



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kalaiya & another v Nairobi Metropolitan Services & 2 others (Petition E144 of 2022)  
[2025] KEHC 7959 (KLR) (Constitutional and Human Rights) (2 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7959 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**PETITION E144 OF 2022**  
**AB MWAMUYE, J**  
**MAY 2, 2025**  
**IN THE MATTER OF: THE CONSTITUTION OF KENYA**  
**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 28, 29, 35,**  
**47, 48, 49, 50, 51, 258 AND 259 OF THE CONSTITUTION**  
**OF KENYA.**  
**AND**  
**IN THE MATTER OF: ALLEGED CONTRAVENTION, VIOLATION AND/OR**  
**ENFORCEMENT OF FUNDAMENTAL RIGHTS AND**  
**FREEDOMS OF INDIVIDUALS AS ENSHRINED UNDER**  
**ARTICLE 28, 34 AND 47 OF THE CONSTITUTION OF**  
**KENYA**  
**AND**  
**IN THE MATTER OF: THE THREAT OF A BREACH TO THE FUNDAMENTAL**  
**RIGHT TO A FAIR HEARING AS ENSHRINED UNDER**  
**ARTICLE 50 (2) OF THE CONSTITUTION OF THE**  
**REPUBLIC OF KENYA**  
**AND**  
**IN THE MATTER OF: THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**  
**1948 AS ENFORCED UNDER ARTICLE 2 (6) OF THE**  
**CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF: THE BREACH OF THE FUNDAMENTAL RIGHTS OF**



**DIGNITY AND THE FREEDOM AND SECURITY OF THE  
PERSON AS ALLOWED UNDER ARTICLES 28 & 29 OF THE  
CONSTITUTION OF KENYA**

**AND**

**PAGE 1 OF 18**

**IN THE MATTER OF: THE AFRICAN CHARTER ON HUMAN AND PEOPLE  
RIGHTS 1981 AS ENFORCED UNDER ARTICLE 2 (6) OF  
THE CONSTITUTION OF KENYA**

**BETWEEN**

**ROHIT KALAIYA ..... 1<sup>ST</sup> PETITIONER**

**TISAR LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIROBI METROPOLITAN SERVICES ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners approached this Court vide Petition dated 29<sup>th</sup> March, 2022 where he sought the following orders;
  - a. A Declaration that the acts and omission of the Respondents have breached the Petitioners' fundamental rights and freedoms enshrined in the Constitution as stated above.
  - b. A Declaration that the Respondents acts and actions is malicious, without jurisdiction, unreasonable, actuated by faith, ill will, irrelevant and extraneous considerations, unlawful, illegal, ultra-vires the Constitution and therefore null and void ab initio.
  - c. A Declaration that the Petitioners are due for damages from the Respondents in a manner determined by the Court for breach of the Petitioners' Fundamental Rights and Freedoms.
  - d. The cost of the Petition be provided for.
2. In support of the Petition, the Petitioners filed a Supporting Affidavit sworn by Rohit Kalaiya on 29<sup>th</sup> March 2022 where the Petitioners outlined the grounds for the Petition.
3. In the Supporting Affidavit, the Petitioners aver that on Monday 4<sup>th</sup> October, 2021 at around 11:30AM at the reception offices located at Solai road, the 1<sup>st</sup> Petitioner encountered a Nairobi Metropolitan Service Officer and 2 Administration Police Officers who inquired about the business license for the premises, to which the 1<sup>st</sup> Petitioner informed them that it was on display at the entrance of the building.



4. The Petitioners aver that the Nairobi Metropolitan Service Officer by the name “Jamina” proceeded to demand for the immediate payment of Kes. 30,000.00 for storage citing underpayment of the business license by not declaring ‘storage’.
5. The 1<sup>st</sup> Petitioner states that he informed the officer that he had no knowledge about the matter and that they should wait for the owner of the premises to take up the discussion with them.
6. The 1<sup>st</sup> Petitioner further avers that the officers proceeded to arrest him and at no point did they try to establish his identity or association with the company and upon his arrest he was taken to the Business License Centre where he tried to establish the reasons for his arrest without success.
7. He further states that the officer allegedly asked for a bribe of Kes. 10,000.00, which the 1<sup>st</sup> Petitioner declined to pay, and was taken to Central Police Station where he spent the night and was arraigned at City Court the next day on 5<sup>th</sup> October, 2021.
8. The 1<sup>st</sup> Petitioner avers that he pleaded not guilty and after reviewing the documents and listening to the testimony of the director of the 2<sup>nd</sup> Petitioner, Mr. Ravinder Singh Grewal, the Trial Magistrate discharged him.
9. The 1<sup>st</sup> Petitioner further avers that as a result of his incarceration in the police cells at Central Police Station, his medical condition has deteriorated and he has sought several medical treatments to address his underlying conditions; leading to the expenditure of significant sums of money.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit in response to the Petition sworn by Johnson Akong’o Abwor sworn on 12<sup>th</sup> February 2024 to which he averred that on 4<sup>th</sup> October 2021, in exercise of the power provided under Section 24 of Nairobi City County Trade License [Act No. 2 of 2019](#) he entered the 2<sup>nd</sup> Petitioner’s premises to conduct an inspection.
11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that upon revealing his identity card, he required the 1<sup>st</sup> Petitioner to produce a permit instead the 1<sup>st</sup> Petitioner insisted that the permit was displayed on the premises hence minimizing the need to produce it for examination.
12. They further contend that the 1<sup>st</sup> Petitioner failed to produce, exhibit, bring forward and bring into view the permit committing an offence under Section 20 of the Nairobi City County Trade License [Act No. 2 of 2019](#), therefore placing the Petitioner under arrest and who was later taken to the Central Police station.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents state that upon production of the permit by the Petitioners, the prosecution withdrew its case against the 1<sup>st</sup> Petitioner.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the 1<sup>st</sup> Petitioner was in clear contravention of Section 20 of the Nairobi City County Trade License [Act No. 2 of 2019](#) and was lawfully arrested, charged and tried and further that the Petitioners have failed to link the 2<sup>nd</sup> Respondent to any violation of a constitutional right to warrant the intervention of this Honourable Court since at all times the 2<sup>nd</sup> Respondent acted within the confines of the Act.
15. The 3<sup>rd</sup> Respondent filed grounds of opposition in response to the Petition dated 31<sup>st</sup> July, 2024. They contend that the Petitioners herein have not demonstrated before this Honourable Court how the 3<sup>rd</sup> Respondent violated their constitutional rights therefore the Petition fails to meet the threshold of a constitutional petition as stipulated in Rule 10 of the Mutunga Rules and in substance as held in *Anarita Karimi Njeru v R* (1976-1980) KLR 1272.



16. The 3<sup>rd</sup> Respondent contends that there is no cause of action against them at all as the 3<sup>rd</sup> Respondent only exercised their constitutional statutory mandate to assist the relevant county officials to effect an arrest for violation of county by-laws therefore, this petition being defective both in form and substance should be dismissed with costs to the 3<sup>rd</sup> Respondents.
17. The Petitioners filed a further affidavit dated 14<sup>th</sup> October 2024 to which he reiterated contents of his supporting affidavit.
18. Parties agreed to canvass the Petition by way of written submissions.
19. The Petitioners filed written submissions dated 14<sup>th</sup> October 2024, to which they analyzed two issues for determination namely; whether the 1<sup>st</sup> Petitioner's arrest was unlawful infringing on his constitutional rights and whether the Petitioner's are entitled to exemplary and punitive damages.
20. In analyzing the legal foundation regarding the standard for lawful arrest, the 1<sup>st</sup> Petitioner relied on the cases of *James Kahindi Simba v. Director of Public Prosecution & 2 Others* [2020] eKLR where the court held that the person who arrests a suspect must have sufficient information justifying the arrest of the suspect. They also relied on the case of *Erastus Maina Karanja v Machakos County Government* [2021] eKLR where the court made it clear that an arrest should only be made after thorough investigations have been conducted. They also cited *Republic v Director of Public Prosecutions & 2 Others Ex-parte Francis Njakwe Maina* [2015] eKLR where the court held that for an arrest to be lawful, there must be probable cause to suspect that the person being arrested has committed an offense. If law enforcement agencies bypass this critical step and act based on verified suspicion, the arrest becomes unlawful and unconstitutional.
21. The Petitioners further submitted that the crux of the matter lies in whether the prosecution of the 1<sup>st</sup> Petitioner was based on probable cause or whether it was driven by malice, ulterior motives, or negligence. In support of this, they relied on *Kuria & 3 Others v Attorney General* [2002] 2KLR 69.
22. On whether there was probable cause the Petitioners relied on the case of *Kagane & Others v Attorney General* [1969] EA 643 where the Court set the test for probable cause, stating that a reasonable and prudent person must be satisfied that there is sufficient material to support the belief that the accused is probably guilty of the crime. They equally relied on the case of *Republic v Director of Public Prosecutions & 2 Others Ex-parte Francis Njakwe Maina* [2015].
23. The Petitioners further submitted that the arrest and prosecution of the 1<sup>st</sup> Petitioner was motivated by malice and improper motives which was so that the enforcement officers would somehow get a bribe. They cited the case of *Isaac Anyula Khatete v Joseph Khalwenyi Omwalo* [2010] eKLR, *Josephat Mureu Gibiguta v Howse & McGeorge Ltd* [1993] eKLR and finally the case of *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR.
24. The 1<sup>st</sup> Petitioner contends that he suffered significant harm as a result of the unlawful arrest and malicious prosecution which included humiliation, loss of reputation, emotional distress that exacerbated his bipolar condition. The 1<sup>st</sup> Petitioner averred that his mental health deteriorated leading to his hospitalization shortly thereafter and was therefore seeking damages for medical expenses together with compensatory damages for emotional distress. He relied on the case of *Samuel Roro Gicheru & Another v OCS Nanyuki Police Station* [2018] eKLR, *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR and finally on *Chritus Otieno Caleb v Attorney General* [2014] where the court awarded the Petitioner Kes. 500,000.00 in punitive and exemplary damages for being unlawfully detained.



25. The 2<sup>nd</sup> Respondent filed two separate submissions both dated 15<sup>th</sup> May 2024. The 2<sup>nd</sup> Respondent outlined 5 issues for determination namely; whether this Court has Jurisdiction to maintain this Petition, whether the Petitioners have proved their claims to warrant grant of the reliefs sought, whether the Petitioner's medical condition was rightly attributed to his arrest, whether the Petitioners proved daily losses and finally whether the Petition as constructed violates the locus classicus case of *Anarita Karimi Njeru v The Republic (1976-1980)*.
26. On the first issue, the 2<sup>nd</sup> Respondent submitted that the Petition was instituted within a five(5) month period which was well within the time limit of twelve (12) months for instituting a claim against a Public Authority allowed by Section 3(1) of the *Public Authorities Limitation Act*. They further claim that the Petitioners ought to have launched a tortious claim for damages instead of filing a constitutional petition therefore, this Honourable Court lacks jurisdiction to entertain the instant petition.
27. On the second issue, the 2<sup>nd</sup> Respondent contends that since the Petitioner failed to produce/exhibit the permit when required by the county officer, and by failing to forward into view the required permit, the Petitioner violated Section 20 of the Nairobi City Trade Licensing *Act No. 2 of 2019* Act which empowers the relevant officer by law to cause the arrest of the 1<sup>st</sup> Petitioner.
28. They further stated that the Petitioners did not prove the essential ingredients of malicious prosecution that include whether the consequent criminal proceedings ended in favour of the Petitioners, whether prosecution was initiated without reasonable and probable cause and whether there was proof that the defendant's conduct in setting the criminal process in motion was fueled by malice. Reliance was placed on several cases which include *Stephen Gachau Gitghaiga & Another v Attorney General (2015) eKLR*, *Gwagilo v Attorney General [2002] 2EA 381* and *Dickson Chebuye Ambeyi v National Police Service & another; Peter Sifuna Wesonga & another (Interested Parties) [2020] eKLR*.
29. On the third issue, the 2<sup>nd</sup> Respondent submitted that in their knowledge, the 1<sup>st</sup> Petitioner is not a doctor and therefore devoid of capacity to establish any link of causation between his medical condition and his lawful arrest and in furtherance, there is no medical report produced by the 1<sup>st</sup> Petitioner to back up his claim. They relied on the case of *LVW (Suing as administrator of BMN) deceased v Charles Githinji [2019] eKLR*
30. On the fourth issue, the 2<sup>nd</sup> Respondent submitted that the Petitioners have failed to produce any evidence in support of their claim for loss of business to the tune of Kes. 2,000,000.00.
31. On the fifth and final issue, the 2<sup>nd</sup> Respondent contends that the Petitioners must patently express the manner in which the Respondents have their rights as established in the case of *Matiba v Attorney General [1990] KLR 666*. They aver that the Petition violates the requirements of a petition as established in the case of *Anarita Karimi Njeru v The Republic (1976-1980)* and reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* and should therefore be dismissed with costs to the 2<sup>nd</sup> Respondents.
32. The second set of written submissions by counsel for the 2<sup>nd</sup> Respondent merely reiterated contents of the first submissions especially on the first and second issues.

### **Analysis and Determination**

33. I have very carefully considered the Petition, the Affidavits in support and in opposition, the Grounds of Opposition thereto and the subsequent submissions filed as well as the authorities relied upon in support thereof. The issues that arise for consideration can be summed up as follows: -



- i. Whether the petition as presented raises any constitutional issues.
    - a. Whether the Petition as presented raises any constitutional issues
34. It is the duty of this court to satisfy itself in a matter that it is possessed of jurisdiction otherwise it may end up acting in vain. The jurisdiction of this court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.
  35. The Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* had the following to say on Constitutional Petitions: -
 

“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 the 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.”
  36. The issue before Court is whether the Petitioner’s constitutional rights under Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 28, 29, 35, 47, 49, 49, 50, 51, 258 and 259 were violated by the Respondents.
  37. The gravamen of this petition is that the 1<sup>st</sup> Petitioner’s arrest, detention and prosecution by the respondents was unjustified and thus violated the Petitioner’s constitutional rights.
  38. It was the Respondents’ submission that the instant petition is an abuse of the court process as it was a claim for malicious prosecution cloaked under the guise of a constitutional petition whereas the law sets down the procedure for seeking redress in the way of plaint for compensation for the torts of false imprisonment, unlawful arrest and malicious prosecution. In other words, the Respondents contend that this court lacks jurisdiction to entertain the instant petition.
  39. For this petition to succeed, the Petitioners must demonstrate that the officers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were in breach of their mandate in arresting, incarcerating ,and prosecuting the 1<sup>st</sup> Petitioner.
  40. A fundamental question that must however be asked is whether this dispute as presented is in reality a constitutional dispute. The facts as presented in my view present a dispute that is allegedly based on unlawful arrest, confinement and malicious prosecution. Although these allegations can be framed as constitutional violations, they may very well support a tortious claim of false imprisonment and malicious prosecution but the 1<sup>st</sup> Petitioner appears to have deliberately avoided taking that route.
  41. If therefore the claims before this Court can be adequately litigated in tort, was it proper for the Petitioners to fashion the matter as a constitutional dispute?



42. Courts have constantly weeded out disputes that are disguised as constitutional disputes when in reality they are not. In *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* (2013) eKLR Lenaola J ( as he then was) stated:

“...Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in *AG V Dutambala Criminal Appeal No. 37 of 1991* (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions...”

43. Further in *John Harun Mwau v Peter Gastrow & 3 others* (2014) eKLR the Court held:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights... it is established practice where a matter can be disposed without recourse of the *Constitution*, Constitution should not be invoked at all...”

44. In the case of *Grace Jepkemoi Kiplagat vs Zakayo Cheruiyot* (2021) eKLR Mutungi J held thus: -

“... there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing matters that are essentially civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”

45. The Court of Appeal in dismissing a similar matter in the case of *James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution* (2019) eKLR stated as follows:

“...As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal timeframe...”

46. It is cardinal principle that where there exists an alternative remedy under statutory law or otherwise, then such a remedy should be pursued instead of a constitutional petition. For instance, in *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Lenaola J (as he then was) held:

“I should only say this as I conclude; in Francis *Waitbaka vs Kenyatta University Petition No. 633 of 2011*, this Court was categorical that it is imperative that the Bill of Rights and the



constitutional imperative mandate of this court should not be invoked where other remedies lie.”

47. Chacha J. was of a similar view and which I entirely agree with in the case of Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR where he stated thus:

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

48. Malicious prosecution is a civil wrong, a tort. There are settled legal principles guiding a court in determining whether a prosecution was malicious. As discussed in *Murang’a vs Attorney General* (1976-80) 1 KLR 1251, for a party to succeed in proving a tort of malicious prosecution, the following elements must be proved: -

- a. That a prosecution was instituted by the defendant or by someone for whose acts he is responsible.
- b. That the prosecution terminated in the plaintiff’s favour.
- c. That the prosecution was instituted without reasonable or probable cause.
- d. That it was actuated by malice.

49. In the instant petition, this Court considers the allegations raised heavily lie in the tort of malicious prosecution and other ordinary civil claims. The Petitioner’s cause of action could have been better and more adequately addressed in civil proceedings under that tort as opposed to a constitutional petition. From a perusal of this Petition, the Petitioners have not articulated allegations that shift the dispute from the realm of ordinary tort into the constitutional arena.

50. Moreover, the Petitioners have not adduced evidence to show how the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted ultra vires of their duty or violated the Constitution in exercise of their official duties, so as to create a distinct limb separate from malicious prosecution allegations. Consequently, I find that this matter should have been brought as under tort as opposed to within a constitutional litigation.

51. Guided by the above principles, this Court is satisfied that the grievances raised in this Petition are ordinary civil disputes that the Petitioners are masking as constitutional grievances. Applying the doctrine of constitutional avoidance, this Court finds that it cannot consider the same as a constitutional petition. Accordingly, the petition is found to be devoid of merit. The orders sought in the Petition being declarations as well as punitive damages are declined and dismissed.

52. The Petition herein is found to be without merit and is dismissed accordingly, with each party to bear their own costs of the Petition.

Orders accordingly.



**DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS TWENTY-SECOND DAY OF MAY, 2025.**

**BAHATI MWAMUYE**

**JUDGE**

In the presence of: -

Counsel for the Petitioners – Ms. Rono h/b Mr. Kirwa Kosgei

Counsel for 2<sup>nd</sup> Respondent – Ms. Kwamboka

Counsel for the 3<sup>rd</sup> Respondent – Mr. Weche

Court Assistant – Ms. Neema

