



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 463 OF 2015**

**TITUS BARASA**  
**MAKHANU.....PETITIONER**

**VERSUS**

**POLICE CONSTABLE SIMON KINUTHIA GITAU NO. 83653.....1<sup>ST</sup>**  
**RESPONDENT**

**DIVISIONAL TRAFFIC OFFICE KILIMANI.....2<sup>ND</sup>**  
**RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup>**  
**RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner is an officer of the law, an officer of the court. He is an Advocate of the High Court. He had a brush with the law. He now faces a criminal prosecution in the nature of a traffic case filed against him by the 3<sup>rd</sup> Respondent. Alleging that his constitutional rights have been violated, the Petitioner has sought declaratory orders as well as judicial review remedies and damages.
2. The Petition is contested.

**Background facts**

3. The facts can be mainly discerned from the Petition as well as the Supporting Affidavit. The facts are largely disputed.

4. The Petitioner states that on 11<sup>th</sup> August 2015 whilst driving his motor vehicle registration KBZ 073K along Ngong Road- Mbagathi Road, the 1<sup>st</sup> Respondent flagged him down. He stopped his motor vehicle and availed, at request, his driving licence to the 1<sup>st</sup> Respondent who having inspected the same handed it back and started to walk away. The Petitioner also started to drive away only for the 1<sup>st</sup> Respondent to baton-hit the Petitioner's motor vehicle and also menacingly threaten the Petitioner. The Petitioner alleges that the 1<sup>st</sup> Respondent threatened to kill him and this drew the curiosity of members of the public who gathered around the Petitioner's car.
5. The Petitioner states that when he stepped out of his car he was met with jabs and blows from the 1<sup>st</sup> Respondent who proceeded to cuff the Petitioner and also direct a tow-truck to tow the Petitioner's car to the nearby Kilimani Police station. The Petitioner was also driven to the same police station. The Petitioner was sandwiched in the front seat of the tow-truck between the 1<sup>st</sup> Respondent and the truck driver. In the course of the ride to the police station the Petitioner states that he was assaulted by the 1<sup>st</sup> Respondent. The Petitioner was booked at the police station and detained for 3 hours but later released on a cash bail of Kshs. 10,000/=. The Petitioner's motor vehicle was however not released to the Petitioner. The Petitioner was in the meantime also served with a Notice of intention to prosecute. On 13<sup>th</sup> August 2015, the Petitioner was charged with six traffic offences contrary to the Traffic Act. The counts were all contained in Traffic Case No. 18470 of 2015 and the Petitioner pleaded not guilty.
6. The Respondents dispute the Petitioner's version of the facts. The 1<sup>st</sup> Respondent who was on duty on the material day, places the Petitioner at the scene of the alleged traffic offences. The 1<sup>st</sup> Respondent states that the 1<sup>st</sup> Respondent witnessed the Petitioner change lanes within a roundabout and block other motorists. The 1<sup>st</sup> Respondent flagged the Petitioner down but the Petitioner not only failed to stop but also knocked down the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent was injured. Thereafter members of the public together with the 1<sup>st</sup> Respondent's colleague gave chase and arrested the Petitioner. The 1<sup>st</sup> Respondent then ensured that the Petitioner's motor vehicle was towed to the police station.
7. The 1<sup>st</sup> Respondent also ensured that the Petitioner was taken into custody and driven to the police station. Later on upon review of the evidence, six counts constituting traffic offences were preferred and lodged against the Petitioner.

### **The Petitioner's case and arguments**

8. The Petitioner contends that his fundamental rights and freedoms have been violated by the Respondents. In particular, the Petitioner contends that he was subjected to physical and psychological suffering contrary to Article 29 of the Constitution which guarantees the freedom from torture, cruel, inhuman and degrading treatment. The Petitioner contends that this was evident in the manner of his having been handcuffed, hit by the police baton, spat on handcuffed and pushed into the tow-truck.
9. The Petitioner also contends that his right to property was violated as he was deprived of his property and right therein contrary to Article 40 of the Constitution. The Petitioner states that this was evident in the fact of the Respondents not only detaining the Petitioner's motor vehicle but in the 1<sup>st</sup> Respondent, hitting and damaging the bonnet of the Petitioner's motor vehicle. Further, was also the fact that the Respondents insisted on the Petitioner paying the amount of Kshs. 2,500/= as towing charges prior to release of the motor vehicle and without which payment the motor vehicle was not to be released.
10. Thirdly, the Petitioner contends that his rights as an arrested person as guaranteed by Article 49 of the Constitution were also violated by the Respondents. The Petitioner states that he was not informed of the reasons for his arrest or the right to remain silent and the consequences of not remaining silent amongst all the other rights under Article 49 of the Constitution.
11. Finally, the Petitioner contends that the criminal case was only instituted by the Respondents to cover up the Respondents' misdeeds and misconduct, with the sole purpose of embarrassing and intimidating the Petitioner. To the Petitioner, this amounted to abuse of the process.
12. For completeness, the Petitioner also contends that the Respondents acted contrary to the laid

down procedures by handcuffing him and keeping in custody contrary to earlier directives issued by the Chief Justice concerning traffic offences. Likewise, the Petitioner states that the notice of his intended prosecution prescribed only one charge yet he ended up facing six counts in court. This was contrary to the provisions of Section 116 of the Traffic Act.

13. Petitioner relies on the cases of **Republic -v- Director of Public Prosecutions & 3 Others Ex Parte David Mathenge Ndirangu [2014]eKLR** and **Kuria & 3 Others -v- Attorney General [2002]2 KLR 69** .

### Respondents' case and arguments

14. The Respondents' case is contained in the Grounds of Opposition and the Replying Affidavit of Simon Kinuthia, both filed on 16<sup>th</sup> November 2015.
15. It is the Respondents' case that the 3<sup>rd</sup> Respondent in preferring charges against the Petitioner acted independently and within the powers conferred by the Constitution under Article 157. In this regard, the Respondents stated that the Petitioner was involved in a slight- injury road traffic accident and the assessment of facts laid a foundation for a charge before a competent court of law. The 3<sup>rd</sup> Respondent consequently recommended the Petitioner's prosecution on that basis and not otherwise. The Respondents further submit that the Petitioner has not demonstrated how the charges against the Petitioner were prompted by an ulterior motive.
16. The Respondents also further contend that the Petitioner has failed to demonstrate with adequate particularity how his constitutional rights were violated.
17. For completeness, the Respondents submit that the criminal justice process has adequate safeguards to ensure that the Petitioner gets a fair trial. On the directions by the Chief Justice in regard to traffic offences, the Respondents submit that the circumstances of the case dictated that the Petitioners be arrested and detained. The Respondents also add that nothing stopped the Petitioner from lodging a complaint with the Independent Policing Oversight Authority as against the 1<sup>st</sup> Respondent.
18. The Respondents rely on the cases of **Geoffrey Mutahi Ngunyi -v- Director of Public Prosecution & 4 others [2015] eKLR** and **Republic -v- Chief Magistrate's Court Nairobi & 3 others Ex Parte Stephen Oyugi Okero [2015]eKLR** support their case.

### Discussion and Determination

19. There is no doubt that it is for the Petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision: see Section 107 of the Evidence Act (Cap 80) as well as the cases of : **Githunguri Dairy Farmers Co-operative Society Ltd -v- The Attorney General [2016]eKLR**, **Catholic Commission for Justice & Peace in Zimbabwe -v- Attorney General [1993] 2 LRC 279**, **Anarita Karimi Njeru -v- Republic [1979-80] KLR 154** and **Matiba -v- Attorney General [1990] KLR 666**.
20. In the case of **Stephen Nyarangi Ouma & Another -v- George Magoha & 7 Others [2014] e KLR**, the court stated that:

***“As a basic minimum, a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See Annarita Karimi Njeru v Republic ( 1976-1980) 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.”*** (emphasis mine)

21. The core issue in the instant Petition is whether in exercise of his powers under Article 157, the 3<sup>rd</sup> Respondent either abdicated such powers or abused the powers leading to the violation of the Petitioner's guaranteed rights and fundamental freedoms. There is also the issue as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents also abused their statutory duties by using excessive force and abusing the

Petitioner's constitutional rights and fundamental freedoms.

### ***Freedom from torture and inhuman treatment***

22. The Petitioner contends that he was subjected to physical and psychological torture. The Petitioner states that this was achieved by his being handcuffed and also being beaten by a baton and, further, being spat on and abused by the 1<sup>st</sup> Respondent. The Petitioner states that this was contrary to and in violation of the Petitioner's guaranteed rights to freedom from torture and inhuman or degrading treatment under Article 29 of the Constitution.
23. Article 29 of the Constitution combines a right to freedom and security of person with a right to be free from bodily and psychological integrity. It is essentially intended to protect the physical integrity and dignity of the individual. The rights not to be subjected to torture in any manner or not to be treated or punished in a cruel, inhuman or degrading manner are components of the right to freedom and security of the person. These two components (torture on the one hand and cruel, inhuman and degrading manner on the other) are, under Article 25(a) of the Constitution, inviolate rights. No law can be allowed to stand if such law seeks to blemish or limit such right or freedom. They are absolute rights unless the Constitution itself expresses otherwise.
24. The Petitioner contends under oath, that he was treated in a cruel, inhuman and degrading manner, when he was beaten up by the 1<sup>st</sup> Respondent using a baton. He states this amounted to a violation of his person. He states there was violent conduct on the part of the 1<sup>st</sup> Respondent and he was subjected to such violence. The Petitioner availed a P3 form issued by Kilimani Police station. He had reported the stated assault by the 1<sup>st</sup> Respondent. The Petitioner also availed copies of the treatment cards as well as treatment fees receipts from the Langata Hospital. They were dated the 12<sup>th</sup> August 2015.
25. The Respondents did not contest the evidence availed by the Petitioner. Neither did the Respondents avail contrary evidence. The Replying Affidavit of the 1<sup>st</sup> Respondent was pretty quiet on this particular facet of the evidence. The evidence, by both the Petitioner and the 1<sup>st</sup> Respondent, placed the 1<sup>st</sup> Respondent at the scene and also at the fore of the Petitioner's claims. The 1<sup>st</sup> Respondent however gave no clear version of what transpired, insisting instead that the Petitioner ran him over as he tried to escape his arrest only to be apprehended by members of the public. The 1<sup>st</sup> Respondent also explained having cuffed the Petitioner stating that the Petitioner was unruly.
26. On the facts and circumstances of the case. I am unable to believe the version of the 1<sup>st</sup> Respondent that he had to use force to apprehend the Petitioner. Here was a sole driver who had allegedly run – down or over a police officer. The driver then allegedly drives off. The latter lifts himself up and gives chase in the midst of traffic. The public joins in. The distance from where the police officer was allegedly run-down to where the Petitioner was ultimately apprehended was apparently not far. Yet too, it was not near. It is abit incomprehensible that the public had to join in the fray given that one participant was inside a motor vehicle and another or two others were trotting behind. The 1<sup>st</sup> Respondent evidently used force. The question is whether the force was excessive in the circumstances.
27. Under the National Police Service Act (Cap 84) (“**the Act**”) the police in appropriate circumstances and condition may use force. Section 61 of the Act prohibits the use of violence by a police officer in the performance of his duties. A police officer is however statutorily allowed to use force under certain conditions: see Section 61 (2) of the Act. The Sixth Schedule to the Act states that the force to be used is to be proportionate to the objective to be achieved, the seriousness of the offence, the resistance by the person against whom it is used and only to the extent necessary: see Paragraph 2 of the Sixth Schedule to the Act.
28. A review of the circumstances of this case would reveal that the offence the Petitioner was faced with were relatively minor offences. They were not serious traffic offences. The Petitioner initially, as stated by the 1<sup>st</sup> Respondent changed lanes on a roundabout. Then caused obstruction. Then attempted to flee. A chase was allegedly given and he was apprehended. He was handcuffed. There is no evidence of any scuffle. There is no evidence that the Petitioner resisted his arrest.
29. In my view and finding, there was absolutely no need for the use of any force by the 1<sup>st</sup>

Respondent in the circumstances. Even if the force appeared to be or is indeed minimal, the law prohibits the use of force unless warranted. It was incumbent upon the Respondents to show and establish that the use of force was warranted. They have failed to do so. Indeed, the Petitioner points out that force and violence were meted upon him even after he had been handcuffed. Effectively, he had been subdued even if the 1<sup>st</sup> Respondent's version was to be accepted. This was uncalled for, and unwarranted and indeed contrary to the express provisions of the Constitution.

30. It is my finding that the Petitioner's rights were violated in so far as he was subjected to physical abuse in the sense of being beaten by a baton whilst already in the custody of the 1<sup>st</sup> Respondent.
31. I however do not find that by being handcuffed the Petitioner was subjected to cruel, inhuman and degrading treatment. The mere fact of being handcuffed alone is not adequate to establish cruel, inhuman and degrading treatment. Handcuffs are used by officers in the Police Service as temporary restraints. The officers have the discretion when to cuff a suspect. The discretion is to be exercised after due consideration of all circumstances. There is not sufficient evidence that the discretion was abused. The only piece of evidence close was the attempt to establish the fact that the Petitioner was handcuffed even when already inside the police holding cells. Yet the evidence was not convincing enough. It is a photograph of the Petitioner. The photo could have been taken anywhere, even outside the police holding cell, as I am not entirely convinced that the Petitioner had his camera-phone inside the police holding cells.

### ***Right to property***

32. The Petitioner also contends that contrary to the provisions of Article 40 of the Constitution, his right to property was restricted and violated when the 1<sup>st</sup> Respondent hit and damaged the Petitioner's motor vehicle with a baton. The right to property, it is also the Petitioner's contention, was again violated when the Petitioner's motor vehicle was detained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents at the police station.
33. Article 40 of the Constitution grants every person the right and freedom to acquire and own property of every description. Once acquired and owned then a person is also guaranteed the right that such property may not be denied or arbitrarily taken away. It may not be expropriated. Neither should it be appropriated arbitrarily. Article 40 of the Constitution does not simply protect the physical property alone. The Constitution intended to and does indeed protect proprietary rights as well. Once acquired, one has the right to use his property without any hindrance. A person has a right to alienate and exclude others from the property as well.
34. Article 40 is however not absolute it may be lawfully limited. The Constitution itself has under Article 40(3) provided a constitutional clawback. Various statutes too, have done the same.
35. In the instant case the Petitioner's claim as to violation of his right to property is two-fold.
36. First, the Petitioner states that his property was damaged by the 1<sup>st</sup> Respondents who struck it with a baton. The Petitioner has exhibited a police report and a motor vehicle inspection report to support this claim. The 1<sup>st</sup> Respondent has denied causing such damage. I am not entirely satisfied to the required level with the evidence adduced by the Petitioner. None links the 1<sup>st</sup> Respondents alleged action to the dents on the bonnet of the Petitioner's motor vehicle. Even the assessment report has failed to indicate when and what occasioned the dents. On the evidence before me, it would be unsafe to hold the 1<sup>st</sup> Respondent responsible.
37. Secondly the Petitioner also complains that the subject motor vehicle was withheld arbitrarily by the Respondents. The Respondents have explained and justified their action by stating that the Petitioner was involved alongside the 1<sup>st</sup> Respondent in a slight- injury road accident. The subject motor vehicle was then being driven by the Petitioner. The Respondents opted to lodge charges against the Petitioner. There are six traffic offences. In the circumstances, so contend, the Respondents the subject motor vehicle had to be detained and taken through the motions of a mechanical inspection. Ultimately, the 3<sup>rd</sup> Respondent preferred and instituted charges against the Petitioner.
38. Article 24(1) of the Constitution allows rights and fundamental freedoms to be limited by law so long as such limitation is reasonable and justifiable. In the instant case, the subject motor vehicle was most likely to be used as an exhibit, if necessary, in the preferred traffic offences. The fact of

deprivation was also limited. It was not indefinite. Indeed, once the inspection had been undertaken the motor vehicle was released. The action taken in detaining the motor vehicle for purposes of inspection was in my view reasonable and justified. The Respondents in my view were perfectly justified to hold the motor vehicle.

39. I am not convinced that the Petitioner right to property was violated contrary to Constitutional provisions.

### ***The Petitioner as an arrested person***

40. The Petitioner also contends that following his arrest, the 1<sup>st</sup> Respondent, and by extension the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, blatantly violated his rights enshrined under Article 49 of the Constitution.

41. Article 49 has indexed the rights and arrested person as distinguished from an accused person is entitled to. In summary, an arrested person has the right to certain minimal information. He must be informed at the time of his arrest and in a language that he understands; the reasons for his arrest, the right to remain silent and the consequences of such silence. Besides, he also has the right to remain silent, to communicate with an advocate and not to be compelled to make any confession. Then he has the right to be expeditiously arraigned in court if charges are to be preferred and to be released on bond or bail.

42. The Petitioner contends that the rights under the first fodder were not observed. No information was given to him at the time of his arrest by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents do not deny the Petitioner's contention. In the Replying Affidavit the 1<sup>st</sup> Respondent has gone great lengths to detail what transpired on the day and at the scene of the Petitioner's arrest. The 1<sup>st</sup> Respondent however does not state that the Petitioner was informed of his 'Miranda rights', as the Article 49 rights are often referred to following the well known 1966 United States supreme court case of **Miranda -v- Arizona**. It is the 1<sup>st</sup> Respondent who arrested the Petitioner. It is the 1<sup>st</sup> Respondent who handcuffed the Petitioner. He then never informed the Petitioner of the reasons for his arrest or the right to remain silent and the consequences thereof. It is apparent and I find that the Petitioner's rights as an arrested person were not observed at the time of his arrest as the Constitution dictates that the rights be observed promptly, meaning the time of arrest.

43. The Petitioner does not however state that the lack of being informed of his Miranda rights prejudiced him in any way. No evidence has been availed in this regard as well. I am not convinced that the non-observance of the Article 49 rights in this case is sufficient reason to interfere with the criminal justice process in this regard.

### ***A baseless traffic case***

44. The Petitioner finally contends that the traffic case against the Petitioner which was commenced on 13<sup>th</sup> August 2015 was baseless and not grounded upon any law or fact. Further, the Petitioner contends that the traffic case was instituted for the sole reason of embarrassing the Petitioner and diverting attention from the Petitioner's complaints.

45. It is true that this court has the inherent and residual jurisdiction to ensure that the criminal justice system is not abused by the prosecutor commencing cases which lack any foundational basis or which are motivated by other objectives other than the objectives of the criminal law.

46. Thus in **R -v- Attorney General Ex Parte Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001**, the court was very clear that a

***“ criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.”***

47. Then in **Republic -v- Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, the court restated the position as follows:

***“It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the court. No matter how serious the***

*criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth...When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court...In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in..."*

48. There is also no doubt that this court must only exercise such powers of receiving decisions to prosecute made by the 3<sup>rd</sup> Respondent very sparingly and with circumspection. The rationale must be that it was never the intention of the constitution's draftsmen that the court superintends every move the Director of Public Prosecutions make. The supervision and superintending should only occur where there is evidence of patent abuse and where the criminal justice system is likely to be brought into disrepute because of the heavy misconduct of the parties or institutions involved in the criminal justice system.
49. The 3<sup>rd</sup> Respondent has, in my view, in the instant case adequately explained the circumstances leading to the Petitioner's prosecution including the decision made after review of the available evidence to prosecute the Petitioner. I am unable to fault the public prosecutor. I do not find that the prosecution was prompted by other ulterior motives. Besides, the prosecution process is already underway. The evidence against the Petitioner if any as well as its probity, sufficiency and effect is to be tested by the trial court. For this court to attempt sieving the evidence would amount to an unconstitutional overreach.
50. I do not find that the criminal justice system process has been in any-way abused as to prejudice the Petitioner and to warrant my intervention.

### ***The Chief Justice's circular***

51. The Petitioner also complained that the Respondents, especially the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not observe the dictates of a circular issued by the Chief Justice on 27<sup>th</sup> May 2015 issued by the Honorable Chief Justice of Kenya prohibiting the arrest and detention of any person for allegedly committing a traffic offence. In this regard, the Petitioner complained that he was arrested, handcuffed and placed in custody, and finally detained for some hours in a police holding cell before being granted a cash bail of Kshs. 10,000/=.
52. I have read the Chief Justice's circular-letter in question. The brief answer is that they are not applicable to persons serving in the police service. The circular-letter dated 27 May 2015, for starters, was directed to courts and not to any officer in the police service. The Chief Justice is the head of the judiciary and he has the authority and capacity to issue such regular and legal directives as he may be constitutionally and statutorily be mandated. The Chief Justice may however not direct the command of the National Police Service as headed by the Inspector General. The independence of the police service in the investigations of any particular offence or in the enforcement of the law is enshrined in the Constitution under Article 245(4).

53. It is truly unnecessary to belabor this point. The Chief Justice may give courts directions on how to handle traffic cases but not members of the police service. Any attempt to stretch directions given to the courts to the police service would be tantamount to an illegality. In the result, I do not see how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents can be accused of disobeying a circular by the Chief Justice.

### **Summary of findings**

54. With regard to the reserved questions reserved, I come to the following findings.

55. I find as a fact that the 1<sup>st</sup> Respondent used unwarranted and unnecessary force against the person of the Petitioner and this was contrary to Article 29(c) and (d) of the Constitution and in violation of the Petitioner's rights under the said provisions of the Constitution.

56. I also find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened the Petitioner's rights under Article 49 (1) (a) of the Constitution in so far as the Petitioner was not promptly informed of his rights under the said Article of the Constitution. I however hold that such contravention did not occasion the Petitioner any prejudice as to lead me to intervene in the ongoing trial in Traffic case No 18740 of 2015 before the Chief Magistrates' Court at Nairobi.

57. I also do not find any other reason to interfere with the ongoing traffic case and the find no basis to uphold the Petitioner's contention that the prosecution was commenced for an ulterior motive or that the prosecution is pegged on baseless and insufficient evidence.

58. Finally, I find that the Chief Justice's circular does not apply to the National Police Service and even if they do, they are not binding upon the National Police Service because of the provisions of Article 245 of the Constitution which prohibit any person, the Chief Justice included, from giving directions to the command of the National Police Service on matters touching on the investigation of offences and enforcement of the law.

### **Reliefs**

59. In the circumstances of this case and in view of my findings above the only appropriate relief open to me under Article 23(3) of the Constitution is one that takes a compensatory form. The Petitioner is entitled to some form of damages for the physical pain and suffering that he evidently underwent.

60. I have placed into consideration the fact that the torture or pain inflicted whether to punish or gain unexplained pleasure was not extreme. It was violent but not brutal. It was however caused by a person sworn to uphold the law, including to protect the security of person. I have also considered the length of time involved and the general circumstances of the case. The Petitioner asked for Kshs. 10,000,000/= in damages. I find that excessive. In my view, a fair and proportionate award as general damages would be the global amount of Kenya Shillings Two Hundred and Fifty Thousand ( Kshs. 250,000/=). The Petitioner is awarded the said amount of Kshs 250,000/=.

61. The Petitioner will also have costs and interest.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> day February, 2016**

***J.L.ONGUTO***

**JUDGE**