



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 22 OF 2016

IN THE MATTER OF: ARTICLES 3, 20, 22 (1) & 23

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES
25, 26, 28, 29 (a), (c), (d), (f) and 49(f)**

BETWEEN

ISAAC NJOROGI KAMAU PETITIONER

VERSUS

P.N MASHRU TRANSPORTERS LIMITED 1ST RESPONDENT

PADRA NARAN MASHRU 2ND RESPONDENT

KAMTU ALI 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 5TH RESPONDENT

JUDGMENT

The Petition

1. By a Petition dated 15th May 2016 brought under Articles 2 (1), 3, 20, 22, 25, 26 (1), 28, 29, 29 (c) (d) (f) and 49 (f), the Petitioner seeks the following orders:

a) A declaration that the Petitioner's rights as enshrined at Articles 25, 26, 28, 29 and 49 of the Constitution have been violated and infringed by the Respondents, jointly and severally in the manner pleaded .

b) Compensation by way of general damages for mental anguish and psychological trauma arising, during and after the Petitioner's ordeal.

c) Compensation by way of general damages for infringement of the right to life enshrined by Article 26 of the Constitution.

d) Compensation by way of general damages for infringement of the right to inherent dignity enshrined by Article 28 of the Constitution.

e) Compensation by way of general damages for infringement of the Petitioner's right not to be subjected to any form of violence, not to be subjected to torture in any manner, and not to be treated to punishment in a cruel, inhuman or degrading manners, as enshrined by Article 29 of the Constitution.

f) A declaration that the institution of the criminal proceedings vide **Criminal Case No. 366 of 2016, Republic vs. Isaac Njoroge Kamau**, was not only instituted without any proper basis, but also instituted outside the stipulated time frames as enshrined under Article 49 of the Constitution and the same is nullity.

g) An order of the Court halting any further proceedings against the Petitioner in **Criminal Case No. 366 of 2016, Republic vs. Issac Njoroge Kamau** currently proceeding at the Makadara Law Courts, Nairobi.

h) An Order of compensation by way of general damages for breach of the provisions of Articles 49 (f) of the Constitution for illegal detention of the Petitioner running from 27th January, 2016 to 2nd May 2016.

i) The costs of this petition to be borne by the Respondents.

j) Any other order that this Honourable court may deem fit to grant.

2. The Petition is premised on the grounds set out therein and those in the affidavit of ISAAC NJOROGE KAMAU sworn on 16th May, 2016.

3. The 1st Respondent is a limited liability company duly incorporated carrying on the business of transportation and logistics. The 2nd Respondent is the Principal Director of the 1st Respondent. The 3rd Respondent is an officer of the 1st Respondent. The 4th and 5th Respondents are public officers whose mandates are enumerated under Articles 245 and 157 of the Constitution.

4. The Petitioner alleges that he was an employee of the 1st Respondent having being employed as a truck driver in March 2013 to deliver goods from Mombasa to Nairobi or Kampala. The Petitioner claims that he was later dismissed on the suspicion that he had stolen goods on transit to Nairobi.

5. The Petitioner alleges that on 26th January, 2016, he was walking alongside a road at Changamwe area when he was accosted by the 1st Respondent's officers who forcefully bundled him into their vehicle and took him to an area known as Kokotoni, Uwanja wa Ndege. At that place the Petitioner alleges that he was met by the 3rd Respondent who gave instructions for the Petitioner to be roughed up and assaulted by the 1st Respondent's security officers. The Petitioner contends that the assault included a tyre being placed around his body while his hands and feet were tied and the 3rd Respondent set him ablaze.

6. The Petitioner alleges that the actions of the 2nd and 3rd Respondents were aimed at teaching him a lesson for allegedly stealing the company's goods. The Petitioner claims that it took the intervention of other staff members to rescue him from the fire but at which point he had already suffered serious burns to his back.

7. The Petitioner alleges that he was later taken by the 1st Respondent's security officers to Mariakani Police Station where a report was lodged accusing him of stealing the 1st Respondent's goods. At the police station, the Petitioner claims that the 1st Respondent lied to the OCS that the Petitioner incurred his injuries as a result of being beaten and burnt by angry members of the public.

8. The Petitioner alleges that he stayed in police custody for seven days from 27th January, 2016 and was only arraigned in court on 2nd February 2016. In the period that the Petitioner was in custody, he claims that he was a danger to others as he suffered from tuberculosis and was not given any medical care.

9. It is the Petitioner's case that the actions of the 2nd and 3rd Respondents amounted to torture, inhumane and cruel treatment contrary to Article 25 of the Constitution. Further, the Petitioner claims that his inherent dignity as a person was infringed upon contrary to Article 28 of the Constitution.

10. The failure by the 4th Respondent's officers and agents to arraign the Petitioner in court within 24 hours, the Petitioner claims, violated his right under Article 49 (1) (f). Additionally, the Petitioner contends that the 1st to 3rd Respondents' actions threatened the Petitioner's right to life under Article 26 of the Constitution.

11. It is the Petitioner's case that the 5th Respondent failed to order proper investigations into the circumstances leading to the Petitioner's arrest and subsequent arraignment in court and instead relied on the false statements of the 1st Respondent's agents.

Responses

1st and 3rd Respondents

12. The 1st and 3rd Respondents opposed the Petition by way of a Replying Affidavit sworn by FRANCIS MULILI, the General Manager of the 1st Respondent, on 29th June 2016.

13. The 1st deponent admitted that the Petitioner was employed as heavy commercial vehicle driver for the 1st Respondent in February 2013 and assigned KBN 038D/ZB 5174. On 18th August 2015, the Petitioner was tasked with transporting 17 hot rolled steel wire rods from the 1st Respondent's yard at Changamwe for delivery to a client, KHETSI DHARAMSHI CO. LTD in Nairobi together with a Delivery Note No. 82189.

14. The deponent states that on 20th August 2015 they received a call from their client informing them that the truck loaded with the consignment had been abandoned in a queue and the driver had disappeared. The deponent states that they called another driver to move the truck to the weighing area where upon being weighed it was found that a total of 1, 663 kgs of cargo was missing and a report was made on

20th August 2015 to both Mariakani Police Station and Industrial Police Station.

15. The deponent claims that the Petitioner disappeared without a trace necessitating the 1st Respondent to put an advertisement in the Nation newspaper asking for help from the public to trace the Petitioner. On 28th January 2016, the deponent states that the 1st Respondent's patrol car spotted the Petitioner at Jomvu area and upon seeing the 1st Respondent's staff, the Petitioner started fleeing causing the staff members to make an alarm for members of the public to assist in apprehending the Petitioner.

16. The deponent states that the Petitioner was apprehended by the public who subjected him to mob justice until he was rescued by the 1st Respondent's security team who brought him to the 1st Respondent's yard and later handed him over to the police at Mariakani Police Station from where he was subsequently transferred to Industrial area police station and charged with the offence of stealing the subject of Criminal case no. 366 of 2016.

17. In response to the allegations of torture and cruel treatment, the 1st – 3rd Respondents state that after the arrest and arraignment of the Petitioner, the Petitioner used social media to paint the 1st Respondent and her principal officers as cruel for allegedly torturing him. As a result of the Petitioner's allegations, the 1st – 3rd Respondents claim that Mariakani SPM Criminal Case No. 266/2015 was instituted against the 1st Respondent's staff, ALI KAMTU (the 3rd Respondent), MARTIN MAKANDA and SHABBIR ABDUL OSMAN for the offence of attempted murder.

18. It is the 1st and 3rd Respondents case that the Petitioner is attempting to use this petition to prevent his prosecution for the offence of theft and to blackmail the 1st Respondent into compensating him.

4th and 5th Respondents

19. The 4th and 5th Respondents opposed the petition by way of a replying affidavit sworn by Chief Inspector Timothy Mwangi, OCS Mariakani Police Station, on 16th August, 2016.

20. The 4th and 5th Respondents admit that the Petitioner was taken to the Mariakani Police Station by the 1st Respondent's security officers on 28th January 2016 and booked under OB 41/28/1/2016 for the offence of stealing 4 coils of steel wire pursuant to complaint earlier lodged under OB No. 43/20/8/2015. The 3rd and the 4th Respondents admit that the Petitioner appeared to be injured when he was taken to the police station thus the police directed that he taken to hospital where he was treated, discharged on the same day and returned to the police station.

21. With regard to the allegation that the Petitioner was detained unlawfully by the 4th Respondent, the 4th and 5th Respondents state that the Petitioner was arrested on 28th January 2016 and not 27th January 2016 as pointed out by the Petitioner. Further, the 4th and 5th Respondents state that the offence the Petitioner had been accused of committing had occurred in Nairobi hence the Petitioner needed to be transferred to Nairobi. Additionally, the said Respondents pointed out that due to the Petitioner's injuries he had to ensure that he has properly healed to enable him travel by road all the way to Nairobi and also that 30th and 31st January 2016 fell on the weekend. In the alternative, the 4th and 5th Respondents state that failure to charge a suspect in court within twenty four hours does not quash a charge as damages are sufficient to advance an accused person's private interests where no good reasons have been advanced for the delay.

22. It is the 4th and 5th Respondents' case that the offence preferred against the Petitioner is based on evidence and a constitutional petition should not be used to determine the sufficiency of the evidence. Further, the 4th and 5th Respondents contend that the Petitioner has failed to cooperate in Mariakani CR Case No. 266/2016 in which the 3rd Respondent and 2 others are charged with the offence of attempted murder.

Submissions

23. The Petition was disposed off by way of *viva voce* evidence. The Petitioner called 4 witnesses while the Respondents chose to rely on their pleadings and called no witnesses. Parties then filed their submissions with the Petitioner filing his submissions on 15th September 2017, the 1st to 3rd Respondents on 10th October, 2017, the 4th Respondent on 12th October 2017 and the 5th Respondent on 4th October 2017.

24. **Mr. Maondo**, learned Counsel for the Petitioner submitted that every person has a right to life which right cannot be deprived arbitrarily unless authorized by the law. In explaining how the Petitioner's right to life was threatened, Counsel contended that the Petitioner was assaulted by the 1st Respondent's security officers and set ablaze by the 3rd Respondent. Counsel argued that the Petitioner who was suffering from tuberculosis at the time was held in police custody for several days without proper treatment. Counsel added that the threat to the Petitioner's life is also supported by the charges of attempted murder proffered against the 3rd Respondent and 2 others in Mariakani SPM CR Case No. 266/2016.

25. Mr. Maondo submitted that there was no justification for the Respondents' actions arguing that even if the Petitioner had stolen the consignment, the Respondents should have allowed the law to take due course. Counsel submitted that the Petitioner sustained serious burn injuries which are evidenced by the P3 form dated 31st January, 2016 and confirmed by PW 2 who examined the Petitioner.

26. In relation to the violation of the Petitioner's rights under Article 29 (c) (d) (f) of the Constitution, Mr. Maondo submitted that Article 1 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights prohibit torture, cruel or inhumane, degrading treatment or punishment. Counsel contended that the Petitioner through his testimony has explained how he was

roughed up by the 1st Respondent's security officers and set ablaze by the 3rd Respondent and supported this allegation by producing the T-shirt that he was wearing on that day which had a burned patch on the back. Further, Counsel submitted that the evidence of the Petitioner was corroborated by the evidence of PW 2 who examined him and prepared a medical report dated 1st July, 2016 and the testimony of PW3 and PW 5 who were present when the incident occurred.

27. With regard to the right to human dignity under Article 28 of the Constitution, Mr. Maondo submitted that the right to human dignity is the foundation for other rights such as right to life and right not to be subjected to violence, inhuman and degrading treatment. Therefore since the Petitioner's right to life and right not to be tortured or subjected to inhuman and degrading treatment were violated, so was his right to human dignity. Counsel cited the case of **S vs. Makwanyawe & Another [1995] ZACC 3 para 328** where O'Regan J as he then was held as follows:

“The importance of dignity as a founding value of the new constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically enriched.”

28. Mr. Maondo submitted that the justification offered by the 4th Respondents as to why the Petitioner was arraigned in court outside the 24 hours provided under Article 49 (1) is not satisfactory. Also, Counsel contended that the existence of a criminal case against the Petitioner does not bar the Petitioner from pursuing his constitutional rights as contemplated by this Petition.

29. As to the question of damages, Mr. Maondo submitted that the Petitioner had proved that his constitutional rights had been infringed and thus deserving of relief in the form of declaratory, conservatory and compensatory orders. In terms of compensatory orders, Mr. Maondo submitted that an award of Kshs. 10,000,000 would be sufficient for the threat to the Petitioner's life and violation of his right not to be subjected to torture, violence, inhuman and degrading treatment and a sum of Kshs. 1, 500, 000 as against the 4th and 5th Respondents for detaining the Petitioner for more than 14 hours.

30. **Mr. Busieka**, learned Counsel for the 1st and 3rd Respondents begun by questioning the inclusion of the 2nd Respondent as a respondent to this Petition. Counsel argued that the 1st Respondent is a registered company under the Laws of Kenya with 4 directors. However, the 2nd Respondent is not featured anywhere in the structure of the company as either a shareholder or a director therefore the 2nd Respondent is wrongly named as a director of the company. Further, Counsel contended that the 3rd Respondent has been named as a principal officer of the 1st Respondent while from the evidence of PW4 he is a junior foreman in the workshop section of the 1st Respondent.

31. Mr. Busieka submitted that corporate entities can only be found to be criminally culpable if it is demonstrated that the alleged criminal acts actually occurred, and were expressly sanctioned by a principal officer of the corporate entity. Counsel argued the Petitioner had failed to prove this.

32. Mr. Busieka submitted that the circumstances giving rise to this Petition do not lend themselves to the horizontal application of the Bill of Rights in favour of the Petitioner as the Petitioner has other alternative remedies available to him. Counsel cited the case of **Rose Wangui Mambo & 2 others vs. Limuru County Club & 17 others [2014] eKLR** where the court observed as follows:

“A second level of inquiry with regard to the application of the Bill of Rights is to ask to what extent and in what circumstances such private affairs can be subjected to the court process. In this regard, we must hasten to place a caveat that horizontal application of fundamental rights and freedoms is not an open cheque and whether and to what extent the court will exercise jurisdiction will be informed by the circumstances of each individual case. For instance, if there are alternative civil or other remedies available to a party, then courts may decline to exercise jurisdiction.”

The alternative remedies, Counsel contended, included institution of a breach of contract claim before the Employment and Labour Relations Court by the Petitioner and institution of civil proceedings against the 3rd Respondent if he is found guilty and convicted of the offence of attempted murder.

33. Mr. Busieka submitted that although the Petitioner claims to have been set ablaze by the 3rd Respondent no witness testified to actually seeing the 3rd Respondent commit the act.

34. Mr. Busieka submitted that the Petitioner had not satisfied the requirements of Section 105 b (4) and (5) in production of the video evidence. Counsel contended that the certificate accompanying the video evidence was signed by PW 5 who allegedly recorded the incident on his cell phone while PW 5 simply handed his cell phone to the Petitioner's advocate and did not participate in any way in production of the video evidence. Counsel argue that since the video and other photographic evidence were in the control of the Petitioner's advocate, it is the Petitioner's advocate who ought to have signed the certificate. Alternatively, Mr. Busieka submitted that the video and photographic evidence relied upon by the Petitioner do not show any conclusive proof of burning or torture.

35. Mr. Ngari, learned Counsel for the 4th Respondent submitted that despite the numerous violations alleged by the Petitioner the only allegation attributable to the 4th Respondent is failure to arraign the Petitioner in court on time. Counsel submitted that the Petitioner admitted that he was brought to the police station on 28th January, 2016 and due to injuries that he had sustained he was taken to hospital, treated and returned to the police station but arraigned in court on 2/02/2016. Mr. Ngari submitted that the delay occasioned in arraigning the Petitioner was justified as the 4th Respondent had to make arrangements to transfer the Petitioner to Nairobi as the offence he was charged with has been committed in Nairobi.

36. **Mr. Wamotsa**, learned Counsel for the 5th Respondent submitted that delay in arraigning the Petitioner was sufficiently explained by the

4th Respondent thus the delay cannot be termed as unreasonable or contrary to Article 49 of the Constitution. Alternatively, Counsel submitted that a breach of Article 49 (1) (f) (i) does not automatically lead to quashing of a charge but to an award of damages where the breach has been established.

37. Mr. Wamotsa submitted that there was no unreasonable delay on the part of the 4th and 5th Respondents in charging the alleged assailants of the Petitioner although it took them almost three months to bring them to court. Counsel urged the court to consider that bringing charges against an individual entails extensive investigations, recording statements, collection of documentary and electronic evidence and sometimes subjecting them to forensic analysis and later forwarding of the police file to the 5th Respondent for review and directions.

Analysis and Determination

38. Having carefully considered the pleadings and the submissions therein, the issue for determination by this court is whether the Petitioner's rights under Articles 25, 26 (1), 28, 29 (c), (d), (f) and Article 49 (1) (f) of the Constitution were violated by the Respondents and if so, what reliefs are available to the Petitioner.

Whether the Petitioner's rights under Article 25, 26 (1), 28, 29 (c) (d) (f) of the Constitution was violated by the Respondents

39. The Petitioner alleged that his rights under the aforementioned Articles were violated by the Respondents. The Petitioner's case is that on 28th January 2016 while walking alongside a road in Changamwe area he was accosted by the 1st Respondent's patrol officers and forcefully bundled into their vehicle. He claims that he was taken to the 1st Respondent's premises located at Uwanja wa Ndege where he met the 3rd Respondent who instructed the 1st Respondent's security officers to rough him up. The Petitioner adds that he was assaulted by the security officers and later had his hand and feet tied with a rope. The Petitioner states that the 3rd Respondent then directed the security officers to place a truck tyre around the Petitioner, after which the 3rd Respondent poured a thinner on the Petitioner and set him a blaze. The Petitioner claims that it took the intervention of some of staff members to put out the fire. Later, the Petitioner alleges that he was taken to Mariakani Police station.

40. The genesis of the said acts by the Respondents is said to be an incident that occurred sometime in August 2015 when the Petitioner was an employee of the 1st Respondent. The Petitioner claims that having been employed as a truck driver he was given a consignment of aluminum coils to transport to a client in Nairobi. The Petitioner alleges that he did transport the consignment but on arrival in Nairobi upon weighing the consignment, some consignment was found to be missing and the Petitioner was accused of stealing the same.

41. The 1st and 3rd Respondents, on the other hand, claim that the Petitioner stole some consignment and vanished without a trace since August 2015 and that on 28th January 2016 he was spotted by the 1st Respondent's security officers in Changamwe. The 1st and 3rd Respondents contend that they tried to arrest the Petitioner and take him to the police but he attempted to escape necessitating them to raise an alarm which the public responded to by apprehending the Petitioner. The 1st and 3rd Respondents contend that it is the members of the public who by way of mob justice roughed up the Petitioner and set him ablaze.

42. Did the Respondents violate the Petitioner's rights? Before delving into this issue this court has to address the issue as to whether the 2nd Respondent ought to have been enjoined in these proceedings. The 1st and 3rd Respondents submitted that the 2nd Respondent is not a director of the 1st Respondent and has been wrongly named as such in the Petition. The 1st and 3rd Respondents went on to attach a copy of particulars from the Registrar of Companies showing that as per the 1st Respondent's returns of 8th April 2015, the 2nd Respondent was not a director or shareholder of the 1st Respondent. The Petitioner in his Petition describes the 2nd Respondents as "*a male adult individual and a principal director of the 1st Respondent and in whose presence the acts giving rise to this Petition were undertaken*". The Petitioner claimed the violations against him occurred in the presence of the 2nd Respondent.

43. Article 20 (1) of the Constitution provides that "the Bill of Rights applies to all law and binds all State organs and all persons". The term person is defined under Article 260 to include "a company, association or other body of persons whether incorporated or unincorporated". This means that companies duly incorporated in Kenya are bound to observe and respect rights and freedoms in the Bill of Rights. The intention of the Constitution, I should think, was to ensure that it is not only the state and its organs that are obliged to respect the bill of rights but also other entities and associations thus the application of the bill of rights horizontally.

44. As I understand it, the Petitioner sued the 2nd Respondent in his supposed capacity as the principal director of the 1st Respondent whose actions are attributable to the 1st Respondent. As correctly put by the 1st and 3rd Respondents, a company does not act on its own. It acts through its employees who are its hands thus if an act is proved to have been committed by an employee with the consent of a director or other officer of the company then the company itself becomes liable. In this case, the 1st and 3rd Respondents claim that the 2nd Respondent should not have been sued as he is not a director of the company. I do agree that the 2nd Respondent is not a director of the 1st Respondent. However, the Petitioner in my view seems to have sued the 2nd Respondent not only in his supposed wrong capacity as a director but also in his personal capacity for being present during the incident described above. I therefore find that the 2nd Respondent was properly sued as a Respondent in this matter.

45. As to whether the Respondents violated the Petitioner's rights, the Petitioner submitted that the actions of the 1st Respondent's security officers and the 3rd Respondent infringed on his right to life under Article 26(1); freedom from torture and cruel, inhuman or degrading treatment or punishment under Article 25 (a); right to inherent dignity under article 28 and the right to freedom and security of his person under Article 29 of the Constitution.

46. The aforementioned rights are not only protected by our Constitution but also by several international legal instruments. For instance, Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person. Article 5

of the same Declaration provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. According to the African Charter on Human and People's Rights Article 4 guarantees the right to respect of life and the integrity of the person while Article 5 provides for the right to respect the dignity inherent in a human being and prohibits torture, cruel, inhuman or degrading punishment and treatment.

47. The Petitioner herein is bound to not only precisely state the specific rights that were violated but also to satisfactorily explain the manner in which the rights were violated. These were the requirements established for violation of constitutional rights in the famous case of **Anarita Karimi Njeru vs. Republic, Misc. Criminal Application No. 4 of 1979**. The Petitioner has met the first limb of the requirements by specifically listing the rights that were allegedly violated by the Respondents in the body of the Petition.

48. As to the manner in which the rights were violated, the Petitioner testified to this effect and further called 4 witnesses. PW 2, Dr. Ajoni Adede testified that he examined the Petitioner on 1st July, 2016 while relying on the P3 Form and concluded that the Petitioner had a scar to his back covering 10% of his body which were suggestive of being burned. However, PW2 during cross-examination admitted that he relied on treatment notes dated 27th October 2016, which date is after his examination.

49. PW3, PW4 and PW5 claimed to be employees of the 1st Respondent at the time of the incident. PW3 and PW5 testified that they witnessed the Petitioner being assaulted by the 1st Respondent's security officers and by the 3rd Respondent with PW3 claiming to have called for assistance of the police, and PW 5 claiming to have recorded the incident on his phone. PW4, testified that he was the cousin of the Petitioner and on the material day he was called by the 2nd and 3rd Respondents who claimed to have found the Petitioner and asked him what they should do with the Petitioner. PW5 produced a video in court depicting the Petitioner's legs and hands bound in ropes and a tyre rapped around the Petitioner. PW 5 also identified the 2nd and 3rd Respondents in the video. The video however did not depict the Petitioner being set ablaze by the 3rd Respondent. PW 5 admitted that he begun taking the video after the Petitioner had been set ablaze and the fire had been put off.

50. The 1st and 3rd Respondents in their submissions disputed the admissibility of the video claiming that the certificate under Section 106B of the Evidence Act filed on 9th February 2017 was signed by PW5, PETER NJUNGE WAWERU, yet PW5 took the device (his mobile phone) which he used to take the video to the Petitioner's advocate who then transferred the video to a CD. The 1st and 3rd Respondents submitted that it is the Petitioner's advocate who ought to have sworn the certificate which is in the form of an affidavit thus the Petitioner contravened Section 106B (4) (d) of the Evidence Act. On this issue, I would like to begin by pointing out that the 1st and 3rd Respondents did not object to the production of the video evidence when PW5 was testifying nor did they contest the validity of the Certificate under Section 106B of Evidence Act which was filed way back on 9th February 2017.

51. Section 106B (4) (b) of the Evidence Act provides as follows in relation to the Certificate:

“(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or shall be evidence of any matter in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

The PW5 in the Certificate filed on 9th February 2017 states at paragraph 12, 13 and 14;

“12. THAT on arrival with the assistance of the Petitioner's advocate, I connected my cell phone of specifications X-Tigi using macro Universal service bus (USB) DATA CABLE TO A DESK TOP COMPUTER OF SPECIFICATION Lenovo of Monitor serial number 3CQ052BG711 (model HP Compaq LE1711) and Central Processing Unit (CPU) Serial No. 00144-021-447-966 (model HP Compaq de 7700P small form factor). Both the macro USB and the desk top computer were in good working condition and without mechanical defects.

13. THAT thereafter, I accessed the first video footage from the said desk top computer through the macro USB cable. The video was copied to the computer's hard disk; an empty CD was inserted into the computer's CD-writer RAM; and the video footage was then copied on the CD.

14. THAT at all material time I am the one who was responsible for the operation of my cellphone that contained the electronic record while I was assisted by the Petitioner's Advocate to operate the desk top computer and the monitor...”

52. It is quite evident that PW5 was present during the production of the electronic evidence and participated in the same with assistance of the Petitioner's advocate. Section 106B (4) (d) requires that the Certificate be signed by a person occupying a relevant position in relation to operation of the relevant device. From the averments captured above, PW5 occupied a relevant position with regard to operation of the device. At no point did PW5 claim that it is the Petitioner's advocate who solely transferred the video from his mobile phone to a CD. On the contrary, PW5 also explained in detail the role he played in transferring the video to a CD. I therefore find that the Certificate filed on 9th February 2017 was signed by the proper person according to Section 106B (4) (d) of the Evidence Act.

53. From the testimony of the Petitioner and his four witnesses it is evident that indeed he was assaulted/roughed up by the 1st Respondent's security officers and set a blaze by the 3rd Respondent. Although the video produced in court and the pictures attached to the Petition do not show the Petitioner being set ablaze, this court finds the evidence of the Petitioner and his witnesses to be credible as the said testimony was not shaken during cross examination. Further, this court takes into account a copy of the P3 form dated 31st January 2016 annexed to the affidavit of the Petitioner sworn on 16th May, 2016 and marked as “INK-6” which indicates that the Petitioner had been burnt on the back, and the Replying Affidavit of CHIEF INSPECTOR TIMOTHY MWANGI sworn on 16th August 2016 who deposed that when the Petitioner was taken to Mariakani Police Station he directed that he be taken to hospital as he appeared to be injured.

54. This court disputes the defence put up by the 1st and 3rd Respondents who claimed that the Petitioner was assaulted and set ablaze by the public when he tried to escape. First, the photographs and video brought as evidence by the Petitioner in no way depict a crowd or group of persons assaulting the Petitioner. Second, the 1st and 3rd Respondents did not call any evidence to support their assertion. No witness testified nor was evidence produced to show that the Petitioner was assaulted by members of the public.

55. The rights complained of by the Petitioner are intertwined; by the 1st Respondent's agents/security officers and 3rd Respondent "roughing up", tying up and burning the Petitioner they were infringing on the Petitioner's freedom from torture and cruel, inhuman or degrading treatment or punishment and his right not to be subjected to violence. Further, the said actions threatened the Petitioner's right to life and violated his inherent dignity as a human being. The 1st and 3rd Respondents accused the Petitioner of stealing some consignment when he was in the employment of the 1st Respondent. However, the 1st, 2nd and 3rd Respondents had no right to take justice into their own hands. Instead, the Respondents, upon apprehending the Petitioner, should have handed him over to the Police and let the law run its course. This court does find that the 1st, 2nd and 3rd Respondents violated the Petitioner's rights under Articles 25, 26 (1), 28, 29 (c) (d) (f) of the Constitution.

Whether the Petitioner's right under Article 49 (1) (f) was violated by the 4th and 5th Respondents

56. Article 49 (1) (f) (i) states as follows with regard to the rights of an arrested person;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested

57. The Petitioner claims that he was arrested on 28th January 2016 but only arraigned in court on 2nd February, 2016. The 4th and 5th Respondent attempted to explain the reason for the delay in producing the Petitioner in court. They claimed that when the Petitioner was taken to Mariakani Police Station on 28th January 2016 he appeared injured and was taken to hospital and discharged the same day. However, the Respondents contended that since the alleged crime was committed in Nairobi, the 4th Respondent claimed that he allowed the Petitioner time to heal before being transported to Nairobi and further that travel arrangements needed to be made thus the delay in arraigning the Petitioner before court.

58. I have carefully considered the period within which the Petitioner was in custody. 28th January, 2016 was a Thursday, 29th January a Friday, 30th and 31st fell on a weekend while 1st February was a Monday and 2nd was a Tuesday. The 4th and 5th Respondents claimed that they allowed the Petitioner to heal thus they could not transport him on 29th January 2016, 30th and 31st fell on a weekend thus the Petitioner was transferred thereafter.

59. Article 49 (f) (i) frowns upon detaining an accused person for more than 24 hours before arraigning the accused in court. Any detention after the twenty fours which does not fall within the weekend is considered unconstitutional. However, the onus falls on the 4th Respondent to prove that detaining the Petitioner past the twenty four hours was justifiable. I have considered the reasons given by the 4th and 5th Respondents and find the said reasons to be justifiable. The Petitioner himself admits that when he was taken to Mariakani police station he had sustained several injuries and the 4th Respondent directed that he be taken to hospital. The Petitioner was a suspect in a crime that had occurred in Nairobi and had to be transferred to Nairobi. The Petitioner was to be transported to Nairobi by road. The journey between Mombasa and Nairobi can be quite gruesome especially for an injured person. The 4th Respondent considered it prudent to allow the Petitioner time to recover before the journey. Further, some of the days fell on the weekend and under Article 49 (1) (f) (ii) of the Constitution, I therefore find that the 4th and 5th Respondents did not violate the Petitioner's right under Article 49 (1) (f) of the Constitution.

Whether the Petitioner is entitled to any relief

60. It has already been established that some of the Petitioner's rights were violated by the 1st to 3rd Respondents therefore the Petitioner is entitled to remedies. Article 23 (3) of the constitution provides the following remedies;

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

61. The Petitioner seeks relief in the form of a declaration that his rights as enshrined in the Constitution have been infringed by the

Respondents; compensation by way of damages for the violations; a declaration that **Criminal Case No. 366 of 2016 Republic vs. Isaac Njoroge Kamau** was instituted without a proper basis and an order halting the proceedings in **Criminal Case No. 366 of 2016 Republic vs. Isaac Njoroge Kamau**.

62. I have carefully considered the reliefs sought by the Petitioner. This court cannot interfere with the proceedings in Criminal Case No. 366 of 2016. Article 157 (6) to (11) provide as follows:

“(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 clause (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).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(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.” (emphasis added)

This Article is very clear that the 5th Respondent shall not be directed by any person or authority in carrying out its functions and shall only be subject to the Constitution.

63. This court can only interfere with the authority of the 5th Respondent where it is proved that the 5th Respondent did not have regard to public interest or administration of justice in starting a prosecution process. The Petitioner has not proved any of these. The Petitioner has been charged with the offence of stealing in Criminal case No. 366 of 2016. Whether the charges were proper or not, is not within the realm of this court. The Petitioner must challenge the charges before the court handling the matter.

64. The Petitioner seeks compensation in the form of general damages for the violations. Is an order for compensation in the form of general damages an appropriate relief in this case? The Court of Appeal in the case of **Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR** considered the award of damages for constitutional violations and observed as follows:

“...It seems to us that the award of damages for constitutional violations of an individual’s right ... are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in constitutional violation cases though is limited by what is “appropriate” and “just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration . Public policy consideration is also important because it is not only the Petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

65. In the instant Petition, I find that over and above a declaration that Petitioner’s rights have been violated, an award of damages would be appropriate. The Petitioner in this case suffered injuries as a result of the violations. The 1st to 3rd Respondents have to be held accountable for their actions and a declaration alone, of violation of the rights, would not meet the ends of justice. As to the quantum of damages, this Court directs its mind to the fact that the purpose of damages is not to overly punish the Respondents but to vindicate the Petitioner and serve as a deterrence. Therefore, this court finds that a sum of Kshs. 1,000,000/= would be sufficient as general damages for the violations.

66. For the foregoing reasons the Petition dated 15th May, 2016 succeeds. Orders are made as follows:

a) A declaration be and is hereby issued that the Petitioner’s rights as enshrined under Articles 25, 26(1), 28 and 29 (c) (d) (f) have been violated by the 1st to 3rd Respondents jointly and severally.

b) The Petitioner is awarded the sum of Kshs 1,000,000/= as general damages for the violations. The amount shall be paid by the 1st, 2nd and 3rd Respondents jointly and severally.

c) Costs of the Petition to be borne by the 1st, 2nd and 3rd Respondents.

Dated, Signed and Delivered in Mombasa this 14th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Wafula holding brief Mr. Maondo for Petitioner

Mr. Busieka for 1st and 3rd Respondents

Mr. Mkok for 4th and 5th Respondents

Mr. Kaunda Court Assistant