Kimaru v Inspector General of Police & another; Independent Medico-Legal Unit & another (Interested Parties) (Constitutional Petition E007 of 2023) [2025] KEHC 1782 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION E007 OF 2023

DKN MAGARE, J

FEBRUARY 6, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10,

21, 22, 24, 25(A), 28, 29, 31 (A), (B), (C), 40, 47 & 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION

OF THE RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE PROCUDRE RULES), 2013

BETWEEN

CATHERINE WANJIRA KIMARU ..... PETITIONER

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

OFFICE OF THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

INDEPENDENT MEDICO-LEGAL UNIT ..... INTERESTED PARTY

INDEPENDENT POLICING OVERSIGHT AUTHORITY .... INTERESTED PARTY

JUDGMENT

1. By a Petition dated 22.12.2023, the Petitioners sought the following reliefs:

    i. A declaration that the crackdown/operation and subsequent seizure of motor vehicle 446UBG at the Petitioner's home was unconstitutional for violating the provisions of Articles 47 and 50 of the *Constitution*.

    ii. A declaration that the brutal arrest, cruel, inhuman, degrading and extreme ill-treatment inflicted upon the Petitioner constituted violation of her fundamental rights contrary to Article 25(a) and Article 29 (a), (d), (f) of the *Constitution*.

    iii. A declaration that the forceful, cruel, painful dragging of the Petitioner by police officers constituted violations of her right to human dignity under Article 28 of the *Constitution*.

    iv. A declaration that the taking of pictures of parts of the Petitioner's home and dragging by male police exposing her body constituted violation of her right to privacy.

    v. A compensation for general damages, exemplary damages, punitive damages, special damages of Kshs. 50,000/- and moral damages to torture.

    vi. Release of motor vehicle registration 446UBG.

    vii. Interest

    viii. costs

2. The Petition was supported by the Supporting Affidavit of Catherine Wanjira Kimaru, sworn on 22.12.2023, reiterating the contents of the Petition.

3. The 1st Respondent did not file any document in Response. However, the 2nd Respondent filed Grounds of Opposition dated 22.12.2022 as follows:

    a. The Petition was defective as it did not meet the threshold in Anarita Karimi versus Republic.

    b. The Petitioner offended Sections 3 and 6 of the *Independent Policing Oversight Authority Act*.

    c. Petitioner had not exhausted measures towards finding the police misconduct against the doctrine of exhaustion.

    d. The Petition offends Section 74 of the *Public Service Commission Act*.

Submissions

4. The Petitioner filed submissions dated 7.8.2024 in support of the petition. They contested the issues raised in the 2nd Respondent's grounds of opposition. She submitted that the crackdown was unconstitutional for failure to adhere to Articles 47 and 50 of the *Constitution*. In this regard, it was submitted that the police officers infringed on the Petitioner's rights under Articles 25, 28, 29, 31 of the *Constitution*.

5. To buttress her case, she relied on Harun Thungu Wakaba V AG (2010) eKLR and Margaret Wanjiru Ndirangu & 4 Others v AG (2015) eKLR to submit that her rights against cruel, torture, and degrading punishment and the right to dignity and security of person and privacy were infringed by acts of the Respondents. She further stated that the Respondents infringed on her right to property under

Article 40 of the *Constitution* by destruction of her garage. Secondly the same Article was infringed by continued detention of the motor vehicle 446UBG.

6. She posited that she was entitled to damages to the tune of Kshs. 5,000,000/= as general damages and Kshs. 50,000/= as special damages. This was not elaborated, of the basis and proof of the same. This is based on the altruism set out in the case of Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, where Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

7. Nothing was set out in the submissions of wrongful act, damnum sine injuria. It should be recalled, that injury must be pleaded, then proved.

8. The 2nd Respondent filed submissions dated 12.9.2024. They submitted that the Petition does not meet the threshold set out in the case of Anarita Karimi v Republic (1976-1980) KLR 1272. This was due to the alleged failure to particularize.

9. They further submitted that the Petition was premature, for failure to exhaust all procedures before seeking remedies herein. They placed reliance on the case of William Kabogo Gitau v Ferdinand Ndung'u Waititu [2016] eKLR. An excerpt from the said decision will illuminate the 2nd Respondent's submissions:

> 48. In my view, while this Court enjoys unlimited original jurisdiction in criminal and civil matters by dint of Article 165 (3) (a) of the *Constitution*, that is not a substitute for other first ports of call in determining such civil and criminal matters. In the present case, the Petitioner alleges the commission of various criminal offences and thus concludes that the Respondent is guilty of the same and hence in violation of Articles 10 (2) and 73 of the *Constitution*.
>
> 49. I hold the view that the Petitioner's contentions in regard to the commission of the alleged offences must be raised with the relevant authorities and this Court cannot at this juncture usurp the powers of such authorities. This Court cannot for instance sit to investigate matters of alleged forgeries of academic documents as invited by the Petitioner and neither can the Court make conclusions pertaining to those allegations in the absence of evidence for instance that the investigating agencies have made investigations and the relevant Court has made a finding as to the innocence or otherwise of the Respondent on those allegations.

10. The court was thus urged not to usurp the authority of other bodies, vested with jurisdiction to deal with issues raised. They sought refuge in the 10th edition of the Black's Law Dictionary on what constitutes the doctrine of exhaustion. They stated that the petition did not meet the constitutional threshold as it did not even have evidence. They beseeched the court to dismiss the petition for lack of merit.

Analysis

11. Before court ventures into the depths of the factual matrix of the Petition, it has to state from the outset that where there are allegations of violation of the Bill of Rights, the court is bound to adopt the interpretation that most favours the enforcement of rights. Article 2(1) of the *Constitution* provides that the *Constitution* is the Supreme Law of the Republic and binds all persons. Therefore, both the court and parties are bound by the constitutional imperative to favour enforcement of rights.

12. Article 259 of the *Constitution* enjoins the court to interpret the *Constitution* in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights, and fundamental freedoms in the Bill of Rights, and in a manner that contributes to good governance. This is also set out in more succinct manner in regard to Article 159 (2) (e) of the *Constitution*. The said article confers upon this court the power to protect and promote its purposes and principles. the *Constitution* should be given a purposive interpretation. the *Constitution* of Kenya provides prominence to national values and principles of governance. The Supreme Court, in the case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, stated as follows, in respect of a purposive interpretation in relation to interpretation of statutes to reveal the intention of the statute. The court observed as follows:

> In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
>
> > The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation, which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

13. This court, John M. Mativo as then he was, in the case of Republic v Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon [2019] eKLR, pronounced itself on the purposive interpretation, stating as follows:

> 31. A contextual or purposive reading of a statute must, of course, remain faithful to the actual wording of the statute. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously, one needs to examine the particular statute and all the facts that gave rise to it. All public power must be sourced in law.
>
> 32. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. In Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others. Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-
>
> > " In giving effect to this approach, one should, at least,
> >
> > i. look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved;
> >
> > ii. study the various sections wherein the purpose may be found;

iii. look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with);

iv. draw logical inferences from the context of the enactment."

14. The obligation bestowed on this Court resounds with the unique role of the judiciary system in constitutional interpretation. In Marbury vs. Madison, 5 U.S. 137 (1803), it was observed that the *Constitution* binds the courts and other departments and must be interpreted when a dispute requires it. the *Constitution* obligates all courts to promote the spirit, purport, and object of the Bill of Rights when interpreting legislation. In Phumelela Gaming and Leisure Ltd v Gründlingh and Others (2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883, the Constitutional Court observed as follows:

> " A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.

15. This court is thus the ultimate guardian of the *Constitution* and its values and usually the last bastion of hope. The constitutional court of South Africa in My Vote Counts NPC v Speaker of the National Assembly and Others (CCT121/14) [2015] ZACC 31 (30 September 2015) stated thus:

> We are mindful that it is this Court that is the final arbiter on adherence to the *Constitution* and its values. On this, in Doctors for Life, Ngcobo J says:-
>
> > " ...This Court 'has been given the responsibility of being the ultimate guardian of the *Constitution* and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the *Constitution*] must be fulfilled'. It would therefore require clear language of the *Constitution* to deprive this Court of its jurisdiction to enforce the *Constitution*."

16. The issues that present themselves for determination are:

a. whether the Respondents acted in breach of the constitutional right of the Petitioner under Articles 25, 28, 29, 31,47 and Article 50 of the *Constitution*.

b. Whether the Petitioner is entitled to the reliefs sought.

17. The Petitioner maintained that the Respondents' actions in seizing motor vehicle registration No. 446UBG belonging to her husband, violated Articles 47 and 50 of the *Constitution*, as they violated the Petitioners' right to fair administrative action and hearing before such an administrative process. The case involved her alleged arbitrary arrest, contrary to her constitutional right to freedom and security under Article 29 of the *Constitution*.

18. Her further contestation was that her dignity, right to privacy under Article 31 and Article 48 of the *Constitution* was infringed upon. Though this aspect required that witnesses and cogent evidence is produced.

19. Breach of privacy under Article 31 of the *Constitution* is a serious allegation. Unfortunately, no evidence was placed before the court to support the allegation. The Petitioner proceeded as regards the arbitrary inversion and taking pictures of her private home as if the alleged invasion was common knowledge that the court ought to know.

20. For example, the allegations that the Respondents breached her right under Article 25 as against torture, cruel and inhumane punishment was not supported. Even a simple medical evidence was not tendered to show that the petitioner had any contact that resulted in her injury.

21. This leaves the court with three pertinent roles. First, the existence of rights as claimed in the petition must be established. Secondly, to find whether there was a breach of that right. Lastly, by whom was the breach, if any, was carried out. Whereas this is a constitutional petition, the evidential burden still lies on whoever alleges. This is in line with Sections 107-109 of the *Evidence Act*. The said sections posit as hereunder:

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

22. The proof may be nuanced since the matters are usually determined by affidavits. The court will now address the rights and evidence of their breach. The first one is the right to fair administrative action, which is enshrined under Article 47 of the 2010 Constitution as doth;

> 1. Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall —provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

23. The second aspect relates to Article 29 of the *Constitution* which provides for the right to freedom and security of the person, as follows:

> Every person has the right to freedom and security of the person, which includes the right not to be—
>
> (a) deprived of freedom arbitrarily or without just cause;
>
> (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.

24. The third right complained of was the right against torture, cruel and inhuman punishment. According to Article 25(a) of the *Constitution*, this right cannot be limited or derogated from. The other Articles are listed but no meat is supplied to them.

25. The Respondents maintain that the case is premature for failure to exhaust lawful procedures and the precision required of constitutional petitions set out in the locus classicus of Anarita Karimi versus Republic [supra].

26. The facts supporting contravention or infringement of constitutional rights is a matter that should be spelled out by the Petitioner. There is nothing more painful than listing a list of allegations and annextures without supplying them. This is in breach of the understanding of constitutional practice that a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This was so reiterated by the Supreme Court when discussing the predeterminants of a proper Constitutional Petition, in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR. The court pronounced itself as follows:

> Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

27. The Petitioner herein should set out with a reasonable degree of precision that she complains about the provisions said to be infringed and how they are alleged to be infringed. The foregoing was captured in Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] KLR, where the court observed as follows:

> [i]f a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...

28. Precision is thus crucial for the court to determine the actual dispute between the parties. Precision goes to the root of the petition as a pleading. In Constitutional Petition No E265 of 2021, Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another [2021] eKLR, the

court discussed the need for precision in approval to the precedent in Anarita Karimi decision[supra] and observed as follows: -

> The foregoing finding (Anarita Karimi Njeru) received endorsement from the Court of Appeal in Nairobi Civil Appeal No 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance[2013] eKLR as follows –
>
> (41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

29. The Petition herein meets the threshold, though it could bring out the alleged breaches better, to meet the threshold for constitutional petitions. The Petitioner has laid out the constitutional rights alleged to have been violated and how they were violated. It is a world of difference to set up the allegations precisely on one part and proving them on the other. The allegation that the Petition does not meet the threshold in Anarita Karimi V Republic does not hold water. The Respondent confuses the lack of merit with the listing of the infringement.

30. Whereas the petition laid base to a series of alleged infringements, the same fell far short on evidence. The petitioner alleged to be a Chief of a location in Nyeri County. There was no evidence led to that effect. She alleges existence of a vehicle that belongs to her husband, albeit unknown but there is nothing to show, not even a rusty photo.

31. The Respondents contended that the Petitioner ought to have pursued the acts of the police through IPOA and also appellate processes provided by the Public Service Commission. The grievances related to not being involved in the crackdown as matters of political nature and are not, ex facie, justiciable.

32. The doctrine of justiciability was addressed at length by Mrima J, in Kirungia v Ruto, Deputy Leader of Jubilee Party (Constitutional Petition 11 of 2022) [2022] KEHC 9940 (KLR) (Constitutional and Human Rights) (7 July 2022)(Ruling), where the court posited as doth:

> In Anthony Miano & others v Attorney General & others [2021] eKLR, the Court observed that: -The concept of non-justiciability of disputes before Courts is a sound one in law. It has its basis in Article 159 of the *Constitution* which routes for alternative dispute resolution mechanisms. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined.

33. The court proceeded to address the doctrine of justiciability in the following terms:

> 52. The three doctrines constituting the concept of non-justiciability were discussed at length in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020) eKLR. The Court stated as follows:

96. The Black's Law Dictionary, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:

> Proper to be examined in courts of justice or a question as may properly come before a tribunal for decision

98. We shall commence with the political question doctrine. Black's Law Dictionary, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government.

99. The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L. Bendor; Are there any limits to justiciability" The jurisprudential and constitutional controversy in light of Israeli and American experience"

34. Therefore, to determine whether a crackdown on foreign-registered vehicles was constitutional, it had to be conceptualized, problematized, and contextualized within a policy framework in a political context. No material was placed before the court to find either way. The allegations remained bare and devoid of context and evidence. The ownership of the vehicle was not laced within the decisional purview of the court. In a rather paradoxical way, the Applicant alleges that the crackdown was conducted by NTSA but was not given context or even a material breach that occurred.

35. Finally, for the court to rule on the legality of the crackdown on the particular vehicle, it must be read within the gamut of protections under Article 27 of the *Constitution*, which prohibits discrimination. Was there any discrimination with foreign registered vehicles? Was the vehicle in the country legally, and did the Petitioner have any claim to it? All these were left unanswered.

36. On the other issues, there is a nexus between her official position and the alleged events. Her being a chief is thus irrelevant to the purpose of the petition's determination. In any case, any workplace discrimination, as a chief, qua chief, is an issue to be exhausted within her context as a public service employee. There was no justification for the involvement of chiefs in a crackdown on vehicles.

37. The Public Services Commission's involvement is not necessary for the issues raised in the petition. There was no justiciable dispute for this court to consider regarding not being involved as a chief. Further, there was no evidence of any breach of the *Constitution* in relation to the impounding of the alleged vehicle. There was no evidence set forth on the police's involvement and what their actions were. No wonder IPOA is set up to investigate the matters complained of and create a paper trail.

38. Raising questions of a constitutional nature does not mean that the party raising them must win. The petitioner must prove their case through cogent evidence or such evidence that can call for the Respondent to answer. There was thus no justiciable case based on a real and substantial controversy that unequivocally calls for adjudication of the rights asserted. In the case of Patrick Ouma Onyango & 12 Others v The Attorney General & 2 Others, Misc. Appl. No. 677 of 2005, the court endorsed the doctrine of justiciability, as stated by Lawrence H. Tribe in his book American Constitutional Law, second Edition, p. 92 that;

> For a claim to be justiciable as an Article III, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the stake of the person making the claim to ensure the litigant has suffered

> an actual injury which is, fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also a part of the controversy itself-an aspect of the appropriateness of the issues for judicial decision....and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

39. Further, she laid down 27 statements on how she was denied a P3 until the IPOA intervened. No evidence was filed of these allegations. Even the P3 itself or IPOA intervention did not form part of the court record. Some of the allegations that the petitioner calls infringements were not infringements at all.

40. To contextualize the above finding, it is important to recall that the Petitioner is not claiming on behalf of anyone else. She is claiming on her own behalf. She did not tender evidence of the crackdown or impounding of the vehicle. Further, she has not proved that any of the Respondents herein participated in the crackdown. Further, the vehicle in issue was not hers, and she had no claim over it. Further, she was not taking action on behalf of her unnamed husband.

41. On merits, the violations mounted by the Petitioner are, in my view, below the constitutional threshold for breaches under the Bill of Rights. The alleged violations are the kind to be redressed through redress other than the constitutional remedies stipulated under Article 23 (3) of the *Constitution* as follows:

    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.

42. The Petitioner alleged a breach of her dignity by police officers painfully dragging her. Further, she alleges a violation of freedom against torture, cruelty, and inhumane treatment. This she attributes to the dragging. It was incumbent to prove this. Undoubtedly a photo will have helped even to show her current state. As observed above, the treatment she received is not part of the record. She had evidence and decided not to produce the same. Failure to produce documents in her possession will mean only one thing: had the documents been produced, they would have been against the petitioner. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> > In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

43. An allegation of infringement of the security of a person by admittedly foreign registration was not shown. The alleged vehicle was immobile and needed to be towed. The issues raised should be raised in the trial court hearing the civil dispute on confiscation. In the case of John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR, the court held that the *Constitution* only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:

> " Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the *Constitution*, the *Constitution* should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so."

44. The Petitioner does not therefore, lay a basis to prove by violation of her constitutional rights in circumstances that depict the breach of constitutional rights as the acts were indisputably committed through an alleged operation in which the Respondents were towing motor vehicle 446UBG to the police station and which was indeed of foreign registration, for further investigations. It is not the case of the Petitioner that the said motor vehicle was towed to a place other than Kiamariga Police Station or an unknown place that was not to be found. This court cannot interfere with the functioning of independent bodies without basis. In the case of Godfrey Paul Okutoyi & others –vs- Habil Olaka & Another (2018) eKLR Chacha , J on the issue of there being an alternative remedy in place of constitutional remedies at paragraph *65* stated:-

> 65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum as allowed by the applicable law and procedure.

45. This court cannot interfere with the functioning of the Respondents at this stage when no breach of the law or administrative action has been demonstrated. In Judicial Service Commission vs. Mbalu Mutava & Another[{2015} eKLR] the Court of Appeal held that:-

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

46. The alleged torture and where it occurred, is not documented. There is no evidence of the same. The petitioner made sweeping statements blaming police. The kind of actions alleged are serious. I do not know why the petitioner could not let the independent police oversight authority have documentation over the same. The petitioner promised in the affidavit to annex six documents. They are yet to be filed.

47. The petitioner is left with allegations which have not been investigated and the veracity of the claim set out. The duty to investigate police excesses lies with the Independent Police Oversight Authority. The documents sought to be annexed, but not annexed do not bring out causality. The issue of causality is civil in nature. The allegations that the petitioner was badly injured remain just that, allegations.

48. This then brings me to the question of the jurisdiction of this court. The same is circumscribed under Article 165(3) of the *Constitution* of Kenya, which posits as follows: -

> (3) Subject to clause (5), the High Court shall have-
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144.

49. The Respondents alleged that the Petitioner ought to have pursued investigations on the causes of injuries. They could also have sued for recovery of damages in a civil suit, where evidence of causality or causation would have been tendered. IPOA would have informed the parties of the officers involved. As it stands, all matters alleged in the petition remained unproven. It is not proper to throw pleadings at the court, stating that this is what I have suffered, and pay me. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " ....Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

50. The Respondents alleged that the Petitioner had not exhausted internal mechanisms of disciplinary procedure before filing the Petition. It was submitted that the Petition failed under the doctrine

of exhaustion. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. The Court stated as follows:

> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (I E B C) ex parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words: Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.43.While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

51. Therefore, where a dispute resolution mechanism exists outside Courts, the same should be exhausted before the jurisdiction of the Courts is invoked and this requirement is also to promote the application of Article 159 of the *Constitution*. In the case of Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

52. The Courts have also dealt with the exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception

applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)

53. Therefore, the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. This places the burden upon this Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

54. Moreover, the jurisdiction of this Court to consider disputes on constitutional breaches from parties who lack adequate audience before a forum created by a statute, or the quality of audience before the forum is in doubt, must not be ousted from the seat of this Court. Therefore, statutory provisions ousting Court's jurisdiction are not cast in stone and must be construed restrictively, on case to case basis. This was extensively elaborated by Mativo J in Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others [2018] eKLR as doth:

> In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

55. In this case, the Respondent alleged that the Petitioner had not fulfilled the procedures under IPOA as regards grievances against police misconduct. The dispute herein does not impute the conduct of police officers. It was not the Petitioner's case that the relevant police officers alleged to have violated the rights and fundamental freedoms of the Petitioner had not been investigated despite reports. In other words, there are no perceived crimes that the police officers are alleged to have committed and the relevant police station notified by the Petitioner's reports but without action as to call for intervention by IPOA. I find that the inclusion of IPOA as an Interested Party in the Petition did not ipso facto confer any responsibility not pleaded in the Petition. The doctrine of exhaustion was thus inapplicable.

56. It is the finding of this court that whereas the Petitioner alleged infringement of her rights under the *Constitution*, she had the burden of proof but failed to prove the violation on the part of the Respondents. As held by Mativo, J (as he then was) in Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR:

> "It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

57. In the circumstances I find that this Court has the power and is enjoined to interrogate the constitutionality of actions by state organs and all persons. However, I am unable to find that the Petitioner's rights were violated.

58. Having found no constitutional breaches on the part of the Respondents, I dismiss the prayer for compensation. The alleged damages were not proved. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he held that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it. In Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

Determination

59. The upshot is that I make the following orders: -

    a. The Petition is not merited and is dismissed.

    b. Each party will bear its own costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Nabende for the Petitioner

Mbugua Muthoni for the Respondent

Court Assistant – Jedidah

M. D. KIZTO, J.