



**Kiburi v Matiang'i & 6 others (Petition E319 of 2021) [2025] KEHC 1632 (KLR)
(Constitutional and Human Rights) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E319 OF 2021

LN MUGAMBI, J

FEBRUARY 20, 2025

BETWEEN

JOHN KIBURI PETITIONER

AND

FRED OKENGO MATIANG'I 1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATION 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

**NATIONAL COHESION AND INTEGRATION COMMISSION 5TH
RESPONDENT**

ETHICS AND ANTI-CORRUPTION COMMISSION 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 13th August 2021 is supported by the petitioner's affidavit in support of even date.
2. The Petition alleges that the 1st respondent a state officer uttered hateful and inciteful utterances aimed at provoking ethnic violence. The petitioner brings this Petition against the 1st respondent for violation of his constitutional and for the inaction by the rest of the respondents to perform their mandate in respect of the 1st respondent's conduct.
3. In view of the foregoing, the petitioner seeks the following reliefs:



- i. A declaration that the 1st Respondent's conduct and actions amounted to violation and/or infringement of the Petitioner's fundamental rights and freedoms under Articles 28, 35, 41, 47 and 50(1) of the Constitution.
- ii. A declaration that the Respondents conduct and actions are in breach of the Fair Administrative Actions Act, Rules of natural justice and violates the Petitioner's legitimate expectations.
- iii. A declaration that the 1st Respondent is a member of an outlawed group hence violated the Constitution and should be charged under Section 77(1) (3(b) (C) (d) (e), and 94, of the Penal code and declared unfit to hold the security docket of the country.
- iv. A declaration that 2nd, 3rd, 4th, 5th, 6th and 7th Respondents abdicated their mandate by failing to check on and/ or control the actions of the 1st Respondent and are ordered to investigate and take action against the 1st Respondent.
- v. A declaration that the 1st Respondent through his remarks has confirmed that he is a member of an outlawed criminal gang and can use the security officers to violate the fundamental rights and freedoms of other Kenyans.
- vi. A declaration that the 1st Respondent's remarks amounted to an incitement of the Public to violence and demeans the office he holds.
- vii. Any other relief that this court may deem fit to grant.
- viii. Costs of the petition.

Petitioner's Case

4. The 1st respondent was the Cabinet Secretary, Ministry of Interior and Coordination at the time of filing this suit.
5. The petitioner alleged that on 20th October 2017 and 10th and 11th October 2020, the 1st respondent at public gatherings made utterances that were aimed at causing ethnic chaos which degraded the mandate of the office.
6. The petitioner avers that the 1st respondent further openly stated that he was a member of the outlawed group, 'Chinkororo'. In addition it is stated that he uttered the following utterances: "oyio ogochiesa tamanyeti chinkororo, inche nenkororo koru aiga ,abamura aiga nabaremu tokoruana na abamanyi tuabaita,inche intenenerete abasikari nabo inkobatebia barigererie esemo abamo baakwe chindoe" which is translated to mean;
 - i. The one playing does not know the chinkororo, I am the Enkororo from this place.
 - ii. Don't be threatened, we are the chinkororo and we habitually beat up the Maasai, so nobody can threaten us.
 - iii. Our youth, you are brave, if a person tries to stop you from voting, am in charge of security I will authorize police to look away and allow you to slap such a person.
 - iv. Describing himself as an "Ekororo" meaning he is a member of an outlawed group of "chinkororo".
 - v. "this is our home, they also have their homes (aiga inseito nabarabuo imbawate sobo).



7. According to the Petitioner, the 1st respondent having been a State Officer is required by law not to engage in any threats that can cause a security scare in the nation. Moreover, that the utterances were in violation of *the Constitution* advancing ethnic violence and hate speech. That the 1st respondent promoted negative ethnicity and insecurity in violation of Article 10, 75 and 232 of *the Constitution*.
8. The petitioner depones that in a letter dated 14th October 2020 he wrote to the 1st Respondent demanding withdrawal of the cited utterances and an apology. In like manner, he lodged his complaint vide a letter dated 4th August 2021 with the 2nd respondent and the 5th respondent vide a letter dated 12th October 2020 but none of the institutions responded or took action.
9. The petitioner furthermore faults the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents for failing to commence any legal action against the 1st Respondent's impunity and hateful ethnic incitements as required by the law. He asserts that these respondents have discriminatorily acted against other members of the public who make similar utterances yet have failed to apply the same to the 1st Respondent who continue to disgrace the office.

1st to 5th Respondents' Case

10. These respondents' responses are not in the Court file.

6th Respondents Case

11. In opposition to the Petition, the 6th Respondent's filed grounds of opposition dated 15th October 2021 on the premise that:
 - i. The Commission is established under Section 3 of the Ethics and Anti-Corruption Act, 2011 (EACC) pursuant to Article 79 of *the Constitution* and its independence is guaranteed under Article 249(2)(b) of *the Constitution* that it shall not be subject to direction or control by any person or authority. Therefore, granting prayer (2) of the application and prayers (b) & (d) of the Petition would contravene the provisions of Article 249 (2) (b) of *the Constitution*.
 - ii. The powers of the 6th Respondent are subject to abuse and for the Commission to avert this, Article 252 (1) (a) of *the Constitution* gives power to the 6th Respondent to conduct investigations on its own initiative or on a complaint by a member of public. The Petitioner has not made any reports/ complaints of the alleged utterances by the 1st Respondent to the 6th Respondent which have not been acted upon.
 - iii. The Petitioner has not demonstrated any acts or omissions attributable to the 6th Respondent that has resulted to violations of fundamental rights and freedoms of the Petitioner to warrant the grant of the orders sought against the 6th Respondent.
 - iv. The application and the Petition are therefore frivolous, vexatious, incompetent and improperly before the court, as against the 6th Respondent and therefore abuse of the court process.
 - v. Through the Petitioner's letter dated 12th October 2020 (annexure JN4) the 5th Respondent is seized with the matter and is vested with the mandate, pursuant to the provisions of Section 25 (2)(h) of the National Cohesion and Integration Commission *Act No.11 of 2008* 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.



- vi. The 6th Respondent has no clear identifiable stake in this matter as no order has been sought against it and prays that its participation in these proceedings be dispensed with.
- vii. The Petitioner has not made out a prima facie case to warrant the issuance of the orders sought against the 6th Respondent and the same should be dismissed with costs.

7th Respondent's Case

12. The 7th respondent's response to the Petition is not in the file or Court Online Platform (CTS).
13. The 7th respondent's only response is with reference to the Notice of Motion Application dated 13th November 2021 with reference to the petitioner's challenge to the 7th respondent's representation of the 1st respondent as his Counsel.

Parties Submission

Petitioner's Submission

14. The firm of C.M. Ongoto and Company Advocates for the petitioner filed submissions dated 20th February 2024. Counsel identified the issues for determination as: whether the petitioner is entitled to the relief sought.
15. Counsel reiterating the petitioner's averments in the supporting affidavit submitted that there is a legitimate expectation that a public officer will perform their duties with professionalism.
16. Counsel submitted that the 1st respondent had failed to do this while the other Respondents neglected to perform their mandates in this regard as empowered by their various statutes and *the Constitution*.
17. Counsel in light of this submitted that the respondents had failed to respect and uphold the values and principles set out under Article 10, Chapter 4 and 6 of *the Constitution*. Reliance was placed in *Okoiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Parties) [2022] KEHC 3209 (KLR)* where it was stated that under Section 40 of the *Leadership and Integrity Act*, a State officer, upon assumption of office is required to subscribe to a specific Leadership and Integrity Code. Where the State Officer breaches that Code, section 41 provides as follows: a breach of the Code amounts to misconduct for which the State officer may be subjected to disciplinary proceedings.
18. In conclusion, Counsel submitted that the 1st respondent had failed to act in accordance with the integrity of his office, demeaned the office, by his utterances which in turn showed a blatant disrespect of the integrity of the office which he held. Accordingly, Counsel urged that the Petitioner was entitled to the reliefs sought.

2nd to 7th Respondents' Submissions

19. State Counsel, Eve Mbede on behalf of these respondents, filed submissions dated 21st November 2024. The key issues for discussion were set out as: whether the respondents should be compelled to carry out investigations on the allegation's utterances by the 1st Respondent and whether the reliefs sought are merited.
20. Counsel on the first issue referring to Article 245 of *the Constitution* and Section 35 of the *National Police Service Act* in relation to the 2nd and 3rd Respondent submitted that the said Respondents have the power to investigate crimes once a complaint is lodged. Reliance was placed in *Republic V*



Commissioner of Police & Another Ex-Parte Michael Monari & another [2012] KEHC 4595 (KLR) where it was held that:

“...the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

21. In like manner, Counsel submitted that the 4th Respondent’s mandate is clearly spelt out under Article 157 of *the Constitution* and is empowered to direct the 2nd Respondent. Reliance was placed in Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR where it was held that:

“In this case in terms of prosecutorial powers, the Director of Public Prosecutions may pursuant to Article 157(4) of *the Constitution*, direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction. Upon receipt of such directions, pursuant to Section 35(h) of the *National Police Service Act*, the Inspector General of Police may direct the Directorate of Criminal Investigations to execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*. Clearly therefore there is a clear chain of command set out hereinabove. When it comes to the exercise of prosecutorial powers, as between the three entities, the Director of the Public Prosecutions has the last word. In other words, no public prosecution may be undertaken by or under the authority of either the Inspector General of Police or the Director of Criminal Investigations without the consent of the Director of Public Prosecutions.”

22. Further, Counsel asserted that the 5th respondent under Section 59(1) of the *National Cohesion and Integration Act* is mandated to investigate any person suspected to have committed any utterances of hate speech or incitement to violence.

23. In the 1st respondent’s defense, Counsel submitted that the impugned remarks where not meant to incite feeling of contempt and hatred as alleged. Moreover, since the utterances did not constitute an offence under the *National Cohesion and Integration Act*, the 5th respondent could then not be compelled to carry out an investigation against the 1st Respondent. Reliance was placed in Chirau Alimwakwere V Robert M. Maberu & 4 Others [2012] eKLR where it was held that:

“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*.

Section 62 on the other hand emphasizes 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.”

24. Correspondingly, Counsel submitted with reference to the 6th respondent that Article 252 of *the Constitution* makes known that in addition to conducting its own investigations the Commission also investigates complaints made by members of the public. As such Counsel submitted that the petitioner ought to have filed the complaint with the 6th respondent before filing this suit in relation to breach of the code of ethics of public officers. It is noted that the petitioner failed to do so.
25. In view of the foregoing, Counsel submitted that the petitioner was not entitled to the relief sought as had failed to discharge the burden of proof in his case as is required by law. Consequently, Counsel urged that the petitioner ought to bear the costs of this suit.

6th Respondent’s submissions

26. On behalf of the 6th respondent Counsel, Mercy Biwott filed submissions dated 26th August 2024 and highlighted the issues for discussion as: whether the 6th respondent can be compelled to investigate and take actions against the 1st respondent and whether the 6th respondent abdicated its mandate by failing to check or control the actions of the 1st respondent.
27. On the first issue, Counsel submitted that an order compelling the 6th respondent to carry out its mandate can only be issued where it has failed, neglected or refused to perform that public duty to the detriment of a person who has legal right to expect performance of that duty. Likewise, that issuance of a mandamus order would be tantamount to interfering with its mandate. It is noted that Section 3(1) of the Ethics and Anti-Corruption Act requires that the 6th respondent investigate and make a recommendation to the 4th respondent.
28. Reliance was placed in *Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR where it was held that:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”
29. Counsel submitted that in this matter, the 6th respondent had not failed to carry out its mandate as alleged. On the contrary it was noted that the petitioner had not lodged any complaint upon which



the 6th respondent would have acted. Reliance was placed in R-vs- Anti-counterfeit Agency & 2 others ex-parte Surghipharm [2015] eKLR where it was held that:

“The courts ought not usurp the statutory mandate of investigating and prosecuting authorities to investigate and undertake prosecution in the exercise of discretion conferred upon those authorities. The mere fact that the intended or ongoing investigations or prosecutions are in all likelihood bound to fail is not a ground for halting those proceedings by way of Judicial Review since Judicial Review proceedings are not concerned with merits but with the decision making process.”

30. Consequently, in the second issue, Counsel submitted that the 6th respondent had not failed to check the 1st respondent’s actions. Furthermore, it was submitted that it was evident that the petitioner had failed to utilize and exhaust the available avenues as the first port of call. Reliance was placed Moses Kithinji v Mohammed Abdi Kuti [2020] eKLR where it was held that:

“Be the as it may. nothing shows that the petitioner herein lodged the matters complained of with EACC. Notably. the petitioner has levelled charges of derelegation of duties by EACC. Yet. EACC is not a party in these proceedings and there is no evidence of a report of the matters complained to them that was produced. These matters only augment the argument by the respondent that EACC is the proper forum for these allegations.”

Analysis and Determination

31. I have perused the pleadings and submissions of the parties herein and in my view the issues that arise for determination are:
- i. Whether this Court has jurisdiction to entertain the instant petition.
 - ii. Whether the petitioner’s rights under Articles 28, 35, 41, 47 and 50(1) of *the Constitution* were violated.
 - iii. Whether the petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain the instant petition.

32. The importance of a Court’s jurisdiction to entertain matters before it cannot be over emphasized. The Supreme Court In the Matter of the Interim Independent Electoral Commission [2011] KESC 1(KLR) underscored the significance of jurisdiction as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent...”

33. The jurisdiction to hear and determine Constitutional disputes is granted to this Court by *the Constitution* in particular, Article 165 (3) of *the Constitution* and includes:
- a)
 - b) jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened
 - c)
 - d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—



- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
34. Despite the extensive jurisdiction of the High Court in constitutional adjudication pursuant to Article 165 of *the Constitution*, it is now understood that this jurisdiction is not exercised in a vacuum and is therefore subject to applicable principles of law that have evolved jurisprudentially in the field of constitutional litigation.
 35. Judicial restraint which respondents placed heavy reliance on is among the judicial principles that the Court may consider and decline intervention in a particular matter particularly if the Court is convinced that the issue at hand ought to have been dealt appropriately before a different forum that is vested with the legal mandate over the matter.
 36. The Supreme Court discussed this principle in *Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited* (2020) eKLR in which it explained as follows:
 - “(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...”
 37. The High Court in *Law Society of Kenya v Attorney General & Another; National Commission for Human Rights & Another (Interested Parties)* (2020) eKLR reiterated this principle when it observed thus:
 - “...Where *the Constitution* has reposed specific functions in an institution or organ of the State, the Court must give those organs sufficient time or leeway to discharge their constitutional mandate and only accept an invitation to intervene when those organs or bodies have demonstrably been shown to have acted contrary to their constitutional mandate or in contravention of *the constitution*...”
 38. It thus behooves this Court to examine the respective specific mandates of the respondents and decide whether this is a matter that this is a matter for which this Court’s intervention must be called to resolve or not.
- a. 2nd and 3rd Respondents Mandate**
39. The 2nd Respondent’s office is established Article 240(2)(i) of *the Constitution*. Under Article 245 of *the Constitution*, one of the key functions of the 2nd Respondent is investigation of crime and is stated as follows:
 - (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - a. The investigation of any particular offence or offences;



40. The *National Police Service Act*, 2011 which explicates and sets out further the mandate of the National Police Service by providing under Section 24 (e) the functions of the Police among them; the investigation of crimes.
41. On the other hand, the 3rd Respondent is established under Section 28 of the Act as follows:
- There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.
42. The functions of the 3rd Respondent are accordingly provided under Section 35 of the Act as follows:
- i. collect and provide criminal intelligence;
 - ii. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cybercrime among others;
 - iii. maintain law and order;
 - iv. detect and prevent crime;
 - v. apprehend offenders;
 - vi. maintain criminal records;
 - vii. conduct forensic analysis;
 - viii. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
 - ix. co-ordinate country Interpol Affairs;
 - x. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - xi. perform any other function conferred on it by any other written law.

4th Respondent

43. The 4th Respondent derives his powers from Article 157 of *the Constitution*. Article 157(4), (6), (10) and (11) of *the Constitution* provides as follows:
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may —
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and



- c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
- (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
44. The Office of the Director of Public Prosecutions to be able to perform its functions enjoys independence where in Section 6 it is provided as follows:
- Pursuant to Article 157(10) of *the Constitution*, the Director shall—
- a. not require the consent of any person or authority for the commencement of criminal proceedings;
 - b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution*, this Act or any other written law; and
 - c. be subject only to *the Constitution* and the law.
45. The Court of Appeal in *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR opined as follows:

“(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”

In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:

“At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.”

Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.



- (42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

5th Respondent

46. The 5th Respondent is established under Section 15 of the *National Cohesion and Integration Act* which is:

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.

47. The powers of the 5th Respondent are set out under Section 26 of the Act as follows:

1. The Commission shall have all the powers necessary or expedient for the proper performance of its functions under this Act.
- (2) In the discharge of its functions under this Act, the Commission—
 - a. shall not be subject to the direction or control of any other person or authority;
 - b. shall publish the names of persons or institutions whose words or conduct may undermine or have undermined or contributed towards undermining good ethnic relations, or who are involved in ethnic discrimination or the propagation of ethnic hate;
 - c. may enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purpose for which the Commission is established;
 - d. control, supervise and administer the assets of the Commission in such manner and for such purposes as best promote the purpose for which the Commission is established;
 - e. receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom; and
 - f. open a banking account or banking accounts for the funds of the Commission.

48. In *Senator Johnstone Muthama v Director of Public Prosecutions & 2 others; Japhet Muriira Muroko (Interested Party)* [2020] KEHC 9053 (KLR) the Court noted as follows:

“ 135. It is clear that the above statement was directed to independent constitutional offices, i.e. the National Cohesion and Integration Commission, the IGP and the DPP. The only question to be addressed regarding the statement by the Cabinet Secretary is whether he had powers to give directions to these agencies. Section 26 (2) (a) of the *National Cohesion and Integration Act*[95] provides that in the discharge of its functions under the Act, the Commission shall not be subject to the direction or control of any other person or authority. This provision renders the Cabinet Secretary’s direction to the Commission legally frail. Simply put, the Cabinet Secretary has no powers under the law to give



directions to the Commission. His purported direction to the Commissions flies on the face of the above provision.”

6th Respondent’s mandate

49. The 6th Respondent is established under Chapter 6 under Article 79 of *the Constitution* and Section 3 of the *Ethics and Anti-Corruption Commission Act* as follows:

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

50. The functions of the 6th Respondent under Section 11(1) of the EACC Act are stipulated as follows:

In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

- a. in relation to State officers,
- b. develop and promote standards and best practices in integrity and anti-corruption;
- c. develop a code of ethics;
- d. work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- e. receive complaints on the breach of the code of ethics by public officers;
- f. investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
- g. recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
- h. oversee the enforcement of codes of ethics prescribed for public officers;
- i. advise, on its own initiative, any person on any matter within its functions;
- j. raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality;
- k. subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- l. institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other



punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

51. In *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2018] eKLR the Court held as follows:

- “73. The EACC is the only constitutional Commission that is not specifically located in Chapter Fifteen of *the Constitution*.^[48] Its composition and aspects of its mandate are specifically statutory.^[49] Subject to the provisions of Article 79 of *the Constitution*, the EACC was established by the EACC Act. It replaced the Kenya Anti-Corruption Commission (KACC) after the adoption of *the Constitution*.^[50]
74. As we construe the additional mandate provided under Section 11 of the Act, it is imperative that we determine whether the said mandate can be read in manner consistent with the mandate contemplated under Article 79 of *the Constitution*. A clear reading of Article 79 of *the Constitution* leaves no doubt that the constitutional mandate of the Commission contemplated under the said provision is to “ensure compliance with, and enforcement of, the provisions of Chapter Six of *the Constitution*.”
75. The preamble to the EACC Act reads “An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of *the Constitution*, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes.”
76. *The Constitution* provides, under Chapter 6, for leadership and integrity of all public officers. The Chapter is predicated upon the assumption that State officers^[51] are the nerve Centre of the Republic and carry the highest level of responsibility in the management of state affairs and, therefore, their conduct should be beyond reproach. This means that under *the Constitution* Kenyans decreed that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. This is to ensure that those entrusted with the management of public affairs and resources are persons of good character, probity and uprightness. The chapter lays down the principles upon which the State Officers should conduct themselves. According to Black’s Law Dictionary,^[52] the term Integrity means “soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with “probity,” “honesty,” and “uprightness.”
77. The architecture of Constitution of Kenya, in our view, was intended to deal with a long legacy of impunity, institutional frailties and embedded corruption. The Centre-piece of anti-corruption and public integrity reform is Chapter Six of *the Constitution*, the *Anti-Corruption and Economic Crimes Act* and the *Leadership and Integrity Act*.
78. The EACC is mandated under Section 11(1)(d) of the ACECA to investigate and recommend to the DPP the prosecution of any acts of corruption or



violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to Chapter Six of *the Constitution*. Further, under the provisions of Section 35 of ACECA as read with the provisions of Section 11(1) (d) of EACC Act, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not.

79. The EACC lacks prosecutorial powers and has to forward all cases it has investigated to the Director of Public Prosecutions (DPP) for prosecution. There is no doubt that the State's prosecutorial powers are vested in the DPP under Article 157 of *the Constitution*.”
52. The bedrock that underlies this case as the 1st respondent's utterances that the Petitioner complains violated the constitutional standards specified in Article 75 in regard to State officers and that despite making the complaint; the 2nd and 5th Respondent, did not act on the Petitioner's complaint.
53. The 6th respondents decried the petitioner's failure to lodge his complaint with the 6th Respondent so as to give it an opportunity to investigate the matter.
54. I would from the onset point out that the nature of allegations regarding the alleged utterances one matters that would call for an investigation to determine whether or not such utterances were actually made, when, by who and in what context or circumstance so as to assist in determining if the implication of those words is as alleged by the Petitioner or not. Further, considering that the words were allegedly made in mother-tongue, the integrity of the translation and the competence of the translator and the necessity of the certificate of translation are to the admissibility of the evidence that would assist the Court in establishing the truth which without a credible investigation may be difficult to find.
55. In that regard, the Court cannot thus be the first port of call as the Court does not have an investigative machinery. The action thus taken by the Petitioner of reporting complaint on the alleged utterances to the 2nd and 5th Respondent was thus the correct course as from their mandate, it is obvious that issue fell within the scope of their constitutional or legislative responsibility.
56. In his affidavit in support of the Petition, the Petitioner annexed the letter dated 14th October, 2020 and marked 'JN2' that notified the 1st respondent of his intention to institute legal proceedings arising from the alleged utterances as he considered them to be in violation of Article 75 of *the Constitution*. The Petitioner also annexed the letter addressed to the Inspector General of Police dated 21st August, 2021 'JNM3' referenced "Complaint Against Fred Matiangi Cabinet Secretary for the Ministry of Interior and Coordination of National Security" and equally to the Chairman of National Cohesion & Integration Commission, a letter dated 12th October, 2020 on the same subject.
57. The two letters bear the receiving stamp of the National Cohesion and Integration Commission of 4th August, 2020 and 12th October, 2021 respectively. Despite this, the Petitioner deponed that he neither received a response to his complaint nor was he notified of any action taken by the two Institutions.
58. The two Respondents, the 2nd and 5th Respondent did not bother to respond to the Petitioner. The question thus becomes, what was the Petitioner to do, should the Petitioner come to this Court to complain about the two public bodies for the failure to respond to his complaint?
59. *The Constitution* prescribes the values and principles of public service under Article 232 (1) (c) & (f) by stating that provision of public services shall among others be responsive, prompt, effective, timely and transparent.



60. The Constitution has created structures to facilitate the achievement of that objective so that these standards do not become mere platitudes. Under Article 59 (1) of the Constitution, the Constitution creates the Kenya National Human Rights and Equality Commission whose functions among others is what is provided in Article 59 (1) (i)
- “to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive or unresponsive official conduct.”
61. Under article 59 (4), the Constitution states that Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions. It is in compliance with this Constitutional dictate that the Commission on Administrative Justice was birthed through an Act of Parliament.
62. The preamble to the Act states that it is “An Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes.”
63. Under Section 2 (1) (b) of the Act, administrative action among other means:
- “a failure to act in discharge of a public duty required of an officer in public service”
64. Part of the functions of the Commission under Section 8 (b) includes
- “Investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector”
65. The Petitioner ought to have reported the dodging of the responsibility by the 2nd and 5th Respondents to the Constitutional body clothed with the mandate to investigate maladministration by public entities, while complaints relating to breach of Article 75 ought to have been lodged with the Ethics and Anti-Corruption Commission.
66. In the light of the doctrine of ripeness and judicial restraint, this Court cannot delve deeper into the merits of the issues raised in the Petition until such a time the matter shall be ripe and is properly placed before the Court. It is the responsibility of the Petitioner in processing a complaint of this nature to abide by the defined legal structures and mechanisms for processing of the complaint against the 1st Respondent and against the 2nd and 5th respondents.
67. It is my considered view that the dispute in this petition has not yet matured for judicial intervention at the moment as there are bodies vested with mandates to address the complaint by the Petitioner that the Petitioner has overlooked before rushing to Court.
68. For this reason, my humble view is that the petition is not yet ripe for determination and prudence demands that this Court allows the relevant constitutional and legislative bodies to carry out their mandate as stipulated in the law first before assuming jurisdiction.
69. I need not consider any other issue in this petition.
70. The Petition is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH FEBRUARY, 2025.

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L N MUGAMBI
JUDGE

