



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 6 OF 2012

HON. CHIRAU
ALIMWAKWERE.....PETITIONER

AND

ROBERT M.
MABERA.....1STRESPONDENT

COMMISSIONER OF POLICE.....2ND
RESPONDENT

NATIONAL COHESION AND INTEGRATION COMMISSION.....3RD
RESPONDENT

HON. ATTORNEY
GENERAL.....4THRESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5TH
RESPONDENT

JUDGMENT

Introduction

1. This case concerns the constitutionality of certain provisions of the *National Cohesion and Integration Act (Act No. 12 of 2008)* (“the *NCI Act*”) and whether the petitioner should be investigated and prosecuted for offences under the Act he is alleged to have committed.

Petitioner’s Case

2. The petitioner is a Cabinet Minister and the Member of Parliament for Matuga Constituency. This petition stems from events of the 2010 by-elections campaign where the petitioner, while at a public rally in Kombani area in Matuga Constituency of Kwale County, allegedly uttered words amounting to an offence of ethnic or racial contempt contrary to **section 62(1)** of the *NCI Act*. The petitioner is alleged to have uttered the following words:

Waswahilina Waarabu tuna uchungusanasana, walitugandamiza, wakatufanyawatumwa, hatutakubali, hatutakubali, sisi, sisi, kamawalivyofanyamababuzetu, walisema wale Wadigo, Wakambana Wadurumatukawanunuakamamakaa.....

Nawaonyawatuwabarawalionaukabilawataona cha mtemakuni. Ningetoamrinamanenoyakawamengine.

3. The petitioner denies uttering the aforesaid words. He contends that on the material date the speeches he made were intended to remind the voters of historical injustices that they had suffered in the past. He states that as a victim and witness to post independence suffering and oppression, he is entitled to agitate about the issues that constitute historical injustices as a leader.
4. The petitioner maintains that his speeches are protected under **Article 33** of the Constitution (Unless otherwise stated “Article” shall refer to the Constitution in this judgment). He avers that what he stated at the various meeting did not amount to propaganda to war, incitement to violence, hate speech and advocacy of hatred as defined by the Constitution or under the **NCI Act**.
5. On 21st August 2010, the petitioner was requested to record a statement under inquiry and caution by the 1st respondent acting on instructions from the other respondents. After recording the statement, the petitioner accuses the respondents for agitating for his arrest and prosecution. He views this act as an infringement of his fundamental rights and freedoms.
6. By his petition dated the 12th January, 2012, the petitioner asks this court to declare **sections 13, 14 and 62** of the **NCI Act** unconstitutional to the extent that they purport to criminalise the freedom of a person to express themselves about past injustices.
7. It is the petitioner’s argument that the said impugned sections of the **NCI Act** limit the right of persons and communities who have suffered historical injustices, indignation and violation of human rights from speaking clearly, loudly to express their bitterness, pain, suffering or educating the future generations hence limiting their freedom of expression in this regard. Furthermore, the petitioner argues that the matters which he expressed are the subject of the **Truth Justice and Reconciliation Act (Act No. 6 of 2008)** and stopping him from raising these historical injustices would contradict the provisions of that Act.
8. The petitioner submits that the impugned sections are also unconstitutional to the extent that they do not state the intention of the legislature in limiting the constitutional right to freedom of expression as is required of the legislation under **Article 24(2)(a) and (b)** of the Constitution.
9. The petitioner asks this court to declare as unconstitutional the respondents’ actions of investigating and charging the petitioner for the alleged offence of ethnic or racial contempt pursuant to the provisions of **section 62(1)** of the **NCI Act**.
10. The petitioner seeks the court’s intervention by way of the grant an order of *certiorari* to quash the respondents’ decision to investigate and charge him under the provisions of the **NCI Act** or any other laws and an order of prohibition to prohibit the respondents and their agents from commencing or continuing any criminal proceedings against him for the alleged offence.

Respondents’ Case

11. The National Cohesion and Integration Commission (“NCIC”) has opposed this petition through the affidavit sworn on 16th March 2012 by its secretary, Hassan Mohamed. He depones that a written complaint was lodged on 12th July 2010 by the Executive Director of Muslims for Human Rights (MUHURI) in regard to alleged hate speech by the petitioner. The complaint was accompanied by a Video Compact Disk (VCD) recording of the petitioner’s alleged speech.
12. Mr Hassan Mohamed deposes that the NCIC thereafter reviewed the recording of the speech and was satisfied that it raised legitimate concerns falling within its statutory mandate. Since it does not have the authority to lodge prosecutions, the complaint and the VCD was forwarded to the Criminal Investigation Department requesting that investigations be instituted to establish whether an offence under the **NCI**

Act had been committed by the petitioner. Mr Hassan Mohamed further deposes that the NCIC has not been informed about the outcome of the investigations or whether a decision has been made to prosecute the petitioner.

13. Robert Mabera, the 1st respondent, is a Chief Inspector of Police and was at the time material to this case, the officer investigating the complaint against the petitioner. He has filed an affidavit sworn on the 8th February, 2012 opposing the petition. He states that he received a complaint from the NCIC to investigate the allegations of the offence of ethnic or racial contempt contrary to the provisions of the **NCI Act**. He embarked on this task by reviewing video footage of the petitioner's speech at Kombani Trading Centre and taking a statement under inquiry from the petitioner. He thereafter forwarded his report to the office of the Director of Public Prosecutions.

14. The 2nd and 5th respondents, the Commissioner of Police and the Director of Public Prosecutions ("DPP") have also opposed the petition by filing Grounds of Opposition dated the 13th March 2012. They assert that it is well within their constitutional and statutory competence to investigate criminal complaints and for NCIC to investigate specific complaints on incitement to violence and hate speech. They maintain that the application was premature as there was no evidence that the DPP was intending to lay charges against the petitioner and that the orders sought could not lie as there was no allegation of want or lack of jurisdiction against the respondents or that the rules of natural justice had been breached.

15. The Attorney General filed submissions dated the 26th March 2012 in opposition to the petition supporting the proposition that the respondents were mandated by legislation to act in the manner complained including investigating and charging the petitioner regarding allegations of hate speech.

16. It was the Attorney General's contention that **section 13** of the **NCI Act** complemented **Article 24** while **section 62** is only complementary to **Article 33** which qualifies the freedom of speech in certain instances. Counsel for the Attorney General contended that the orders sought by petitioner could not be granted as criminal proceedings had yet to be instituted against the petitioner and that the petitioner's claims could only be determined at another forum.

Freedom of Expression

17. The freedom of expression is one of the fundamental rights and freedoms protected by the Bill of Rights. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. **Article 19(2)** provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

18. **Article 10** enjoins this court and other state organs to respect the national values and principles which include patriotism, national unity, sharing and devolution of power, rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality and human rights.

19. Under **Article 20(4)**, in interpretation of the Bill of Rights, the court is enjoined to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and objects of the Bill of Rights and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

20. The importance of the freedom of expression in a democratic society cannot be gainsaid. It is the bedrock of democratic governance and if I may quote the Supreme Court of Canada in the case of **Edmonton Journal v Alberta (Attorney General), (1989) 2 SCR 1326** where it stated, "*It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of*

circumstances.”

21. Similarly, the Supreme Court of Zimbabwe in **Mark GovaChavunduka and Another v The Minister of Home Affairs Supreme Court Civil Appeal No. 156 of 1999** (Unreported) noted that freedom of expression serves special objectives in a democracy. The court observed, “Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual attain self-fulfilment; (ii) it assists in the discovery of truth and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change”

22. **Article 19(2)** of the **International Covenant on Civil and Political Rights** (“ICCPR”) guarantees the right to freedom of expression as follows, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”

23. **Article 9** of the **African Charter on Human and Peoples’ Rights** provides that every individual shall have the right to receive information and that every individual shall have the right to express and his opinions within the law. Implicit in this provision is that the right to express opinions may be limited within the law (See the **John D Ouko v Kenya ACHR Communication No. 232/99** at paragraph 28).

24. This right to freedom of expression is limited by the provisions of **Article 19(3)** of the ICCPR which permits limited restrictions on freedom of expression where these are a) provided by law; b) for the protection of one of the legitimate interests listed; and c) necessary to protect that interest. The ICCPR places an obligation on State Parties to prohibit hate speech under **Article 20(2)** which provides that, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” It should be noted that the UN Human Rights Committee (HRC), the body of experts tasked with interpreting the ICCPR, has specifically stated that Article 20(2) is compatible with Article 19. (See *General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, 29 July 1983.)

25. International law not only allows, but actually requires States to ban certain speech on the basis that it undermines the right of others to equality or to freedom from discrimination, and occasionally also on the basis that this is necessary to protect public order. Freedom of expression is neither absolute nor boundless; most democratic societies impose limitations on freedom of expressions which attempt to balance the freedom of expression and the societal or public interest and the rights of others. Indeed the case of **Charles Onyango Obbo and Another v Attorney General of Uganda Constitutional Appeal No. 2 of 2002 (Unreported)**, cited by the petitioner recognises this principle.

26. **Article 4** of the **International Convention on the Elimination of All Forms of Racial Discrimination** (“CERD”) obliges State Parties to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

27. Like other democracies, Kenya, has the freedom of expression entrenched in the Constitution. **Article 33** provides:

33. (1) Every person has the right to freedom of expression, which includes—

- a) **freedom to seek, receive or impart information or ideas;**
- b) **freedom of artistic creativity; and**
- c) **academic freedom and freedom of scientific research.”**

(2) *The right to freedom of expression does not extend to-*

- a) *propaganda for war;*
- b) *incitement to violence;*
- c) *hate speech;*
- d) *or advocacy of hatred that-*

(i) *constitutes ethnic incitement, vilification of others or incitement to cause harm; or*

(ii) *is based on any ground of discrimination specified or contemplated in Article 27 (4).*

28. Freedom of expression as part of the Bill of Rights must be read and interpreted in light of the objectives of the Constitution. It underpins the broad democratic principles upon which our society is built. It also gives effect to the national values and principles and must be protected in a manner that empowers the citizen, enhances dignity of the individual and community and promotes social justice.

29. Any legislation that gives effect to **Article 33(2)** will not be unconstitutional as long as it is within the set parameters. Therefore, the fact that there are provisions of a law that criminalise hate speech is not in itself an infringement of the petitioner's freedom of expression. Such provisions cannot be unconstitutional by their mere existence.

30. For the purpose of this suit, it becomes immediately clear that the freedom of expression is not absolute. The purpose of **Article 33(2)** is to exclude certain forms of expression from the protection of the right to expression. In construing a similar clause of the South Africa Constitution, the South Africa Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC) paragraph 10* stated that, “[T]he categories of expression enumerated in section 16(2) are not be regarded as constitutionally protected speech. Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgement that certain expression does not deserve constitutional protection because, among other things, it has potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect.”

31. Kenya has ratified the provisions of the ICCPR, the African Charter and the CERD. These conventions are part of the law of Kenya by dint of **Article 2(6)** and unless the treaty or convention is in conflict with the Constitution they must be given full effect particularly where they entitle the person to enjoy guarantee rights and freedoms to the greatest extent as provided in **Article 20(2)**. (See generally *Beatrice Wanjiku and Another v Attorney General and Another Nairobi Petition No. 190 of 2011 (Unreported)*). In relation to the issue of freedom of expression, these international instruments admit limitations to the freedom of expression and permit the State to exclude hate speech from constitutional protection consistent with the Constitution.

32. Consistent with international principles, **Article 33(2)** in essence provides that if the form of expression falls within the definition of propaganda for war, incitement to violence, hate speech or advocacy for hatred, it falls outside the terms of constitutional protection. Any other limitation must be determined in accordance with the criteria for the limitation of fundamental rights and freedoms provided in **Article 24**.

33. Several reasons have been advanced for the prohibition of hate speech. Hate speech is outlawed in order to prevent disruption to public order and social peace stemming from retaliation by victims, to prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in community and contribute to society. Prohibition of hate speech also prevents visible exclusion of minority groups that would deny them equal opportunities and benefits of society and invisibly exclude their acceptance as equals in society. If hate speech were permitted it would lead to social conflagration and political disintegration. At a personal level hate speech is a direct invasion of the dignity of individuals and communities. (See *Afri-Forum and TAU SA v Julius Sello Malema and*

Others, [2011] 4 All SA 293 (EqC)).

Principles of Interpretation

34. Before dealing with the issues that have been raised in this application, it is important to remind ourselves of the principles of constitutional interpretation. First, the Court is also commanded to apply the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.

35. Second, all provisions of the Constitution bearing upon a specific issue should be considered together; this is the principle of *harmonization*. Where the Constitution contains several provisions relating to an issue, all these provisions must be looked at as a whole. As was held in ***Olum v Attorney General of Uganda* [2002] 2 EA 508**, ‘*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.* Accordingly, in discerning the purpose of freedom of expression, the court must consider the broader values of the embraced by the Constitution.

36. Third, there is a general presumption of law that the legislation enacted by parliament is constitutional. The burden of proof thus lies on any person who alleges otherwise. However, where there are limitations to fundamental rights, the onus is on the body restricting the right to show that such limitation was justified. (See ***Ndyanabo v Attorney General* [2001] EA 495**) Justice Lenaola, in the case of ***Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*** paragraph 25, posed the question, “*In what circumstances can a Court declare a Law to be unconstitutional?*” He stated, “*There is a whole raft of Legal authorities on this subject but I am persuaded by the reasoning in ***Hamdardda Wakhama v Union of India AIR 1960 at 554*** where the Court stated inter-alia as follows, “...when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and forthat purpose regard must be had to the enactment as a whole to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at.”*

37. In examining whether a particular statutory provision is unconstitutional, the court must have regard to its purpose and the effect of the statutory provision (See ***Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)***). What this means is that if the purpose of an Act of Parliament is inconsistent with a provision of the Constitution, the Act or the provision being challenged shall be declared unconstitutional. Similarly, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, that provision(s) of the Act shall be declared unconstitutional.

38. Finally when interpreting a statute, it must be interpreted on the basis of its own language and that words derive their own colour and content from the context and the overall object of the statute is of paramount consideration. (See ***Lall v Jeypee Investments Limited* [1972] EA 512**)

Constitutionality of the National Cohesion and Integration Act

39. It is against this background that I now proceed to determine the petition. I am not called upon to determine whether the words allegedly uttered by the petitioner constitute an offence under the ***NCI Act***. That is a matter for the DPP to address particularly where the words are disputed by the petitioner and the matter is still under investigation. The matter for determination before this court is whether provisions of **sections 13, 14 and 62(1)** of ***NCI Act*** offend constitutional provisions on freedom of expression.

40. The long title to the Act provides its purpose as “*An Act of Parliament to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for*

connected purposes.”

41. The intention and purpose of the Act as a whole is therefore to encourage peaceful co-existence and national integration by empowering the NCIC to engage in activities that promote national cohesion and integration and by outlawing discrimination based on ethnic grounds. Within the Kenyan context, the NCI Act and the NCIC were created after the tragic events of 2007/2008 post-election violence that claimed lives and displaced others.

42. Let me first dispose of one the petitioner’s argument that **sections 13, 14 and 62** of the *NCI Act* are invalid for failure to give the reasons for their limitation of the rights contrary to **Article 24(2)** which provides as follows:

Despite clause (1), a provision in legislation limiting a right or fundamental freedom— 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..[Emphasis Mine]

43. The petitioner’s argument fails because the President assented to the *NCI Act* on the **24th December 2008**. The Act came into force on the **9th March 2009** vide **Legal Notice No. 32 of 2009** which was before the effective date, that is, **27th August 2010**.

44. **Section 13** of the *NCI Act* provides for the offence of **“Hate Speech”** as follows:

13. (1) A person who-

- (a) uses threatening, abusive or insulting words or behaviour, or displays any written material;**
- (b) publishes or distributes written material;**
- (c) presents or directs the public performance of a play;**
- (d) distributes, shows or plays, a recording of visual images; or**
- (e) provides, produces or directs a programme;**

which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(3) In this section, “ethnic hatred” means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

45. **Section 62** of the *NCI Act* provides for the offence of **“ethnic or racial contempt”** and it states; **“Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fines not exceeding one million shillings or to imprisonment for a term not exceeding five years, or both.”**

46. Hate speech, incitement to violence and other forms of expression excluded from the ambit of protection of **Article 33(2)** are not defined by the Constitution. Because of the deleterious effects of propaganda for war, incitement to violence, hate speech and advocacy for hatred, which I have referred to at paragraph 33 above, the State has an interest and indeed an obligation to impose sanctions on such

conduct through criminal law. **Sections 13 and 62** of the *NCI Act* give effect the State objective to promote ethnic harmony and national cohesion by prohibiting hate speech. This objective is consistent with the national values and principles of the Constitution particularly human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

47. The Canadian Supreme Court was called upon in *R. vKeegstra*[1990] 3 S.C.R.to examine the constitutional validity of section 319(2) of the Criminal Code which prohibits the wilful promotion of hatred, other than in private conversation, towards any “identifiable group,” defined as “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.” in light of the Charter’s guarantee of freedom of expression. In a majority decision the Court found that these were justifiable in a democratic society. Chief Justice Dickson reviewed Canada’s obligations under international law and stated, “*That the international community has collectively acted to condemn hate propaganda, and to oblige State[s] Parties to [the CERD] and [the ICCPR] to prohibit such expression, thus emphasizes the importance of the objective behind [section] 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter.*”

48. Coming back to our own legislation, reading and applying the plain meaning interpretation of the **section 13**, I do not find that this provisions simply ‘criminalise’ the voicing of historical injustices as contended by the petitioner, **section 13** only curtails such freedom of a *person who intends to stir up ethnic hatred or having regard to all circumstances, ethnic hatred is likely to be stirred*. It is thus not merely a question about the falsity, truth, popularity or otherwise of particular information or expression. It appears to me that the statute lays more emphasis on the likely effect of the objectionable information and intention of the person delivering it rather than on the content of the objectionable expression.

I do not therefore find that the impugned provisions merely ‘criminalise’ any of the content as the petitioner seems to imply. The petitioner is thus free to enjoy his freedom of expression as far as possible including speaking out against injustices of minorities as long as this is within the four corners of the Constitution.

49. **Section 62** on the other hand emphasises the intention to incite feelings of contempt and hatred. It does not refer to expression such as would expose the petitioner to prosecution for merely expressing or voicing concerns about historical injustice and marginalization.

50. One of the purposes of the provisions of the *NCI Act* is to make provisions for outlawing discrimination. **Part III** of the Act titled, “*Acts, Conditions and Circumstances Deemed Discriminatory*” enjoins all public establishments to ensure that they represent the diversity of the people of Kenya. In order to meet this objective certain acts are declared discriminatory and unlawful. The petitioner has contended **section 14** of the *NCI Act* does not shield or protect persons who have been subjected to historical injustices to openly speak about them to their future generations.

51. **Section 14** whose marginal note reads ‘**Exception to Part**’ means exceptions to **Part III** under which the section falls. The exceptions made under the **section 14** relate to affording access to facilities and opportunities to a select group of people and hence the section only exempts acts that do not fall within the definition of discrimination or put another way, acts and circumstances that will not be deemed as discriminatory. I am of the view that these exceptions do not directly touch on or apply to hate speech under **section 13** of the Act. I therefore find the petitioner’s prayer in this respect to be misguided. In any case, mere exclusion or omission to address a particular issue, in this case exception on historical injustices, would not in itself render the section unconstitutional.

52. As the offences provided in **sections 14 and 62** of the *NCI Act* fall within provisions of **Article 33(2)**, it is unnecessary for me to consider whether they constitute a general limitation to the right to freedom of expression under **Article 24**. In my view that the provisions of the *NCI Act* are not antithetical to the Constitution but rather complementary to its provisions.

Investigating and charging the petitioner

53. I am called upon to issue orders of *certiorari* and prohibition to prevent the respondents from charging the petitioner over allegations of hate speech.

54. The NCIC is under a statutory duty to investigate any person suspected to have committed any utterances of hate speech. **Section 59** of the *NCI Act* also empowers it to initiate investigations on all cases relating to hate speech and incitement to violence. Further, **section 25(2)(h)** of the Act, bestows upon it wide functions relating to the promotion of national cohesion and integration efforts in the country including to, ***“investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority on the remedial measures to be taken where such complaints are valid.”***

55. The DPP is constitutionally mandated under **Article 157** to order investigations on any information or allegation of criminal conduct and institute criminal proceedings against any person before any court. The office of the DPP is an independent office and this court would not ordinarily interfere in the running of that office and the exercise of its discretion provided it is within the Constitution and the law. The office of DPP is subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

56. In the case at hand, a complaint has merely been forwarded by the NCIC, there is no evidence that a decision has been made to charge the petitioner with any offence. This court cannot interfere with the ordinary duties of the DPP unless it is shown that there is a breach of the petitioner’s fundamental rights and freedoms or that there is a breach of the Constitution.

Disposition

57. Having come to the conclusion that these **sections 13, 14 and 62** of the *NCI Act* are valid, there is no reason for me to intervene in a legal process of investigating the petitioner. The petitioner’s fundamental rights and freedoms protected under the Constitution have not been infringed.

58. It must follow that the petition must be dismissed and it is hereby dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 27th day of July, 2012

D. S. MAJANJA

JUDGE

Mr Mwangi instructed by the Waweru Gatonye and Company Advocates for the petitioner.

Mr Okello instructed the Directorate of Public Prosecutions and the Commissioner of Police.

Mr Kemboi instructed by Kemboi and Ogola Advocates for the 1st and 3rd respondent.

Mr Wasike instructed by the State Law Office for the 4^t