



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 138 OF 2015

IN THE MATTER OF ARTICLES 2(1), 19, 20, 21, 22, 23 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 29, 31, 33(2) & (3), 35(2), 38, 47 AND 50 OF THE CONSTITUTION OF KENYA

BETWEEN

JOSPHAT KOLI NANOK.....1ST PETITIONER

PAUL EKWOM NABUIN.....2ND PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

JUDGMENT

1. By a Petition dated 10th April 2015, the Petitioners seek the following specific prayers:-

a) A declaration that the sections of the Ethics and Anti-corruption Commission **Report on the Current Status of Corruption Matters Under Investigations to the Presidency dated 20th March 2015** (at page 30 thereof) which referred to, defamed and condemned the petitioners herein unheard (hereinafter called "the said sections of the impugned report") **are illegal, unconstitutional and therefore null and void and should be expunged and/or quashed.**

b) An order of certiorari quashing the said sections of the impugned report or in the alternative an order expunging the said sections of the impugned report.

c) An order of injunction prohibiting the respondent from further publishing the said sections of the impugned report in any other manner and to any other person howsoever and whatsoever.

d) An order of mandatory injunction compelling the respondent to publish a public apology to the petitioners in at least two daily newspapers with national circulation in connection with the aforesaid defamation as well as the violation of their fundamental rights and freedoms.

e) An order of compensation by way of damages for defamation due to the injuries occasioned to the petitioner's reputation among the right thinking members of the society generally.

f) An order of compensation by way of damages for other violations of the petitioner's fundamental rights and freedoms as outlined hereinabove in this petition.

g) Costs of this petition.

h) Any other relief or orders that this honourable court shall deem just and fit to grant.

2. The facts in support of the petition's case are set out in the Petition as follows:

“FACTS THAT GROUNDS THE PETITION

15. The 1st petitioner is the elected governor of Turkana County. The 2nd Petitioner is the County Executive for the Ministry of Finance and Economic Planning and also the Principal Finance Officer in the County Government of Turkana. Both are residents of Turkana County.

16. The primary aim of the petitioners seeking and ascending to political offices was to serve the people of Turkana County. Indeed since their ascension to office, they have served the people of Turkana County with zeal, dedication and diligence. To this end, they have engaged in development projects aimed at improving the lives of the people of Turkana County.

17. The Respondent herein has vide a report entitled “**ETHICS AND ANTI-CORRUPTION COMMISSION REPORT ON THE STATUS OF CORRUPTION MATTERS UNDER INVESTIGATION TO THE PRESIDENCY**” at page thirty thereof made statements to the effect that the petitioners herein, as public servants, and using public monies paid a sum of Kshs.14, 000,000/= to some unnamed contractor purportedly for construction of a bridge when no bridge was constructed.

18. In their natural and ordinary meaning, the said statements were intended to mean and were understood to mean that the petitioners herein are corrupt individuals who are unfit to hold public office by virtue of the provisions of Chapter 6 of the Constitution of Kenya.

19. The statements were also grossly defamatory and were published with the sole intention of reducing the petitioner’s reputation in the estimation of right thinking members of the public and thereby subjecting them to public ridicule, humiliation, opprobrium and obloquy and thereby cause them to suffer irreparable loss in their personal, social, professional and political life.

20. The publication of the said statements has also led to a gross violation of the petitioners’ fundamental rights and freedoms as outlined in the petition annexed herewith.

21. The publication of the said statements has also led to a gross violation of the petitioners’ fundamental rights and freedoms as outlined in the petition annexed herewith.

22. The statements were wholly untrue and were published maliciously and without any colour of right.

23. The truth is that neither the County Government of Turkana nor the Petitioner’s herein have ever made any such payments to any person. Indeed, since its inception in 2013, the County Government of Turkana has never included in its budget any project for the construction of any bridge. The only bridge that has been constructed in Turkana County was actually constructed by Turkana County Council long before the 2013 general election that operationalized Turkana County Government.

24. All projects undertaken by Turkana County Government must first be included in the annual budget, which must be approved by the Turkana County Assembly, before the Controller of Budget can authorize the release of funds for the same. There has never been any project for construction of a bridge in Turkana County as Alleged and further that no payments as alleged by the respondents in its report aforesaid, has ever been approved by the County Assembly nor by the controller of Budgets and further that no such payments has ever been made.

25. The aforesaid report was submitted to the president of the Republic of Kenya even without giving the Petitioners herein the opportunity to be heard in connection therewith. The report was then taken to parliament where it was debated and its contents released to the media and publicized to the entire world. The applicants herein have therefore been condemned and damnified unheard.

26. The petitioners herein are therefore being vilified publicly and wrongly portrayed as corrupt individuals who are unfit to hold public offices. In the process the entire public has been incited against the applicants and presently there are calls to have them step aside, a situation that has created unnecessary hostility against them and thereby greatly and adversely affecting their personal, social, professional, and political life, situation that cannot be allowed to continue for any longer owing to its psychological and traumatic effect upon the applicants herein.”

Alleged Violations of the petitioner’s fundamental rights and freedoms

3. Based on the above alleged facts it was contended that the respondent’s action resulted in the violation of petitioners’ rights under the Bill of Rights as follows:

a. By handing in the impugned report to the president, the respondent violated the petitioners’ right to equality before the law. The report made damning allegations against the petitioners. They greatly dented their image and reputation among the public. They were never called up to answer any charges against them in accordance with the due process of the law. As such the respondent violated the petitioner’s right to equal protection before the law as guaranteed under Article 27.

b. The publication on the report also violated the petitioner’s right to human dignity contrary to Article 28 of the constitution. The allegations made subjected the petitioners to contempt, public ridicule, opprobrium and obloquy. This therefore lowered their human dignity. As such the respondents violated the petitioners’ right to human dignity contrary to the provisions of the constitution.

c. Further the publication of the report by the respondent and its subsequent circulation exposed the petitioners to public hatred. No

doubt according to the tenor of the report, a reasonable man would understand the report to mean that the petitioners are corrupt and that they are unfit to be in office. This in turn has turned the electorates and the members of Turkana county against the petitioners. This has threatened their security. It has increased their chances of being subjected to violence from both public and private sources. Indeed they now risk being treated in a cruel and degrading manner in the public. These publications therefore violated the right to security of the person contrary to the provisions of Article 29 of the constitution.

d. Whereas the respondent has the freedom of expression, this right should nonetheless be exercised in accordance with the law. The publication of this damning report ignored the respondent's duty under the constitution. The respondent had the duty under Article 33 not to incite violence, hatred or vilification of others. Indeed the respondent was under a particular duty to respect the rights of the petitioners and their reputation. Despite these legal duties, the respondent nonetheless went ahead to publish a malicious, false and baseless report thereby contravening Article 33(2) and (3) of the Constitution.

e. The malicious act of handing in the report to the presidency and subsequently to parliament and the media violated the petitioner's right of access to information therein. It categorically denied them the right and opportunity to have the untrue and misleading information deleted or corrected contrary to Article 35(2) of the Constitution.

f. The petitioners are political leaders. They, just like all other Kenyans are entitled to political rights. The publication of the report by the respondents infringed their political rights contrary to Article 38 of the c

Constitution. First the malicious information has been used by the political opponents to their advantage. Secondly, the information has the potential to create a rift between the leaders and the electorates thereby affecting the petitioners' chances of re-election. Significantly, the damning allegations also affect the petitioners' suitability to hold public office. Chapter six of the Constitution together with the Leadership and Integrity Act gives very strict and lofty standards for eligibility to hold public office. Any person who vies or seeks any such office must then and without exception meet these standards. To this extend therefore; the publication of the report violated the petitioner's political rights contrary to Article 28 of the Constitution.

g. Further the respondent is a government entity. Before taking any decision that can adversely affect another person, they are under a duty to give the person likely to be affected a chance to rebut any allegations. The respondents blatantly refused to give the petitioners such a chance. Rather than give them a chance to rebut any such allegations, the respondent just published the report, which as a result greatly injured the reputation of the petitioners thereby exposing them to ridicule, contempt, opprobrium and obloquy. This act violated their right to a fair administration action which is expeditious, efficient, lawful, reasonable and procedurally fair.

h. The respondents also denied the petitioners the right of access to justice. Rather than having them face the allegations before a tribunal or a court of law, they sent the report to the presidency, parliament and the media. This had the effect of denying them a chance to approach court for redress before any damage was done. This as a result was a violation of the petitioner's right to access to justice as guaranteed under Article 48 of the Constitution.

i. The respondent equally violated the petitioners' right to a fair trial as guaranteed under Article 50 of the constitution. The respondent did not submit the allegations made against the petitioners before any independent and impartial body or tribunal established under the law. They were also not informed of the charges they were facing beforehand. On the contrary, the respondent just published the report to the Presidency parliament and to the public at large. The humble petitioners were also not presumed innocent until proven guilty. The publication of these malicious allegations made the people interpret that the 2 petitioners are guilty of the charges. No adequate time or facilities was accorded to the petitioners to sufficiently answer the charges. The publication in general had the effect of violating Article 50 of the constitution. Suffice to note is the fact that no matter what the charges or where the trial, under no circumstances can a trial derogate from the provisions of Article 50 of the constitution."

Responses

4. In response to the Petition, the Respondent filed a replying affidavit sworn by its Forensic Investigator, Richard Kipkosgey Kilimo, on 21st may 2015 setting out its defence as follows:

“REPLYING AFFIDAVIT of RICHARD KIPKOSGEY KILIMO

4. *THAT sometimes in March 2015 the Commission forwarded to the President a report titled “Report on the Current Status of Corruption Matters under Investigation to the Presidency”. The report is dated 20th March 2015.*

5. *THAT I am advised by the Commission's advocate on record which advise I verily believe to be true that this report was forwarded to the President pursuant to Article 254 of the Constitution which are in the following terms:*

Reporting by commissions and independent offices;

254. (1) *As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.*

(2) *At any time, the resident, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.*

(3) *Every report require from a commission or holder of an independent office under this Article shall be published and publicized.*

[Emphasis added].

6. THAT it is subjective for the Petitioners to allege at page 14, paragraph 18, 11, 12 and 13 of their Petition that “in their natural meaning and ordinary meaning, the said statements were intended to mean and were understood to mean that the Petitioners herein are corrupt individuals who are unfit to hold public office by virtue of the provisions of Chapter 6 of the Constitution of Kenya.

7. THAT this could not be further from the truth because these are matters whose investigations are ongoing.

8. THAT I am further advised by the Commission’s advocate on record which advice I verily believe to be true that Articles 79, 80 and 252 of the Constitution, as well as Section 11 of the Ethics and Anti-corruption Commission Act [EACC Act] mandate the Commission to carry out such investigations.

9. THAT I am aware that Section 11(d) of the EACC Act expressly states that:

“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall - investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution;”

10. THAT it is abundantly clear that all the actions and steps taken by the Commission were, and still are, advised and informed by statutory as well as constitutional underpinnings.

11. That the averments of the Petitioners at the aforementioned paragraphs can, at best, be described as a red herring, because the same are merely pre-emptive of the investigations currently being carried out by the commission.

12. That the Petitioners cannot be heard to claim at page 14 paragraph 13 of their Petition that the statements were wholly untrue and were published maliciously and without any color of right, No malice has been proved by the Petitioners. In contra-distinction, I have demonstrated that that report was made with the full tenor of the law.

13. That it is not true, as averred by the Petitioners at page 15 paragraph 17 of their Petition, that they have been vilified publicly and wrongly portrayed as corrupt individuals who are unfit to hold public offices. These are matters that are still under investigations and, until investigations are complete such conclusions as to capacity or incapacity to hold office are premature.

14. That contrary to the assertions by the Petitioners at page 17, paragraph 25 the act of revealing investigation reports to the person under investigation at a preliminary stage would beat that entire purpose of the said investigations.

15. That further, the Commission only investigates and pursuant to Section 35 of the Anti-Corruption and Economic Crimes Act [ACECA], forwards the investigation report to the Office of the director of Public Prosecutions [DPP], who then elects to prosecute the same or not.

16. That Section 35 of ACECA states as follows:

“35. Investigation report

(1) Following an investigation the Commission shall report to the Director of Public Prosecutions on the results of the investigation.

(2) The Commission’s report shall include any recommendation the Commission may have that a person be prosecuted for corruption or economic crime.”

17. THAT the averments at page 15, paragraph 19 of the Petition that “They were never called upon to answer any charges against them in accordance with the due process of the law, and that this was discriminative”

18. THAT I wish to reiterate that investigations are a covert exercise and once the investigations are finalized, the report is forwarded to the DPP in accordance with the Section 35 of EACC, ditto. The Commission does not carry out prosecutions and so there were no charges [emphasis created] to be answered by the Petitioners.

19. THAT the averments at page 16, paragraph 22 of the Petition are riddled with untruths and lack any factual basis. I have demonstrated how the report is to be published under the Constitution and so the allegations of incitement to violence, hatred or vilification.

20. THAT I am further advised by the counsel or record, which advice I verily believe to be true that allegations of defamation as printed out in prayers (a) and (e) of the Petition cannot be entertained by this Court as they are non-existent. And that in the alternative, if any existed then the Petitioners ought to have filed a Civil Suit.

21. THAT this Honourable Court cannot be cajoled by the Petitioners, as they are attempting, so as to quash a report that was prepared pursuant to living statutory as well as constitutional requirements.

22. That I am informed by the Counsel on record, which information I verily believe that no fundamental rights and freedoms of the Petitioners have been violated by the Commission in any manner whatsoever.

23. That this Petition is an attempt to emasculate the Commission and prevent it from discharging its statutory and constitutional duties.

24. That I swear that affidavit in opposition to the Petition dated 10th April 2015, and I urge this Honourable Court to dismiss the same with costs”

Further affidavits

Petitioner's further affidavit

5. The Petitioners responded to the respondent's replying affidavit by a further affidavit sworn by the 1st petitioner on 8th June 2015 in which the petitioners while admitting the mandate of Commissions and holders of independent offices under Article 254 of the Constitution to submit a report to the president and Parliament, contend that, such “a report to be submitted by a Constitutional Commission or an Independent Office under Article 254 of the Constitution must perforce contain information as to what the Constitutional Commission or Independent office **has done** in pursuit of its constitutional and statutory mandate. Accordingly, such a report must be confined in terms of its contents to tasks that have been **accomplished** by the Constitutional Commission or independent office. Besides, the form and content of a report under Article 254 of the Constitution must be as prescribed in the statute that operationalizes the Constitutional Commission or independent office.”

6. It was contended that in accordance with section 27 of the EACC Act, the report must be an annual report, submitted at the end of the financial year or within three months thereof, and containing details of tasks **accomplished** by the Commission and containing the matters set out in section 27 (3) of the Act. The Petitioners urged that the impugned report entitled “Ethics and Anti-Corruption Commission Report on the Status of Corruption Matters under Investigation to the Presidency” merely contained unsubstantiated allegations and, consequently, it did not meet the legal threshold of the Annual report envisaged under Article 254 of the Constitution as read together with section 27 of the EACC Act. It was contended that the report was merely “a statement scandalously and maliciously authored and published by the Respondent for the sole purpose of defaming and violating the fundamental rights of several innocent persons whose names were included therein including the applicants herein and with a view to ruining their social, professional and political lives and bringing them to public shame and ridicule.”

7. The petitioners' cause of action in the Petition is encapsulated in Paragraph 14 of the further affidavit as follows:

“[A] constitutional body like the respondent herein cannot be deemed to have exercised its legal powers validly without first hearing the people who are going to suffer as a result of any decision in question and for good reason. Once the decision is made, it is difficult to reverse it and the person prejudiced by it would have been completely ruined by the decision. The affected person will have been tried and convicted in the court of public opinion and his social, political and professional life ruined beyond redemption. His standing in the society would be gone and his political career destroyed completely. It is even worse where, as here, the allegations are wholly false and a simple telephone call to the applicants before releasing the report would have created a huge difference.”

Respondent's further reply

8. In reply to the petitioner's further affidavit, the forensic investigator of the EACC who swore the replying affidavit made a further affidavit of 30th June 2015 in which he deponed that the petitioners had by letter of 10th June 2015 been invited to appear before the Commission on 24th June 2015 for interview and recording of statements on various financial irregularities including the subject of “allegations that the County Government of Turkana paid 14million shillings to a contractor of a foot bridge over River Kerio, Turkana South Constituency for works not done” and that “no decision has yet been reached by the EACC on the allegations contained in the impugned report.” It was further averred that the complaint that the petitioners were never called upon to answer any charges in accordance with due process of the law was made at a very early stage of the investigation considering that “the act of revealing investigation reports to the person under investigation at a preliminary stage would beat that entire purpose of the said investigations [and that] the persons affected are nevertheless later summoned as we have demonstrated hereinabove to react to these allegations.”

Submissions

9. The Parties then filed written submissions and subsequently made supplementary oral submissions to highlight the written submissions as follows:

Mr. Arwa for the Petitioner

[The] Facts are captured in the petition and further Affidavit of the 1st Petitioner. Report on current status of Anti-corruption cases dated 20/3/2015. It alleged that the petitioners had made payment in connection with a bridge that was not constructed. Report was submitted to President and later to Parliament. There was subsequent discussion on the Report which painted a bad picture of the petitioners.

The Petitioners contended that they were tried by the media and their reputations were adversely affected by the allegations of corruption. The petitioners are professionals and they contend that their professional lives were affected. The allegations were completely unfounded. It was alleged that the Government had lost 14 million. The payments were made before the County

Governments in 2012. The Petitioners' case is that the information was in public domain and there was no basis for making of such allegations that had capacity to destroy lives and careers. The documents are attached to the petition. The petitioners had nothing to do with the payments.

The petitioners contended that the allegations were false, default and had violated their rights to privacy, fair administration action and fair hearing. Articles 47 and 50 of the Constitution. The Petitioners seek an award of damages for violation.

Written Submission of the Petitioners.

Right to dignity, Right to privacy and right to a reputation, these rights are justiciable under the Constitution. I refer to **National Media Ltd & 3 Ors. v. Bogoshi, Nthedi Morole**, The Supreme Court of Appeal of South Africa Case No. 579/96, No.2 on the list of authorities. Constitutional provisions of South Africa expounded the right of regulation beyond the common law defamation. Damages are recoverable for breach of the Constitutional right. Section 14 of the South Africa is word for word with section 31 of Kenya Constitution.

The Right is Justiciable

Right to privacy are not suspended during investigation. The duty to investigate must be sensitive to fundamental rights. The Respondents have a duty to protect the rights of the person under investigation and to abstain from revealing prematurely the information before **prima facie** case is established. When allegations are made which can be verified premature disclosure can ruin reputation. It is the Constitutional Court to set standards for investigations. Premature investigation disclosure is wrong.

I refer to authorities on European Court of Human Rights –**Panteleyenko v. Ukraine case no. 1190 of 2002; Khuzin and Others v. Russia case no. 13470 of 2002 and Z. v. Finland case no. 22009 of 1993** - at page 14 of the Submissions. The mere fact the investigation have been launched should not mean that the rights of persons are under investigation can be violated. Investigation cannot be launched until preliminary inquiry is done. Investigation can only be launched after inquiry reveals a prima facie case.

Article 47 of the Constitution.

A decision to investigate is an administrative action as any other and therefore the standards of Article 47 apply. The person under investigation must be heard. I rely on authorities set out at page 17 of the submission. I also refer to the case of Eng. **Michael Kamau v. EACC** on Supplementary list of authorities at pp. 301 – 307.

The court held that the Petitioners should have been given a hearing before the publication of the investigation. Report violated right to fair hearing Article 50 (2) of the Constitution and accused person under Article 50 (2) does not mean a person facing trial. A person under investigation is a person accused for purposes of the Article 50 (2). Accused person rights applies to a person under investigation.

Respondent contends that they are under constitutional duty under Article 254 of Constitution as read with section 27 of the EACC Act for provision of Report to the President. I refer to page 22 of the submissions we show that the Report under Article 254 is a report of concluded matters not of which has not been done. The Respondents report is not under Article 254, which is very detailed. The argument was considered by a 3 Judge bench in times Michael Kamau cases at paragraph 372 – 374. See summary of Finding of no. 4. The respondent's Report in this case was not a report under Article 254 and its publication was a violation of the petitioner's rights. Even if the report was within Article 254 and section 27 of the Act, to the extent that the standards under International Human Rights Law were not met, it was a violation of petitioner's Rights. The person subject of investigation must be given opportunity to correct the information of investigations. Otherwise, it is a violation of Article 47.

Compliance with statutory and constitution provisions must be within the 4 corners of the Constitution. An investigation body can ruin careers and lives simply because they are complying with statutory obligations. The Respondents should do their job without violating the rights of the persons under investigation. Due care should have been taken to protect the integrity of the persons concerned. The petitioner's seek damages for violation of rights of petitioners.

Mr. Opondo for the Respondents

Respondents oppose the petition. We rely on Replying Affidavit and Submissions. It was print and electronic media that painted the petitioners in bad light. It painted them as not eligible to hold office.

[That] Information could easily be verified and there was no basis for making the allegation; Verification is by investigation.

Respondent has mandate under Article 252 (1) of the Constitution to conduct investigations. Section 13(2) (c) of EACC Act. A complaint is made to the Commission at the Report Centre. It is then captured as a report. The petition in short contends that report was defamatory. It seeks relief as a defamation suit clothed as a constitutional application.

I refer to *Kenyatta v. Star*, No. 1 of list of Authorities, per Lenaola, J. Remedy for tort lies in Civil Law not Constitutional Law. Right to dignity, privacy are justiciable but not absolute. In conducting investigation as long as the Respondents have not infringed rights, it cannot be said that constitution has been violated. Article 24 limits rights.

Contents of investigation prematurely revealed: The question to who revealed the information. The President acted under Article 254 (2) of the Constitution in seeking a report from the Respondent. The Report given to the president is that titled **Report on**

Current State of Anti-corruption Matters under Investigations. The Constitution gives the president to request for any report. What the President does with the Report is not in the control of the Respondents. The Respondent did not reveal the contents of the Report as section 35 of the EACC Act indicates how the Reports are to be revealed. Once the Report was tabled in Parliament by the President the media published it. It was the media that revealed it.

Standard of investigation

The court could dictate to the Commission how it investigates. It would be a usurpation of the mandate of the Commission to set the standards by investigation.

Decision to investigate as administrative decision: It is true. The question is whether the petitioners were afforded opportunity to be heard. Paragraph 5 of the Further Replying Affidavit indicates the petitioners were called to record statements in conformity with fair administrative action.

Article 50 (2) of the Constitution: The Court of Appeal in the case of **Oluoch Dan Owino v. Kenyatta University** no. 4 on list of Authorities - Article 50 (2) applies to person who has been charged before the court.

Article 254 of the Constitution and section 27 of the EACC Act cannot be read together. Article 254 (2) allows for request for a report. Section 27 of the EACC Act is on different right in an annual Report. Section 27 is a periodic report while Article 254 (2) is a report, which may be requested any time.

Investigation bodies should not ruin careers: Constitution allows the President to call for a report. If the Respondent complies with a request, it cannot be held responsible. The Respondent's hands were tied as the supreme law of the land allowed the President to call for a report.

The petitioner has not proved violation as the Respondents acted within Constitutional and statutory mandate in recording charges. It is absurd to ask the court to award damages. It is a civil suit surrounding defamation by the Media. The Attorney General should also have been joined as it was the President who tabled the Report in Parliament.

Mr Arwa in reply

The petitioners' case is simple - that not every complaint to the EACC that has to be investigated. Only complainant's raising a prima facie case of corrupt activity. Not anything said is the subject of investigation. We ask the court to interpret the law.

I refer to section 25 of the EACC Act in receipt of complaint by EACC and Commission declines to investigate. There is a basis for refusal. The Commission must do a preliminary inquiry to establish a prima facie case.

What the President asked for were matters meeting the threshold and not any complaint. Damage is caused when any complaint is published. Report should have been confined to only those matters that meet the threshold.

Media or respondent? The media only published the content of the Report. It is the report which damaged the reputations of the petitioners.

Defective claim? The Constitutional Court of South Africa ruled that the scope of right under law of defamation is narrower than the protection under section 14 of the Constitution of South Africa parallel to Article 31 of the Kenyan Constitution. These are parallel actions which can be pursued at the same time.

Article 22 of the Kenyan Constitution gives a forum for enforcement of a violation of a constitutional right. There is power to grant damages.

Lenaola J's decision is not binding on this court. The present case has several rights not only Article 33 (4) on defamation. The petition here relates to right to fair administrative action under Article 47 which cannot be litigated in a civil court.

Opportunity to record statement to the petitioners

Invitation to the petitioners to appear before the EACC: submissions were filed earlier than the opportunity was granted. It was an attempt to answer to petitioners' case. The petitioners were not given the opportunity before the allegations were made. There is no value in an opportunity granted after the report.

The EACC should have given the President matters under investigation of which had been examined by EACC and discovered that there was a prima facie of corruption. The report could not have included matters which were not taken up for investigation. The report should not have contained matters, which did not reveal a prima facie case.

Including this case in the report was malicious and in violation of the Constitution and we pray for damages.

The publication was to the President in giving the report under Article 254 (2) of the Constitution."

Points for determination

10. The following issues arise for determination in this petition:

- (a) Whether the EACC is under an obligation to grant a hearing to a person under investigation following a complaint or of its own motion;
- (b) Whether a report by EACC at the request of the President under Article 254 (2) of the Constitution must contain only cases in which prima facie case has been established upon investigations;
- (c) Whether damages for defamation are available in constitutional litigation;
- (d) Whether the respondent has demonstrated breach of their rights under the Bill of Rights; and
- (e) What reliefs, if any, are the petitioners entitled to in the circumstances of this case?

Determination

Interpretation jurisdiction of the Court

11. The Constitution must be interpreted in a purposive manner to give effect to its values, principles and purposes as particularly directed in Article 259 (1) of the Constitution as follows:

“Construing this Constitution.

- 259. (1) This Constitution shall be interpreted in a manner that— (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.”

12. As a corollary of the principle of supremacy of the Constitution under Article 2 of the Constitution, acts of persons or state organs in exercise of State authority in accordance with constitutional provisions are constitutional and cannot be adjudged to violate the Constitution. Article 2 (2) of the Constitution makes it clear that **“no person may claim or exercise State authority except as authorised under this Constitution.”** It is, therefore, only a question of interpretation whether the alleged acts of the Respondent are in accordance with the Constitution, which is the province of the interpretation jurisdiction of the High Court under Article 165(3) (d) (ii) of the Constitution.

13. A holistic, purposive and harmonious approach to constitutional interpretation requires that the Constitution be construed to accord with the constitutional principles, purposes and values as a whole with each provision supporting rather than destroying any other so that a report under Article 254 must not violate rights protected by the Constitution under the Bill of Rights. The Constitution could not require or authorize the doing of an act which violates its own provisions.

14. In the context of this petition, a report under Article 254 must be consistent with the provisions of the Constitution relating to the Bill of Rights as they affect persons subject of the Report. In other words, the requirements of the Bill of Rights must be read into the reporting mechanism of Article 254. The constitutional Commission’s mandate to report under Article 254 of the Constitution and or, for that purpose, under any law, to investigate a matter must be exercised with scrupulous regard of the constitutional rights and freedoms guaranteed by the Constitution.

15. The justiciability of the Bill of Rights is paid by Article 22 of the Constitution.

The right to Dignity, Privacy and reputation

Right to dignity

16. Article 28 of the Constitution protects the right to dignity as follows:

“28. Human dignity

Every person has inherent dignity and the right to have that dignity respected and protected.”

17. On the evidence before the court, I would find that the Petitioners’ right to dignity under Article 28 of the Constitution was intact and in no way violated by the acts of the Respondent herein, and equally significant, no evidence of loss, damage or injury was led to demonstrate any loss of dignity arising from the respondent’s alleged action.

Right to Privacy

18. Article 35 (3) of the Constitution reserves the right and obligation of “the State [to] publish and publicize any important information affecting the Nation”. It cannot be disputed that information relating to corruption of state officers is a matter of national importance and public interest as to qualify to be “important information affecting the nation.”

19. The President and Parliament as organs of the State cannot be faulted for publishing and publicizing “any important information affecting the Nation” including government efforts in combating corruption as a national malaise and of the persons implicated in corruption and action taken against them. And there is mechanism for such publishing and publicizing of the information by the state institutions under Article 254 of the Constitution.

20. The report was published by the media upon tabling in Parliament by President. The two acted within mandate to receive and consider a report from a commission under Article 254 of the Constitution. How can that action taken under the Constitution be the subject of litigation for breach of the Constitution?

The dispute

21. Herein lies the dispute: the petitioners contend that the respondent could not properly have given, in response to the Presidential directive calling for a report under Article 254 of the Constitution, a report including the complaints for which no determination as to *prima facie* merit of the complaint had been made. And if it did, the Respondent violated the right to fair administrative action by denial of a right to be heard.

22. The respondent contended that it was entitled under the law to file a report on its activities and that investigation being part of its mandate was the proper subject of the report, and that the court could not dictate a procedure for the conduct of such investigations, and that in any event, the petition had been filed prematurely at a very early stage of the investigations when a final decision to charge or not to charge [which is really the province of the Director of Public Prosecutions] had not been taken. A consideration of the mandate and powers of the Respondent under the Constitution and statute is necessary in resolving the dispute.

Constitutional and statutory authority of the Respondent

23. The general powers of Commissions under the Constitution are set out in Articles 252 and include investigative power as follows:

General functions and powers.

252. (1) Each commission, and each holder of an independent office—

(a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(b) has the powers necessary for conciliation, mediation and negotiation;

(c) shall recruit its own staff; and

(d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2).

(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations—

(a) the Kenya National Human Rights and Equality Commission;

(b) the Judicial Service Commission;

(c) the National Land Commission; and

(d) the Auditor-General.

Contents of Article 254 of the Constitution

Disclosure, reporting or publishing of information by the Respondent

24. Generally, the EACC has a constitutional duty to make annual and special reports under Article 254 of the Constitution as follows:

“Reporting by commissions and independent offices.

254. (1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office,

shall submit a report to the President and to Parliament.

(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.

(3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.”

25. Section 27 of the Act gives effect to Article 254 of the Constitution in the following terms:

“27. Reports

(1) The Commission shall, at the end of each financial year cause an annual report to be prepared.

(2) The Commission shall submit the annual report to the President and the National Assembly three months after the end of the year to which it relates.

(3) The annual report shall contain, in respect of the year to which it relates—

(a) the financial statements of the Commission;

(b) a description of the activities of the Commission;

(c) such other statistical information as the Commission may consider appropriate relating to the Commission’s functions;

(d) any recommendations made by the Commission to State departments or any person and the action taken;

(e) the impact of the exercise of any of its mandate or function; (f) any impediments to the achievements of the objects and functions under the Constitution, this Act or any written law; (g) the state of compliance with the provisions of section 18(4)(b); and (h) any other information relating to its functions that the Commission considers necessary.

(4) The Commission shall cause the annual report to be published and the report shall be publicized in such manner as the Commission may determine.

[Act No. 12 of 2015, s. 5.]”

26. The contents of the annual report under Article 254 (1) as elaborated by section 27 (3) (b), (c) and (h) of the Act are general enough to include **“(b) a description of the activities of the Commission; (c) such other statistical information as the Commission may consider appropriate relating to the Commission’s functions;”** and **“(h) any other information relating to its functions that the Commission considers necessary.”**

27. It is not possible to limit the matters that the respondent can report on pursuant to Articles 254 and section 27 of the Act provided that they are matter relating to its **activities** and **functions**.

Publishing and publication of information in the reports

28. Section 29 of the EACC Act provides for the management of **information** by the Commission as follows:

“29. Management of information

(1) The Commission shall publish and publicise important information within its mandate affecting the nation.

(2) A request for information by a citizen—

(a) shall be addressed to the Secretary or such other person as the Commission may for that purpose designate;

(b) may be subject to the payment of a reasonable fee; and

(c) may be subject to confidentiality requirements of the Commission.

(3) Subject to Article 35 of the Constitution, the Commission may decline to give information to an applicant on the following grounds—

(a) the request is unreasonable in the circumstances;

(b) the information requested is at a deliberative stage by the Commission;

(c) failure of payment of a prescribed fee; or

(d) failure of the applicant to satisfy confidentiality requirements by the Commission.

(4) The right of access to information under Article 35 of the Constitution is limited to the nature and extent specified under this section.

(5) Every member and employee of the Commission shall sign a confidentiality agreement.”

29. In publishing the report presented to the President under Article 254, the EACC, even if it were the publisher, which is denied by the Respondent, and the court does not find that it was, would be within the constitutional mandate of Article 254 (3) of the Constitution and the statutory authority of section 29 (1) of the EACC Act. The publication of the Report cannot, therefore, be held to be unconstitutional and to found an action in defamation, unless the contents thereof violated constitutional rights of persons named therein.

30. If the contents of the Report violated the rights to reputation of others, Article 33 (3) of the Constitution on freedom of expression would be violated in addition to civil liability for the tort of defamation although as discussed below the court on the principle of constitutional avoidance may decline jurisdiction. In this case, the court does not find on the evidence before it that the right to reputation under Article 33 (3) was violated.

31. If the fair hearing procedure for arriving at any **conclusions** contained in the Report is breached the affected persons’ rights, the right to fair administrative action would be violated.

Whether the EACC is under an obligation to grant a hearing to a person under investigation following a complaint or of its own motion

Statutory powers of the Respondent

32. At the Statute level, section 13 of the EACC Act, 2011 gives the Powers of the Commission as follows:

“13. Powers of the Commission

(1) The Commission shall have all powers generally necessary for the execution of its functions under the Constitution, this Act, and any other written law.

(2) Without prejudice to the generality of subsection (1), the Commission shall have the power to— (a) educate and create awareness on any matter within the Commission’s mandate;

(b) undertake preventive measures against unethical and corrupt practices;

(c) conduct investigations on its own initiative or on a complaint made by any person; and

(d) conduct mediation, conciliation and negotiation.”

33. See also section 11 of the Act giving among functions of the Commission as to “receive complaints on the breach of the code of ethics by public officers, investigate and recommend to the Director of Public Prosecutions the prosecution of any act of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution [and to] recommend appropriate action to be taken against state officers or public officers alleged to have engaged in unethical conduct”. Section [11 (1) (c), (d) and (e)].

34. In terms of section 23 of the Act, the EACC officials have, when conducting investigations, all the police powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime.

35. It was submitted for the Respondent that-

‘2(d). Pursuant to its constitutional mandate as well as statutory mandate, the respondent received anonymous intelligence reports that irregular payments of Ksh.14 million were made to a contractor by Turkana County for construction of a bridge across River Kerio in Turkana South when no work was actually done. There are also other allegations against the Petitioners, other than these, that are under investigations by the respondent.’

36. In accordance with Article 252 of the Constitution and sections 11 and 13 of the EACC Act, it was clearly within the respondent’s mandate to receive the complainants and to investigate them. It cannot be faulted for acting on a complaint when it is its constitutional and statutory duty so to do. By undertaking investigations the Respondent does not violate any constitutional rights. Violation of rights may only occur in the manner of execution of its investigative mandate and the aggrieved petitioner is under a duty to demonstrate that his rights have been so violated by the manner of investigation and attendant process.

Reasonable suspicion

37. The Petitioners' submission of reasonable suspicion as a basis for investigations is not well founded. Article 252 (1) (a) of the Constitution empowers the respondent, in the words of the Constitution, that the Commission –

“(a) may conduct investigations on its own initiative or on a complaint made by a member of the public.”

38. While the Commission may on its own initiative in-house rules set criteria for the nature of the claim and level of evidence thereon whether called “reasonable suspicion” or “probable cause” or “reasonable cause” the existence of which the Commission may formally undertake investigations into a matter and below which the complainant may be rejected as unwarranted for undertaking comprehensive investigation. Yet the process of determination whether the complainant or matter is of such a nature is an **investigation** and an activity of the Commission which is properly the subject of an Article 254 report to the President and Parliament.

39. Whether referred to as preliminary inquiry, investigation on or investigation to determine whether there is reasonable suspicion to warrant a full-blown investigation it is still an investigation within Article 252 of the Constitution. The very work of the Commission is investigation of matter of complaint whether raised by its own initiative or by a complaint by any person.

40. The Commission cannot, therefore, be held to have infringed any standards and, therefore, rights by reporting on **its activities** in this regard. The only requirement was that the report indicates the fact only of receipt of complaint and its status as **under investigations** and not suggest concluded finding of guilt of the persons subject of the complaint.

Fair hearing before concluding decisions set out in the Report

41. The fair trial guarantee of Article 50 (2) of the Constitution clearly applies to “an accused person”. The right under Article 50 (2) (d) to **“a public trial before a court established under this Constitution”** clearly points to the interpretation of **“accused person”** in the provision as a person who stands trial before a court, and consequently, it is inapplicable to a person who faces disciplinary or other administrative proceedings. I respectfully agree with the Court of Appeal decision in **Judicial Service Commission v. Gladys Boss Shollei** (2014) eKLR that Article 50 (2) of the Constitution does not apply to disciplinary proceedings. See also **Oluoch Dan Owino & 3 Ors. v. Kenyatta University**, Nairobi HC Petition No.54 of 2014.

42. It cannot be supposed that an investigator should give a suspect a right to hearing before he takes the decision to formally investigate him but when a decision to investigate is taken, the suspect or the person against whom a complaint is made must be given a fair hearing before a decision to report the matter as a concluded investigation, whether for consideration for prosecution by the DPP or for purposes of President's request under Article 254 or for compliance with the statutory reporting requirements under section 29 of the EACC Act. That is the only interpretation that gives meaning to the **process of investigation**. Investigation must entail gathering information on a matter from the persons involved and no person is more involved than the person against whom the complaint giving rise to the investigation is made.

43. I have no hesitation, therefore, in finding that investigation into complaints and offence by investigative agencies is administrative, if also quasi-judicial, act which is governed by authority of law and open to judicial review on grounds of illegality, ultra vires, unreasonableness and unfair procedures contrary to natural justice.

Right to fair administrative action

44. Before making an administrative or quasi judicial decision, that there are reasonable grounds for the prosecution of a person against whom corruption allegations are made, the respondent must observe such person's right to fair administrative action, by granting him an opportunity to respond to the complaint.

45. The situation is, however, different in the case of preliminary processing of complaints before investigations into the complaint is undertaken. As part of those investigations, the person against whom the complaint is made must be heard, but the preliminary inquiry, if any, into the matter before formal investigation is launched is an internal procedure that need not result in any investigation that may give rise to an adverse finding against the subject of the complaint.

46. There are of course dangers of the court prescribing a certain *modus operandi* for the investigative agencies. For their own purposes, they may adopt a policy of all complaints are investigated, without a preliminary inquiry or a graduated process where all complaints are taken through a pre-qualifying inquiry to sieve out frivolous ones and leave only those demonstrating probable cause for further fully fledged investigation to determine whether the corruption allegations are established. I think it is inappropriate to set standards of review of complaints or matter to warrant investigation. The court should not interfere in the exercise of the investigative mandate of the agencies by prescribing a straightjacket of investigative procedures; all the court must guard against is the condemnation of a person who is under investigations before he has had an opportunity to be heard and to respond to the charges leveled against him.

Invitation to interviews with officers of the Respondent

47. However, in this case, it is not disputed that the petitioners had been invited to interview with the respondent's officers during the pendency of this Petition. The petitioners lamented that the apparent opportunity to be heard was given after the impugned report had been made and the proceeding in this suit filed, so that the opportunity to be heard was not meaningful.

48. To be sure, however, this Court notes that the respondent has not made a verdict on the merits of the complaints lodged against the petitioners, which are the subject of this petition. It cannot, therefore, be held that the opportunity to be heard granted by the Respondent in this case is non-consequential and overtaken by the event of the Report already made to the President. The invitation to interview is clearly a further step in investigation towards a finding on the merits or otherwise of the complaints made against the petitioners, and I daresay, it is in the interests of the petitioners to honour the invitation and exercise their right to be heard before a decision on the complaints is made by the respondent. The suit is clearly premature.

Alleged Violation of Rights to Dignity, Privacy and Reputation

49. Moreover, I think that it trivializes the Constitution, its values and principles when empty allegations of infringement are made. A petitioner who cites a violation of the Constitution must by cogent evidence relate alleged breaches with real, concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation, drop conceptual abstracts and interpolations to fit some artificial textbook arguments of the nature and extent of constitutional principles. The violation must be real, with real implications on real lives of the people. This, I respectfully conceive, is the profound meaning of rule of specificity and particularity of pleadings in constitutional litigation developed in the famous decision of **Anarita Karimi Njeru v. The Republic (No. 1)** (Trevelyan & Hancox, JJ.) (1976-80) KLR 1272, 1275.

50. The position in **The Speaker of the National Assembly v. Karume** (2008) KLR (EP) 423 that where there is under the Constitution or Statute is a mechanism for redressing the same should be strictly followed resonates with view taken by Lenaola, J. (as he then was) in **Uhuru Kenyatta v. The Nairobi Star Publications Limited**, Nairobi HC Petition No. 187 of 2012 –

“16. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in **Haco Industries** (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in **AG v. S.K. Dutambala** Cr. Appeal No. 37 of 1991 (Tanzania Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

51. In similar terms, this court discussed the principle of constitutional avoidance in **The County Government of Migori & 4 Ors. v. The Privatization Commission of Kenya & Anor.**, Nairobi HC Petition No. 187 of 2016, and held as follows:

“Principle of Constitutional Avoidance

*Even where a dispute is properly before the Court, the principle of constitutional avoidance bears upon the consolidated petitions and judicial review proceedings. In **MOMBASA HC CONSTITUTIONAL PETITION NO. 61 OF 2012, Jackson Maina Ngamau v. Ethics and Anti—Corruption Commission & 3 Ors.**, this Court discussed constitutional avoidance as follows:*

*18. The principle of ‘constitutional avoidance’ as discussed by the Supreme Court of Kenya in **Communications Commission of Kenya & 5 Ors. v. Royal Media Services Ltd & 5 Ors.** (2014) eKLR that the Court will not determine a constitutional issue or question even where it is properly before it, if there is another basis upon which the case can be disposed of, does not oust the jurisdiction of the Court but rather calls for judicial restraint in cases where there exists an statutory or other remedy. In addition, in accordance with the rule in **The Speaker of the National Assembly v. Karume** (2008) EG&F, it is now accepted as a principle of constitutional adjudication that where the constitution or statute makes provision for the process for determination of a particular matter that procedure should be strictly followed.*

The jurisdiction of the High Court as the Constitutional Court is not ousted by such stance, nor is the Court abdicating its role as the interpreter of the constitution under Article 165(3) (d) of the Constitution. The Court only considers that there is adequate and appropriate remedy elsewhere.”

52. The petitioners herein had adequate remedy in the civil law of defamation against the publishers of any defamatory material, and they could have filed suit in a civil court. If they failed to take action in a civil court, it is not open for them to seek constitutional intervention in the same regard.

On the Merits

53. On the merits of the Petition now before the Court, the report entitled **“Report on the Current Status of Corruption Matters Under Investigation to the Presidency”** did not pretend to be a decision of the respondent on investigations carried out. It was only a status, or position report on the work of the Respondent indicating also the complaints filed with the respondent, which were under or pending investigations situational. If a complaint is received or the respondent commences investigations into a matter, and the fact of such complaint or investigation is recorded in a report on the status of corruption matters as a matter under or pending investigation, it cannot be the basis of an imputation of corruption and therefore non-suitability to hold office. It is merely an innocuous statement of the status quo with regard to complaint matters and the information in the report would be that such a person is under investigation for corruption and not that such a person is corrupt. It is not a conviction or finding of guilty on a person. It is merely a statement of the state of things in the workings of the respondent. The report did not even suggest that there was *prima facie* evidence of corruption.

54. Would the Respondent have been required to keep away the fact of the complaints received on the petitioners and others in like position because the investigations into the complaints against them had not been concluded? So as to avoid defamation charges? I consider that such a report devoid of a statement of the complaints received against such persons and any action taken thereon, or merely stating that such complaints had been made against certain persons without naming such persons and giving the particulars of the complaints would have been incomplete.

55. The report should have been taken by all who dealt with it, including the President and the Parliament, on the basis of what it contained: where concluded investigations were reported as a final report and where matters were pending investigation as such so that no irresponsible dealing with the report, to the detriment of the persons implicated was made.

56. Of course, the inquiry as to whether the President should have presented the Report to Parliament and whether Parliament should have discussed the matter based on the inchoate status of the report is not before the Court. Neither the consequential reporting by the Media, nor any social media reactions.

Proof of injury, damage and loss

57. There was no evidence of loss resulting from any defamation of the petitioners, if they were defamed. As pointed out by the respondent, the petitioners continued to hold positions in public office unaffected by the alleged breach of right to reputation.

58. Damage and loss are, in any event, separate inquiries upon proof of liability and since the same has not been demonstrated in this case, the question of compensation for violation of rights in the Bill of Rights and for defamation does not arise. There being no proof of liability there can be no basis or occasion for award of damages for the petitioners as prayed, or otherwise.

Miscellaneous

59. It is no answer to a complaint for subject of investigations to say that the complaint lodged against has no merit and that it should be dismissed offhand. The investigative agency must be let to conclude the investigations and the duty of the person investigated is to take up the opportunity granted for the purposes of responding to the complaint against him in exercise of his right to be heard. That is crystal clear.

Conclusion

60. A person's right to fair administrative action to be heard on a matter in which a complaint is filed with a commission before a decision thereon is made is violated if a report purports to give a report bearing a **concluded** decision on the matter without giving the person subject of the complaint.

61. A report by a commission clearly indicating the fact only the complaints as received and pendency of investigations before it does not violate any constitutional right as it is within the mandate of the Commission to report on its activities whether on specific directive by the President or Parliament or in accordance with statutory timelines.

The verdict

62. I think that the matter is easily resolved as follows. The respondent as with other constitutional commissions has the constitutional mandate under Article 252 (1) (a) 'to conduct investigations on its own initiative or on a complaint made by a member of the public'. It is also under an obligation under Article 254 to submit a report to the president and to parliament generally and periodically at the end of each Financial Year or at any time upon request by the President, National Assembly or Senate on a particular issue. In making such a report, while it must comprehensively include all complaints received or under investigations on its own initiative, the Respondent must in fulfillment of its obligation under article 20(1) of the Constitution to observe the Bill of rights, not present the report in such a manner as to indicate or insinuate that the persons against whom the complaints are made or investigations are conducted are guilty of any corruption or that the corruption allegations have been established before the investigations are completed and the persons affected given an opportunity to respond to the complaints, and the report must in clear terms indicate that complaints are under investigations and their inclusion in the report is for reporting purposes only and not indicative of any verdict as to guilt or otherwise or liability to be charged for any offences in complaints for which they are being investigated.

63. The question then remains whether the petitioners have been condemned unheard; and the two subset issues are whether the petitioners have been *condemned* by the respondent and whether they have been *heard*. The dispute before the court is therefore to be resolved by an examination of the contents of the report as presented to the President to determine whether any inculpatory conclusions were made or insinuated against the petitioners before they had been given an opportunity to meet the allegations of corruption made against them.

64. No administrative or quasi-judicial decision of any finding on the allegations against the petitioners is made. It is purely a statement of the complaints received, without comment on the truth or otherwise of the allegations; merely a statement that the complaints had been received and were under investigations in accordance with the mandate of the Commission.

65. The report in this Petition did not express a concluded finding or decision on a complaint but rather only the fact of the lodging and pendency of investigations into, a complainant against the petitioners. The report with the complaint the subject of this Petition was itemized as No. 47 at p. 30 of the **Report on the Current Status of Corruption Matters Under Investigation to the Presidency** as follows:

No.	Department	Date Reported	Name of Suspect	Position of suspect	Nature of allegation	Status
47	Turkana County	20/05/2015	Joseph Nanok, Paul Naibuin	Turkana County Governor, CFC Finance, and principal Finance officer	Allegation of irregular payments of Kshs.14 million to a contractor by Turkana County for construction of bridge when no work was done.	Under investigation

66. The overview to the section of ***Investigation Report*** at p. 11 of the Report clearly indicates that it was a report on the various stages of the investigations into different complaints as follows:

“INVESTIGATION REPORT

Over the years the commission received numerous reports, which can be categorized into two, those relevant to the commissions mandate and those not relevant which are referred to the relevant government agencies for action.

Reports relevant to the commission are usually many against the limited resources in the commission; hence this has necessitated the commission to develop a criterion that is used when prioritizing and allocating reports for investigations. Prioritization of matters to be investigated is based on public interest and financial value of the subject matter.

These reports are analysed and once satisfying the standards, forwarded to the DPP for prosecution or any further action pursuant to Section 35 of the Ant-Corruption and Economic Crimes Act, 2003.

Based on these facts, the Commission has received and therefore dealing with the following cases. The reports are handled at various levels and they are at different stages of receipt, analyses and actions.”

67. The right to dignity and privacy is not violated by a public report in compliance with constitutional mandate to report on a matter under investigation, if the same is done within the parameters of the constitutional rights.

68. The petition was filed prematurely, before investigation into the matter and conclusive report made in accordance with the Constitution and statute. The disclosure of the report by the media did not *per se* violate the rights of the petitioners. It would only amount to such violation if it were suggested in the said published reports that the petitioners were guilty of the impropriety subject of the complaint. Disclosure of the report may amount to defamation under its usual principles of the tort if the media reports made false injurious statement alleging or confirming the involvement of the petitioners in some impropriety. Such determination would however be the subject of the civil process of the court under the common law liability for which the petitioners would be obliged to file a civil suit in that behalf.

69. The Petition before the court is, therefore, also without merit and incompetent. That being the view of the Court, there is no occasion for application of the comparative constitutional law cases and materials so generously provided by the Counsel for the petitioners. However, the court is grateful for the exposition on the rights of dignity, privacy and reputation, but of which there is, in this case, no proof of violation.

70. Moreover, even if the publication of the contents of the Report were held to be unlawful, the wrongdoers, namely the President, Parliament and the Media that reported on it, are not before the Court.

Costs

71. In challenging by this Petition, the constitutional and statutory mandate of the respondent, the petitioners must be taken to have considered and accepted the risk of being mulcted in costs should their petition for enforcement of their private rights be declined by the court. Accordingly, the petitioners shall pay the costs of the Petition to the respondent on the principle that costs follow the event.

Orders

72. Accordingly, for the reasons set out above, the court makes the following orders in the Petition:

- 1. The Petitioners’ petition dated 10th April 2015, is dismissed.**
- 2. The Petitioners’ shall pay the costs of the petition to the Respondent.**

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2018.

E C MWITA

JUDGE

Appearances:

M/S Rachier & Amollo, Advocates for the Petitioners.

Mr. Antony J. Opondo, Advocate for the respondent.