



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 179 OF 2016

**IN THE MATTER OF ACTUAL THREATENED BREACH OF
SUBJECTS CONSTITUTION RIGHTS ENSHRINED UNDER
ARTICLES 19, 31,39,40,48 OF THE CONSTITUTION.**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMNETAL FREEDOMS)
PRACTISE AND PROCEDURE RULES, 2013**

BETWEEN

REHANKANTILAL SHAH.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS DIVISION.....3RD RESPONDENT

THE OFFICER IN CHARGE ANTI –

NARCOTICS POLICE UNIT.....4TH RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner herein, according to the petition is a male Kenya Citizen of sound mind residing and working for gain at Nairobi within the Republic of Kenya.

2. The 1st Respondent, **the Director of Public Prosecutions**, is an office established by Article 157 (1) of the Constitution tasked with responsibilities of instituting and undertaking criminal proceedings against any person before any court in respect of any offence alleged to have been committed.

3. The 2nd Respondent, **Inspector General of Police**, according to the petition is responsible for the management and administration of all officers serving under National Police Service Cap 89 Laws of Kenya.

4. The 3rd Respondent, **the Director of Criminal Investigation Division**, according to the petition is responsible the conduct and administration of all criminal investigations while the 4th Respondent is the Officer in Charge of Anti-Narcotics Police Unit.

The Petition

5. According to the petition, on the night of 31st March, 2016 at around 8.45pm while the Petitioner was lawfully resting in his premises at Loresho in Nairobi County, persons who were later established to be Officers of the Directorate of Criminal Investigations Anti-Narcotics Unit entered the premises aforesaid after which they proceeded to the Petitioner's home at Jana Estate off Jogoo Road House Number 37 where they continued with the search for the alleged narcotics. Before the commencement of the search, the group upon demand by the Petitioner failed and/or refused to produce either a search warrant or any other authority granting them to access to the premises and the Petitioner contends that the entry and the search into the premises was unlawful. Further, the said officers refused, failed and/or neglected to identify themselves despite several request from the Petitioners..

6. It was pleaded that subsequent to the said unlawful entry, they confiscated the Petitioner's Firearm Certificate Book number 5866 valid until March 2017 from his Loresho home and proceeded to detain the Petitioner at Parklands Police Station from 1st April, 2016 at 5.00am to around 4.00pm on 2nd April, 2016 when he was released on free bond on condition that the Petitioner surrenders his passport.

7. According to the Petitioner, this action constituted wanton violation of his rights by the servants and/or agents of the 2nd, 3rd and 4th Respondents during the whole exercise, which included the violation of privacy by being exposed to arbitrary search. Further he was released on 2nd April, 2016 on free bond and up to date no charges have been preferred against him. The Petitioner pleaded that during the entire exercise the said Police Officers ransacked the entire house ferrying everything that they laid their hands on and unlawfully seized a number of properties including guns, and magazines.

8. In was the Petitioner's case that notwithstanding the intent and purpose of the search, the inventory of the items seized without the search clearly demonstrate malice, bad faith and was intended to unduly punish the Petitioner as the illegal seizure of his passport had absolutely no connection to do with offences being investigated and that the same were seized with the sole and clear intention of harassing and punishing the Petitioner. Apart from the said guns and magazines, the said servants and/or agents of the 2nd, 3rd and 4th Respondents unlawfully seized Gold Jewellery worth Kenya Shillings Six Million Only (Kshs. 6,000,000/); Two Mobile phones; make: Samsung Curve; Two Kenyan Passports registered under the name **Shifana Reham Shah**; and One Kenyan Passport registered under the name **Rehan Kantilal Shah**.

9. It was pleaded that all the above properties were unlawfully seized and their continued detention by the Respondents is unjustified and amounts to warrant deprivation of personal rights. It was however disclosed that on 19th April, 2016 the Police Officers of the 2nd, 3rd and 4th Respondents called the Petitioner and handed over some items but refused to hand-over the passport and the phones without giving any reasons to the Petitioner despite the Petitioner's several demands for the release of the same.

10. It was the Petitioner's case that the illegal seizure and continued holding of the properties subject to the petition herein occasions the petitioner grieve prejudice and injustice and is a clear violation of Articles 33, 34, 35 and 39 of the Constitution of Kenya, 2010 which guarantees freedom of movement

and the right to leave Kenya. In addition the Petitioner risks losing his source of livelihood given that he cannot travel out of the country to meet with his business partners.

11. It was his case that he has no other alternative of even mitigating the losses other than to have the passport and mobile phones released and disclosed that he was ready and willing to comply with any conditions that are just and reasonable that the court may impose for the release of his passport and mobile phones pending the hearing of any proceedings that may be commenced, or even the instant proceedings.

12. According to the supporting affidavit, on 31st March 2016, at around 8.45 pm, police officers who identified themselves as officers of the Directorate of Criminal investigations- Anti Narcotics Unit purporting to investigate alleged possession of narcotics carried out a search in the Petitioner's home at Loresho and then proceeded to his home at Jana Estate off Jogoo Road, House Number 37 where they continued with the search for the alleged narcotics. Having searched both houses in vain, on 1st April 2016 at around 5.00 am the Petitioner was arrested by the officers from the Directorate of Criminal Investigations – Anti Narcotics Unit and detained at Parklands Police Station pending investigation.

13. According to the Petitioner, despite having informed the arresting officers that he was a licensed gun holder, they nonetheless proceeded to confiscate several firearms and rounds of ammunitions from his Jana Estate home and confiscated his Firearm Certificate Book Number 5866 valid until March 2017 from his Loresho home.

14. The Petitioner averred that following his arrest on 1st April 2016, the same officers from the Directorate of Criminal Investigations - Anti Narcotics Unit also carried out a search at his Loresho home and seized Gold Jewellery worth Kenya Shillings Six Million Only (Kshs. 6,000,000/-); Two Mobile phones; make: Samsung Curve; Fire Arm Book; Fire Arm Certificate No. 5866; Two Kenyan Passports registered under the name **Shifana Reham Shah**; and one Kenyan Passport registered under the name **Rehan Kantilal Shah**.

15. It was contended by the Petitioner that the said police officers detained him at Parklands Police Station from 1st April 2016 at 5.00 am to around 4.00pm on 2nd April 2016 when he was released on free bond. The Petitioner lamented that the police officers from the Directorate of Criminal Investigations Anti Narcotic Unit carried away his guns and ammunitions despite having a Civilian Firearm Certificate Number 5866 and having been authorized by the Office of the President under the Kenya Police Central Firearms Bureau and the Chief Licensing officer Kenya Police to import fire arm accessories. The Petitioner disclosed that on 28th October 2010, he was authorized by the Office of the President under the Chief Licensing Officer Kenya Police Central Fire Arms Bureau to import a firearm while on 12th September 2011, he was authorized by the Chief Licensing Officer Kenya Police through a letter dated 12th September 2011 to import 22 Air Rifle from the United Kingdom. He further revealed that he has been a member of the Bamburi Rifle Club since 31st December 2011 where he engages in sports which include Target shooting, Bird Shooting and Clay Shooting. In addition to the above, from the year 2010, he held a certificate of Bird Game License from the Kenya Wildlife Service to engage in hunting game birds after he had paid all the requisite charges.

16. Based on legal advice, the Petitioner contended that under the **Firearms Act**, Cap 114 Laws of Kenya, it is only the Chief Licensing Officer who has the power to withdraw guns from a licensed gun holder and not the Directorate of Criminal Investigations – Anti Narcotic Unit.

17. The Petitioner averred that since his release on 2nd April 2016 on free bond to date no charges have been preferred against him though as a condition for his release from police custody, he was required to appear before the police at the Criminal Investigation Department Head quarters on 14th April 2016 failure to which warrants would be issued for his arrest. To him, the search and seizure was not only illegal but a gross violation to his constitutional right guaranteed under Articles 31 (a) (b) and 40 of the Constitution of Kenya 2010.

18. He averred that since his arrest on 1st April no charges have been brought or preferred against me by the respondents herein.

19. It was averred by the Petitioner that on 8th April 2016, his advocate on record wrote to the Chief firearm Licensing Officer requesting for a copy of the records of all the guns registered in his name, which letter he has never replied up to date. Further on 11th April 2016, his said advocate wrote to the Independent Policy Oversight Authority complaining of the illegal search, on the conduct of the police officers attached to the Anti- narcotics investigation department and on 15th April 2016, wrote to the Director of Criminal Investigations requesting for the release of his passport but up to date no reply has been forthcoming. Similar request on 20th April 2016 to the office of the Director of Public Prosecutions went unanswered.

20. It was therefore the Petitioner's case that it is unconstitutional and unprocedural for the agents or servants of the 1st, 2nd, 3rd, and 4th Respondent to continue detaining his passport and phones without preferring any charges against himself.

21. He reiterated that on 19th April 2016, the servants of the 4th Respondent released some of the items in their custody and retained the rest which clearly shows that continued detention of the rest of the items is meant to harass him and his family.

22. In the premises the Petitioner prayed for the following orders:

a. A declaration that the Respondents have contravened the Petitioners rights under Articles 19, 31, 33, 34, 35, 39, 40 and 48 of the Constitution.

b. Declaration that the forcible entry and subsequent search on the Petitioners premises at Nairobi on the 31st March, 2016 were illegal and unconstitutional.

c. A declaration that the illegal seizure of all the items from the Petitioner was illegal and unconstitutional.

d. A declaration that the continued holding of the following properties is unlawful and in breach of the petitioners constitution rights, that is to say:-

i. One Kenyan Passport registered under the name of REHAN KANTILAL SHAH.

ii. Two mobile phones Samsung curve belonging to REHAN KANTILAL SHAH.

e. An order for the immediate release of the Passport and mobile phones belonging to the Petitioner.

f. An order of Damages for compensation under Article 23 (3) of the constitution.

g. That the costs of this Petition be provided for.

h. Any other orders that this Honourable Court may deem fit to grant.

23. It was submitted by the Petitioner that aggrieved by the actions of the Respondents and that those actions amounted to a gross violation of his fundamental rights:-

a. That the Respondents contravened the Petitioner's rights under Article 19, 31, 33, 34, 35, 39, 40 and 48.

b. That the forcible entry and subsequent search on the Petitioner's premises at Nairobi on the 31st

March, 2016 was illegal and unconstitutional.

c. That the illegal seizure of all the items from the Petitioner was illegal and unconstitutional.

d. That the continued holding of the Petitioners passports and two mobile phones was unlawful and in breach of the Petitioner's constitutional rights.

24. The Petitioner relied on Article 31 of the Constitution of Kenya and submitted that the search carried out at the Petitioners home was calculated at humiliating him and was short of the provisions under Article 25 of the Constitution of Kenya. He relied on **Joseph Musomba –vs- Attorney General (2012) eKLR**, where the court expressed itself in relation to humiliation and unfair treatment suffered as follows:-

“The clandestine way in which the Respondent did their investigation was to say the least made in bad faith. The rules and procedures of investigations ought to be adhered to by all and”

25. To the Petitioner the manner in which the search and illegal seizure of his property was conducted by the Respondent's was tantamount to a gross violation of his fundamental right to human dignity as guaranteed under Article 28 of the Constitution and due to the seizure of his passport by the Respondent, his business suffered a great deal over time as he was unable to travel out of the country for planned meetings with business associates which cost him valuable time and huge losses due to loss of business opportunities. He averred that his freedom of movement was limited with no good reason on the part of the Respondents and he therefore engaged counsel to apply on his behalf that his seized property be brought to court and presented to him. The piecemeal return of the seized items demonstrates the Respondent's very casual approach in investigating the Petitioner for any crime he is suspected to have committed.

26. The Petitioner therefore sought for an order of compensation under Article 23(3) noting that this honourable court has a constitutional duty to punish any person who violates constitutional rights or freedoms and in this respect relied on **Abubakar Shariff Abubakar –v- Attorney General & Another (2014) eKLR**.

27. The Petitioner herein submitted that from the foregoing he is entitled to compensation in the form of damages for violation of his fundamental rights as guaranteed under Articles 28 and 31 of the Constitution. He contended that in comparative jurisdiction, the realm of constitutional damages has been embraced in recognition of the courts duty to protect against a violation or breach of a right guaranteed under the constitution and cited **Ntesang @ Panyaza Oatile vs. Attorney General CVHLB-001835-07**.

28. In conclusion the Petitioner submitted that violated the Petitioner's rights under Article 19, 28, 31, 33, 34, 35, 39, 40 and 48 of the Constitution hence he is entitled to the declarations and orders as prayed for in the Petition.

Respondent's Case

29. In opposition to the application the Respondents averred that the Petitioner was arrested together with **Zahid Iqbal** on 1st April, 2016 at 0200 hrs at Mukabi Lane within Loresho Area in a house they both live in (extended family setting) owned by **Zahid Iqbal** and **Sifana Rehan's** parents.

30. According to the Respondent, the search was pursuant to information that the residence was used for trafficking of Narcotic Drugs Contrary to section 4(a) of the ***Narcotic Drugs and Psychotropic and Substances Control Act No. 4 of 1994***. To the Respondent, section 60 of the ***National Police Service Act, 2011*** and section 73(5) of the ***Narcotics Drugs and Psychotropic Substances Control Act, 1994***, empowers an officer investigating an alleged offence on reasonable grounds to search premises without a search warrant.

31. The Respondent averred that the Petitioner introduced himself as the husband of **Sifana Rehan** who is the sister of **Zahid Iqbal** and they all confirmed that they reside in the one house but different rooms. It was deposed that a search was conducted in all rooms and different items found in separate rooms as indicated in the inventories prepared. In the said search it was revealed that the Jewellery from **Sifana's** room was found in a safe together with 50 rounds of ammunition which were recovered for verification and further Police action. However, **Sifana** disowned the ammunition found with the jewellery and indicated that they were for her husband, the Petitioner in this case.

32. It was averred that the Petitioner informed the police that he was a licensed firearms holder with firearms certificate book and card and that upon interrogation on possession of the 50 rounds of ammunition, the Petitioner confirmed to the Police that he had more firearms and ammunition held in another residence at Jana Estate off Jogoo road, house number 37 and that 10 firearms and 2,032 ammunitions of a different calibre were seized from the applicant for purposes of verification in light of the recent security incidents and threats facing the Republic of Kenya.

33. To the Respondent, section 10 of the Act empowers a police officer to request for a firearms certificate or permit which firearm certificate and card were thereafter collected for verification pursuant to section 4 of the Act. In the Respondent's view, upon initial perusal of the firearms certificate as provided by the Petitioner:-

- a. The firearms confiscated as compared with the firearms certificate did not tally;
- b. The applicant did not further avail any other information to support the need to have the numerous firearms and ammunitions;
- c. That the circumstances raised suspicion taking into account that drugs were confiscated in the same home.

34. It was further disclosed that an inventory was prepared and duly signed and served upon the applicant on property confiscated for verification pursuant to section 57(5) of the **National Police Service Act** and that the applicant was arrested on 1st April, 2016 at 0200 hrs after search of his residence and booked at Parklands Police Station the same day vide OB 23/1/04/2016. To the Respondent, the arrest of the applicant and **Zahid Iqbal** was in accordance with section 80 of the **Narcotic Drugs and Psychotropic and Substances Control Act No. 4 of 1994**, sections 58(c), 59 and 60 of the **National Police Service Act**, and sections 22 and 29 of the **Criminal Procedure Code** respectively. It was clarified that whereas **Zahid Iqbal** was arraigned in Kibera Law Courts on 4th April 2016 to face charges on drugs trafficking, the applicant has never been arraigned in any Court and was accorded all the rights as per articles 49 and 51 of the Constitution and released on 2nd of April, 2016 at 1656 hrs vide OB 48/2/04/2016 and was requested to appear before the Officer in Charge Anti-Narcotics Unit pending completion of investigations in respect of possession of the firearms and ammunition. According to the Respondents, this request was also in accordance with the law. These investigations, it was averred, entailed confirmation from the Chief Licensing Officer that the confiscated firearms and ammunitions are all registered under the firearms and ammunitions certificate.

35. It was therefore pleaded that there was no prejudice to investigations being carried out and no conclusion had been reached in respect of the said investigations to enable a sound decision be made in that respect. However the petitioner's passport was retained in accordance with sections 57 and 60 of the **National Police Service Act** and section 31 of the **Kenya Citizenship and Immigration Act** since it was noted that the petitioner was a frequent traveller out of the country.

36. The Respondents disclosed that investigations were ongoing and the respondents intended to invoke section 121 of the **Criminal Procedure Code** in respect of property seized without a warrant. Further, the petitioner was required to appear before Officer in Charge Anti-Narcotics Unit on 14th April, 2016 at 1000hrs for an update of investigations, however instead the petitioner under certificate filed JR. Misc Application 163 of 2016 dated 11th April 2016 also addressing issues within this petition and obtained

interim orders which took precedence.

37. It was contended that investigations with the assistance of the Chief Licensing Officer vide his letters revealed the following information:-

- a. That the firearm certificate and book held by the applicant is genuine and valid;
- b. That the applicant has registered approximately 16 firearms with the bureau as itemized in para 7 of his letter dated 27th April 2016;
- c. That the applicant is expected to renew his certificate on a yearly basis;
- d. That out of the 16 firearms 4 of the firearms have been renewed in the year 2016;
- e. That out of the 16 firearms, 6 firearms itemized para 1-6 of the report are not part of the recovered and/or confiscated firearms;
- f. That the whereabouts of the said 6 firearms mentioned hereinabove are yet to be verified and ascertained from the applicant;
- g. That whereas the applicant is required to submit transfer forms (duly filled) of firearms transferred to another in accordance with section 16(1) and 16(2) of the Post Notice of the Act, no such records exist in his file;
- h. That whereas the applicant is further required to notify the Chief Licensing Officer of change of physical residence or permanent address for the firearms in accordance with section 4(2), 5(5) and 5(7) of the Act, this has not been done so.

38. It was the Respondent's case that notwithstanding the above, the property of the petitioner was released in good faith during the pendency of this petition and not pursuant to any court order and that the investigations into this matter have not yet been concluded.

39. It was contended that in addition thereto, the petitioner has changed his permanent address and failed to notify the Chief Licensing Officer of change of address of the firearms contrary to section 4(2), 5(5) and 5(7) of the **Firearms Act** as the addresses provided include:-

- a. P O Box 4021-00100 Nairobi;
- b. P O Box 50330-00200 Nairobi;
- c. Valley Arcade Apartments, Block C, Apartment 3;
- d. Lavington Leeds Apartments;
- e. Westlands Maruti Court 11;
- f. Lavington; and most recently,
- g. Jana Estate off Jogoo road, house number 37

40. To the Respondent, the failure to comply with the said condition is an offence punishable in law under section 4(2) of the **Firearms Act**, Cap 114. It was however contended that the Respondents were unable to register the charge sheet due to the stay order issued by this Court on 7th April 2016. In their view, the functions of the office as prescribed under the Constitution in terms of enforcement of law and institution of criminal proceedings have been curtailed and at present there is no guarantee that the petitioner will remain within this jurisdiction with the current security issues facing the Country; it is crucial and vital

that all terms and conditions for permitting firearms possession must be observed by all firearms holders as firearms and ammunitions have been classified as dangerous weapons. Their case was that the petition is meant to obstruct, prevent, pervert or defeat the course of justice. Since no assurances have been provided in terms of the availability of the petitioner to answer to the intended charges, it was crucial that the travel document be retained until the final determination of the pending case namely JR. 163 of 2016.

41. The Respondent asserted that:

- i. that under Article 157(6) of the Constitution of Kenya 2010, the respondent exercises the state powers and functions of Prosecution;
- ii. that the said right has not yet been invoked to warrant the orders sought in the application;
- iii. that in addition thereto, the respondents in the discharge of its duties and functions, is required to respect, observe and uphold the following Constitutional provisions, *inter alia*;
 - a. Uphold and defend the Constitution;
 - b. The national values and principles of governance enshrined in Article 10 in the application, interpretation of the Constitution as well in making and implementing the laws and public policy decisions;
 - c. Respect, observe, protect, implement, promote and uphold the rights and freedoms in the Bill of Rights enshrined in Article 21(1);
 - d. To be accountable to the public for decisions and actions taken and generally observance Article 73 (2) (d);
 - e. To be accountable for administrative acts and observance of the values and principles of public service Article 232(e).
- iv. that the applicant has not demonstrated that in making the decision to carry out investigations, and enforce the requisite laws, that the respondents have acted without or in excess of the powers conferred upon them by law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the foregoing provisions of the Constitution or any other provision thereof;
- v. that the applicant seeks to curtail the mandate of the criminal justice system actors as enshrined within the Constitution of Kenya;
- vi. that the respondent does not act under the direction or control of any person or authority and as such Article 249 (2) of the Constitution, provides that an independent office is subject only to the Constitution and the law and is not subject to the direction or control by any person or authority; and,
- vii. that the allegation by the applicant is without merit, legal reason or backing.

42. In view of the foregoing, the Court was urged to exercise extreme care and caution not to interfere with the Constitutional powers of the respondents to investigate and subsequently institute and undertake criminal proceedings and should only interfere with the independent judgment of the respondents if it is shown that the exercise of powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process. In this case it was argued that the applicant had failed to demonstrate that the respondents had not acted independently or had acted capriciously, in bad faith or had abused the legal process in a manner to trigger the High Court's intervention. The Respondent therefore prayed that this application be dismissed in its entirety.

43. It was submitted on behalf of the Respondent that simply stating the constitutional provisions without demonstrating how each of these rights have been infringed falls short of the reasonable requirement as provided in **Anarita Karimi Njeru vs. AG (1979) KLR 154**,

“... that the petitioner should with sufficiency demonstrate how each of the rights have been infringed, the violations faced and the damages suffered.....”

44. According to the Respondents, the petitioner has failed to discharge this burden as required by law in accordance with section 107 and 109 of the **Evidence Act**, Cap 80.

45. To the Respondents, the rights and fundamental freedoms listed hereinabove are rights that can be limited in accordance with article 24 of the Constitution of Kenya. It was submitted that the entry made into the petitioner’s premises was in accordance with the law on the basis of information given of an offence of trafficking in drugs. The respondent contended that section 73(5) of the **Narcotics Drugs and Psychotropic Substances Control Act** empowers the police to search premises without a warrant based on reasonable grounds. Further, sections 57 and 60 of the **National Police Service Act** further empowers the police to search premises on similar grounds. It is as a result of the said search that drugs were seized from the said home occupied by the petitioner and his brother-in-law. It was therefore their case that the entry into the premise of the petitioner was in accordance with the law as such there was no constitutional violation in this regard.

46. To the Respondents, the Constitution of Kenya and the **National Police Service Act** mandates that Inspector General of Police to carry out investigations as such the conduct of the officers were in line with the said laws.

47. The Respondents took the position that the seizure of the petitioner’s property as provided hereinabove was in connection to investigations undertaken of the items recovered during the search. Some of the items discovered include drugs, a number of firearms and a sizeable amount of ammunitions while the seizure of the petitioner’s passport and mobile phones were pursuant to investigations pursuant to section 57 and 60 of the **National Police Service Act**, which recognizes that such acts are permitted without a warrant. In addition section 31 of the **Kenya Citizenship and Immigration Act** further notes the need on certain circumstances the retention of passports for purposes of investigations also without a warrant.

48. While appreciating the provisions of section 121 of the **Criminal Procedure Code**, the respondents noted that although there is no timeline provided for presentation of seized property before court where property is seized without a warrant, the respondents intended to abide by the said provision. However before the scheduled meeting between the investigating officer and the petitioner, the petitioner under certificate filed JR. Misc Appli. 163 of 2016 subjecting the entire investigations to court including the element of retention of property belonging to the petitioner.

49. It was submitted that the need to ensure that the rights of individuals are respected as such investigations undertaken must be carefully done so in light of recent security incidents and threats facing the Republic of Kenya. To them, the circumstances in this case are peculiar in nature hence the need to ensure that justice is at all times upheld on both sides.

50. It was reiterated that the petitioner is in possession of his property noting that he is a frequent traveller. The respondents have so far identified offence(s) to be preferred upon the petitioner pursuant to investigations but are unable to register the said charges due to pending court order issued under JR. 163 of 2016. To them, there is no guarantee that the petitioner will be available (within jurisdiction) to answer to charges disclosed once they have been registered and that the petitioner seeks to curtail the institutions empowered to maintain and enforce law and order by interjecting and/or interfering with the logical conclusion of the investigations through litigation.

51. The Respondents averred that Article 39 of the Constitution is not one of the rights that cannot be limited as provided under article 25 of the Constitution and submitted that the petitioner holds his

passport which was released to him. To them, the investigations were in accordance with the law as such there are no violations to warrant damages or special damages.

52. It was submitted that numerous cases decided have held that an order of exemplary damages is not an appropriate relief to grant in the constitutional applications especially where the same can be sought more so in a civil suit under special damages. The respondent as such humbly implored the Honourable Court to note that there are no special circumstances in this instance to warrant the orders sought.

53. The Respondents therefore urged the Court to dismiss the Petition with costs with an additional order that the petitioner deposits his passport with Court pending the conclusion of investigations.

Determination

54. I have considered the Petition.

55. The Petitioner seeks *inter alia* a declaration that the Respondents have contravened the Petitioner's rights under Articles 19, 31, 33, 34, 35, 39, 40 and 48 of the Constitution. In my view the only provisions relevant to this petition, based on the facts of this petition are Article 31 that deals with privacy, Article 39 that deals with freedom of movement and residence and Article 40 that deals with the right to property.

56. I must however mention that in his submissions the Petitioner has touched on Article 28 on human dignity and Article 29 which deals with freedom of security of the person and encompasses arbitrary deprivation of freedom, detention without trial, violence, torture, cruel, inhuman or degrading manner. It is true that these provisions were not expressly adverted to by the Petitioner.

57. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Attorney General** (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in our view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

58. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

59. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and we so hold that the later ought to prevail over the former. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR**, declined to adopt the **Anarita Karimi** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

“Although section 84(1) was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal...The narrow approach in ANARITA KARIMI NJERU was ultimately abandoned in Kenya, in favour of purposive interpretation of Section 84(1).”

60. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing... Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

61. I will say no more on this issue.

62. With respect to the claim that the actions of the Respondents amounted to cruel, inhuman and degrading treatment, it is my view that for the police to resort to a process of harassment in order to intimidate and harass a person with a view to obtaining information may well amount to torture. To subject a person to constant harassment and threat of incarceration for an unreasonably long period of time without arraigning that person before a Court of law in my view amounts to mental torture and degrading treatment contrary to Article 29 of the Constitution See **Marete vs. Attorney General [1987] KLR 690**.

63. Torture has been defined to mean *‘infliction of intense pain to the body or mind; to punish, to extract a confession or information or to obtain sadistic pleasure. It means infliction of physically founded suffering or the threat to immediately inflict it, where such infliction or threat is intended to elicit or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civic or ecclesiastical interest. It is a deliberate inhuman treatment causing very serious and cruel suffering’*. “Inhuman treatment” is *‘physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity’*. See **Black’s Dictionary (8th Edn); Torture and English Law 2 (1982) By James Heath; Ireland vs. United Kingdom [1978] 2 EHRR (European Court of Human Rights); Celebici Camp Case No. IT-95-14/2PT (1999) page 44**.

64. Therefore whereas mere police interrogation may not *ipso facto* amount to “torture” or “cruel, inhuman or degrading treatment” a continuous interrogation extending for a long period of time meant to

extract vague information for the purposes of prosecution of a person other than the subject may well fall under the rubric of “torture, cruel, inhuman and degrading” treatment. A person faced by such a threat is properly entitled to invoke the supervisory jurisdiction of this Court to bring such conduct to a halt as the same is a threat to fundamental rights and freedoms. As was held in **Re Bivac International Sa (Bureau Veritas) [2005] 2 EA 43**, judicial review, which is now one of the constitutional remedies where there is an allegation of violation of the Bill of Rights or a threatened violation thereof, pursuant to Article 23 of the Constitution, has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

65. Therefore whereas the Court may not unless cogent evidence is adduced grant orders whose effect would be to halt investigations, it ought to be appreciated that under Article 28 of the Constitution, every person has inherent dignity and the right to have that dignity respected and protected. To conduct a search in a manner that impairs the person’s dignity as a human being would invite this Court’s wrath and warrant the intervention by the Court to protect, uphold and promote the letter and the spirit of the Constitution. I am alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. See **Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516**.

66. Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated. In the circumstances, it is my view that this right need not be pleaded for it to be enforced and even if pleaded, its application must be explained. My view gathers support from Article 19 of the Constitution provides:

a. The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.

b. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

c. The rights and fundamental freedoms in the Bill of Rights—

i. belong to each individual and are not granted by the State;

ii. do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

67. In interpreting the Bill of Rights Article 19(4) obliges the Court to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. Article 28 on the other hand recognises that every person has inherent dignity and the right to have that dignity respected and protected. Human dignity is therefore an integral ingredient of the Bill of Rights and the Bill of Rights is expressed under Article 19 to be an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. As expressed by **Albie Sachs** in *The Strange Alchemy of Life and Law* (OUP) at page 213:

“Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the “haves” can continue to have, but to help create conditions in which the basis dignity of the “have nots” can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the

judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice.”

68. It is therefore my view that any law or policy must as of necessity have as its core objective the upholding of human dignity, a test to which any law and policy must be subjected. As was aptly put by this Court in Federation of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] EKLK (HCK):

“One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture.....The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons. As was stated by Madan, CJ in the case of *Githunguri vs. Republic KLR [1986] 1* these proceedings have put our Constitution on the anvil. It is the subject of considerable anxiety, notoriety and public attention. To quote the words of Madan, CJ; “We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society.”

69. This was the position of the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] EKLK where it expressed itself as follows:

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – “*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*” And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved

government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racist governance system. Karl Klare, in his article, “*Legal Culture and Transformative Constitutionalism*,” *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: “*At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.*” The scholar states the object of this South African choice: “*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*” The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s achievements in constitutional precedent. We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of the Constitution of 2010”.

70. Article 49(1)(f) of the Constitution provides that an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested or if the twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day. In this case, the applicant contends that he was arrested and detained at Parklands Police Station from 1st April 2016 at 5.00 am to around 4.00pm on 2nd April 2016 when he was released on free bond. This contention is not controverted. This was clearly a period of more than 24 hours. No reason has been advanced as to why the Petitioner was neither released on bond before the expiry of the said mandatory constitutional period or taken to Court. The Constitution, it has been stated, should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.

71. I therefore find that by detaining the Petitioner beyond the period permitted by the Constitution and without any explanation for doing so, the Petitioner’s rights and freedoms under the Bill of Rights were violated.

72. With respect to the right to privacy, Article 31 of the Constitution provides that:

Every person has the right to privacy, which includes the right not to have

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed;

(d) the privacy of their communications infringed.

73. Clearly Article 31 rights do not fall within the non-derogable rights under Article 25 of the Constitution. The rights can therefore be limited. However as held in **Manfred Walter Schmitt & Another vs. Attorney General & 3 Others [2014] eKLR:**

"[18] The authority given to State agencies to conduct searches and seizures is a limitation of the fundamental right to privacy protected under the provisions of Article 31.

[19] Since searches infringe the right to privacy and the right against arbitrary deprivation of property protected under Article 40, searches must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains, which include obtaining information from third parties like banks, of ordinary citizens is one of the features that distinguish a democracy from a police state."

74. This was the position of the South African Constitutional Court in **The Minister of Safety and Security vs. Van Der Merwe & Others 2011(2) SACR 301 (CC)** where it expressed itself as follows;

"Search and seizure warrants by their very nature implicate at least two constitutional rights, namely the rights to dignity and privacy."

75. Similarly the right to possess firearm is not absolute and may be restricted as long as the due process is followed. In this case, if I understand the Respondents correctly, they are not questioning the misuse of the firearm which is the prerogative of the firearms licensing officer but are investigating the commission of a criminal offence relating to failure to adhere to the provisions of the ***Firearms Act*** with respect to the requirement for disclosure of the petitioner's address.

76. It was however contended that the 1st, 2nd and 3rd Respondents decision to institute criminal proceedings against the Applicant in the future would be in bad taste following the manner in which the illegal search and seizure of property was conducted. I agree with the holding of the Supreme Court of Appeal of South Africa in **Ivanov vs. North West Gambling Board (312/2011) [2012] ZASCA** in which the Court expressed itself as follows:

"[15] Put differently, the lawfulness of the search and seizure is dependent on the legality of the search warrant. This must necessarily be so as the warrant provides the justification for the search and seizure. If the warrant is declared null and void, it means that there was no basis in law for the search and seizure, which were therefore invalid ex tunc. In this case, the police had no authority to seize the appellant's goods, albeit that they acted in good faith and believed that they had the power to search in terms of the warrant."

77. Article 50(4) of the Constitution however provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

78. Suffice it to say that evidence obtained in violation of the law is only to be excluded where its admission would render the trial unfair or otherwise detrimental to the administration of justice. In my view it is not the mere fact of the manner in which the evidence is obtained that determines its admissibility and the effect on the fairness of the trial process. That is a matter that can only be determined by the trial Court if and when a determination is made that criminal proceedings be preferred against the petitioner. It is at that stage that the Respondent will be hard put to satisfy the trial Court that there existed special circumstances that warranted the search to be carried out even in the absence of the search warrants.

79. It is however one thing to say that such evidence is not to be excluded and another to say that the evidence was obtained in breach of the provisions of the Constitution. In my view, whereas such evidence may at the discretion of the trial Court be admitted, it does not necessarily mean that the same was not obtained in a manner that violates any right or fundamental freedom in the Bill of Rights. Where such evidence though admissible was obtained in a manner that violates any right or fundamental freedom in the Bill of Rights the Court may well be entitled to grant relief commensurate with the gravity of the violation. Article 31 as already stated hereinabove protects the right to privacy and provides that every person has the right not to have their person home or property searched. This provision is however subject to Article 24 of the Constitution.

80. Similarly, section 57(1) of the *National Police Service Act*, provides as follows:

Subject to the Constitution, if a police officer has reasonable cause to believe—

a. that anything necessary to the investigation of an alleged offence is in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success of the investigation; or

b. that any person in respect of whom a warrant of arrest is in force, or who is reasonably suspected of having committed a cognizable offence, is in any premises, the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.

81. The right to privacy is accordingly limited by section 57(1) of the *National Police Service Act* and it is not contended that the said provision is unconstitutional. As to whether there existed grounds for the invocation of the said limitation, is a matter which I am unable to determine based on the material placed before me in this petition.

82. It is conceded by the Respondents that they set out to investigate a complaint relating to drug trafficking. However in the course of their investigations they came across facts which according to them disclose a possibility of a commission of a criminal offence in the nature of the failure to disclose change of location of firearms. To them the failure to do so constitute the commission of an offence.

83. Section 24 of the *National Police Service Act No 11 A of 2011* sets out functions of the Kenya Police Service as being the—

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order;

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

84. In my view, if in the course of their investigations the police chance upon an act or omission which in their view reasonably leads them to believe that an offence different from the one being investigated may have been committed, the police in their duty to prevent and detect crime cannot be expected to close their eyes to that fact. If they do this it would amount to abdication of their statutory duty. I must however hasten to point out that even in cases where the police set out to carry out a search armed with a search warrant, the said search must be carried out lawfully and in accordance with the Constitution in particular

with due regard to the dignity of the person. Therefore even where the police are entitled to carry out a search, they may be liable if in the course of the search they violate the provisions of the Bill of Rights.

85. According to the applicant, under section 5(4) of the *Firearms Act*, Cap 114 Laws of Kenya, (hereinafter referred to as “the Act”) it is only the Licensing Officer who has the power to withdraw a firearms certificate from a licensed firearms holder and not as purported by the Directorate of Criminal Investigations – Anti Narcotic Unit.

86. However section 10 of the Act provides as follows:

(1) Any police officer, customs officer or licensing officer may demand from any person whom he believes to be in possession of a firearm or ammunition the production of any firearm certificate or of any permit granted under subsection (12) or subsection (13) of section 7 at or before such time, at such place and to such police officer, customs officer or licensing officer as he may specify.

(2) A demand under this section may be made orally or in writing.

(3) If any person upon whom a demand is so made fails to produce any certificate or permit granted to him, or to allow the officer to read it, or to show that he is entitled by virtue of this Act to have the firearm or ammunition in his possession without holding a firearm certificate or permit, the officer may seize and detain the firearm or ammunition, and may require that person to declare to him immediately his name and address.

(4) If any person upon whom a demand is so made fails, without reasonable cause, to produce any certificate or permit granted to him, or to allow the officer to read it, or refuses so to declare his name and address, or fails to give his true name and address, he shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.

87. From the foregoing it is apparent that certain acts and omissions which constitute criminal offences under the *Firearms Act* may be enforced by police officers.

88. With respect to the confiscation of the Petitioner’s passport, the Respondents relied on section 31 of the *Kenya Citizenship and Immigration Act*, Cap 172 Laws of Kenya. The said section provides as follows:

a. An immigration officer or any other law enforcement officer may suspend or confiscate a passport or other travel document where—

i. the holder permits another person to use his passport or travel document;

(b) the holder has been deported or repatriated to Kenya at the expense of the Government;

(c) the holder is convicted for drug trafficking, money laundering, trafficking in persons and smuggling, acts of terrorism or any other international crime;

(d) a warrant of arrest has been issued against the holder and there is a risk of absconding;

(e) the holder is a person against whom there is a court order restricting movement or authorizing denial, confiscation, or suspension of the passport or travel document;

(f) the holder is involved in passport or document fraud, passport or document forgery or transnational crimes; and

(g) it is necessary to examine the passport or travel document for a period not exceeding seven days.

(h) subject to the Constitution, any other circumstances which in the opinion of the Director would be prejudicial to the interest of the State or holder of the passport.

89. In this case it is clear that the only reason advanced by the Respondent for the confiscation of the Petitioner's passport was that the petitioner was a frequent traveller out of the country. That is clearly not one of the grounds prescribed under section 31 of Cap 172. That ground cannot therefore be said to be a ground that meets the prescription of limitations under Article 24 of the Constitution. Article 24 of the Constitution which provides *inter alia* that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

90. The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127**, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Secondly, both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality. Thirdly, the constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.

91. In this case there is no restriction that limits the freedom of movement in the nature of one being a frequent traveller in order to justify the confiscation of one's passport unless the provisions of section 31 of Cap 172 apply. In my view practices and norms are not constitutional grounds for restriction or limitation of fundamental rights and freedoms under the Bill of Rights. In order to satisfy this requirement a law must be clear and without ambiguity or vagueness in order that citizens may know what their obligations are. I accordingly associate myself with the decision of the Hong Kong Court of Final Appeal case of Leung Kwok Hung vs. HK Special Administrative Region where it was held at para 27 that:

“To satisfy this principle, certain requirements must be met. It must be adequately accessible to the citizen and must be formulated with sufficient precision to enable the citizen to regulate his conduct. As pointed out by Sir Anthony Mason NPJ (at para.63), the explanation of these requirements in the often quoted passage in the majority judgment of the European Court of Human Rights in *Sunday Times v. United Kingdom (No.1) (1979 – 80) 2 EHRR 245* (at para.49, p.271), the “thalidomide” case, is of assistance:

“First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

92. It is therefore my view and I find that the confiscation of the Petitioner's passport amounted to unjustifiable limitation of the Petitioner's freedom of movement.

93. It was however contended that this Court by its orders issued in the Judicial Review 163 of 2016 curtailed the Respondent's rights to conduct their investigations. Whereas the Respondents are entitled to conduct investigations into the allegations of the commission of criminal offences, it is however my view that criminal investigations ought to be carried and finalised with expedition and a decision made one way or another as soon as possible so as to avoid subjecting a person to unnecessary anxiety. In George Joshua Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR this Court expressed itself as follows:

“The Petitioners further contend that the said charges are being brought after a long period of time after the investigations thereon had been closed. Under Article 47(1) of the Constitution, “every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself. Whereas the decision whether or not the action was expeditiously taken must necessarily depend on the circumstances of a particular case, on our part we are not satisfied that the issues forming the subject of the criminal proceedings were so complex that preference of charges arising from the investigations therefrom should take a year after the completion of the investigations. From the charges leveled against the Petitioners, the issues seemed to stem from the failure to follow the laid down regulations and procedures in arriving at the decision to sell the company's idle/surplus non core assets. In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made.”

94. In this case the Petitioner was arrested on 1st April, 2016. The order of stay was issued on 7th April,

2016. In my view in the circumstances of this case the Respondents cannot be accused of inordinate delay in finalising their investigations and arraigning the Petitioner in Court.

Disposition and Remedies

95. Having considered this petition, it is my view and I hereby find that the Petitioner's freedom of movement was unlawfully violated. This is so because there was no lawful justification and authority for the Respondents to have confiscated the Petitioner's passport. Similarly there was no justification to confiscate the jewellery and the mobile phones. I also find that by detaining the Petitioner beyond the period permitted by the Constitution and without any explanation for doing so, the Petitioner's rights and freedoms under the Bill of Rights were violated.

96. With respect to the reliefs Article 23(3) of the Constitution provides:

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

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

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

(e) an order for compensation; and

(f) an order of judicial review.”

97. I agree with the decision of **OBK Dingake, J** in the High Court of Botswana at Lobatse in **Ntesang @ Panyaza Oatile vs. Attorney General CVHLB-001835-07** that:

“the net effect of a majority, if not all, of the decisions referred to above is that it now appears almost universally accepted that damages are available as a remedy for infringement of fundamental rights and freedoms entrenched in the constitution.”

98. The Petitioner relied on **Abubakar Shariff Abubakar –v- Attorney General & Another (2014) eKLR**, in which the Court expressed itself as follows:-

“I find that the actions of the Police in retaining the seized items until ordered by the court to produce them contravened the Criminal Procedure Code and was therefore unlawful. I therefore award to him general damages in the sum of Kshs.400,000/= plus interest at court rates. I find that the special damages of Kshs. 270,000/= claimed by the Petitioner as payment to a firm of Advocates in respect of proceedings to compel the Police to produce in court the items seized from his residence is merited. From the above violation I award to the Petitioner general damages in the amount of Kshs. 400,000/= as well as special damages in the amount of Kshs. 270,000/= plus interest at court rates from today's date until payment in full.”

99. Doing the best I can in the circumstances of this case, I am of the view and hold that an award of Kshs 500,000.00 is reasonable. Accordingly the Petitioner is awarded Kshs 500,000.00 for violation of his rights under the Constitution. As the Petitioner's passports and mobile phones were released during the pendency of these proceedings the prayer therefor no longer falls for determination.

100. I award the costs of this petition to the applicant to be borne by the Respondents.

101. Orders accordingly.

Dated at Nairobi this 13th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kimani for the Petitioner

Mr Mbugua for the Respondents

CA Mwangi