse of power that may lead to harassment or persecution. See Githunguri v Republic [1985] LLR 3090.*
>
> *It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process. See Ndarua V. R. [2002] 1EA 205. See also Kuria & 3 Others v. Attorney General [2002] 2KLR.*

101. The High Court in ***Kuria & 3 Others vs. Attorney General [2002] 2 KLR*** *69* held that:

> *The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.....The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives …..…The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped….*

102. The pendency of the Tribunal cases has not been denied. It is also not in doubt that the 1st and 10th Respondents are constitutionally and statutorily bound to discharge their investigative and prosecutorial mandates for public good. Further, it is the position that the 2nd Respondent also discharges various public duties.

103. In this case the 2nd Respondent received a complaint from the 3rd Respondent over the affairs of the hospital. It was a formal complaint. The letter read in part as follows: -

> *The residents of the above residential plot are complaining of health related nuisances emanating from the nursing home which is situated on the first floor of my building. They include: waste disposal, smell and health risk issues.*
>
> *After several consultation with the tenant…. nothing has been done to rectify the situation.*
>
> *I am hereby requesting your office assist to clear this health hazard since it can affect a lot of my tenants who now threaten to leave my premises.*

104. Vested with requisite obligations under the Public Health Act, Cap. 242 of the Laws of Kenya (hereinafter referred to as '*the Health Act'*), the 2nd Respondent dispatched its officers to carry out an inspection of the hospital. That was on 31/03/2020. The inspection revealed that the hospital operated without a change of user, had no proper access and exit for patients, was located on the first floor of the premises with a very narrow stair case, the maternity wing was poorly lit and not adequately ventilated coupled with very strong and foul smell hence completely inhabitable, there was no proper waste disposal system of surgical gloves and some used swabs were littered within the premises

and outside.

105. The 2nd Respondent issued a 24-hour statutory notice to the hospital to stop further operations until the Petitioners met the minimum operational requirements. As stated above the notice was not complied with and an enforcement notice was eventually issued.

106. The Health Act no doubt gives an avalanche of powers to the 2nd Respondent in order to discharge its duties under the said Act. For instance, Part IX thereof (*Sections 115 to 156* inclusive) provides for sanitation and housing. Needless to say, the 2nd Respondent also derives its authority and power from several other statutory enactments.

107. Section 118 of the Health Act defines what constitutes *'nuisance'*. Of application to this matter include: -

> *(1) The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this Part—*
>
> *(a) ……*
>
> *(b) any dwelling or premises or part thereof which is or are of such construction or in such a state or so situated or so dirty or so verminous as to be, in the opinion of the medical officer of health, injurious or dangerous to health, or which is or are liable to favour the spread of any infectious disease;*
>
> *(c) any street, road or any part thereof, any stream, pool, ditch, gutter, watercourse, sink, water-tank, cistern, water-closet, earth-closet, privy, urinal, cesspool, soak-away pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust-bin, dung-pit, refuse-pit, slop-tank, ash-pit or manure heap so foul or in such a state or so situated or constructed as in the opinion of the medical officer of health to be offensive or to be injurious or dangerous to health;*
>
> *(d) ……*
>
> *(e) any noxious matter, or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side channel of any street, or into any nullah or watercourse, irrigation channel or bed thereof not approved for the reception of such discharge;*
>
> *(f) ……*
>
> *(g) ……*
>
> *(h) any accumulation or deposit of refuse, offal, manure or other matter whatsoever which is offensive or which is injurious or dangerous to health;*
>
> *(i) any accumulation of stones, timber or other material if such in the opinion of the medical officer of health is likely to harbour rats or other vermin;*
>
> *(j) any premises in such a state or condition and any building so constructed as to be likely to harbour rats;*
>
> *(k) any dwelling or premises which is so overcrowded as to be injurious or dangerous to the health of the inmates, or is dilapidated or defective in lighting or ventilation, or is not provided with or is so situated that it cannot be provided with sanitary accommodation to the satisfaction of the medical officer of health;*
>
> *(l) any public or other building which is so situated, constructed, used or kept as to be unsafe, or injurious or dangerous to health;*
>
> *(m) any occupied dwelling for which such a proper, sufficient and wholesome water supply is not available within a reasonable distance as under the circumstances it is possible to obtain;*
>
> *(n) any factory or trade premises not kept in a clean state and free from offensive smells arising from any drain, privy, water-closet, earthcloset or urinal, or not ventilated so as to destroy or render harmless and inoffensive as far as practicable any gases, vapours, dust or other impurities generated, or so overcrowded or so badly lighted or ventilated as to be injurious or dangerous to the health of those employed therein;*
>
> *(o) any factory or trade premises causing or giving rise to smells or effluvia which are offensive or which are injurious or dangerous to health;*
>
> *(p) any area of land kept or permitted to remain in such a state as to be offensive, or liable to cause any infectious communicable or preventable disease or injury or danger to health;*
>
> *(q) ……*
>
> *(r) ……*

(s) any act, omission or thing which is, or may be, dangerous to life, or injurious to health.

108. Sub-section 2 defines the author of a nuisance to mean the person by whose act, default or sufferance nuisance is caused, exists or is continued, whether he/she is the owner or occupier or both owner and occupier or any other person.

109. From the legal description of what nuisance is and in view of the results of the inspection carried out by the 2nd Respondent, it comes out that save for the issue of the 'changer of user' the rest of the issues revealed by the inspection amounted to various forms of nuisance. In such a case Section 119 of the Health Act required the medical officer of health, if satisfied of the existence of a nuisance, to issue a notice to the author of the nuisance requiring the author to remove it within the time specified in the notice, or to execute such work and do such things as may be necessary for that purpose.

110. Section 120 of the Health Act is on the procedure that follows if the owner fails to comply with the notice issued under Section 119 of the Health Act**.** The procedure is elaborate and is outlined as follows: -

(1) If the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before his court.

(2) If the court is satisfied that the alleged nuisance exists, the court shall make an order on the author thereof, or the occupier or owner of the dwelling or premises, as the case may be, requiring him to comply with all or any of the requirements of the notice or otherwise to remove the nuisance within a time specified in the order and to do any works necessary for that purpose.

(3) The court may by such order impose a fine not exceeding two hundred shillings on the person on whom the order is made, and may also give directions as to the payment of all costs incurred up to the time of the hearing or making of the order for the removal of the nuisance.

(4) If the court is satisfied that the nuisance, although removed since the service of the notice, was not removed within the time specified in such notice, the court may impose a fine not exceeding two hundred shillings on the person on whom such notice was served, and may, in addition to or in substitution for such fine, order such person to pay all costs incurred up to the time of the hearing of the case.

(5) If the nuisance, although removed since the service of the notice, in the opinion of the medical officer of health is likely to recur on the same premises, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate, and the magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before him.

(6) If the court is satisfied that the alleged nuisance, although removed, is likely to recur on the same premises, the court shall make an order on the author thereof or the occupier or owner of the dwelling or premises, as the case may be, requiring him to do any specified work necessary to prevent the recurrence of the nuisance and prohibiting its recurrence.

(7) In the event of the person on whom such order as is specified in subsections (5) and (6) not complying with the order within a reasonable time, the medical officer of health shall again cause a complaint to be made to a magistrate, who shall thereupon issue a summons requiring such person to appear before him, and on proof that the order has not been complied with may impose a fine not exceeding two hundred shillings, and may also give directions as to the payment of all costs up to the time of the hearing.

(8) Before making any order, the court may, if it thinks fit, adjourn the hearing or further hearing of the summons until an inspection, investigation or analysis in respect of the nuisance alleged has been made by some competent person.

(9) Where the nuisance proved to exist is such as to render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment the dwelling is fit for that purpose; and may further order that no rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate the closing order and by a further order declare the dwelling habitable, and from the date thereof such dwelling may be let or inhabited.

(10) Notwithstanding a closing order, further proceedings may be taken in accordance with this section in respect of the same dwelling in the event of any nuisance occurring or of the dwelling being again found to be unfit for human habitation.

(emphasis added)

111. Hitan deponed that when the inspection was carried out on 31/03/2020 he issued a notice to the Petitioners to carry out some remedial works within 24 hours. The intended works were stated in the notice which is part of the Court record. According to Hitan the Petitioners failed to comply as directed in the notice. Hitan then issued a closing order on the hospital. The order is dated 03/04/2020 and is also part of the record. The order read in part as *'…the facility should and is hereby closed forthwith until the raised Public Health requirements are met.'*

112. The closing order issued by the 2nd Respondent was, therefore, not in compliance with Section 120 of the Health Act**.** Further, the order did not state the provisions of any law it was grounded on.

113. It is also clear from the closing order that the hospital was closed on the basis of failure to comply with '*public health requirements'* and not on the basis of failure to obtain a '*change of user'*.

114. It was as well admitted that the officers of the 1st Respondent stationed at Embakasi Police Station accompanied the County officers during the inspection exercise. The officers of the 1st Respondent did not however take part in the inspection but only kept law and order during the exercise.

115. The DCIO deponed that as a result of the inspection he was informed that the Petitioners had variously contravened the Health Act and the Building Act. He further deponed that the Petitioners failed to produce any evidence of registration and licensing of the hospital. It was the DCIO's further testimony that the Petitioners later produced the hospital license which the police subjected it to investigations on its authenticity.

116. Out of the police investigations the 2nd to 4th Petitioners were charged with two counts in the criminal case. The counts were: -

> **Operating a health institution in unlicensed premises contrary to Section 15(11) as read with Section 22(5) of the Medical Practitioners and Dentists Act, No. 5 of 2019, Cap. 253 Laws of Kenya**
>
> *On the 3rd day of April 2020 at Embakasi in Embakasi sub-county, within Nairobi County, jointly with others not before court you were found operating a health institution namely scion hospital which is not registered as required by medical practitioners and dentist act*
>
> **Operating a health institution without a licence contrary to Section 22(1) of the Medical Practitioners and Dentists Act, No. 5 of 2019, Cap. 253 Laws of Kenya**
>
> *On the 3rd day of April 2020 at Embakasi in Embakasi sub-county, within Nairobi County, jointly with others not before court you were found operating a health institution namely scion hospital without a valid license as required by medical practitioners and dentist act*

117. I will reproduce Sections 15(11), 22(1) and 22(5) of the Medical Practitioners and Dentists Act, Cap. 253 Laws of Kenya (hereinafter referred to as 'the Medical Act') so as to understand the context in which the provisions were used in the criminal case.

> *Section 15(11):*
>
> *No premise shall be used by any person as a health institution unless it is registered and licenced for such use by the Council.*
>
> *Section 22(1):*
>
> *A person who is not registered or licensed, including a person aiding or assisting therein, under this Act, and makes or produces or causes to be made or produced any false or fraudulent presentation or declaration either orally or in writing, commits an offence and shall be liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.*
>
> *Section 22(5):*
>
> *A person who uses premises as a health institution which premises is not licensed as a health institution commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding five years or to both.*

118. According to Section 15(11) of the Medical Act, the licensing agency is the *Council*. Section 3 thereof describes the Council to mean *the Kenya Medical Practitioners and Dentists Council* as established under section 3 of the Medical Act.

119. Section 3 describes the Council as body corporate with perpetual succession, a common seal and capable, in its corporate name, suing and being sued; taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property; and doing or performing all such other things or acts necessary for the proper performance of its functions under the Medical Act as may lawfully be done or performed by a body corporate.

120. The functions of the Council are set out in Section 4 of the Medical Act. Relevant to this matter are the following functions: -

> ***(k) register and license health institutions;***
>
> ***(l) carry out inspection of health institutions;***
>
> ***(m) regulate health institutions and take disciplinary action for any form of misconduct by a health institution;***

(n) .....

(o) issue certificate of status to medical and dental practitioners and health institutions; and

(p) do all such other things necessary for the attainment of all or any part of its functions

121. The Petitioners adduced evidence of the 1st Petitioner's incorporation. It was *vide* a Certificate of Incorporation No. CPR/2011/42796 dated 08/03/2011. It was issued by the Registrar of Companies. The Petitioners also produced the 1st Petitioner's Licence to Operate as a Private Medical Institution issued by the Council on 01/01/2020 (hereinafter referred to as '*the Licence*'). The Licence was for the year 2020. It licensed the 1st Petitioner to operate as a Level 3B Nursing Home.

122. The Licence was issued on the condition that the minimum requirements set by the Council for operation of the facility were adhered to at all times. The License was in force when the Respondents conducted the inspection. It is still current.

123. The DCIO deponed that he launched investigations on the licence. He intended to establish whether it was a forgery and/or fraudulently obtained. None of the Petitioners had been charged with either forgery of and/or fraudulently obtaining the licence as at the time the Petition was heard.

124. Upon completion of the investigations the 1st and 2nd Respondents made a decision to charge the 2nd, 3rd and 4th Petitioners. It was decided, and the 10th Respondent so approved, that the Petitioners be charged under the Medical Act and on the basis of the inspection carried out by the County officers and the police on the hospital.

125. I must make it clear that on one hand the police have the mandate to investigate and prefer charges against any person reasonably suspected to have committed an offence known in law. On the other hand, there are other distinct agencies created by the law which also undertake investigative duties. Among them are the 2nd Respondent's Public Health Officers under the Health Act and the Council under the Medical Act. As rightly so stated by the DCIO the role of the police in the investigations conducted by the other agencies is mainly to keep law and order.

126. There are several issues which come to the fore in this matter. The first is that although the investigations in this matter were conducted by the 2nd Respondent's Public Health Officers under the Health Act and that the 2nd Respondent found that the Petitioners had committed several acts of nuisance under the Health Act the Petitioners were neither subjected to the compliance process provided for under Section 120 of the Health Act nor were they charged with any offences under the Health Act. Further, the 2nd Respondent did not undertake any prosecutions as provided for under Section 167 of the Health Act.

127. The second issue is that the Council never carried out any investigations on the Petitioners. Also, the Council neither preferred any charges against the 2nd, 3rd and 4th Petitioners nor was it involved in anyway. Third, there were other tenants in the premises carrying on businesses but they were not tasked to produce their respective 'change of user'. Fourth, the 3rd Respondent being the owner of the premises, upon being asked to produce the documentation on change of user by the 1st Petitioner took the position that he was not keen on being drifted into any issues between the 2nd Respondent and the 1st Petitioner. Fifth, the 1st Respondent carried out investigations over the hospital and found out that the hospital was duly registered and properly licensed by the Council.

128. The foregoing scenario elicits several questions. They include why the sustenance of the charges in the criminal case against the 2nd, 3rd and 4th Petitioners even after investigations revealed that the hospital was duly registered and licensed to operate by the Council, why the Council was never involved in the investigations over the Petitioners and yet the charges preferred against the 2nd, 3rd and 4th Petitioners were made on behalf of the Council and on the basis of the Medical Act, why the 2nd Respondent refused or failed to comply with Section 120 of the Health Act even after deducing that the Petitioners had committed nuisance, why the police did not charge the Petitioners under the Penal Code, Cap. 63 of the Laws of Kenya or any other law save the Medical Act, how come the 3rd Respondent declined to avail the documentation on the changer of user of the premises, why the other business owners in the premises were not asked to produce the 'change of user' for their respective businesses but only the 1st Petitioner, the manner in which the closure notice on the hospital was unilaterally issued, among many others.

129. It is not hard to deduce the answers to all those questions. *First*, had the 2nd Respondent complied with Section 120 of the Health Act the Petitioners would have been accorded an opportunity to challenge the inspection report and/or make good the nuisance, if proved, more so given the fact that there was another medical facility within the premises. *Second*, had the Council been notified of any misconduct on the part of the Petitioners it would have carried out investigations and, if need be, undertaken appropriate disciplinary proceedings as provided under the Medical Act. *Third*, the police did not find any evidence to suggest that the Petitioners had committed any offences under the Penal Code or any other law under which the police are mandated to prefer charges. *Fourth*, if the Petitioners are eventually found guilty as charged then they would probably be imprisoned and the hospital would be ordered to be closed. *Fifth*, the 2nd Respondent did not pursue the issue of the 'change of user' as it would have adversely affected the 3rd Respondent on whose shoulder the burden to obtain the change of user rested. *Sixth*, the other business owners in the premises were not asked to avail the 'change of user' since they were not targeted for eviction.

130. The complaint to the 2nd Respondent was made by the 3rd Respondent after the institution of the Tribunal cases. That was after the 3rd Respondent vowed to evict the 1st Petitioner from the premises notwithstanding the pendency of the Tribunal cases. As a result, all hell broke loose for the Petitioners. All over a sudden, the County officers swung into action, a 24-hour ultimatum was issued, a closure order on the hospital followed immediately and the 2nd, 3rd and 4th Petitioners were arrested and charged.

131. The 3rd Respondent is the owner of the premises. He had been sued by the 1st Petitioner in the Tribunal cases over attempts towards termination of the tenancy between the 3rd Respondent and the 1st Petitioner. The Tribunal cases are still pending.

132. From the totality of the circumstances in this matter, there is a defined and a well-choreographed trajectory revealed in the manner the events unfolded. It is obvious that the end result of the Respondents' joint undertakings would be the closure of the hospital and eventual eviction of the 1st Petitioner from the premises. Therefore, the charging and prosecution of the 2nd, 3rd and 4th Petitioners had a bearing on the hospital and Tribunal cases. The bearing was to exert pressure on the Petitioners so as to give up the premises. Through the prosecution it was hoped that the Petitioners be found guilty and possibly be imprisoned, the hospital be eventually closed and the 1st Petitioner be evicted from the premises. It could as well be the case that the prosecution was intended to hold the Petitioners in court over a long period thereby distracting them from proper running of the hospital and would also potray the hospital in bad light to the public. The current and potential clients would then find alternative health facilities. With such an overall outcome the Tribunal cases would all fall flat on their bellies. The 3rd Respondent would get vacant possession and it will be all over.

133. The foregoing could be the only explanation as to why the 2nd Respondent flatly ignored to comply with Section 120 of the Health Act, why the 1st Respondent did not involve the Council prior to preferring the charges against the 2nd, 3rd and 4th Petitioners or at all, why the issue of the 'change of user' was not pursued, why there was selective dealing with the Petitioners over the other tenants including the other medical facility, why all happened after the institution of the Tribunal cases and the undertaking by the 3rd Respondent that the 1st Petitioner would be evicted from the premises, why the 10th Respondent insisted on proceeding on with the prosecution of the criminal case even after the 1st Respondent found out that the 1st Petitioner's hospital was duly registered and licensed by the Council. And, the list continues.

134. The charges were hence not supported by any iota of evidence. They must, therefore, have been instituted for other ulterior motives. The Court of Appeal in ***Gordon Ngatia Muriuki v Director of Public Prosecutions (DPP) & 2 Others [2017] eKLR*** held as follows: -

> *10. ……. Courts are reluctant to freeze proceedings before a court of law that has jurisdiction to try criminal cases; only in instances where there are trumped up charges (that cannot be founded in law) or the prosecution is not undertaken according to law, or it is actuated by malice and meant to harass the appellant, having no basis at all in law or in fact. It is in that rare occasion that the Court of Appeal has intervened by dint of its inherent jurisdiction to ensure the ends of justice and prevent the abuse of the process as indeed this is a country that is governed by the Constitution and the dictates of the rule of law.*

135. All the exceptions made by the Court of Appeal in ***Gordon Ngatia Muriuki case*** (supra) are well founded in this case. The charges in the criminal case, hence, qualify as 'tramped up charges'.

136. The Constitution and the law calls upon the 1st and 10th Respondents to have regard to the public interest, the interests of the administration of justice and to prevent and avoid abuse of the legal process in discharging their respective mandates. They are, as well, called upon to act lawfully, reasonably and procedurally fair.

137. I perceive serious acts of impunity in this matter. The 1st and 10th Respondents preferred the charges against the 2nd, 3rd and 4th Petitioners on the basis of the Medical Act. More surprisingly is the fact that the said Respondents are intent on prosecuting the criminal case even after investigations revealed that the hospital was duly registered and licensed by the Council and that the preferred charges do not have any basis in law and evidence.

138. The 1st and 10th Respondents, for reasons well known to themselves, decided not to involve the Council which was the only body mandated in law to deal with issues of registration and licensing of medical facilities. The Council even has powers to take disciplinary actions against those found culpable including prosecution. The effect of the actions and decision by the 1st and 10th Respondents was to usurp the powers of the Council. The Respondents did not offer any justification for overreaching unto the mandate of the Council.

139. The totality of the foregone is obviously that the criminal case was intended for other purposes. More precisely, it can be reasonably inferred beyond preponderance of probability, that the criminal case was otherwise aimed at compromising the Tribunal cases.

140. It can only be in public interest that the law is upheld by every organ and individual. As said, there was demonstration of gross impunity in the manner the matter was handled. All hinged on abuse of the rule of law and the legal process. The impugned actions also impeded on the fair administration of justice. It is sad that all happened at the instance of the 3rd Respondent who vowed to compromise the Tribunal cases and obtain vacant possession of the premises. It is sadder that the Respondents were the available vehicles for use.

141. I must once again state that State organs, state officer and public officers serve the larger public good. They must at all times resist the temptation of being used to settle personal vendetta between private individuals or entities. Unless the State organs and officers faithfully stand up to their calling, high are chances that the public is likely to lose trust on such institutions and officers. That can only lead to anarchy and lawlessness.

142. The foregoing discussion leads to the finding that the Respondents variously infringed on the rights and fundamental freedoms of the Petitioners and that the 1st and 10th Respondents failed to act in public interest, in the interests of the administration of justice and failed to prevent and avoid abuse of the legal process more so in preferring to charge and by sustaining the criminal case against the 2nd, 3rd and 4th Petitioners.

Remedies:

143. There are several prayers which the Petitioners sought in this matter. One of them is a declaration that the 4th to 9th Respondents are in

contravention of the Constitution and as such unfit to hold public office of any kind anywhere in the country.

144. The 4th to 9th Respondents were employed by the 2nd Respondent. There is no doubt that the 2nd Respondent had the power to carry out inspection of premises *inter alia* in pursuit of good public health. The 2nd Respondent is an institution. It can only act through its staff and officers.

145. The 4th to 9th Respondents discharged their duty in carrying out the inspection of the hospital. They then handed over their report to Hitan. There was no evidence that the 4th to 9th Respondents were thereafter involved in the subsequent decisions by the 1st, 2nd and 10th Respondents. I cannot therefore see the basis upon which the 4th to 9th Respondents herein can be found to be unfit to hold public office.

146. There is also a prayer for special damages for loss of income and loss of business. Such claims call for proof of the alleged losses. However, the Petitioners failed to lead any evidence in proof thereof. Consequently, the prayers are for rejection.

147. The Petitioners as well sought for general damages *'against the Respondents for aggravated contravention of the rights of the 1st Petitioner.'* The prayer was specific to the 1st Petitioner. It consciously excluded the other Petitioners.

148. The 1st Petitioner is not among the accused persons in the criminal case. The 1st Petitioner is a limited liability company hence a legal person. It could have been charged in the criminal case as well. However, it was not charged. The 1st Petitioner owns the hospital. In the circumstances, the 1st Petitioner would have been adequately compensated had it proved the loss to its business and income as it alleged. Be that as it may, there is evidence that the 1st Petitioner was discriminated against in that no other tenant was ordered to issue a change of user for its business. Further, there was no other inspection that was carried out to ascertain that it was only the 1st Petitioner who committed nuisance in the whole premises.

149. The Court of Appeal at Kisumu in **Migori County Government & Another v Josiah Onyango Okello t/a Cargo Secured Services [2019] eKLR** had the following to say: -

> *73. …. We likewise are of the view that an award of general damages is due to the respondent. The appellants' officers conduct was high-handed, reprehensible, capricious and borders on abuse of power. This is a case where we would have awarded exemplary damages if the same were pleaded and prayed for. Despite impounding the vehicles, the appellants stone facedly denied the same. Such conduct is detestable and unbecoming of public officers. We therefore find that the general damages awarded by the trial court did not sufficiently take into account the unlawful conduct of the appellants officers and the stone face denial of impoundment of the vehicles. Nevertheless, there is no cross appeal on the award for general damages. Accordingly, in the absence of a cross-appeal, we affirm and uphold the sum of Kshs. 500,000/= awarded as general damages by the trial court.…*

150. As the 2nd, 3rd and 4th Petitioners did not seek general damages for contravention of their rights I will only consider a reasonable compensation to the 1st Petitioner. The sum of Kshs. 200,000/= is adequate relief.

151. From the analysis it is clear that there was a sustained scheme by the 1st, 2nd, 3rd and 10th Respondents to ensure that the Tribunal cases were compromised and the 1st Petitioner is eventually evicted from the premises. The scheme was orchestrated by way of impunity and disregard to the Constitution and the law. The main culprits were however the 2nd and 3rd Respondents. The 1st and 10th Respondents were on the periphery although they allowed themselves to be used in the uncouth scheme.

Disposition:

152. As I come to the end of this judgment I must appreciate all Counsels for their diligence in this matter. I have greatly benefitted from the respective submissions and research on the matter. I am particularly impressed by the decision to abandon the interlocutory application in favour of hearing of the main Petition. By so doing this Court has been able to dispose of the matter within a period of 6 months. Galore appreciations.

153. Finally, the following orders do hereby issue: -

(a) A declaration hereby issues that the prosecution of Augustine Kinyua, Caundesia Njoki and Peter Gathendu before the Chief Magistrates Court at Makadara in Nairobi in Criminal Case No. 1327 of 2020 is unconstitutional, unlawful, irregular and unfair.

(b) The prosecution of Augustine Kinyua, Caundesia Njoki and Peter Gathendu before the Chief Magistrates Court at Makadara in Nairobi in Criminal Case No. 1327 of 2020 is hereby terminated forthwith.

(c) General damages of Kshs. 200,000/= is hereby awarded to Scion Healthcare Limited jointly and severally against the Director-General Nairobi Metropolitan Service and Peter Maina Njuguna.

(d) Costs of the Petition to the Petitioners. Such costs shall be jointly and severally borne by Director-General Nairobi Metropolitan Service and Peter Maina Njuguna.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 12th day of November 2020

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Nyamweya, Learned Counsel instructed by the firm of Messrs. Nyamweya Mamboleo Advocates for the Petitioners.

Miss. Mwangi, Learned Senior State Counsel instructed by the Honourable Attorney General for the 1st Respondent.

Miss. Kabila, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the 2nd Respondent.

Dominic Waweru – Court Assistant