



**First Choice Recruitment and Consultancy Agency Ltd & 2 others v
The Senate of the Republic of Kenya & 2 others (Constitutional Petition
E026 of 2024) [2025] KEHC 5635 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CONSTITUTIONAL PETITION E026 OF 2024**

RN NYAKUNDI, J

MAY 5, 2025

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 19, 20, 21, 22, 23, 24, 25, 27, 28,
29, 40, 43, 47, 50 AND 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ARTICLES 1, 2, 3, 7, 8, 9 AND 10 OF
THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT, 2015

AND

**IN THE MATTER OF ARTICLES 9, 14 AND 15 OF THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF RULES 3, 4 AND 10 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE PROCEDURE RULES, 2023**

AND

**IN THE MATTER OF ARTICLES 96(3), 125, 174, 185
AND 226(2) OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

**FIRST CHOICE RECRUITMENT AND CONSULTANCY AGENCY
LTD 1ST PETITIONER
JUDY JEPCHIRCHIR 2ND PETITIONER
FAITH WARIGA GICHUHI 3RD PETITIONER**



AND

THE SENATE OF THE REPUBLIC OF KENYA 1ST RESPONDENT
THE HON. CLERK OF THE SENATE 2ND RESPONDENT
THE SENATE STANDING COMMITTEE ON LABOUR AND SOCIAL
WELFARE 3RD RESPONDENT

JUDGMENT

1. The Petitioners herein filed this petition dated 2nd October 2024 seeking the following reliefs;
 - a. A declaration that the Respondent's Report on the Petition by Mr. Kimutai Kirui and other residents of Uasin Gishu County concerning alleged fraud by the First Choice Recruitment and Consultancy Agency Limited dated September 2023 is unlawful, illegal and an infringement of the Petitioner's Constitutional, Fundamental and Contractual Rights.
 - b. An order of Certiorari to bring to this Honourable Court and quash the Respondents' Report on the Petition by Mr. Kimutai Kirui and Other residents of Uasin Gishu County Concerning alleged fraud by the First Choice Recruitment and Consultancy Agency Limited dated September, 2023.
 - c. An Order of Prohibition to prohibit the Residents or their agents from in any way interfering with the Petitioners' business or rights
 - d. Any other relief that this Honourable Court might deemed just, fair and necessary to grant
 - e. Costs for the Petition
2. The brief facts of this petition are that the 1st Petitioner received requests for its clients to provide recruitment services for persons to undertake various assignments during the 2022 FIFA World Cup in Qatar and the 1st Petitioner sent out invitations for potential persons towards the above mentioned recruitment and received numerous applications.
3. There arose a hitch due to the rescheduling of the dates of the World Cup Tournament leading to inability of some of the clients to absorb all the successful candidates and the 1st Petitioner succeeded to send several successful candidates to Qatar who then commenced work as agreed with the employees. Moreover, there are candidates who despite being successful in the recruitment process were not able to travel to Qatar due to the above-mentioned hitches which were communicated to them timeously and comprehensively. The Applicants or potential candidates were required to pay a fee to facilitate the recruitment the process and in particular take care of the expenses as a consideration for the recruitment service they consumed and the 1st Petitioner reached out to the candidates who were not able to travel to Qatar and agreed with them on a way out of the situation.
4. From the Petition, some candidates chose the option for refund of the money paid to the 1st Petitioner less the disbursements and some candidates requested the 1st Petitioner not to refund the money but rather apply the same to scout for alternative opportunities for them. Moreover, it was stated that Kimutai Kirui and Senator Samson Cherargei filed a petition against the 1st and 2nd Petitioners and submitted the same to Uasin Gishu County Assembly and the County Assembly admitted the same lacking in basic presentation requirements including the signature of the supposed Petitioner.



5. The County Assembly's Ad Hoc committee summoned to the 2nd Petitioner vide its letter dated 6th January 2023 inviting her for a meeting on 19th January 2023 for the hearing of the petition and the 2nd Petitioner attended the above meeting and subsequent meeting before the Ad Hoc committee of the County Assembly. Further to this, the 1st and 2nd Petitioner received a letter from the Respondents indicating that they had received a Petition from Kimutai Kirui and had admitted the same for consideration by the 3rd Respondent.
6. The 1st and 2nd Petitioners responded to the allegations in the Petition as directed by the respondents and attended several meetings convened by the 3rd Respondent. The 3rd Respondent proceeded to write a Report dated September 2023 and tabled the same before the 1st Respondent. The above mentioned Report by the 3rd Respondent made recommendations against the Petitioner to wit;
 - i. The 1st Petitioner to refund unknown and undisclosed persons through Bankers Cheque only, within one month of tabling the report.
 - ii. The Asset Recovery Agency to repossess the Petitioner's Assets
 - iii. Freezing of the Petitioners' bank Accounts
 - iv. The Petitioners' passports to be withheld by the Directorate of Criminal Investigations
 - v. The Ministry of Labour and Social protection and the National Employment Authority to put up advertisements on local dailies declaring a ban against the Petitioners from carrying on business.
 - vi. The Petitioners and affiliates to cease business operations for a period of not less than 5 years.
 - vii. The petitioners be barred from registering, operating of managing any company in the Republic of Kenya.
 - viii. The Commission on Administrative Justice and Ethics and Anti-Corruption Commission to investigate the Petitioners' business operations.
 - ix. The Office of the Director of Public Prosecutions and the police to carry out criminal investigations and institute criminal proceedings against the petitioners.
7. The Petition was supported by the affidavit dated 2nd October 2024 sworn by JUDY JEPCHIRCHIR, the 2nd Petitioner herein which averments are on the face of the record.

1st, 2nd and 3rd Respondents' Written Submissions

8. The 1st, 2nd and 3rd Respondents' filed submissions dated 28th November 2024 in opposition of the Petition dated 2nd October 2024, which submissions are captured as hereunder;
9. Learned Counsel Mr. Mukele for the Respondents' stated that pursuant to the provisions of Article 110 of *the Constitution* of Kenya as read with section 4(1) of the Petitions to Parliament (Procedure Act) on alleged fraud by the First Choice Recruitment and Consultancy Agency Limited was presented to the Clerk of the senate. He also stated that the Clerk of the Senate certified that the Petition as meeting the requirements of the *Petition to Parliament (Procedure) Act* and Standing Order 232(5) of the Senate Standing Orders and that the clerk of the Senate forwarded the petition to the Hon. Speaker of the senate for tabling in the house.
10. Counsel also stated that the Petition was presented before the senate on Wednesday, 15th February 2023 and subsequently committed to the Standing Committee on Labour and Social Welfare ("standing



Committee”) in accordance with Standing Order 238(1) of the Senate Standing Orders. He further submitted that the senate observed that the recruitment agencies were taking advantage of high unemployment rates among the youth in Kenya in their desire to pursue studies or jobs abroad to defraud them off their financial resources.

11. It was Learned Counsel’s submission that the senate tasked the senate Standing committee on Labour and Social Welfare to respond to the Petitioner within sixty (60) days by way of a report addressed to the Petitioner and laid on the Table of the Senate in line with Standing Order 238(2) of the Senate Standing Orders. He also submitted that before commencing its investigations, the Senate Standing Committee on Labour and Social Welfare confirmed that the Uasin Gishu County Assembly processed a similar petition and the Standing Committee took note of the recommendations and noted that they were yet to be implemented.
12. Moreover, counsel submitted that on 27th February 2023, the Senate Standing Committee on Labour and Social Welfare considered the petition by Mr. Kimutai Kirui and other residents of Uasin Gishu County concerning the First Choice Recruitment and Consultancy Agency limited and the Standing Committee resolved to meet with the Petitioners on 14th March 2023. He further submitted that the Senate Standing Committee on Labour and Social Welfare engaged the Petitioners who presented their grievances and the standing Committee also requested the Petitioners to provide documentary evidence and a documentation of their submissions before the Committee.
13. Further, he submitted that on 27th April 2023, the Senate Standing Committee on Labour and Social Welfare met the management of First Choice Recruitment and Consultancy Agency limited on who were given an opportunity to respond to the allegations in the petition and in attendance was Ms. Judy Jepchirchir, the 2nd Petitioner. He went further and submitted that on 17th May 2023, the Senate Standing Committee on Labour and Social Welfare had a meeting with the stakeholders and in attendance was Mr. Godfrey Kiptoo who is a Commissioner at the Insurance Regulatory Authority and the 2nd Petitioner, Ms. Judy Jepchirchir was absent.
14. The learned counsel furthermore submitted that on 8th June 2023, the Senate Standing Committee on Labour and Social Welfare had a meeting with the stakeholders including Mr. Japheth Koome, the Inspector General of the Police and the Cabinet Secretary, Ministry of Health and in attendance was Ms. Judy Jepchirchir, the 2nd Petitioner. He also stated that on 22nd June 2023, the Senate Standing Committee on Labour and Social Welfare had a meeting with stakeholders including Hon. Jackson Mandago, EGH, Cabinet Secretary, Ministry of Cooperatives and Micro, Small and Medium Enterprises and the National Employment Authority and in attendance was Ms. Judy Jepchirchir, the 2nd Petitioner. Counsel further submitted that on 31st July 2023, the Senate Standing Committee on Labour and Social Welfare had a meeting with stakeholders including CS Ministry of Labour and Social Services, the National Employment Authority and the Data Commissioner and Miss Judy Jepchirchir, the 2nd Petitioner did not attend the meeting.
15. Moreover, the learned counsel submitted that on 10th August, 2023 the Senate Standing Committee on Labour and Social Welfare had a meeting with the Director, First Choice Recruitment and Consultancy Agency, Ms. Judy Jepchirchir and the 2nd Petitioner through her lawyer informed the Standing Committee as follows;
 - a. The matter under consideration by the Standing Committee had been filed before the High Court and therefore noted their reservations in appearing before the committee.
 - b. The Petitioners had written to the President of the Republic of Kenya on the same issue.



- c. The lead Petitioner had not presented a letter to the Recruitment Agency showing proof of consent by the other petitioners to be enjoined in the Petition.
16. Counsel noted that the Standing Committee noted the following;
 - a. The Director First Choice Recruitment and Consultancy Agency had not submitted copies of the documents to the secretariat as requested by the Standing Committee.
 - b. The Petition had first been presented in the Senate and therefore filing the same in the High Court could not stop the Standing Committee from continuing with the investigations.
 17. It was submitted for the Respondents that on 17th August, 2023, the Senate Standing Committee on Labour and Social Welfare had a meeting with affected residents of Uasin Gishu County and Miss Judy Jepchirchir, the 2nd Petitioner, did not attend the meeting. He further stated that on 1st September 2023, the Senate Standing Committee was taken through a draft report of the petition concerning First Choice Recruitment and Consultancy Agency and the Standing Committee adopted the report and proposed the recommendations. He stated that the report of the Senate Standing Committee on Labour and Social Welfare on the petition by Mr. Kimutai Kirui and other residents of Uasin Gishu County concerning the alleged fraud by First Choice Recruitment and Consultancy Agency Limited was laid on the table of the Senate on 17th October 2024. The Learned Counsel also submitted that the court be guided by the legal principles in the case of Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others [2014] eKLR
 18. From the above, the learned counsel listed 5 issues for determination as follows;
 - Whether the Petitioner was accorded a fair hearing before the Senate Standing Committee on Labour and Social Welfare.
 - Whether the Respondents exposed the petitioners to unlawful, unreasonable and procedurally unfair administrative action.
 - Whether the recommendations of the report by the Senate Standing Committee on Labour and Social Welfare are lawful.
 - Whether this Honourable Court can interfere with the decision of the Senate.
 - Whether the Petitioner has met the threshold for the grant of the reliefs sought.
 19. As to whether the petitioner was accorded a fair hearing before the senate standing committee, the Learned Counsel submitted that the Petitioners had stated that they condemned without being accorded an effective opportunity to present their defense in blatant breach of their right to be heard and without being invited to respond to any allegations against her. He made reference to the case of Kidero & 4 Others Vs Waititu & 4 Others (Petition 18 & 20 of 2014). He submitted that the Senate Standing Committee on Labour and Social Welfare understand the right to fair hearing and fair administrative action are legal edicts anchored in law and that the Standing Committee further understands that a person whose interests are likely to be affected by an administrative action has a reasonable expectation that they will be accorded a fair hearing before any adverse action is taken against them.
 20. The learned Counsel opined that the Standing Committee accorded the Petitioners a fair hearing and fair administrative action by;
 - a. Notifying the Petitioners on the Petition on alleged fraud by the First Choice Recruitment and Consultancy Agency Limited as presented to the Clerk of the Senate;



- b. Giving the Petitioners an opportunity to respond to the issues raised in the petition and to appear before the Standing Committee for hearing of the petition;
 - c. Giving the Petitioners sufficient time to prepare their defence. On numerous occasions, the Standing Committee acceded to the Petitioner's request for adjournment and/or additional time in order to enable her prepare her defense. By way of example at the meeting held on 10th August 2023, the Standing Committee adjourned to allow the Petitioners more time to submit requested documentation;
 - d. Providing the petitioners with the requisite documentation; and
 - e. Allowing the petitioner's to be represented by Counsel and indeed the 2nd Petitioner was represented by Counsel on numerous occasions.
21. The learned counsel also opined that the petitioners were furnished with all documents and evidence that formed the basis for the report and indeed at the meeting convened on 27th April 2023, the 1st Petitioner confirmed that the allegations raised by the Petitioners and further undertook to submit a list of all the refunds made with their names, identification numbers, signature and amount paid. Counsel also stated that the petitioners fully participated in proceedings before the Senate Standing Committee on Labour and Social Welfare and attached the Replying Affidavit as evidence and further stated that the fact was acknowledged by the Petitioners at paragraph 32 of the Petition.
22. On the proceedings of the senate standing committee being sub-judice, the learned counsel submitted that sub-judice is not an absolute rule, Standing Order. No 103(5) of the Senate Standing Orders provides that notwithstanding this standing order, the speaker may allow reference to any matter before the senate or a Committee of Senate. Reference was made to the case of Mike Sonko Mbuvi Gideon Kioko & Another Vs Clerk, Nairobi City County Assembly & 9 Others [2021] eKLR. He also stated that in the meeting held on 10th August 2023, the Standing Committee rightfully noted that the petition had first been presented in the Senate and therefore filing the same in the High Court could not stop the High Court from continuing with the investigations.
23. On whether the petitioners were denied an opportunity to cross examine, learned counsel submitted that there is no provision in *the Constitution* or the Senate Standing Orders allowing persons who are not senators to cross examine a person during sittings of committees of the House. He stated in his submission that the role of the Senate Standing Committee on Labour and Social Welfare in the exercise of its oversight is to conduct an inquiry, to gather evidence and determine whether the petition has been substantiated. He cited section 4(3)(f) of the *Fair Administrative Action Act*. He further made reference to the cases of Joseph Mbalu Mutava Vs Attorney General & Another [2014] eKLR; SGS Kenya Limited Vs Energy Regulatory Commission & 2 Others (Petition 2 of 2019). He also noted that both the 2nd Petitioner and her counsel were present in the Standing Committee proceeding of 27th April 2023, 8th June 2023, 22nd June, 2023 and 10th June, 2023 in which they were accorded an opportunity to comment on the averments made by the Petitioners.
24. The learned Counsel submitted that Standing Order 219 of the Senate Standing Orders provides for attendance by non-members of the meetings of a Select Committee. He went further stating that Hon. Senator Samson Cherargei was present during the Standing Committee Proceedings of 14th March 2023, 27th April 2023, 8th June 2023, 22nd June 2023, 10th August 2023 and 17th August 2023 and that the senator did not vote on any matter before the standing committee and consequently had no role to play in the deliberations of the report. He finally submitted on this issue that the Petitioners were accorded a fair hearing before the Senate Standing Committee on Labour and Social Welfare and that



- sub-judice is not an absolute rule and the same was inapplicable to the proceedings before the Standing Committee.
25. It was the learned Counsel's submission on this issue that Article 47 of *the Constitution* of Kenya guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He stated also that the procedure for fair administrative action is elaborated in section 4(3) of the *Fair Administrative Action Act*. Reference was made in the case of Catherine Chepkemai Mukenyang Vs Evanson Pkemei Lomadung & Another [2022] eKLR. Further to this, the learned counsel submitted that the petitioner was more specifically given;
 26. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - a. An opportunity to be heard and to make representations in that regard;
 - b. A notice of the right to legal representation; and
 - c. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 27. He cited the case of JNN, (a Minor) MNM, suing as next friend Vs Naisula Holdings Limited t/a N School [2018] eKLR and finally submitted that the petitioners were accorded their right to fair administration which was lawful and procedurally fair.
 28. As to whether the recommendations were lawful, counsel cited standing order 228 of the Senate Standing Orders which provide for the appointment and functions of the standing committees and submitted that Senate Standing Committee on Labour and Social Welfare is established pursuant to standing order No. 228(3) of the Senate Standing Orders as read with the Fourth Schedule thereof. He further stated that the committee is mandated to consider all matters related to manpower and human resources planning, pension, gender, culture and social welfare youth, National Youth Service, Children's Welfare national heritage, betting, lotteries, sports, public entertainment, public amenities and recreation. Further, he submitted that the mandate of the committee spans three Ministries: The Ministry of Labour and Social Protection, Public Service, the Ministry of Gender and Affirmative Action, and the Ministry of Youth Affairs, Sports and the Arts. Moreover, it was his submission that the committee also oversees the following state departments; the State Department of Culture and Heritage, the State Department of Diaspora Affairs and the Pensions Department under the National Treasury.
 29. The learned Counsel also made reference to Standing Order 228(4) of the Senate Standing Orders which provides for the functions of a Standing Committee. He submitted that a reading of Standing Order 228 as read together with the Fourth Schedule to the Senate Standing Orders demonstrates that the Senate Standing Committee on Labour and Social Welfare has the power to investigate, inquire into; and report on all matters relating to the mandate, management, activities, administration and operations of the assigned Ministries and Departments. He further noted that upon conclusion of the investigation into the alleged Fraud by the First Choice Recruitment and Consultancy Agency Limited, the committee indeed ascertained that the petitioners had collected monies from the youth with the promise of facilitating their placement for jobs and studies abroad and this fact was acknowledged by the Petitioners.
 30. It was the learned Counsel's submission that on 22nd June 2023 when the Petitioners appeared before the Senate Standing Committee on Labour and Social Welfare, they assured the Committee they were ready to refund the petitioners their monies and they requested for 3 months to ensure that the petitioners were paid in full. Further to this, he stated that the Standing Committee resolved that First Choice Recruitment and Consultancy Agency within one (1) month provides clear documents with



signatures and contracts having fully paid over 50% of the Petitioners their monies and to date, the petitioners have not complied.

31. The learned Counsel opined that once the Senate adopts the report of the Standing Committee, it is then incumbent upon the relevant Cabinet Secretary, Independent Commissioner or holder of an independent office under whose portfolio the implementation of the resolution falls to work on the modalities of the implementation of the report and made reference to Standing Order 225 of the Senate Standing Orders. He further opined that the senate does not implement its own recommendations and the recommendations of the report are made with the understanding that there are specialized bodies and/or organs established in law for purposes of carrying out an independent assessment of the matter. It was his final submission on this issue that the recommendation of the report by the Senate Standing Committee on Labour and Welfare are lawful.
32. Counsel submitted that this Honourable Court and other Superior Courts have in the past been put to task to determine whether judicial organs are within good practice and order to interfere with decisions of other arms of government while exercising mandate exclusively to them by *the Constitution*. He made reference to the case of Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another [2017] eKLR; Speaker of the Senate & Another Vs Attorney General & Another; Law Society of Kenya & 2 Others (Amicus Curiae) (Advisory Opinion Reference 2 of 2013) and the case of Pevans East Africa Limited & Another Vs Chairman, Betting Control & Licensing Board & 7 Others [2018] eKLR.
33. The Learned Counsel submitted that the petitioners have sued the Clerk of the Senate and the Senate Standing Committee on Labour and Social Welfare. He made reference to Article 117 of *the Constitution* which provides for powers, privileges and immunities in Parliament. He also stated that the *Parliamentary Powers and Privileges Act* was enacted by Parliament pursuant to Article 117 of *the Constitution* to provide for powers, privileges and immunities in Parliament, its committees, the Leader of the Majority Party, the Leader of the Minority Party, the Chairpersons of Committees and Members and to make provision for regulating admittance to and conduct within the precincts of Parliament and for connected purposes. He cited section 12 of the *Parliamentary Powers and Privileges Act* and the case of Samira Dedhia Soni Vs Shakeel Shabbir & 2 Others; National Assembly & Another (Interested Party) [2022] eKLR.
34. He finally submitted on this issue that the *Parliamentary Powers and Privileges Act* accords privilege and immunity to the 2nd and 3rd Respondents in respect of acts done or ordered by them in the discharge of their functions relating to proceedings of either house or Committee of Parliament and that the 2nd and 3rd Respondents are not proper parties to this Petition.
35. On this, counsel submitted on this issue that an order for prohibition is by its nature an equitable remedy and that an equitable relief is a court-granted remedy that requires a party to act or refrain from performing a particular act in cases where legal remedies are not considered to provide sufficient restitution. He further stated that the crux of this petition is a challenge on the senate's report on the investigation into the alleged fraud by the First Choice Recruitment and Consultancy Agency Limited.
36. He moreover submitted that despite the assurances by the Petitioners to the Senate Standing Committee on Labour and Social Welfare to refund the monies to the Petitioners, the Petitioners have refused, failed and/or neglected to refund the monies. He made reference to the case of Caliph Properties Limited Vs Barbel Aharma & Another [2015] eKLR. It was his final submission that the Petitioners have not come to this Court with clean hands and consequently, the petitioners are not entitled to the reliefs sought.



Analysis and determination

37. This Court is tasked with traversing the delicate constitutional terrain that separates judicial intervention from parliamentary autonomy. At the heart of this petition lies a fundamental tension: the obligation to uphold individual rights against administrative excesses while respecting the constitutional doctrine of separation of powers that guards our democratic order. The Court's power to review and potentially quash the recommendations made by the Senate Standing Committee must be exercised with profound judicial restraint, yet with unwavering commitment to constitutional supremacy.
38. Given the nature of the petition and evidential material relied upon by the Ad hoc committee of the Senate and the protocols involved in arriving at the various recommendations by the committee of the whole house, it is now my singular duty to make a finding whether the Petitioners have met the threshold for the reliefs applied for to be granted by this court.
39. First and foremost, it is whether the Petitioners have discharged the burden of proof as established in law. This includes appreciating the evidential material as pleaded in the petition within the parameters of section 107(1), 108 and 109 of the *Evidence Act*.
40. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR stated 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 vs. 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.”
41. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -
- “As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
42. It is the expectation of procedural and substantive law that the petitioner has the duty to discharge the standard and burden of proof which is purely evidential in nature. This is what the court emphasized in the case of *Suleiman Kasuti Murunga vs. IEBC & 2 Others* (2018) eKLR wherein it was stated as follows:
- “The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court



that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.” (See also Kiambu County Tenants Welfare Association versus The AG & another, Nairobi Petition No. 392 of 2013)

43. In analyzing the evidence, the petition could be subjected to the guidelines set out in the *Evidence Act* and the sample authorities in which the superior courts have laid down as to what constitutes the standard and burden of proof which is always vested with the petitioner and it never shifts to the Respondents/Defendants for that matter. Going by the facts of this petition, I am satisfied that in the context of the impugned report by the Ad Hoc Committee, the petition meets the guidelines on the standard and burden of proof of a constitutional petition to be adjudicated by this court.
44. There is another aspect of this petition which requires comment by this court. This is on the guiding principles on constitutional interpretation in light of the submissions by the parties. The scheme of interpretation of *the Constitution* can be referenced in the identifiable provisions under Art. 161(2), 163(1), 165(4) and 259 of the same supreme law of the land. There have been strong submissions from both learned counsels for the petitioners and respondents which can be summarized as to the justifiability of this petition in view of the fact that the Ad Hoc Committee properly admitted the petition filed by the victims who alleged violations and infringements of their rights by the petitioners in the instant petition. This therefore calls this court to exercise its constitutional mandate of making entry to the Bill of rights in Chapter 4 of *the Constitution* with a view to rule conclusively as to the grievances pleaded in this petition.
45. The touchstone principles in interpretation of *the Constitution* are to be found in Art. 259 which expressly states as follows:
- “(a) This constitution shall be interpreted in a manner that promotes its purposes, values and principles.
 - (b) Advances the rule of law and the Human Rights and fundamental freedoms in the Bill of Rights.
 - (c) permits the development of the law and contributes to good governance.
 - (2) If there is a conflict between different language versions of this Constitution, the English language version prevails.
 - (3) Every provisions of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore among other things:
 - (a) A function or power conferred by this Constitution on an office, may be performed or exercised as occasion requires by the person holding the office.
 - (b) Any reference to this Constitution to a state or other public office or officer or a person holding such an office includes a reference to the person acting in or otherwise performing the function of the office at any particular time”



46. The breadth and width of this Art. was construed in the case of Attorney General vs. Law Society of Kenya & 4 others [2019] eKLR where the court held:

“The starting point, as always, is Article 259 on the construction of *the Constitution* which directs that it shall be interpreted 'in a manner that: (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance'. Those values must permeate the process of constitutional interpretation. Many local and international decisions were cited before us to illustrate other governing principles of interpretation but we shall not belabour them as they are largely common ground. For emphasis, however, we reiterate what this Court stated in the case of *Njoya & 6 Others vs. Attorney General & another* [2004] eKLR thus:

“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that *the constitution*, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”

We also emphasize the principle of holistic interpretation where *the Constitution*, which has different Chapters and Articles is read as one document, not disjointed sections; where each provision is read as supporting the other and not destroying the other; where the provisions are all ultimately in harmonious symphony. In the case of *Tinyefuze vs. Attorney General of Uganda Constitutional Petition No. 1 of 1997* [1997] 3 UGCC the Uganda Constitutional Court put it thus:

“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness.”

Our own Supreme Court In the Matter of Kenya National Commission on Human Rights [2014] eKLR explained what a holistic interpretation entails when one counsel before it persisted on asking the Court to find that Article 163(6) of *the Constitution* does not mean what it says, through “a holistic interpretation”. The Court stated:

“But what is meant by a ‘holistic interpretation of *the Constitution*’? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.” (see also *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 [2014] eKLR)

47. Similarly, in the Supreme Court Advisory Opinion in *Re Interim Independent Election Commission* (2011) eKLR, the Learned Justices pronounced themselves as follows:

“The rules of Constitutional interpretation do not favor formalistic or positivistic approaches as can be appreciated from Art. 20(4) and 259(1). *The Constitution* as incorporated non-legal considerations which we must take into account in exercising our jurisdiction. *The Constitution* as a most modern Bill of rights that envisions a Human Rights based and social justice oriented state and society. The values and principles articulated in



the Preamble, in Art. 10, in Chapter 6 and in various provisions reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. In Art. 159(1) it states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court.” (See also In the matter of the Kenya National Commission on Human Rights Advisory Opinion Reference No. 1 of 2012 (2014) eKLR)

48. What is at stake here is the Respondents’ submissions that the legislative body engaged the scope of its mandate in conformity with *the Constitution* as it is discernable from Standing Committee on Labour and Social Welfare report dated September, 2023. On the other hand, the petitioners advanced the argument that the Respondents in conducting investigations failed to observe the basic legal values and wondered why the Senate should construe those values under Art. 10 differently or even disregarded them altogether. If you ask where the court gets its mandate to give an interpretation of *the Constitution*, I say, it comes from the framers of *the Constitution* who vested that jurisdiction as provided for under Art. 165(3). In this respect, the High court is invited to carry out a merit analysis as to whether the procedure adopted by the Senate to establish a select committee to look into the affairs of the 1st petitioner and its directors following a petition by some known victims who had contractually interacted with the petitioner through their intermediaries violated the fundamental rights and freedoms of the petitioners.
49. In this discourse, the importance of the rights under the Bill of rights take a central place in *the constitution* and must be emphasized at the outset. According to Art. 10, the Kenyan Republic is founded on the values of Human dignity, the achievement of equality, social justice and the advancement of Human Rights and freedoms. This Constitution describes the Bill of rights as an instrument which enshrines the rights of all citizens and the people within our borders and affirms those democratic values to govern our society. Therefore, when *the Constitution* recognizes the right to equality and non-discrimination under Art. 27(1) and further recognizing a right to dignity in Art. 28 is an acknowledgment of the intrinsic worth of human beings who are entitled to be treated as worthy of respect and concerned. This court in interpreting the constitutionality of a statute, policy or a decision should have regard to the norms and provisions of Art. 259 and the International instruments in which a country has subscribed as provided for in Art. 2(5) & (6) of *the Constitution* as an aid to interpretation. These principles will mirror the determination of this petition as pleaded by the petitioners and responded to by the Respondents. Although learned counsel Mr. Mukele for the Respondents invited the court to rule on five issues which to my persuasion captures the tone of the remedies in the petition. For clarity purpose, besides the preliminary issues, discussed elsewhere in this ruling, I find it pertinent to highlight the issues hereunder as relevant to dispose off the merits of the Petition:
- i. Whether the Ad hoc Committee of the 1st Respondent acted lawfully within its mandate.
 - ii. Whether the recommendations made by the Ad hoc Committee infringed on Constitutional rights of the Petitioners in the report made by the 1st Respondent.
50. These issues as couched, though presented distinctly, are inextricably linked in their resolution. The legitimacy of the Ad hoc Committee’s actions depends not only on procedural compliance with its governing framework but also on substantive adherence to constitutional protections. Similarly, the constitutionality of the Committee’s recommendations cannot be assessed in isolation from the question of whether the Committee acted within the proper scope of its authority. It is with this understanding that I shall proceed to analyze each issue in turn, mindful that the Court’s



determination must balance the necessary respect for legislative functions with its solemn duty to uphold constitutional rights and values.

Whether the Ad hoc Committee of the 1st Respondent acted lawfully within its mandate.

51. The men and women who met in Bomas and thereafter the conversation at Naivasha which culminated to a report of the parliamentary select committee on the review of *the constitution* on the reviewed harmonized draft constitution dated 29th January, 2010 were practical statesmen and stateswomen experienced in understanding and appreciating the history of the Republic and its politics of governance since attainment of independence on 12th December, 1963. In putting together, the Constitutional order, they viewed the principle of separation of powers as a vital check against authoritarianism and tyranny. During the referendum, the supreme law of the land which came into being provided for establishment of the legislature in chapter 8, the executive in chapter 9 and the judiciary authority together with its legal system in Chapter 10 of *the Constitution*. The persuasive approach taken by the Kenyan people is the version of the doctrine of separation of powers, that none of the organs of governance shall have a division of power concentrated in one branch of government. This version of separation of powers doctrine often attempts to draw a line on jurisdiction of the powers to be exercised between the different branches of government without an absolute independence but sustainability of interdependence in order to succeed in the implementation of the scheme of governance provided in *the constitution* and other enabling statutes. The letter and spirit of *the Constitution* 2010 is to make different branches of government accountable to each other hence the maxim, checks and balances.
52. It is a fact of primacy that the concept of separation of powers does foster constitutional conversations between the different branches of government within the dictates of *the Constitution*. It is a constitutional imperative and is clear from *the Constitution* itself that the conception of separation of powers envisages simply independent arms of government as between the executive, the legislature and the judiciary but with appropriate checks and balances to ensure accountability, responsiveness and openness. This is the ultimate aspirational as clearly stated in Art. 2(1) that *the constitution* is the supreme law of the Republic and binds all persons and all state organs at both levels of government. Art. 2(2) further states that no person may claim or exercise state authority except as authorized under this Constitution.
53. To start off this discussion, I find the Supreme courts sentiments in its opinion in Reference No. 2 of 2013 quite relevant. The court while making reference to Karle Klare in his article, “Legal Culture and Transformative Constitutionalism” published in South African Journal of Human Rights, Vol. 14 (1998). The court noted as follows:
- “(61) It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *the Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *the Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect *the Constitution* and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *the Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *the Constitution*. While Parliament is within its general



legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *the Constitution*. It cannot operate besides or outside the four corners of *the Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

(62) We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under *the Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where *the Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of *the Constitution*. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach *the Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated *the Constitution*, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way.”

54. The Court of Appeal in *Stephen Mringa Masano & 4 Others versus County Assembly Taita Taveta & 2 Others* [2017] while speaking to the question of select committees referenced “Writing on Kenya’s Parliamentary Practice, which draws heavily from the Westminster model, H. B. Ndoria Gicheru, a long serving Clerk-Assistant in the National Assembly states as follows regarding select committees: and added

“All committees which are composed of a certain number of members may be appositely designated “select committees” as distinguished from those comprising the whole House. These Committees are used for two fundamentally different purposes; first, there are debating committees which supplement the House in its task of considering new legislation in detail; secondly, there are investigating committees appointed for tasks which the House itself is not suited to do, for example, the finding out of facts of a case, the examination of witnesses and sifting of evidence, and the drawing up of reasoned conclusions”.

Later on he added:

“Committees exist not to take the initiative and rule the House, but to carry out the task imposed on them; they are creatures of the House with no independent existence. The House gives specific terms of reference which must be adhered to, and it may also issue an “instruction”, which is a motion directing the committee to do some particular thing within its orders of reference.....

” Without the committees therefore, it is patently clear that legislative bodies, like the County Assembly in question in this appeal, would be seriously hampered in the discharge



of their constitutional mandates, as they would be required to do all their work in plenary, which is not practical.”

55. Order 228 of the Senate Standing Orders provides as follows:

Appointment and Functions of Standing Committees

- (1) There shall be Select Committees to be designated Standing Committees which shall be nominated by the Senate Business Committee in consultation with parliamentary parties at the commencement of every Parliament.
- (2) A Senator appointed to a Standing Committee at the commencement of a Parliament or at any other time during the term of a Parliament shall, unless the Senator is discharged in accordance with standing order 200 (Discharge of a Senator from a Select Committee) or the Senate otherwise resolves, serve for the term of that Parliament.
- (3) The Standing Committees shall be as set out in the Fourth Schedule and shall deal with the subject matters respectively assigned to them.
- (4) The functions of a Standing Committee shall be to—
 - (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration and operations of the assigned Ministries and departments;
 - (b) study the program and policy objectives of Ministries and departments and the effectiveness of the implementation;
 - (c) study and review all legislation referred to it;
 - (d) study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - (e) consider the Budget Policy Statement in line with Committee’s mandate;
 - (f) report on all appointments where *the Constitution* or any law requires the Senate to approve;
 - (g) make reports and recommendations to the Senate as often as possible, including recommendation of proposed legislation;
 - (h) consider reports of Commissions and Independent Offices submitted to the Senate pursuant to the provisions of Article 254 of *the Constitution*;
 - (i) examine any statements raised by Senators on a matter within its mandate;
 - (j) follow up and report on the status of implementation of resolution within its mandate; and
 - (k) follow up and report on the status of commitments made by Cabinet Secretaries in their response to questions under Standing Order 51C.

56. In the present case, it is not in dispute that the Senate Standing Committee on Labour and Social Welfare was established pursuant to Standing Order 228(3) of the Senate Standing Orders and the Fourth Schedule thereof. Its mandate spans matters related to manpower and human resources planning, social welfare, and other related areas. The committee's formation and constitution were in accordance with the provisions of the Senate Standing Orders and Art. 124 of *the Constitution*, which



empowers Houses of Parliament to establish committees for the effective discharge of their functions. The said article provides as follows:

“124(1) each house of parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.

124(2) Parliament may establish joint committees consisting of members of both houses and may jointly regulate the procedure of those committees.

124(3) The proceedings of either House are not invalid just because of: -

- a. A vacancy in its membership; or
- b. The presence or participation of any person not entitled to be present at, or to participate in, the proceedings of the House.”

57. The Senate Standing Committee undertook its inquiry pursuant to a petition presented before the Senate on 15th February 2023, which was then committed to the Committee in accordance with Standing Order 228 of the Senate Standing Orders. The Committee was tasked to investigate allegations of fraud by the First Choice Recruitment and Consultancy Agency Limited and to respond to the petitioner within sixty (60) days by way of a report. In delivering this mandate, the Ad Hoc Committee was not explicitly precluded on being guided by Art. 125 of *the Constitution* on the power to call evidence.

58. From the facts presented before this Court, it is evident that the Committee's mandate was to inquire into the allegations of fraud, gather evidence, and make appropriate recommendations. This is consistent with the oversight function of Parliament as contemplated in Chapter 8 of *the Constitution*, which empowers the Senate to protect the interests of counties and their governments. The glance of the final report only mentioned that the Petitioners herein were invited not tender evidence as known in law but to make some clarifications on certain interrogatory questions framed by the members of the committee. I take cognizance that fraud though in the realm of civil law by its language, it is also a criminal offence as provided for under Section 313 of the *Penal Code* thus:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanor and is liable to imprisonment for three years.”

59. I am of the considered view that within the domain of the jurisdiction exercised by the Ad Hoc Committee, it was a seminal case of tackling the intricate issues of misrepresentation and fraud as viewed through the lens of this applicable legislations and Kenya contract law. The facts presented by the case would have yielded profound insights into the legal implications surrounding the misrepresentations alleged by the victims as against the petitioners. Whether the agreements entered into between the alleged victims and the petitioners in their capacity as a juristic body or as directors amounted to fraudulent misrepresentation and deceit is indeed a threshold jurisdiction beyond the ad hoc select committee of the senate. The issues as to how the alleged victims would have been persuaded to invest their hard earned financial resources was significant to influence the fraudulent representation when making decisions which ultimately became a subject of inquiry in this petition. Just to demonstrate what the Ad Hoc Committee was faced with in discharging their mandate, I am



inspired by the dicta in *Derry v. Peek* (1889) UKHL 1 in which Lord Herschell considered the meaning of fraudulent as follows: “Fraud is proved when it is shown that a false representation has been made:

- a. Knowingly, or b. without belief in its truth, or (c) recklessly, or (d) careless whether it be true or false. Although second and third are distinct cases, third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must always be honest belief in its truth.”

60. In the punitive recommendations which ensued, the factual matrix and the chain of events as presented before the Ad Hoc Committee, the standard of proof relates to the evidential threshold required for a claim to be considered as having been proved. In my view, the context that the evidence adduced before the senate met the threshold to prove the facts in issue to warrant the sanctions against the petitioners had not been met.
61. The Petitioners have contended that the Senate Standing Committee exceeded its mandate by making far-reaching recommendations that effectively condemned them without adequate opportunity to present their defense. This contention strikes at the heart of the constitutional balance between parliamentary authority and individual rights, and requires this Court to undertake a nuanced examination of the Committee's actions against the backdrop of its constitutional and statutory mandate.
62. The question of whether a parliamentary committee has acted ultra vires its mandate requires careful judicial consideration. This Court, in examining the Committee's actions, must strike a proper balance; neither showing excessive deference to parliamentary processes, nor improperly intruding into Parliament's legitimate constitutional domain. Parliamentary committees are established by and accountable to Parliament, deriving their authority from *the Constitution* and the Standing Orders of the respective Houses. While their mandates are intentionally broad to enable effective oversight, they remain bounded by constitutional principles and cannot be exercised without limitation or restraint. The Court's role is not to substitute its own judgment for that of the Committee, but rather to ensure that the Committee has acted within the constitutional and legal parameters that define its authority.
63. The Supreme Court also in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR set out the following principles to be applied by the Courts while observing the doctrine of separation of powers: -

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follow;

- a) each arm of Government has an obligation to recognize the independence of other arms of Government;
- (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
- (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
- (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon



appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

- (e) in the performance of the respective functions, every arm of Government is subject to the law.”

64. Having said that, this Court must distinguish between the Committee's investigative function and its recommendation function. The investigative function encompasses gathering evidence, hearing testimony, and making factual findings about alleged fraud in recruitment services, which clearly falls within the Committee's legitimate purview. The more complex question concerns the nature and scope of recommendations the Committee may legitimately make based on its findings.
65. The Committee's recommendations in this case are remarkably far-reaching, including asset seizure, freezing of bank accounts, withholding of passports, business prohibition for five years, and a permanent bar from company registration or management. These recommendations, if implemented, would constitute severe restrictions on the Petitioners' constitutional rights to property, economic activity, and freedom of movement. The question arises whether such recommendations, which effectively propose punitive measures typically associated with judicial or quasi-judicial determinations following full adversarial proceedings, fall within the legitimate scope of a parliamentary committee's mandate.
66. In the case of *R Vs. Oakes* [1986]1 R.CS, the Supreme Court of Canada stated as follows on the importance of presumption of innocence: -
- “The presumption of innocence lies at the very heart of the criminal law and is protected ...this presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major International human rights documents... The right to be presumed innocent until proven guilty requires at a minimum that; an individual be proven guilty beyond reasonable doubt, the state must bear the burden of proof; and criminal proceedings must be carried out in accordance with lawful procedures and fairness.”
67. This Court recognizes that parliamentary committees play a vital role in our constitutional architecture, especially in their oversight function. They serve as Parliament's eyes and ears, investigating matters of public interest and recommending appropriate action. However, this function must be discharged with due regard to constitutional rights and principles of natural justice. The Committee's mandate to recommend does not extend to proposing measures that would, if implemented, constitute punishment without the procedural safeguards of a fair trial.
68. It is upon meticulous examination of the record, this Court finds that the Senate Standing Committee did conduct a thorough investigation into the allegations of fraud against the Petitioners, which was squarely within its mandate. The Committee heard evidence from multiple stakeholders, including some of the victims themselves, and made factual findings based on the evidence before it. This investigative aspect of the Committee's work was properly within its mandate.
69. However, certain aspects of the Committee's recommendations appear to transcend the legitimate boundaries of its mandate. This Court acknowledges that the Committee's findings do reveal concerning issues regarding the operations of the Petitioners' recruitment agency. The evidence before the Committee suggests irregularities in how funds were collected from job-seekers, with promises made that were subsequently not fulfilled for all applicants. These findings are significant and warrant proper scrutiny by the appropriate investigative and regulatory bodies. The Committee was well



within its rights to recommend that agencies such as the Ethics and Anti-Corruption Commission (EACC), the Director of Public Prosecutions (DPP), and other relevant regulatory authorities conduct thorough investigations into these matters. Such recommendations respect the constitutional framework where Parliament identifies potential wrongdoing and the proper investigative bodies then pursue these matters through established legal channels.

70. However, recommendations that propose what are effectively punitive measures such as asset seizure, business prohibition, and a permanent bar from company registration without the procedural safeguards of a criminal trial or administrative due process, raise serious constitutional concerns. While the Committee appropriately flagged issues that merit investigation, recommending pre-emptive punitive measures before such investigations have concluded and before the relevant bodies have made determinations according to their statutory mandates exceeds the proper bounds of the Committee's authority. The appropriate sequence in our constitutional order is for parliamentary committees to identify concerns, for investigative agencies to thoroughly examine those concerns under their statutory powers, and only then for punitive measures to be imposed through proper legal channels following due process.
71. This is not to suggest that parliamentary committees cannot make robust recommendations based on their findings. They can and should, however, such recommendations must respect the constitutional division of powers between legislative, executive, and judicial functions. A parliamentary committee is not a court of law but exercises a quasi-judicial function and cannot arrogate to itself the power to issue final sanctions penal in nature, which only are a reserve of the courts of law, after rigorous civil or criminal proceedings in line with the fair trial rights in Art. 50 of *the Constitution*.
72. In the delicate constitutional balance that is our democracy, each organ of state must respect the proper domain of the others while fulfilling its own constitutional mandate. The Senate Standing Committee, in recommending what are effectively punitive measures without the safeguards of a judicial process, strayed beyond the bounds of its legitimate mandate into the territory reserved for the courts following proper legal processes.
73. One of the key arguments in this petition is that the fair trial rights of the victims prevailed over the petitioner's rights as provided in Art. 50 of *the Constitution*. The rights in my opinion can be described as follows: that in the jurisdiction vested by the statute and *the Constitution* on any of the administrative body, quasi-judicial organ, tribunal or court in adjudicating any dispute, fair hearing rights shall not be derogated from for they affirm the rule of law. This is one of the founding value of our Art. 10 of *the Constitution*. The right to a fair hearing be either in any of the forums mentioned above lies at the heart of fair administration of justice. It is a prerequisite before an adverse order is made against anyone. The right to a fair trial is more fundamentally entrenched to ensure the concept of substantive fairness of the trial.
74. In glancing through the entire record, yes there is a note that the Petitioners were issued with notice during the pendency of the Investigation before the Ad Hoc select committee. In furtherance of this process, it is also alleged by the Respondents that the issues which were highlighted were responded to by the petitioners. Undeniably, in the petition before the senate, there is an averment that the claim on misrepresentation and fraudulent conduct impacted on or about 5,000 residents of Uasin Gishu County. There is no evidence on record that these individuals or persons have recorded their respective statements on the terms of the contract and respective obligations with the petitioners for them to be part of the sample size of the five victims who formed part of the investigations carried out by the Ad Hoc select committee of the Senate.



75. This court in scrutinizing the entire proceedings has not come across furnished particulars of matters alleged in the allegations and conduct of the petitioners during their engagement with the victims to the alleged scam. The test under the fair trial rights is whether the information in the docket prepared by the select committee contained substantial facts necessary to enable the Petitioners to prepare a proper defence. This involves asking the question whether at the time of conducting the inquiry which the court has termed as being in the nature of an investigation, the petitioners were able to effectively exercise their constitutional rights to properly adduce and challenge evidence without access to the docket from the 5000 complainants. It is not sufficient merely to furnish enough particulars to enable the petitioner to understand the allegations of the charge bedeviling the contract with the victims. The Petitioners under Art. 50 must at least be entitled to the statements of witnesses to be relied upon by the Ad Hoc Select committee. It remains somewhat unclear whether the failure by the Petitioner to be given an opportunity to cross examine the six sampled witnesses by the committee cannot be viewed as a violation of the right to adduce and challenge evidence within the scope of fair trial rights. The precise contours and content of the measures outlined under Art. 50 which have to be adopted it primarily by any tribunal, quasi-judicial body or court do not seem to have been complied with by the committee.
76. Similarly, the Court of Appeal decision in *Judicial Service Commission versus Mbalu Mutava (2015)* Eklr clearly articulated the law in cases of this nature by making the following observations inter alia:
- “That the right to a fair administrative action under Art. 47 is a distinct right from the right to a fair hearing under Art. 50 of *the Constitution*. Fair Administrative action broadly refers to administrative justice in Public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional and statutory duties guided by constitutional principles and policy considerations. In what is considered the cardinal guidelines in any proceedings before a court of law, independent and impartial tribunals or bodies.”
77. In the *Fair Administrative Action Act* under section 4, it provides very clear legal principles which I find relevant to the facts of this case. Thus:
- “..... (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to



- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

78. A fair process is foundational to the legitimacy of the decision by the select committee especially in the facts of this petition, the Petitioners did not seem to have been accorded the right of an appeal against the substantive impugned decision which were adverse and prejudicial to the fundamental rights and freedoms protected and guaranteed by *the Constitution*. Indeed the most important warranty provided to any suspect alleged to have committed a penal offence, his/her dispute will be determined through a fair, impartial and equal process. According to Art. 27 of *the Constitution*, “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”
79. Our case law anchored in Art. 50 of *the Constitution*, also canvasses multiple amplifications on the pillar of natural justice commonly known as the fair hearing rule. There are two specifications of this rule which is relevant for this court’s present purposes with regard to this petition. First, the select committee in adjudicating the issues at stake was expected to apply its mind. To the issues and arguments which are live in the dispute and the submission and evidence adduced by the parties and on that basis. It was not open to the committee to make the final declarations on the matter. Secondly, a case such as the present where substantially evidence relied upon was never subjected to the rules of evidence, there are high chances that the fundamental rules of natural justice were infringed or violated.
80. For the select committee to get to the heart of the complaint, it would have been invariably helpful to consider the source from which the material oral or documentary evidence as well as the surrounding circumstances including any other third party who may have contributed to the mitigating factors of frustrating the contract. Where the material evidence in question is lifted from the submissions of one of the parties or a sample of five to represent a wider cluster of complainants it will be necessary to consider whether the way in which this was done gives rise to the reasonable suspicion or apprehension to the tribunal or quasi-judicial body with the requisite degree of fairness and impartiality of the decision. Put another way., the issue is whether the material evidence relied upon by the select committee could reasonably have made a difference if it was subjected to cross examination to test its reliability, veracity, credibility, admissibility and truthfulness of the transactions of this controversial contract between the complainants and the petitioners. It follows therefore from the facts when considering whether to set aside the decision of the select committee on the basis that it had been rendered in breach of natural justice, this court is concerned not only with the integrity of the process but also with the correctness of the outcome in so far as the verdict on sentencing as against the petitioners is concerned.
81. It is worthy elaborating that the discretion vested with the committee in one specific instance justifiably formulated categories of other constitutional organs/institutions to correlate any evidential material which forums are also to be subjected to wide ranging provisions for Art. 47,48 & of *the Constitution*. As to whether the so called gravity threshold as an indicator for the National Police Service, Ministry of Labor and Social Protection, the Commission on Administrative Justice, Ethics and Anti-Corruption Commission, the Office of the Director of Public Prosecutions to take up the recommendations by the Senate is a doctrinal question of *the Constitution*. as provided within the scope of *the Constitution*. The



law is silent on the structural interdict or implementation guidelines and recommendations adopted by the Senate and their binding nature upon other constitutional organs of the state.

82. The petition in particular invites this court to address the question as to whether there were any threats or violations or infringement of any of the fundamental rights as crafted in Chapter 4 of *the Constitution*. In construing and interpreting the Bill of Rights, more specifically as it relates to this petition, one must delve into the issues of juristic persons and those considered to fall into the class of the living being. It is universally accepted that the right to life (Art.26), freedom of movement (Art. 39) and human dignity and security of the person (Art. 28), the right to freedom and security of the person (Art. 29) are essentially and sensibly not applicable per se to juristic persons. However, on the other hand the right to equality (Art. 27), privacy (Art. 31), property rights (Art. 40), freedom of expression (Art. 33), consumer rights (Art. 46), right to fair administrative action (Art. 47), right on access to justice (Art. 48) and Art. 50 on fair trial rights are to some extent dependent upon the facts of each case available to the juristic persons. The import of this, the first petitioner who is a juristic person is jurisdictionally joined in this petition by dint of the relationship between these activities and the fundamental rights of the natural persons who happen to be the first and second petitioner standing behind the juristic person in the name and style of the 1st petitioner. basically in our constitutional law, a person has standing to challenge the constitutionality of laws or conduct of state or non-state actors provided that they allege that a fundamental right in Chapter 4 of *the Constitution* is infringed or threatened and they have in terms of Art. 21 and 22 of *the Constitution* sufficient interest in obtaining the remedies. The fundamental aspect of Locus standi is that it focuses on the party seeking to get his complaint or grievance adjudicated by an independent tribunal or various court forums as prescribed in our legal architecture. It is now settled law that the Claimant, Plaintiff or petitioner would have locus standi in the matter to sue or to be sued only if he has a special legal right or alternatively if he/she has sufficient special interest in the performance of the duty sought to be enforced.
83. The approach to standing in litigating the Bill of rights finds its place in Art. 22 and 24 of *the Constitution* as read with Art. 119 of the same Constitution. The courts have adopted a broad approach to standing consistent with the mandate of *the Constitution* in Art. 3(1) which states that every person has an obligation to respect, uphold and defend this Constitution when there is an allegation of infringement or threat to the fundamental rights and freedoms. The important consequence of this approach may have informed the petitioners to file a petition with the senate involving the applicants who had approached the petitioners as categories of the Citizenry who sought specific services being offered by the petitioners to this petition. The question of locus standi therefore and justifiability of the petition remains undisputed.
84. It suffices to say whatever the outer boundaries of separation of powers are as set out in *the Constitution* 2010, the seminal question here is that whether the power exercised by the Ad Hoc Committee as approved by the senate can be said to be justifiable or reasonable in an open and democratic society guided by the supreme law promulgated in 2010. This is the power within the very heartland of the judicial authority under Art. 159 of *the Constitution*.

Whether the recommendations made by the Ad hoc Committee infringed on Constitutional rights of the Petitioners in the report made by the 1st Respondent.

85. This court in exercising jurisdiction under Art. 165(3)(b) of *the Constitution* has to bear in mind the structure of the Bill of Rights and its subsequent litigation by various petitioners and interested parties who meet the test on locus standi. This court in examining the plethora of case law and other provisions of *the Constitution* with regard to this petition will be concerned with both procedural and substantive questions in furtherance to the application of the Bill of Rights to the subject matter before the senate.



86. This court is tasked to consider by reference to the facts of the petition and in construing and interpreting the Bill of Rights whether any such rights were violated as against the petitioners as a resultant outcome to vindicate the rest of the victims who came into contact with the Petitioners in entering the various contractual agreements whose terms are privy to the parties to the so called contract of service. If this court does find that the fundamental freedoms and rights of the petitioners have been violated, it must then consider whether that violation is a justifiable limitation of the right. In the second limb of interrogation if the court finds that a violation of the Fundamental rights was not accompanied with justifiable limitation, it would have to consider the proper remedy which answers the question of unconstitutional infringement or conduct of those rights.

87. *The Constitution* provides for a limitation clause of rights and fundamental freedoms as provided in Art. 24 in the following language:

- “(a) the nature of the right or fundamental freedom
- c. The importance of the purpose of the limitation;
- d. The nature and extent of the limitation;
- e. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- f. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

88. The importance of the limitation of rights on the strength of Art. 3 is to be viewed from the lens of reasonableness and justification. In the case of *S. Versus Makwanyane (1995) S.A CC* the court made the following observations in interpreting similar provisions with Art. 24 of our own constitution thus:

“The limitation of a Constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. The fact that different rights have different implications for democracy and in the case of our Constitution for an open and democratic society based on freedom and equality, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality which calls for the balancing of different interests. In the balancing process, the relevant consideration will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality. The purpose for which the right is limited and the importance of that purpose to such a society, the extent of the limitation, its efficacy and particularly where the limitation has to be necessary, the question would be whether the desired ends could reasonably be achieved through the alternative due process, which is less damaging to the rights accorded in *the Constitution*.”

89. Having established that aspects of the Committee’s recommendations exceeded its legitimate mandate, this Court must now address the more fundamental question of whether these recommendations, if implemented, would infringe upon the Petitioners’ constitutional rights. This inquiry goes to the heart of constitutional supremacy and the protection of fundamental rights against potential excesses of state power, regardless of which organ exercises that power.



90. The recommendations of the Senate Standing Committee, as enumerated in paragraph 6 of this judgment, include compelling the 1st Petitioner to issue refunds through banker's cheques within one month, seizure of the Petitioners' assets by the Asset Recovery Agency, freezing of bank accounts, withholding of passports, public blacklisting through advertisements in local dailies, prohibition from business operations for at least five years, and a permanent bar from registering or operating any company in Kenya. The Committee further recommended criminal investigations and prosecution.
91. These recommendations, viewed holistically, represent a profound intrusion into multiple constitutional rights guaranteed to the Petitioners. Art. 40 of *the Constitution* protects the right to property meaning essentially that no one may be deprived of property except in terms of the law of general application in Kenya. The recommendations for asset seizure and account freezing, made outside the established legal framework for such measures, would constitute a prima facie infringement of this right. Similarly, Article 43 guarantees economic and social rights, including the right to earn a livelihood, which would be severely curtailed by the recommended five-year business prohibition and permanent bar from company registration.
92. As we have seen above the petitioner's right to freedom and security is broad and generous if the language of Art. 29 of *the Constitution* is anything to go by. The right to freedom is a Constitution protection of a sphere of individual liberty and any orders made by a quasi-judicial body like the committee of the senate in this case against the imposition of legal and other restrictions on conduct of the petitioners without sufficient reasons or an opportunity to challenge such orders is a violation to *the Constitution*. There are two different aspects of freedom contemplated in *the Constitution*. The first is concerned particularly with the reasons for which the state in our case the senate may deprive the petitioner of freedom and the second is concerned with the manner whereby the petitioner is deprived of freedom without being subjected to due process clauses. In entrenching the right to freedom and security of the person, it means that right cannot be arbitrarily taken away for reasons that are not acceptable or what may also be conveniently described as the substantive aspect of the guarantees of freedoms and security of the person. The forms of questions which remained unanswered are whether the deprivation of physical freedom of the Petitioners has met the threshold enquiry under *the Constitution*? Secondly, it is whether the reasons for the deprivation of the freedom of the petitioners acceptable in law and thirdly is whether the manner of deprivation of freedom of the petitioners can be stated to be procedurally fair? Generally speaking, this means the cause for deprivation of freedom and security of the person must be in accordance with the basic tenets of our legal system and must be grounded upon the National values and principles of governance in Art. 10 of *the Constitution*.
93. This is a seminal case by virtue of its terms of reference and the court has to assess the relevant facts within the framework of the purpose of judicial review remedies which the applicant is seeking to obtain several declarations in support of the petition. Albert Fiadjoe, Commonwealth Caribbean Public Law, (3rd edition), in examining the issue of judicial review, states as follows:

“The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality..... it is jurisdiction is always involved at the instance of a person who is prejudiced or aggravated by an act or omission of a public authority

Once an applicant satisfies the requirement of locus standi, an applicant may bring proceedings for judicial review even if no decision on which a prerogative order can legally rest. This is because judicial reviews is wider than the old prerogative orders. Accordingly,



one can seek redress in judicial review by the most suitable remedy and there would be no obstacle to the grant of, say, a declaration merely because certiorari could not be granted or was inappropriate.

Accordingly, the court has power in a judicial review application to declare as unconstitutional, law or governmental action which inconsistent with *the Constitution*. This involves reviewing governmental action in the form of laws or acts of the executive for consistency with *the Constitution*.”

94. Judicial review is given further justification and definition by the requirements of the principles set out in *Pastoli v. Kabale District Local Government Council & Others* (2008) EA 300:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” (See also *Kenya National Examination Council v. Republic ex p. Njoroge* (1997) eKLR, *Director of Public Prosecutions v. Maina* (2017) eKLR (CA), *Republic v County Assembly of Samburu ex p Lemitin* (2019) eKLR (ELRC).

95. The truism of our constitution is that no right is to be considered absolute which implies that from the outset of the interpretation, each right is always already limited by every other right accruing to another citizen. In the context of this case, the interdicts directed at the petitioners from a quasi-judicial body referenced as a select committee of the Senate, that declaration when construed within the spirit, purport and objects of the Bill of Rights, Chapter 4 of *the Constitution*, it simply constitutes the violation or threat to the fundamental rights of the Petitioners. *The Constitution* expressly stipulates that such rights may only be limited through legislation or by a decision from a court of law within the criteria provided for in Art. 22 and 24 of *the Constitution*, which requires that limitations be reasonable and justifiable in an open and democratic society. Parliamentary committee recommendations, by their nature, do not constitute such legislation.
96. It is not disputed that the Ad Hoc select committee draws its powers from the standing orders No. 228 of the Senate Standing orders. From its nature the Ad Hoc select committee is obviously not well equipped as the formal court systems are to handle disputes of such a magnitude involving the petitioners and the victims during the formation of their contractual obligations. Putting it all together, such punitive sanctions imposed against the petitioners from the adopted report presented to the senate required compliance with sections 4 and 7 of the *Fair Administrative Action Act*, Art. 47 and 50 of *the Constitution*. Select committees are now an important channel for ministerial accountability



although it is the Cabinet secretary who is responsible to parliament, the select committees nevertheless may wish to take evidence within the docket of that ministry on the issues of public concern. A question which has arisen in this petition is whether the select committee in this most controversial issue had the expertise to admit relevant evidence duly subjected to cross-examination by the petitioners or their appointed legal counsel and on a weighted measure to make a finding of guilt, conviction and impose applicable sanctions as fashioned in the final report. The enhanced Senate/parliamentary scrutiny on topical matters of public importance is insulated in our Constitution by virtue of that arm of government.

97. This Court acknowledges the unique constitutional position of parliamentary committees, which are not courts of law but rather organs designed to facilitate Parliament's oversight function through inquiry and investigation. Unlike impeachment proceedings, which *the Constitution* explicitly structures as quasi-judicial in nature with specific procedural requirements, ordinary committee investigations serve primarily an information-gathering and policy-recommendation function. The Senate Standing Committee on Labour and Social Welfare is not expected to replicate the procedural rigors of a criminal trial or formal administrative adjudication.
98. Nevertheless, this constitutional distinction does not permit parliamentary committees to recommend sanctions that would effectively circumvent Art. 50 of *the Constitution*, which guarantees the right to a fair hearing. While the Committee's investigative procedures need not mirror judicial processes, its recommendations must respect established constitutional principles regarding the imposition of punitive measures. When a parliamentary committee transitions from fact-finding and recommending further investigation to proposing specific punitive actions against identified individuals or entities, it enters territory where constitutional rights protections must be carefully observed.
99. The Kenyan Constitution has often been described as transformative and one of its most important purposes in its transformative journey is to ensure the realization of the rights and fundamental freedoms of its citizens as prescribed under chapter 4 of *the constitution*. In this case, it is adverted to by the Respondents that the select committee's mandate is to conduct an inquiry on a subject matter or cause of action from a member of the public christened as the petition for consideration by the Senate. This court challenges not that jurisdiction.
100. However, by the Senate pronouncing itself with finality on certain declarations which pose a threat, infringement or violations of the petitioner's right to a fair hearing, that derogation is frowned at by the same Constitution. There will be no escape route for justification or excuse for this Constitution is located in the history of a country with struggles of the Kenyan people to negotiate for its promulgation in 2010. The citizens therefore in achieving this milestone constitutional enactment were looking to the present and the future for a society based on national values and principles of governance as expressly stated in Art. 10 and this spirit and letter of the law characterizes the constitutional enterprise as a whole. It is trite that this court is persuaded to exercise the prerogative writ of certiorari to quash certain aspects of the declarations made by the Senate based on the initiated process where the evidence available was so minimal that the legality, correctness, propriety, justness of the impugned decision could not be left to stand and it is plainly untenable.
101. The nature of the pronouncement by the Senate which adversely affects the rights of the petitioners is akin to findings of guilt and conviction in a criminal case. "I will seize the benefit of these authorities to guide me on the matter of burden and standard of proof; and, thus, enable me reach a just decision in the instant matter before me. In *Miller vs Minister of Pensions* [1947] 2 All E.R. 372 at page 373 to page 374, Lord Denning stated quite succinctly that: "The degree of beyond reasonable doubt is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect



the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence: 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; but nothing short of that will suffice." 4 In *Andrea Obonyo & Ors. V. R.* [1962] E.A. 542, the Court stated at p. 550 as follows: "As to the standard of proof required in criminal cases DENNING, L.J. (as he then was), had this to say in *Bater v. Bater* [1950] 2 All E.R. 458 at 459: 'It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.' That passage was approved in *Hornal v. Neuberger Products Ltd.* [1956] 3 All E.R. 970, and in *Henry H. Ilanga v. M. Manyoka* [1961] E.A. 705 (C.A.). In *Hornal v. Neuberger Products Ltd.*, HODSON, L.J., cited with approval the following passage from Kenny's *Outlines Of Criminal Law* (16th Edn.), at p. 416: 'A larger minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature.... in criminal cases the burden rests upon the prosecution to prove that the accused is guilty 'beyond reasonable doubt'. When therefore the case for the prosecution is closed after sufficient evidence has been adduced to necessitate an answer from the defence, the defence need do no more than show that there is reasonable doubt as to the guilt of the accused. See *R. v. Stoddart* (1909) 2 Cr. App. Rep. 217 at p. 242. [In criminal cases the presumption of innocence is still stronger, and accordingly a still higher minimum of evidence is 5 required; and the more heinous the crime the higher will be this minimum of necessary proof. Where, on the evidence adduced before Court, there exists only a remote possibility of the innocence of an Accused person, it would mean the Prosecution has proved its case beyond reasonable doubt; hence, the Prosecution would have conclusively discharged the burden that lay on it to prove the guilt of the Accused. In *Obar s/0 Nyarongo v. Reginam* (1955) 22 E.A.C.A. 422, at p. 424 the Court held that: "We think it apt here to cite a passage from the recent Privy Council case of *Chan Kau v. The Queen* (1952) W.L.R. 192. ... At p. 194 Lord Tucker said this: 'Since the decision of the House of Lords in *Woolmington v. Director of Public Prosecutions* (1935) A.C. 462; and *Mancini v. Director of Public Prosecutions* 28 C.A.R. 65; it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defence." In *Okethi Okale v. R.* [1965] E.A. 555, the trial judge had misdirected himself on the onus of proof; and made remark on the defence evidence, stating that: "I have given consideration to this unsworn evidence but I do not think it sufficient to displace the case built up by the prosecution or to produce a 'reasonable doubt'." On appeal, the Court responded at p. 559 as follows: "We think with respect that the learned judge's approach to the onus of proof was clearly wrong, and in *Ndege Maragwa v. Republic* 6 (1965) E.A.C.A. Criminal Appeal No. 156 of 1964 (unreported), where the trial judge had used similar expressions this court said: "... we find it impossible to avoid the conclusion that the learned judge has, in effect, provisionally accepted the prosecution case and then cast on the defence an onus of rebutting or casting doubt on that case. We think that is an essentially wrong approach: apart from certain limited exceptions, the burden of proof in criminal proceedings is throughout on the prosecution. Moreover, we think the learned judge fell into error in looking separately at the case for the prosecution and the case for the defence. In our view, it is the duty of the trial judge... to look at the evidence as a whole. We think it is fundamentally wrong to evaluate the case for the prosecution in isolation and then consider whether or not the case for the defence rebuts or casts doubt on it. Indeed, we think that no single piece of evidence should be weighed except in relation to all the rest of the evidence. (These remarks do not, of course, apply to the consideration whether or not there is a case to answer, when the attitude of the court is necessarily and essentially different.)" (emphasis added).



102. It cannot be said with precision that the Ad Hoc senate select committee being an investigating urgency conclusively discharged the burden that lay on it to prove the guilty of the petitioners for the members to exercise discretion and make declarations which are punitive in nature and with finality. As a consequence of this analysis a writ of certiorari shall be granted by this court on the recommendations and declarations made by the senate while adopting the Ad Hoc select committee in so far as it touches on the fundamental Rights and Freedoms as read with Article 40 of *the constitution* without having the evidence being subjected to already established constitutional organs of the state like the National Police Service, the EACC the money laundering institutions or the Director of Public Prosecutions.
103. On the other hand, this court takes judicial notice that some of the recommendations by the Senate making reference to the findings by the Ad Hoc Select Committee may or may have not been brought to the attention of the referenced constitutional organs. As a matter of fact, they were not part of these proceedings, it is also trite that the independent organs provided in our constitution are independent and free from any outside influence unless and until grievances have been raised of anyone of them exceeding the constitutional and statutory jurisdiction of their mandate. Selective committees are seen as a key part of the constitutional framework, successive in influencing policy for both the government and external bodies, and a leading forum for public debate. It also become a forum in which great extends the engagement of the public with parliament in a positive way. Selective committees legitimacy in the eyes of the public is growing exponentially hence the reason may be the victims in the contractual agreement with the petitioners sought their intervention on the pending issues. It is fundamental therefore to a just decision that each party should have the opportunity of knowing the case and replying to it within the parameters set out in Section 4 and 7 of the *Fair Administrative Action Act*. The principle of open justice is fundamental to our constitutional democracy the administrative of justice and the rule of law.
104. In the instant proceedings there was more expected to be done by other constitutional organs of state to lay a strong basis upon which a valid conclusion could be reached as to the nature of the unlawful acts of omission or commission as it relates to the petitioners' regulatory framework as provided for in the Memorandum and Articles of Association. *The Constitution* requires the select committee through a mission of investigation to give effect to the fundamental values in Art. 10 and they are under a duty to examine the objects and purport of the Standing Orders and to read these provisions so far as is possible in conformity with *the Constitution*. In exercising discretion in this matter on certain aspects of the impugned report, I place reliance in the observations made in the case of Ashok Kumar Gupta and another v. state of U.P. and others (1997) 5 SCC 201 which throws light on the role of courts in situations of this nature as between the petitioners and the respondents: -

“Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic constitution, broadly and liberally. The rights that are guaranteed as fundamental rights under our constitution are the dynamic and timeless rights of liberty and equality and it will be against the principles of our constitution to give them a static interpretation without recognizing their transformative and evolving nature.”

105. The Court must emphasize that *the Constitution* recognizes no hierarchy of rights, and that Art. 24 establishes stringent criteria for their limitation. The recommendations made by the Committee would, if implemented, constitute severe restrictions on multiple fundamental rights without meeting the constitutional threshold for such limitations. While *the Constitution* does not prohibit appropriate regulatory or punitive measures against those found, through proper legal processes, to have engaged



in fraudulent business practices, it insists that such measures follow established legal channels that incorporate adequate safeguards for the rights of the accused.

106. The Respondents have argued that the Committee's recommendations are merely suggestive and require implementation by appropriate executive agencies, which would presumably follow their own statutory procedures before taking action. While this argument has some merit, it fails to acknowledge the substantial reputational harm and potential prejudice to future legal proceedings that would result from the official adoption of these recommendations by the Senate.
107. It bears emphasizing that this Court's finding of constitutional infringement should not be construed as a determination on the merits of the allegations against the Petitioners. The record before this Court does indicate concerning practices that warrant proper investigation. However, the Constitution demands that such investigations, and any subsequent punitive measures, follow established legal processes that incorporate adequate safeguards for individual rights.
108. This Court therefore finds that the recommendations made by the Senate Standing Committee in its report dated September 2023, insofar as they propose measures that would effectively punish the Petitioners without the benefit of established legal processes, do infringe upon their constitutional rights to property, economic activity, freedom of movement, and fair administrative action. The Constitution recognizes the Senate's distinct investigative role, which differs from judicial proceedings, but this distinction does not exempt its recommendations from constitutional scrutiny when they propose measures with direct punitive effect. While the Court recognizes Parliament's vital oversight role and the importance of addressing potential fraud in the recruitment sector, these legitimate objectives must be pursued through means that respect constitutional rights and established legal processes.
109. In conclusion, while recognizing the Senate's constitutional oversight role and the legitimate public interest in investigating alleged recruitment fraud, this Court finds that certain recommendations in the Committee's report exceed its proper mandate and would, if implemented, infringe upon multiple constitutional rights of the Petitioners without adequate procedural safeguards. The Constitution's vision of separated but complementary powers requires each organ of state to fulfill its mandate while respecting both the role of other organs and the fundamental rights guaranteed to all persons. The Committee's recommendations, in their current form, fall short of this constitutional ideal.
110. In light of the foregoing analysis and findings, this Court makes the following orders:
 - a. A declaration is hereby issued that the recommendations contained in the Respondent's Report on the Petition by Mr. Kimutai Kirui and other residents of Uasin Gishu County concerning alleged fraud by the First Choice Recruitment and Consultancy Agency Limited dated September 2023, specifically recommendations (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), and public blacklisting elements of recommendations (ix) and (x), insofar as they propose punitive measures without established legal processes, are unconstitutional and an infringement of the Petitioners' rights under Articles 39, 40, 43, 47, and 50 of the Constitution as read with Articles 22 and 24 of the same supreme law of the Republic.
 - b. An order of Certiorari is hereby issued to bring to this Honorable Court and quash the aforementioned recommendations (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), and public blacklisting elements of recommendations (ix) and (x) of the Respondents' Report.
 - c. The recommendations contained in paragraphs (xii), (xiii), (xiv), (xv), and (xvi) of the Report, which propose investigations by various agencies including the Ministry of Labor and Social Protection, the Commission on Administrative Justice, Ethics and Anti-Corruption



Commission, the Office of the Director of Public Prosecutions, and the police, are upheld as falling within the Committee's legitimate mandate, provided that such investigations are conducted in accordance with established legal procedures and with due regard to the Petitioners' constitutional rights. Recommendations (viii) regarding the Ministry ceasing operations of similar recruitment agencies upon public concerns, and the transparency and publication aspects of recommendations (ix) and (x) regarding legitimate agencies, are similarly upheld as proper regulatory measures within the Committee's mandate.

- d. The order of Prohibition sought against the Residents is denied. With the Court having quashed the impugned recommendations and having directed that any investigations must proceed through established legal channels with appropriate procedural safeguards, there remains no legal basis for issuing a prohibition order. The proper investigative agencies have been permitted to examine the allegations in accordance with their statutory mandates, and these bodies are bound by law to follow due process. A prohibition order would therefore be superfluous and unnecessary. Moreover, the Petitioners have not demonstrated an imminent or ongoing interference with their rights that would necessitate such extraordinary relief.
- e. The Court acknowledges that the Senate Ad hoc Committee identified legitimate concerns regarding the recruitment practices of the Petitioners that warrant proper investigation, in line with the recommendations by the Senate. Such investigations must proceed through established legal channels with appropriate procedural safeguards. The relevant state agencies including the Ministry of Labor and Social Protection, the Commission on Administrative Justice, Ethics and Anti-Corruption Commission, the Office of the Director of Public Prosecutions, and the police are directed to conduct any investigations in accordance with their statutory mandates and with full adherence to constitutional due process protections.
- f. That a declaration is hereby made that the grievances being raised by the victims who approached the Senate for a resolution have other legitimate doors within our legal system including and not limited to the courts, the DPP, the EACC and the National Police Service who shall subject their jurisdiction on the issues within the constitutional imperatives and statutory law.
- g. Each party shall bear their own costs.

111. Orders accordingly.

**SIGNED, DATE AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY 2025 AND
PUBLISHED ON 7TH MAY 2025**

.....
R. NYAKUNDI

JUDGE

In the Presence of:

Ms. Chelogoi, Advocate for the Petitioners.

Mr. Mukele Eugene, Advocate for the Senate.

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