



**Mstumi v Dubeo & 3 others (Petition 86 of 2020)
[2024] KEHC 1042 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 86 OF 2020
OA SEWE, J
JANUARY 24, 2024
IN THE MATTER OF ARTICLES 1, 2, 3, 10, 21, 22, 23, 27, 28,
47, 48, 49, 73, 159, 165(3)(D), 258 AND 259 OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF VIOLATION OF THE RIGHT TO HUMAN
DIGNITY, FAIR ADMINISTRATIVE ACTION AND PROTECTION
OF FREEDOM AND SECURITY OF PERSON AND LIBERTY
BETWEEN

BETWEEN
JUMA MWAMTSUMI MSTUMI PETITIONER

AND
RAJNESH DUBEO 1ST RESPONDENT
DEVYANI FOOD INDUSTRIES LIMITED FORMERLY KNOWN AS SAMEER
AGRICULTURE & LIVESTOCK (K) LTD 2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT
INSPECTOR GENERAL, THE ATTORNEY GENERAL 4TH RESPONDENT**



JUDGMENT

- [1] The petitioner is a male adult Kenyan resident in the County of Mombasa. He filed this Petition on 3rd August 2020 alleging violation of various provisions of *the Constitution* by the respondents. By way of background, the petitioner averred that he is a former employee of the 2nd respondent, having worked for the company as a sales supervisor, Mombasa Region. In that capacity, it was brought to his attention, on the 31st August 2019, that 29 freezers had been stolen from the 2nd respondent's go-down. He accordingly reported the matter to the 1st respondent, the latter being the Manager of the 2nd respondent. The matter was thereafter reported to Nyali Police Station. The petitioner further averred that on the way to Nyali Police Station, the 1st respondent intimidated him to report that 50 freezers had been stolen instead of 29 freezers for purposes of the company's insurance claim.
- [2] The petitioner further averred that, because he refused to comply with the 1st respondent's directive, he was arrested and detained at Nyali Police Station, allegedly to help with investigations. He further stated, at paragraph 29 of his Petition, that he was held in custody beyond the constitutionally mandated period of 24 hours from 31st August 2019 to 2nd September 2019 and was thereafter arraigned before the Magistrate's Court at Shanzu, charged with the offence of breaking into a building and committing a felony, contrary to Section 306(a) of the Penal Code in Shanzu Criminal Case No. 1336 of 2019: Republic v Juma Mwamtsumi Mtsumi & Another.
- [3] The petitioner pointed out that the complaint was ultimately withdrawn; whereupon he was acquitted under Section 204 of the Criminal Procedure Code. He was then paid all his employment dues and asked to report to work. He worked until 2020 when his employment was terminated due to the Covid-19 pandemic. Thus, the petitioner filed this suit contending, at paragraph 37 of the Petition, that he was falsely and maliciously prosecuted at the instigation of the 1st respondent when the respondents failed to fabricate evidence against the petitioner; and that, ultimately, the respondents resorted to withdrawing the complaint.
- [4] In the premises, the petitioner prayed for the following reliefs against the respondents:
- (a) A declaration that the petitioner's arrest and detention in police custody was wrongful and the subsequent prosecution was malicious.
 - (b) A declaration that the actions of the respondents are and were unconstitutional hence null and void for violating the rights and freedoms of the petitioner under Article 27, 28, 47, 48 and 49 of *the Constitution* of Kenya.
 - (c) An order that the petitioner be adequately and promptly compensated by the respondents and the Government of Kenya for violating his constitutional rights.
 - (d) General, exemplary and punitive damages.
 - (e) The petitioner be paid costs of the Petition.
 - (f) Any further relief or orders that the Court may deem just and fit to grant.
- [5] On behalf of the 1st and 2nd respondents, a Replying Affidavit was sworn by the 2nd respondent's Assistant Legal & Human Resources Manager Mr. Paul Maina. They conceded therein that indeed the petitioner was employed by the 2nd respondent as a sales supervisor, Coast Region; and that the 2nd respondent's warehouse in Mombasa was broken into and refrigerators stolen therefrom. The 1st



and 2nd respondents further confirmed that the incident was reported to Nyali Police Station by the 1st respondent, in his capacity is the General Manager of the 2nd respondent; and that the petitioner was arrested alongside another employee as suspects; but because there was no credible evidence against them, the charge was withdrawn.

- [6] The 1st and 2nd respondents further averred, at paragraphs 8 of their Replying Affidavit that, in the period that the petitioner was employed by the 2nd respondent, he was an honest and average employee. The respondents reiterated the circumstances leading to the arrest of the petitioner, and asserted the 1st and 2nd respondents played no part in the arrest and prosecution of the petitioner. They added, on without prejudice basis, that there was nevertheless reasonable and probable cause for the prosecution of the petitioner. They therefore took the posturing that these proceedings are an afterthought and a vindictive attempt by the petitioner to unjustly enrich himself upon termination of his employment. They accordingly prayed for the dismissal of this Petition with costs.
- [7] On behalf of the 3rd and 4th respondents, a Reply to the Petition was filed on 7th January 2021. They contended that the Petition raises no constitutional issues in so far as it is purely a civil suit couched in constitutional language with a view of disguising the claim and passing it off as a constitutional petition. The 3rd respondent asserted that, at the core of the petition are allegations of malicious prosecution and/or wrongful detention which can only be remedied through a civil suit. In addition, the 3rd respondent averred that, upon reaching a conclusion that there was reasonable ground to believe a crime had been committed, he merely exercised his authority under Article 157 of the Constitution to commence prosecution.
- [8] In the 3rd respondent's Grounds of Preliminary Objection dated 9th December 2020, it was contended that:
- (a) The withdrawal of Shanzu Criminal Case No. 1336 of 2019: Republic v Juma Mwamtsumi Mtsumi & Another under Section 204 of the Criminal Procedure Code was grounded on an understanding between the complainant and the petitioner and therefore the 3rd respondent should not be held liable on account thereof.
 - (b) The petitioner has not demonstrated in any manner whatsoever how the 3rd respondent has violated his constitutional rights.
 - (c) The petitioner's interpretation of *the Constitution* is misleading, misconceived and self-serving as, he had an opportunity to raise issues of violation of his fundamental rights before the trial court but failed to do so; yet the trial court could have addressed the issues.
 - (d) The 3rd respondent has not violated any rights of the petitioner and the said withdrawal under Section 204 of the Criminal Procedure Code was within the powers of the trial court under Article 159 of *the Constitution*.
 - (e) The act of the complainant in withdrawing Shanzu Criminal Case No. 1336 of 2019: Republic v Juma Mwamtsumi Mtsumi against the petitioner was not evidence of malice.
 - (f) The Petition is misplaced, an afterthought and an abuse of court process, intended to extort money from the State fictitiously.
 - (g) The Petition is hapless, presumptive and an abuse of the court process and should therefore be dismissed with costs.
- [9] The Petition was disposed of by way of viva voce evidence, pursuant to the directions given herein on 18th March 2021. Accordingly, the petitioner testified on 28th April 2021 and adopted his averments in



his Supporting and Further Affidavits as well as the written statement filed herein on 31st May 2021. He confirmed that he was employed as a Sales Supervisor by the 2nd respondent in 2013, with the responsibility of selling milk products and ice cream in the entire Coast Region. He testified that he was arrested on 31st August 2019 after the 2nd respondent's warehouse in Nyali was broken into and 29 freezers stolen therefrom.

- [10] The petitioner further told the Court that, because he declined to support the 1st respondent's false report that 50 freezers instead of 29 were stolen, he was treated as the culprit. He was arrested, charged and arraigned before on a charge of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code in Shanzu Criminal Case No. 1336 of 2019: Republic v Juma Mwamtsumi Mtsumi & Another. He further stated that later on, the 2nd respondent's lawyer went to court and withdrew the complaint. The petitioner produced several documents in support of his Petition, including a copy of the criminal proceedings in Shanzu Criminal Case No. 1336 of 2019.
- [11] On behalf of the respondents, evidence was called from the 2nd respondent's Assistant Legal and Human Resource Officer, Paul Maina (DW1). He adopted the averments set out in his Replying Affidavit sworn on 26th January 2021 together with the annexures thereto. He confirmed that the petitioner was one of the 2nd respondent's employees; and that on the 30th August 2019, he got to learn that the 2nd respondent's warehouse at Nyali had been broken into and 29 freezers stolen therefrom. He was one of the first people to visit the scene; and he stated that they found the gates to the warehouse open and the freezers missing. They then proceeded to Nyali Police Station and reported the incident for further action by the Police.
- [12] It was also the testimony of DW1 that, the petitioner was one of the suspects and was therefore arrested and arraigned before court on 2nd September 2019. He was categorical that they neither specifically complained to the Police against the Petitioner, nor did they apply for his detention. He added that the Company thereafter instructed its Advocate to have the case withdrawn. He added that the 2nd respondent conducted its own investigations and concluded that there was no credible link between the petitioner and the theft; and therefore, after the charge was withdrawn, the petitioner resumed work and was paid all his dues.
- [13] DW1 concluded his testimony by confirming that the petitioner's services were terminated with effect from 11th June 2020 for poor performance; and therefore that on the part of the 1st and 2nd respondents, there was no malice in the arrest, prosecution or termination of the services of the petitioner. He produced the termination letter together with other pertinent documents as exhibits in support of the case of the 1st and 2nd respondent.
- [14] On their part, the 3rd and 4th respondents relied on the testimony of PC Juma Nyamweya (DW2). He adopted his witness statement dated 26th November 2021 as part of his evidence in chief. He therefore confirmed that a report was made on behalf of the 2nd respondent by the 1st respondent of theft of freezers from the 2nd respondent's go down in Nyali; and that he was one of the police officers assigned to investigate the complaint. He further stated that, having recorded witness statements from the 1st respondent, the petitioner and other witnesses, he charged the petitioner as the 1st accused and a security guard as the 2nd accused in Shanzu Criminal Case No. 1336 of 2019; which case was later withdrawn at the instance of the Advocate for 1st and 2nd respondents.
- [15] At the close of the respondents' respective cases, the parties were given an opportunity to file written submissions and therefore the petitioner's written submissions were filed herein on 14th June 2022 in which the following issues were proposed for determination:



- (a) Whether the arrest and prosecution of the petitioner was illegal and unlawful or actuated by malice, and whether it was done in violation of the petitioner's constitutional rights.
 - (b) What is the legal competence of the Petition?
 - (c) What damages, if any, is the petitioner entitled to?
 - (d) what orders should the Court make?
- [16] The petitioner submitted, in respect of the first issue, that his rights to freedom and security of the person under Article 29 of *the Constitution* was violated by the fact of his arrest and arraignment before court on charge of store-breaking and committing a felony, which complaint was subsequently terminated. Accordingly, the petitioner submitted that his constitutional rights under Articles 28, 29, 31 and 39 had been violated by reason of his arrest and malicious prosecution; considering that he had to endure great mental anguish, humiliation and stress, which in turn affected his social, emotional and mental state.
- [17] On the competence of the Petition, the petitioner relied on the cases of *Mbowa v East Mengo Administration* [1972] EA 352, *Patrick Nyamuke Etori v National Police Service Commission & 2 Others* [2019] eKLR and *Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 Others* [2020] eKLR as to the elements of malicious prosecution. He urged the Court to find that he has proved all the elements, namely that he was indeed arrested, detained and prosecuted without any probable cause, and is therefore entitled to compensation. And, at paragraphs 31 to 42, the petitioner pitched for the award of Kshs. 20,000,000/= as general damages together with Kshs. 10,000,000/= as punitive damages together with interest and costs.
- [18] On behalf of the 1st and 2nd respondents, written submissions were filed herein on 22nd September 2022 by Eliud Maina Karanja Advocates. They proposed the following issues for determination:
- (a) Whether the arrest and prosecution of the petitioner was illegal, unlawful or actuated by malice and thus whether it was done in violation of the petitioner's constitutional rights.
 - (b) What is the legal competency of the case?
 - (c) Whether the petitioner proved his claims to warrant grant of the reliefs sought.
- [19] The 1st and 2nd respondents addressed the Court on each of the four elements of malicious prosecution and urged that a finding be returned that the petitioner utterly failed to establish any of those elements against them. To the contrary, they posited that the petitioner's arrest and detention by the Police and prosecution by the 3rd respondent was not only lawful but also premised on reasonable and probable cause. In support of their submission the 1st and 2nd respondents relied on *Hicks v Faulkner* [1878] 8 QBD 167 and *Kagane v Attorney General & Another* [1969] EA 643 as well as Section 58 of the *National Police Service Act*, No. 11a of 2011, which gives a police officer the power to arrest on reasonable grounds; and Article 157(6)(a) of the Constitution which empowers the 3rd respondent to institute and undertake criminal prosecutions against any person before any court in respect of any alleged offence on the basis of reasonable suspicion.
- [20] On the competence of the Petition, the 1st and 2nd respondents relied on *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272 and *Mumo Matemu v Trusted Society of Human Rights Alliance & Others* [2013] eKLR for the proposition that constitutional violations must be pleaded with a reasonable degree of precision. Their contention was that, although the petitioner pleaded a number of provisions of *the Constitution*, he did not precisely demonstrate or prove to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened with violation



by the respondents. In this regard, reliance was placed on *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR for the proposition that decisions on violation of constitutional rights should not be made in a factual vacuum.

- [21] Thus, the 1st and 2nd respondents urged the Court to conclude that the Petition has been brought by a bitter employee whose services were terminated for poor performance; and is therefore a dispute between an employer and employee disguised as a constitutional petition. The case of *Gabriel Mutave & 2 Others v Managing Director, Kenya Ports Authority* [2016] eKLR was cited for the holding that *the Constitution* is not a general substitute for normal procedures for invoking redress under substantive law; and that the proper course is to bring the claim under the applicable law instead. Accordingly, the 1st and 2nd respondents prayed for the dismissal of the Petition with costs.
- [22] The 3rd respondent's written submissions were filed herein on 23rd September 2022 by Ms. Anyumba. In her view, the issues for determination in this Petition are:
- (a) Whether the 3rd respondent violated the petitioner's rights;
 - (b) Whether the elements of malicious prosecution were proved; and,
 - (c) Whether the petitioner is entitled to damages.
- [23] Counsel reiterated the mandate of the 3rd respondent as set out in Article 157 of the Constitution. She likewise made reference to the functions of the Kenya Police Service as provided for in Article 244 of the Constitution and Section 24 of the *National Police Service Act*, to support her submission that the investigation crimes falls within the mandate of the Kenya Police Service; and that once reasonable and probable cause has been established, the 3rd respondent would be within its mandate to initiate and maintain a prosecution. The 3rd respondent relied on *Kagane v Attorney General & Another* [1969] EA 643 and *Anthony Murimi Waigwe v Attorney General & 4 Others* [2020] eKLR to underscore the fact that the prosecution of the petitioner was in the ordinary discharge of its prosecutorial mandate and cannot therefore be construed as an infringement of Article 47 of the Constitution.
- [24] The 3rd respondent also addressed the Court on whether the elements of malicious prosecution have been proved in this Petition. Counsel relied on *Bethwel Omondi Okal v Attorney Genral & Another* [2018] eKLR, *Robert Okeri Ombaka v Central Bank of Kenya* [2015] eKLR and *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR to support her submission that, the burden of proof was on the petitioner to prove all aspects of his case to the requisite standard. She further argued that the mere fact that the Shanzu criminal case was terminated in his favour per se is neither proof that petitioner's prosecution was malicious nor that there was no reasonable or probable cause for his prosecution. Counsel accordingly urged the Court to dismiss the Petition with costs.
- [25] The 4th respondent's written submissions, which were largely in similar lines as the 3rd respondents, were filed herein on 22nd September 2022 by Mr. Makuto. The 4th respondent pointed out that, although the petitioner alleged that he was held in custody for more than 24 hours, from 31st August 2019 to 2nd September 2019 when he was arraigned in court, he did not sue the arresting authority, the Inspector General of Police of the National Police Service. The 4th respondent further explained that, since 31st August 2019 fell on a Saturday, it was not possible to present the petitioner to court within 24 hours from the date of arrest.
- [26] On whether the claim for malicious prosecution is tenable, the 4th respondent reiterated the stance that there was sufficient cause for the petitioner's arrest and prosecution; and that the mere fact that the proceedings were terminated in his favour is no proof that his arrest and prosecution was malicious or that the same was without reasonable and probable justification. The 4th respondent also urged the



Court to note that, when the application to withdraw the complaint was made in Shanzu Criminal Case No. 1336 of 2019, the 3rd respondent did not oppose it; an indication that there was no malice on the part of the 3rd respondent. Accordingly, the 4th respondent relied on *Robert Okeri Ombaka v Central Bank of Kenya (supra)*, *Republic v Paul Kihara Kariuki, Attorney General & 2 Others, Ex Parte Law Society of Kenya [2020] eKLR* to support the argument that the petitioner ought to have filed a civil suit and not a constitutional petition, granted his grievance; and that by presenting a claim for malicious prosecution by way of a constitutional petition, the petitioner contravened the doctrine of constitutional avoidance. Thus, the 4th respondent prayed for the dismissal of this petition with costs.

- [27] From the foregoing summary, there appears to be no dispute that, on the 8th May 2019, the 2nd respondent bought 31 freezers and stored the same in its go-down situate in Nyali. Two of the freezers were thereafter released and delivered to the 2nd respondent's customers, leaving 29 freezers at the go-down. The parties were further in agreement that, on the 31st August 2019 the go-down was broken into and the 29 freezers stolen. The matter was reported to Nyali Police Station and investigations led to the arrest of the petitioner and the watchman on duty at the go-down at the time.
- [28] There is, further, no controversy that, although the petitioner was charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code, the charge was later withdrawn on 17th September 2019 under Section 204 of the Criminal Procedure Code. It is also common ground that the petitioner resumed work thereafter and that it was not until 11th June 2020 that his services were terminated by the 2nd respondent. The Petition was filed soon thereafter on 13th July 2020.
- [29] Thus, the Petition alleges violation of the petitioner's rights in so far as he was not presented before court within 24 hours of his arrest. He also complained that his arrest and prosecution by the respondents was malicious, and hence without any reasonable or probable cause. The petitioner also alleged violation of other provisions of the Constitution such as Articles 25, 27(1) and (2), 28, 47, 48 and 73 of *the Constitution*.
- [30] In the premises, as to the merits of the Petition, the key issues for determination are:
- (a) Whether the arrest and prosecution of the petitioner was done in violation of his constitutional rights.
 - (b) Whether the petitioner is entitled to the reliefs sought.
- [31] However, before attempting a discussion of the aforementioned issues, it is imperative for the Court to satisfy itself as to the competence of the Petition. As pointed out herein above, the 3rd respondent filed Grounds of Preliminary Objection dated 9th December 2020 and what emerges therefrom and from the written submissions of learned counsel for the 3rd and 4th respondents, are two-fold technical objections; namely that the petition was not pleaded with the requisite precision as expected; and that the petitioner's allegations of malicious prosecution do not amount to constitutional issues.
- [32] To buttress the first argument, the respondents relied on the case of *Anarita Karimi Njeru (supra)* in which it was held:

...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."



[33] Indeed, the importance of precision and clarity cannot be overemphasized. Suffice it to restate the expressions of the Court of Appeal in *Mumo Matem v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR 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.

[34] Looking at the Petition, there can be no doubt that the petitioner set out the constitutional foundation of his Petition at paragraphs 8 to 22 before stating the brief facts on which the Petition is founded. Thus, specific reference was made to the Preamble of *the Constitution* as well as Articles 2(1), 2(5), 3, 10, 22(1), 23, 25, 27(1) and (2), 28, 47, 48, 73, 159 and 259 thereof. Then, at paragraphs 39 to 41 of the Petition, the petitioner specifically stated the manner in which Articles 10, 28, 29, 47, 48 and 73 were contravened by the respondents.

[35] Hence, in *Mumo Matem* (supra) the Court of Appeal added:

... 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.”

[36] The second technical point raised by the respondents was whether the petitioner’s allegations of malicious prosecution amount to constitutional issues. There is no gainsaying that malicious prosecution is a wrong that sounds best in the civil realm of the Court’s jurisdiction. According to *Black’s Law Dictionary*, Tenth Edition, malicious prosecution is defined as:

1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort requires proof of four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause for the lawsuits initiation; (3) malice; and (4) favourable termination of the original law suit. 2. The tort claim resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant’s favour, he or she may sue for tort damages.”

[37] It is now a cardinal principal 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 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”.

[38] 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.”

(39) 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.”

[40] In the premises, to the extent that the Petition seeks to vindicate the petitioner’s alleged malicious prosecution, it is misconceived; and on that account I would have proceeded to strike out the Petition without further ado. Accordingly, allegations premised on the alleged malicious prosecution, such as those hinged on Articles 10, 28, 29, 47, 48 and 73 of the Constitution must fail and require no further consideration. It is noted however that there is another angle to the Petition, namely the allegation that the petitioner was incarcerated beyond the 24-hour period stipulated in *the Constitution*. What that means is that the doctrine of avoidance is not applicable herein. The Court must therefore proceed and consider the merits of that aspect of the Petition.

A. On whether the arrest and prosecution of the petitioner was done in violation of his constitutional rights:

[41] First and foremost, it is pertinent to point out that the burden of proof was on the petitioner to prove all his 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.”



[42] Indeed, in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed as follows in this regard:

..."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."

[43] I therefore, I agree entirely with the position taken by Hon. Mativo, J. (as he then was) in *Leonard Otieno v Airtel Kenya Limited* (supra) 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* an inevitable 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."

[44] Although the petitioner made no reference to Article 49 of the Constitution, that is the provision that anchors the rights of arrested persons. Hence, Article 49(1)(f)(i) stipulates that:

An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested..."

[45] From the evidence adduced herein, which was conceded to by the respondents, the petitioner was arrested on 31st August 2019 and was not taken to court until 2nd September 2019. That was definitely a period of more than 24 hours. It is noteworthy however that 31st August 2019 was a Saturday and therefore it was not possible to comply with the 24-hour requirement. In effect therefore, the earliest date for the petitioner's arraignment was 2nd September 2019; which was, in fact, the date on which he was arraigned before court for plea. That being the case, no liability can arise from the omission, granted the express provisions of Article 49(1)(f)(ii) of the Constitution that:

If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

(46) In the premises, even the second limb of the petition has no merit. In the result, the Petition is hereby dismissed with no order as to costs. For the avoidance of doubt, the petitioner is at liberty to pursue his claim for malicious prosecution in the appropriate forum should he be minded so to do. On account of the circumstances of the matter, it is hereby ordered that each party shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE

