



Kariuki v OCS, Diani Police Station & 2 others (Constitutional Petition E062 of 2022) [2024] KEHC 813 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEHC 813 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E062 OF 2022**

OA SEWE, J

JANUARY 23, 2024

IN THE MATTER OF CONTRAVENTION OF ARTICLES 2(1), 3, 19(B), 19(3), 20, 21, 24, 25(A), 27(4), 28, 29(A) (D) (F), 43, (2), 47, 48, 49(1)(C) & (H), 51(1), 232 & 244 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 24 & 59 OF THE NATIONAL POLICE SERVICE ACT, 2011

AND

IN THE MATTER OF THE FIFTH SCHEDULE OF THE NATIONAL POLICE SERVICE STANDING ORDERS, 2017

AND

IN THE MATTER OF THE KENYA PLICE SERVICE DELIVERY CHARTER, 2015

AND

IN THE MATTER OF ARTICLE 5 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

AND

IN THE MATTER OF ARTICLES 1 AND 4 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984

BETWEEN

SUSAN MICHAEL KARIUKI.....PETITIONER

VERSUS

OCS, DIANI POLICE STATION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT



BETWEEN

SUSAN MICHAEL KARIUKI PETITIONER

AND

OCS, DIANI POLICE STATION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

- 1 The petitioner, Susan Michael Kariuki, is a resident of Ukunda in Kwale County. She filed this Petition on 9th December 2022 alleging contravention of her constitutional rights by the 1st respondent jointly officers attached to Diani Police Station. She explained that she is the proprietor of all that piece of land known as Kwale/Ukunda/2924; and that she was arrested on 6th March 2022 by police officers from Diani Police Station on allegations of theft of a goat that had strayed and damaged crops on the aforementioned property. She complained that she was placed in cells briefly before being released at 8.30 p.m. with instructions to report back the following day to assist with investigations.
- 2 She explained that prior to 5th March 2022, she had received reports from her caretaker on the land that a certain goat and some cows had been destroying her crops. She accordingly visited her shamba in Mwakidifu and confirmed the reports and detained the goat with a view of ascertaining its owner. The petitioner further averred that after the owner showed up, they initiated discussions for compensation but could not finalize the same because it was already dark, and therefore the extent of the damage could not be immediately ascertained. They agreed to meet again the following day to progress their discussions. She therefore expressed surprise when she was arrested instead and placed in police custody on allegations of stock theft.
- 3 While the complaint against her was undergoing investigations under the charge of one PC Kadenge, the petitioner also took a decision to report her own complaint to the Police for action; which she did on 14th March 2022. She added that, on seeing her and ascertaining her intention, PC Kadenge got infuriated and caused her to be re-arrested and placed in cells. She was denied bail as well as access to members of her family; and had to stay overnight in a cell without basic sanitary facilities. She also complained that, while in the cells, she accidentally slipped and fractured her leg; and that instead of being taken to hospital the next morning for treatment, she was arraigned before court on a charge of theft. She added that, it was only upon being released on bond that she was able to seek the medical attention she needed as she pursued her complaint.
- 4 It was further the assertion of the petitioner that, although she was ready to proceed with her trial to its logical conclusion in the full knowledge and belief that she was innocent, the charge was subsequently withdrawn. At the same time, no further action was taken in respect of her complaint regarding the destruction of her crops; notwithstanding that she escalated the matter to the Independent Policing Oversight Authority. Accordingly, the petitioner filed this Petition alleging violation of her rights as enshrined in various provisions of *the Constitution*; the particulars of which were set out at Section D of her Petition. In the premises, the petitioner prayed for the following reliefs against the respondents:



- a. A declaration that the actions of the 1st respondent and the police officers attached to Diani Police Station in Kwale contravened Articles 2, 3, 10, 20, 25, 27, 28, 29, 43, 47, 48, 49 and 51 of *the Constitution* of Kenya.
 - b. An order of compensation in general damages against the respondents jointly or severally for violating the petitioner's constitutional rights.
 - c. An order of compensation in punitive general damages against the respondents jointly and severally for violating the petitioner's constitutional rights.
 - d. Costs of the suit and interest thereon.
 - e. Any other relief the Court deems fit and just in the circumstances.
5. The Petition was premised on the averments set out in the Supporting Affidavit sworn by the petitioner on 6th December 2022 and the annexures thereto. She gave a detailed account of the events leading up to her arrest, detention and arraignment before court on allegations of stock theft. She also adverted to her injury while in police custody and exhibited documents in proof thereof. I will revert to the details thereof shortly.
6. In response to the Petition, the respondents relied on the Replying Affidavit sworn by Police Constable Mathias Kadenge who was the investigating officer in the subject criminal case. He confirmed that a complaint was booked at Diani Police Station on 6th March 2022 by Miriam Kombe Yeri against the petitioner vide OB No. 32/6/03/2022; and that the matter was assigned to him for investigation. He further averred that he proceeded to record statements from the complainant and two other witnesses and ascertained that the goat had indeed been locked up by the petitioner in a house at her farm in Mwakidafu area.
7. PC Kadenge further deposed that, upon recovery of the goat and ascertaining the petitioner's reason for her action, he gave the parties, who are neighbours, an opportunity to pursue alternative dispute resolution, under the chairmanship the village elder, Ali Hamisi Mwabugu; but the same yielded no positive results. He added that, as the petitioner insisted on being taken to court, he concluded his investigations and handed over the file to the Officer in Charge of Station, CI Damaris Nzuve, who, upon perusing the file, approved the charge of stock theft, contrary to Section 268 as read with Section 278 of the Penal Code.
8. Thus, PC Kadenge confirmed that he arrested the petitioner on 14th March 2022 vide OB No. 24/14/03/2022 at 1130 Hours and placed her in custody at Diani Police Station. He further averred that the petitioner was offered cash bail but could not raise the same; and that she was consequently charged and arraigned before the court at Kwale on 15th March 2022. According to him, the petitioner did not raise any complaint of any kind while in police custody. He added that upon arraignment, the petitioner denied the charge, was released on cash bail of Kshs. 10,000/= and given a date for pre-trial conference on 22nd March 2022.
9. Thus, at paragraph 13 of his Replying Affidavit, PC Kadenge asserted that the petitioner's complaint on 18th March 2022 about her injury while in police custody was nothing but an afterthought. He pointed out that no such complaint was raised before the plea court as is usually the practice. PC Kadenge also stated that the petitioner was advised to take up the matter with the Independent Policing Oversight Authority (IPOA). He concluded his affidavit by stating that, subsequently, the complainant, Mariam Kombe Yeri, decided to withdraw the charge and forgive the petitioner. Accordingly, the criminal case against the petitioner was withdrawn on 28th June 2022 in the presence of the petitioner and her lawyer, Ms. Munywoki.



10. The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 2nd March 2023. Accordingly, the petitioner’s counsel, Mr. Rono, relied on the petitioner’s written submissions dated 21st March 2023. He proposed the following issues for determination:
 - a Whether the Court has jurisdiction to determine this matter.
 - b Whether the 1st respondent infringed the petitioner’s constitutional rights.
 - c Whether the petitioner is entitled to the grant of general damages against the respondents jointly or severally for violating the petitioner’s constitutional rights.
 - d Whether the petitioner is entitled to the grant of punitive damages against the respondents jointly or severally for violating the petitioner’s constitutional rights.
 - e Who should bear the costs of the suit.
11. The petitioner relied on Article 165 of *the Constitution* as well as the cases of Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Another, Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 and Kenya Hotel Properties Ltd v The Attorney General & 5 Others [2018] eKLR for the proposition that the Court, being a creature of *the Constitution*, can only exercise the jurisdiction conferred on it by either *the Constitution* or legislation.
12. At paragraphs 31 to 125 of her written submissions, the petitioner set out the manner in which her constitutional rights had been violated by the respondents, as well as the other infringements alleged by her. In particular, the petitioner contended that:
 - a. The 1st respondent and the officers attached to Diani Police Station infringed her right to bail and bond under Article 49(1)(h) of *the Constitution*.
 - b. The 1st respondent infringed her rights to communicate with an Advocate and other persons whose assistance was necessary at the time, as provided for under Article 49(1)(c) of *the Constitution*.
 - c. The actions of the 1st respondent and the officers attached to Diani Police Station infringed on her right to non-discrimination as provided for in Article 27(1) of *the Constitution*.
 - d. The 1st respondent and the officers concerned infringed on her right to dignity as enshrined in Article 28 of *the Constitution*.
 - e. The respondents infringed on her right to freedom and security of the person as provided for under Article 29(a), (d) and (f) of *the Constitution*.
 - f. The 1st respondent infringed her rights to emergency medical treatment as provided for under Article 43(2) of *the Constitution*.
 - g. The 1st respondent and the officers concerned infringed on her rights to access justice as provided for in Article 48 of *the Constitution*.
 - h. The 1st respondent and the officers concerned contravened Articles 2, 3, 10(2)(b), 19(3), 20, 21, 24, 25, 232 and 244 of *the Constitution*.
13. Thus, counsel for the petitioner urged the Court to find that the petitioner is entitled to the reliefs prayed for by her in the Petition. He proposed an award of general damages in the sum of Kshs. 15 million for the contraventions of the petitioner’s rights; and Kshs. 10 million for the violations of *the Constitution* by the respondents and the officers attached to Diani Police Station.



14. On behalf of the respondents, written submissions dated 5th April 2023 were filed herein on 11th April 2023 by Ms. Nimwaka Kiti. Counsel proposed the following issues for determination:
 - a. Whether the petitioner's right to freedom from torture, cruel and inhuman or degrading treatment or punishment was violated.
 - b. Whether the respondents contravened Article 244 of *the Constitution*.
 - c. Whether the petitioner's rights under Article 29 were violated.
 - d. Whether the petitioner's right to bail was violated.
 - e. Whether the petitioner was denied emergency medical treatment and hence whether her rights under Article 43(2) of *the Constitution* were violated.
 - f. Whether the petitioner's right to communicate to an advocate was infringed upon.
 - g. Whether the 1st respondent infringed on the right to fair administrative action of the petitioner.
 - h. Whether the petitioner is entitled to damages and costs.
15. In the submission of the respondents, the facts presented by the petitioner fall short of the threshold for torture and/or degrading treatment as envisaged by Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Their contention was that the petitioner needed to prove that the actions complained of were meant to punish her with a view of obtaining a confession from her. They added that the 1st respondent is only a civil servant and cannot be held liable for the conditions obtaining in police cells; which conditions are not unique to Diani Police Station or the petitioner.
16. The respondents denied that the petitioner was denied emergency medical treatment after sustaining a leg fracture, as alleged. They made reference to their Replying Affidavit and asserted that no such complaint was brought to their attention by the petitioner. In response to allegations of violation of Article 29 of *the Constitution*, the respondents submitted that the petitioner was lawfully arrested and charged following a formal complaint of stock theft; and therefore their actions were justified in law. They relied on *Wilson Olal & 5 Others v Attorney General & 2 Others* [2017] eKLR to buttress their assertion that the acts complained of fall within the exceptions provided for under Article 24 of *the Constitution*.
17. On whether the petitioner was denied bail unjustifiably and in contravention of Article 49(1)(h), the respondents were of the posturing that whether or not to grant bail is in the discretion of the Officer in Charge of a police station by dint of Standing Order 9(a)(i); and that in this instance, the petitioner was only held in custody briefly before her arraignment in court. In similar fashion, the respondents refuted the assertions of infringement of Articles 47 and 244 of *the Constitution*, positing that no sufficient evidence was presented before the Court in proof of the alleged violations. Accordingly, the respondents prayed for the dismissal of this Petition with costs.
18. From the foregoing, there appears to be no dispute that the petitioner is the proprietor of the land Kwale/Ukunda/2924 on which she had planted an assortment of crops that included amaranthus (also known as 'mchicha'), bananas and 'kunde'. Her averments to the effect that she received a report from her caretaker that some cows and a certain goat would stray on to her farm, and that she visited the shamba on the 5th March 2022 and found a goat eating her crops are also uncontroverted. Moreover, there is no dispute that she detained the goat and her version that she proceeded to call the village chairperson, Mr. Ali Hamisi, and informed him of that state of affairs is also undisputed. According



to the petitioner, she duly alerted Mr. Hamisi that she had detained the goat and was waiting for the owner to show up; for which reason she requested that any inquiries be directed to her residence at ‘Mzee wa Kisima’.

19. The petitioner asserted that on the same date at around 6.00 pm a group of people arrived at her house and demanded for the goat, but since it was late she only showed them the goat and asked them to return the following day for amicable settlement. These assertions were likewise uncontroverted. Indeed, it was the contention of the petitioner that, on the 6th March 2022, before she left for church she instructed her caretaker to release the goat to the owner and inform them that she had forgiven them; but later got to learn that the owners did not return for their goat. Instead, she was arrested by two police at around 6.30 p.m. and escorted to Diani Police Station. There is no dispute therefore as to the circumstances preceding the petitioner’s arrest or the fact of her arrest.
20. Regarding the events at the police station on the 6th March 2022, again there is no dispute that, though placed in the police cells briefly, the petitioner was later released on instructions to report to the police station on the following day, the 7th March 2022. She complied with the instructions and reported as instructed on 7th, 8th and 9th of March 2022. While the matter was pending investigations, the petitioner took the initiative to report her own grievance regarding the destruction of her crops to Diani Police Station on the 14th March 2022 for appropriate action. The parties are in agreement that that was the occasion of her re-arrest and placement in custody pending arraignment for the offence of stock theft, in respect of which the instant Petition was filed.
21. Thus, what was disputed by the respondents was the petitioner’s allegation that she was denied bail; forced to stay in deplorable conditions in cells; or that she suffered a leg injury while in custody. The respondents further denied that the petitioner asked for emergency treatment or that her pleas for help were ignored by the 1st respondent and the officers concerned. In the same vein, the respondents denied the petitioner’s assertion that she was not allowed to see her husband who had offered to post bail on her behalf; or that she suffered degrading treatment at the hands of the police by being called a “goat thief”.
22. In the premises, the key issues that emerge for determination from the foregoing summary of facts are:
 - a. Whether the 1st respondent infringed the petitioner’s constitutional rights.
 - b. Whether the petitioner is entitled to the grant of general damages against the respondents jointly or severally for violating the petitioner’s constitutional rights.
 - c. Whether the petitioner is entitled to the grant of punitive damages against the respondents jointly or severally for violating the petitioner’s constitutional rights.
 - (d) Who should bear the costs of the suit.
23. It is also noteworthy that one of the issues proposed for determination by counsel for the petitioner is whether the Court has jurisdiction to determine this matter. No such argument was raised by the respondents and therefore it appears to have been raised suo motu by the petitioner. Since jurisdiction is primordial, it is essential that the same be settled first before engaging in a merit consideration of the Petition. Indeed, in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra) it was held:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

24. In *Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others* (supra) the Supreme Court quoted with approval the following excerpt of the decision of the Supreme Court of Nigeria in Case No. 11 of 2012: *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others*, which I find apt:

“...It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

25. Needless to say that jurisdiction is conferred either by *the Constitution* or statute. Thus, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (also see *Kenya Hotel Properties Ltd v Attorney General & 5 Others* (supra) and *Interim Independent Electoral Commission*, supra)

26. That the Court has the jurisdiction to entertain constitutional petitions is explicit in Article 165 of *the Constitution*. Sub-Article 3 thereof states:

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



- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv. a question relating to conflict of laws under Article 191;
 - and
- e any other jurisdiction, original or appellate, conferred on it by legislation.

27. Nevertheless, it is also trite that a litigant alleging violation of constitutional rights or freedoms, must plead his/her case with reasonable precision in line with the principle enunciated in *Anarita Karimi Njeru v Republic* [1979] eKLR that:

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

28. A look at the Petition confirms that the petitioner complied with this requirement. The Petition has sufficient details in Section B thereof as to the its legal foundation. The facts relied on were set out by the petitioner in Part C of the Petition, while in Part D, she supplied the particulars of the threatened or actual violation of her fundamental rights and freedoms. There is no gainsaying therefore that the petitioner pleaded her case with the requisite specificity expected of such matters. It must always be borne in mind that specificity does not mean exactitude. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR pointed out that:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

29. Moreover, it is imperative that the allegations be serious enough to measure up to the high standards set out in *the Constitution*. Where, for instance, there exists an alternative remedy through statutory law, then such a remedy ought to be pursued instead. In *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Hon. Lenaola, J. (as he then was) held:

“I should only say this as I conclude; in *Francis Waithaka -vs- Kenyatta University* Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further the Court also cited with approval, the decision in *Teitinnang -vs- Ariong* (1987) LRC (const.) 517 where it was held as follows: -



“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Laws? The rights and duties of individuals, and between individual, are regulated by private laws. *The Constitution*, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by *the Constitution* under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of *the Constitution* no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before me, and I so hold”.

30. Hon. Lenaola, J. further stated, and I entirely agree with him on this: -

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

31. Hon. Chacha, J. was of a similar view in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR, 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 the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

32. On the face of it, the allegations of malicious arrest and prosecution would be seen in the foregoing light. In the same vein, compensation for alleged damage of her crops ought to have been pursued by the petition under the civil jurisdiction. That notwithstanding, it is manifest that the Petition is predominantly aimed at the vindication of the petitioner’s constitutional rights, granted her assertions that:

- a. The 1st respondent and the officers attached to Diani Police Station infringed her right to bail and bond under Article 49(1)(h) of *the Constitution*.
- b. The 1st respondent infringed her rights to communicate with an Advocate and other persons whose assistance was necessary at the time, as provided for under Article 49(1)(c) of *the Constitution*.
- c. The actions of the 1st respondent and the officers attached to Diani Police Station infringed on her right to non-discrimination as provided for in Article 27(1) of *the Constitution*.



- d. The 1st respondent and the officers concerned infringed on her right to dignity as enshrined in Article 28 of [the Constitution](#).
 - e. The respondents infringed on her right to freedom and security of the person as provided for under Article 29(a), (d) and (f) of [the Constitution](#).
 - f. The 1st respondent infringed her rights to emergency medical treatment as provided for under Article 43(2) of [the Constitution](#).
 - g. The 1st respondent and the officers concerned infringed on her rights to access justice as provided for in Article 48 of [the Constitution](#).
 - h. The 1st respondent and the officers concerned generally contravened Articles 2, 3, 10(2)(b), 19(3), 20, 21, 24, 25, 232 and 244 of [the Constitution](#).
33. Accordingly, I entertain no doubt at all that the Petition meets the requisite threshold. Indeed, in *Attorney General v Kituo Cha Sheria & 7 others* [2017] e K LR, the Court of Appeal aptly reiterated that:

“Quite beyond argument then, the Bill of Rights in Kenya’s constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country’s democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

34. In the premises, the Petition is properly before the Court; and in ascertaining whether the 1st respondent infringed the petitioner’s constitutional rights in terms of the 1st issue, it is proposed to determine whether the foregoing allegations of infringement as set out in Paragraph 29 above have been proved by the petitioner.

A. On whether the petitioner has proved her allegations of infringement of her constitutional rights and other provisions of [the Constitution](#):

- (a) Right to Bail:

35. Article 49(1)(h) of [the Constitution](#) is explicit as to the right to bail and bond. It states that an arrested person has the right to be released on bond or bail on reasonable conditions pending charge or trial unless there are compelling reasons not to be released. As has been pointed out hereinabove, the petitioner had no complaint about her first arrest and detention; the parties being in agreement that she was detained only briefly before being released at 8.30 p.m. on condition that she presented herself the following day. Her grievance was in respect of her re-arrest on 14th March 2022. Whereas the petitioner complained that she was denied bail, the respondents took the position that the petitioner was indeed offered the opportunity to post cash bail but was unable to raise the amount, and hence ended up spending the night in police custody. It was therefore a case of the petitioner’s word against



the respondents'. In effect, there was no direct evidence sufficient enough to prove the petitioner's assertions as set out at paragraphs 68 and 69 of her Petition.

36. Indeed, Section 36 of the Criminal Procedure Code underscores the discretion of the police officer in charge of a police station concerned in the following terms:

“When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be serious, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”

37. Hence, where bond/bail it is declined by the Police, it is imperative that the arrested person be arraigned before court within 24 hours; which is what was done in this instance. Accordingly, the right to bail has to be balanced with the constitutional mandate of the Police to investigate crime and such other provisions as Article 49(1)(f) of *the Constitution*; such that where sufficient basis exists for the exercise of the discretion by the officer in charge of a police station to not release a suspect on bond, no complaint ought to ensue if the arrested person is arraigned before court as soon as practicably possible; at any rate within 24 hours. Hence, in so far as the petitioner was presented before the subordinate court at Kwale within the strictures of Article 49(1)(f) and was thereupon admitted to bail, it is my considered finding that no violation of her right to bail has been proved.

(b) Right to communication:

38. At paragraphs 63 to 68 of the petitioner's written submissions, she complained that the 1st respondent infringed her right to communicate with an Advocate and other persons whose assistance was necessary at the time. In this regard, she cited Article 49(1)(c) of *the Constitution* and relied on Annexure SMK 2 to demonstrate that she is a married person; and that her husband visited the police station but was denied the opportunity to see with her. This particular aspect of the petitioner's case was objected to by the respondents at paragraphs 32 to 35 of their written submissions on the ground that it was not pleaded in the Petition. However, from a careful perusal of the Petition, particularly paragraphs 74 and 113(a) thereof, it is manifest that the alleged infringement of Article 49(1)(c) of *the Constitution* was indeed pleaded by the petitioner; and therefore the respondent's submissions in that regard are misleading.

39. As to whether the right was violated, the petitioner acknowledged, at paragraphs 68 and 69 of her Petition, that she was given an opportunity to call her husband and that her husband went to the police station and met the OCS, and was advised to see PC Kadenge in connection with her confinement. The assertions were reiterated at paragraphs 25 and 26 of the petitioner's Supporting Affidavit. I accordingly find no merit in the petitioner's complaint that her rights under Article 49(1)(c) of *the Constitution* were violated.

(c) Freedom from Discrimination:



40. Article 27(4) of *the Constitution*, which the petitioner relied on to anchor her allegations of discrimination states:

“The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

41. Needless to add that, in this context the word “state” means the collectivity of offices, organs and other entities comprising the government of the Republic of Kenya, (see Article 260 of *the Constitution*). Hence, the respondents fall in that category. For the purposes of the Petition, I would subscribe to the definition of discrimination as set out in Black’s Law Dictionary, namely:

“Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

42. Thus, in *Jacqueline Okeyo Manani & 5 others v Attorney General & Another* [2018] eKLR it was held that:

“...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...*The Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”

43. With the foregoing in mind, I have given due consideration to the material presented before the Court by the petitioner. The petitioner asserted that the in this regard infringement was in the sense that the 1st respondent failed to investigate the alleged crime of stealing vis-à-vis her complaint of trespass and destruction of her crops. These arguments are set out at paragraphs 69 to 81 of the petitioner’s written submissions. Hence, at paragraph 73 thereof, the petitioner submitted that:

“...the act of the police officer in not investigating whether the goat had indeed destroyed the Petitioners crops amounted to unfair discrimination...”

44. The same assertion was reiterated at paragraph 75 of the petitioner’s written submissions. At paragraph 78, the petitioner’s written submissions, counsel took issue with the fact that the petitioner was arrested within the vicinity of the police station; and posited that this amounted to discrimination. Hence, the Court was urged to find that the petitioner was subjected to discrimination in the following respects:

- (a) She was arrested and charged with a crime she did not commit;
- (b) Her complaint of crop destruction has never been investigated; and
- (c) Her reputation was dented by reason of her arrest and arraignment for an offence she did not commit.



45. Plainly, the assertions fall short of demonstrating deferential treatment as between the petitioner and other arrested persons in similar situations. Indeed, the three aspects singled out in an attempt to prove discrimination do not support the elements of discrimination as envisaged by Article 27 of *the Constitution*, and therefore it is my finding that this aspect of the petitioner’s claim lacks sound factual basis.

d. Right to Dignity:

46. Article 28 of *the Constitution* is explicit as to the right to dignity and to have that dignity respected and protected. The petitioner’s complaint in this regard was that she was arrested and placed in police cell and thereafter subjected to verbal abuse by being called a “goat thief”. She also complained that she was incarcerated in degrading conditions in which the only facility available for calls of nature was a bucket; which she could not bring herself to use.

47. Whereas no explicit or direct response was given to these allegations in the respondent’s affidavit, the overall tone thereof was a denial. For instance, at paragraph 10 of the Replying Affidavit, it was averred that the petitioner was escorted to Kwale Law Courts on 15th March 2022; that she left Diani Police Station without raising any complaints; and that she appeared fit as per the Cell Register and OB extracts. At paragraph 11 thereof, PC Kadenge further averred that at Kwale Law Courts, the petitioner pleaded not guilty without raising any complaint.

48. No doubt, *the Constitution* envisages that arrested persons be treated with the dignity they deserve. Hence, in *Dawood and Another v Minister of Home Affairs and Others (CCT35/99) [2000] ZACC 8* the Constitutional Court of South Africa aptly stated:

‘Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

49. Nevertheless, it was not demonstrated that the petitioner was treated differentially or that the conditions she complained of are unique to Diani Police Station. As pointed out in at paragraph 26 hereinabove, it would hardly be just to hold an individual Kenyan, such as the OCS of Diani Police Station for the deplorable conditions at Diani Police Station; the reasoning being, as aptly pointed out by Hon. Lenaola, J. (as he then was) that an individual or group of individuals, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals in respect of which declaratory orders can validly issue against such individuals.

50. Indeed, in the *Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR* the Supreme Court acknowledged that, in the case of certain rights, notably economic, social and political rights, attainment could only be progressive. Here is what the Supreme Court had to say:

53. We believe that the expression ‘progressive realization’ is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive



measures are taken by the State. The Exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.

54. Certain provisions of *the Constitution* of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.
- (e) Freedom and security of the person:
51. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person. In the same breath, Article 9 of the International Covenant on Civil and Political Rights also provides that everyone has the right to liberty and security of the person and freedom from arbitrary arrest or detention except on grounds and in accordance with such procedures as are established by law. On the domestic front, Article 29 of *the Constitution* provides:
- Every person has the right to freedom and security of the person, which includes the right not to be—
- (a) deprived of freedom arbitrarily or without just cause;
 - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
 - (c) subjected to any form of violence from either public or private sources;
 - (d) subjected to torture in any manner, whether physical or psychological;
 - (e) subjected to corporal punishment; or
 - (f) treated or punished in a cruel, inhuman or degrading manner.
52. Thus, although it was the assertion of the petitioner that she was unlawfully arrested and detained at a police station for a crime she alleges she did not commit; and that it was actually the complainant's goat that had trespassed on her property and destroyed her crops, the 1st respondent demonstrated that they visited the scene and found that the goat had been locked by the petitioner in a room for over twenty-four hours; that the goat was taken to the police station. As has been pointed out herein above, the petitioner was charged with stealing contrary to Section 268 as read with Section 278 of the



- Penal Code. The Police also indicated that they had urged the parties to pursue an alternative dispute resolution to no avail, as the petitioner insisted on proceeding for trial before the subordinate court.
53. In the circumstances, it cannot be validly argued that the Police acted arbitrarily in arresting the petitioner; or that there was no plausible justification for incarceration; the merits of her case notwithstanding. To the contrary, it is manifest that the Police were acting in response to a formal complaint. Their duty was to verify the allegations made against the petitioner; and having offered the parties an opportunity to resolve the matter amicably to no avail, they cannot be faulted for causing the petitioner to be charged and arraigned before court. It would have been the duty of the subordinate court to weigh the evidence and determine where the truth lay, had the case not been withdrawn. It is also instructive that the petitioner was represented by counsel and that she therefore had the option of objecting to the withdrawal to enable her present her defence, but did not raise any such objection. I therefore find no basis in her claim that her Article 29 rights were violated.
54. The petitioner also alleged that she was treated in a cruel, inhuman or degrading manner, in that she was arrested at 11.30 a.m. in the morning and yet was not taken to court straightaway. She added without any proof that at Kwale Law Courts, plea-taking is usually done in the afternoon. Having found that the 1st respondent complied with Article 49(1)(f) of *the Constitution* and presented the petitioner before court within the prescribed time of 24 hours, I am not convinced that a violation is discernible in that respect.
55. In the same vein, the petitioner's complaint that she was physically tortured and treated in a degrading manner by being told to relieve herself in a bucket have no basis; having conceded that she sustained her fracture from an accidental fall. Having made my observations in respect of the issue of the deplorable amenities in prison, it would follow that even this complaint is untenable.
- (f) Right to emergency medical treatment as provided for under Article 43(2) of *the Constitution*:
56. Article 43 of *the Constitution* speaks to socio-economic rights and in particular, provides thus at Sub-Article (2):
- “A person shall not be denied emergency medical treatment.”
57. Accordingly, the petitioner averred, at paragraph 31 of her Supporting Affidavit that she accidentally fell down in the police cell and sustained a fracture of her leg; and that although she screamed for help, her pleas were ignored by the police officers on duty. She attached several documents to her Affidavit to back up her assertions. They include a photograph depicting her fractured leg, a copy of the x-ray images of the affected leg, copies of the treatment notes as well as a copy of the Medical Examination Report (P3) dated 18th March 2022.
58. Although these allegations were denied by the respondents at paragraph 11 of their Replying Affidavit, the documents annexed to the petitioner's Supporting Affidavit confirm that indeed she suffered a fracture as alleged by her. It is noteworthy that in the P3 form it was narrated that the injury was suffered while the petitioner was in police custody. There is therefore credible evidence to debunk the respondent's assertion that the allegation was an afterthought.
59. That notwithstanding, it is noteworthy that upon being released on bond by the court at Kwale on 15th March 2022, the petitioner did not go for medical treatment as would be expected of an emergency, but went straight home to sleep. Her first visit to hospital was on 16th March 2022. In the circumstances, I am not convinced that this was an emergency for which the respondents ought to be



held to account pursuant to Article 43(2) of *the Constitution*. Indeed, according to the Concise Oxford English Dictionary, an emergency is defined to mean:

“a serious unexpected and potentially dangerous situation requiring immediate action”

60. The petitioner would hardly have gone home to sleep had the situation been an emergency. I therefore find no merit in her assertion that she was denied emergency treatment.

(g) Right to access justice:

61. Article 48 of *the Constitution* provides as follows in terms of access to justice:

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

62. In this regard, the petitioner was miffed that her complaint regarding the destruction of her crops was not taken seriously by the police. I however have no hesitation in dismissing this complaint, considering that it was the flipside of the criminal case and therefore would have been up for ventilation had the criminal case not been withdrawn. Moreover, at paragraph 15 of the Replying Affidavit, PC Kadenge averred that the withdrawal was done under Section 204 of the Criminal Procedure Code with the concurrence and in the presence of the petitioner and her advocate. In any event, access to justice is not a one track affair whereby unless the Police take up a complaint, there would be no other option available to the petitioner. The fact that she filed this Petition is a testimony in itself in favour of access. She could have mounted a private prosecution under Section 88 of the Criminal Procedure Code or filed a civil suit for recompense as other available options.

63. I therefore find no merit in the petitioner’s assertion that her right of access to justice was violated by the respondents. That being the case, and taking into account all the matters aforesaid, it would follow that the petitioner’s allegations of violation Articles 2, 3, 10(2)(b), 19(3), 20, 21, 24, 25, 232 and 244 of *the Constitution* have no basis. Needless to say that the burden of proof was on the petitioner to prove all her allegations on a balance of probabilities, for Section 107(1) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is explicit that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

64. Indeed, in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

“...“proof” is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

65. This is more so in constitutional petitions; and therefore, I agree entirely with the position taken by Hon. Mativo, J. in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR that:

“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be in a factual vacuum. To attempt to



do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.”

B. On whether the petitioner is entitled to the reliefs prayed for:

66. Having failed to prove her allegations to the requisite standard, it follows that the petitioner is not entitled to any of the reliefs sought by her. In essence therefore issues [b] and [c] are hereby resolved in favour of the respondents, with the result that the Petition, being devoid of merit, is hereby dismissed. Each person to bear own costs thereof.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF
JANUARY 2024**

OLGA SEWE

JUDGE

