



Law Society of Kenya v Director of Public Prosecutions & 4 others (Petition 08 of 2019) [2024] KEHC 6615 (KLR) (Constitutional and Human Rights) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 08 OF 2019

LN MUGAMBI, J

JUNE 7, 2024

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

CHIEF JUSTICE OF KENYA 5TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 11th January 2019 was indicated to have been amended by the Petitioner’s counsel, Mr. Akusala on 22nd July 2019. (However, no amended petition was availed to the Court- instead, what appears in the Court file is an undated and unsigned document indicating Petition No. 9 of 2019 on the front/first page and not Petition No. 8 of 2019 as is the current Petition). The Petition is supported by the petitioner’s affidavit in support of even date sworn by Mercy Wambua, the Chief Executive Officer of the Petitioner.
2. The thrust of the Petitioner’s grievance is the manner the 1st, 2nd and 3rd respondents’ have been handling persons suspected of committing crime. The Petitioner asserted that the conduct undermines the rule of law, constitutional values and principles given the manner of arrest, detention and prosecution of the suspects. Accordingly, the petitioner seeks the following reliefs against the respondents:



- i. A declaratory order that the following actions of the respondents contravene the provisions of *the Constitution* under Articles 10, 22, 23, 35, 47, 48, 50, 156, 157, 232 and 258 of *the Constitution* and thus contravene the rights and freedoms of the petitioner and members of the public:
 - a. Whimsical and malicious arrest and detention of citizens on Friday afternoons and times when 24 hours will fall outside court operations hours, in order to circumvent their production in court within 24 hours.
 - b. The arrest of citizens before investigations are complete or their statements taken.
 - c. The denial of bail/bond to such arrested persons without unjustifiable cause.
 - d. Issuance of orders to hold arrested persons without giving them a chance to give alternative facts.
 - e. Subjecting the persons suspected of committing a crime to the court of public opinion by issuing prejudicial press statements of indictment before completion of investigations.
- ii. A declaratory order that the right to bail is a right of every citizen and should not be unreasonably denied by any person or institution and such denial must be founded in law and written reasons proffered to the accused.
- iii. A prohibitory injunction proscribing the 2nd and 3rd respondents and/or their agents from arbitrarily arresting persons suspected of committing non-cognizable offences in instances where summons to appear suffice.
- iv. A prohibitory injunction proscribing the 1st respondent and their agents from:
 - a. Directing the arrest of persons before investigations are complete and that there is evidence of prosecutable value, the same to be given to the suspect forthwith; and
 - b. Releasing prejudicial press statements on directions to arrest persons suspected of committing a crime.
- v. A prohibitory injunction to proscribe the 5th respondent and their employees/agents from issuing ex parte orders to the 2nd and 3rd respondents for holding a person accused of committing a crime in order to complete investigations.
- vi. A mandatory injunction compelling the 5th respondent to:
 - a. Create and operationalize special plea courts to operate on Saturdays, Sundays and Public holidays for instances of arrests falling past official court working hours and days; and
 - b. Make available judges and/or magistrates on duty in every court station throughout the country on weekends, public holidays and after court working hours to deal with any urgent matter of human rights protection.
- vii. A mandatory injunction to compel the respondents to release persons suspected of committing a crime on cash bail/bond unless there are compelling reasons to be communicated immediately in writing.



- viii. An order of structural interdict for this honorable court to supervise compliance with its orders.
- ix. A constitutional interpretation on whose responsibility it is to compute and grant cash bail/bond to an arrested person prior to arraignment.
- x. Any other relief the court deems fit to grant.
- xi. Costs of the application be borne by the respondents.

The Petitioner's Case

3. The petitioner asserted that lately there has been a propensity by police to arrest persons for non-cognizable offenses during Friday afternoons. This would then cause the suspected persons to be detained throughout the weekend. Additionally, there was a tendency to refuse to grant these persons bail/bond.
4. The petitioner also questioned the 1st respondent's actions in arresting and indicting suspected persons with the support of the 2nd and 3rd respondents before concluding investigations and prosecuting them without sufficient evidence. This issue, the Petitioner averred, was being compounded by issuance of court orders sought and issued to the respondents allowing them to continue holding the suspected persons until conclusion of the investigations. In paragraph 5 of the affidavit in support, the Petitioner deponed thus:
 - “5. That the Respondents have by commission and/or omission permitted persons suspected of committing a crime to wallow in remand cells through ex parte orders before conclusion of investigations, and prosecuting the said persons without sufficient prosecutable evidence, thus undermining the very essence of the presumption of innocence and the right to an expedient and procedurally fair process.”
5. It was equally contended that contrary to the principle of presumption of innocence and right to a fair trial process, the suspected persons were being subjected to the court of public opinion as the 1st respondent would issue press statements on the charges preferred yet some would be eventually withdrawn.
6. On grant of bail/bond, the petitioner complained that there was shifting of the burden of proof on whether to grant or deny the suspected persons bail terming the approach incommodious. Despite the petitioner acknowledging that there are cases that may justify denial of bail, the Petitioner took the view that such refusal should only be limited to exceptional cases where a suspected person poses great risk to the public. Nevertheless, it was asserted that the same ought to be done inter partes so as to grant the suspected person an opportunity to state alternative facts. For these reasons, the petitioner urged the court to allow the petition.

The 1st Respondent's Case

7. In response, the 1st respondent filed a replying affidavit by Esther Njuguna sworn on 25th January 2019. The 1st respondent also filed another replying affidavit by Wesley Nyamache sworn on 15th March 2019.



8. The 1st respondent stated that it is not within its mandate to conduct arrests and investigations and the petitioner had not demonstrated to the Court where the 1st respondent had conducted the arrest of a suspect or carried out investigations.
9. The 1st respondent deposed that it receives investigations files from the 2nd respondent with the recommendation which it independently analyzes for sufficiency of the evidence paying due regard to the law and the public interest underlying the prosecution before making a decision to charge. If satisfied that there is sufficient evidence, it directs that the suspects be charged with the relevant offences.
10. Concerning the effect of the 1st respondent's press releases, it was stated the press statements contain reasons and justification on decision to charge and that it is normally done to comply with the constitutional right of access to enable the public know about the information held by the State.
11. The 1st Respondent denied the petitioner's assertion that suspected persons are arbitrarily detained beyond the 24 - hour period. It stated that in exceptional cases where suspects are arrested and the time within which to arraign them lapses, the 1st Respondent always moves to Court for appropriate orders to allow the 2nd and 3rd Respondent to continue holding the suspect beyond the 24 hours for investigation to be concluded, hence, is done in accordance with the law. Moreover, the suspected persons are also availed in court and granted an opportunity to present their case before the custodial orders are granted.
12. In closing, the 1st Respondent asserted that it is mandated by *the Constitution* and legislation to undertake criminal proceedings, take over and continue criminal proceedings; and to discontinue any criminal proceeding and that in exercise of that power it is not subject to the direction or control by any authority and that any withdrawal of criminal charges does not necessarily mean that there is no sufficient evidence to warrant a conviction. That the Petitioner has not demonstrated that in executing its mandate, the 1st Respondent has acted without or in excess of the powers as conferred by law or acted maliciously, infringed, violated, contravened or in any other way failed to comply with or respect and observe *the Constitution*.
13. The 1st Respondent contended that the Petition is not public in interest, and was rather intended to serve and give special protection to some people in the community. That the petition should be dismissed with costs as it lacks merit.

The 2nd and 3rd Respondents' Case

14. The 2nd and 3rd respondents in reply filed their replying affidavit by PC. Abdi Mohammed Ali (No.83892) sworn on 25th January 2019 whose contents were further reiterated in the affidavit of 15th March 2019. Opposing the petitioner's assertion, the 2nd and 3rd respondents affirmed that they are legally mandated to investigate crimes among others functions.
15. It was asserted that the issuance of warrants of search and seizure are a constitutional safeguard to protect people's rights against arbitrarily arrests and granted only if the court is satisfied that there are reasonable grounds for the issuance. Consequently, the issuance of such orders by the court is governed by the law hence lawful. Furthermore, 2nd and 3rd Respondent always comply with the requirement to arraign arrested persons in court within 24 hours.
16. Concerning the right to bail/bond, the 2nd and 3rd Respondent stated that it is not absolute as *the Constitution* states it can be denied where there is a compelling reason why the suspected person ought not to be released. As such, the prayer to compel the 2nd and 3rd respondent to grant bail/bond to all



arrested persons is unconstitutional. He nonetheless stated that the 2nd and 3rd respondents have at all times issued bail and bond except in exceptional cases where there is need to detain the suspects and this is only done with the permission of the Court where the orders sought are granted after the suspected persons have been heard.

17. It was asserted that the petition seeks an amendment of the law through the court yet this is a legislative function. It was in addition argued that the petitioner has not demonstrated any instances where the 2nd and 3rd respondent has arrested suspected persons unlawfully to justify a claim of violation of the alleged constitutional rights.

The 4th Respondent's Case

18. This party's pleadings and submissions are not in the file or CTS.

The 5th Respondent's Case

19. The 5th respondent opposed the petition through the grounds of opposition dated 3rd April 2019. The grounds were:
- i. The petition is fatally defective bad in law and an abuse of the process of the court.
 - ii. The petition does not raise any or reasonable cause of action against the 5th respondent.
 - iii. The petition lacks merit.
 - iv. The orders sought violates the provisions of Articles 159 and 160 of [the Constitution](#).
 - v. The orders sought herein have financial implications for which the 5th respondent does not have funds.

Petitioner's Submissions

20. The firm of Akusala and Company Advocates on behalf of the petitioner filed written submissions dated 10th July 2020 and a list of authorities dated 25th January 2019. Counsel sought to discuss three issues. First the rights at stake when a person is arrested, the procedural safeguards to a fair trial and the permissible scope under [the Constitution](#) for the interference with any right.
21. Counsel relying on Article 29 of [the Constitution](#) as read with Article 9(1) of International Covenant on Civil and Political Rights and Article 6 of the African Charter of Human Rights submitted that everyone has the right to liberty and security of person. Accordingly, a suspected person should not be arrested arbitrarily. Counsel citing Sections 49(4), 58 and 59 of the [National Police Service Act](#) and Section 36 of the Criminal Procedure Code noted that the 2nd and 3rd respondent ought to arrest and detain a suspected person in line with the principles set out under Article 49, 50 and 51 of [the Constitution](#). In support reliance was placed in *Joint Anti-Fascist Refugee Committee vs McGrath* (341 U.S.123 1951, pp.162 -63) where it was held that:

“The requirement of due process is not a fair -weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens.”

22. On this premise Counsel submitted that, arrests without warrant and pleas by the State to detain a suspected person pending further investigation is flouting of the rule of law. According to Counsel, due process places the burden of proof on the police to prove the lawfulness of the conduct of each



arrest and detention. Reliance was placed in *Agnes Kinyua a.k.a Agnes Kinywa vs Director of Public Prosecutions* (2019) eKLR where it was held that:

“The criminal process ought to be invoked only where a prosecutor has a conviction that (s)he has a prosecutable case.... In other words, the police and the prosecutors must not exercise their powers with a view to extracting revenge or maliciously. To effect an arrest of a citizen after hours on a Friday in order to avoid arraigning him in court till after he has spent a number of days in custody without any justification for doing so, in my respectful view amounts to abuse of power.”

23. Counsel submitted that the procedural safeguards to ensure a fair trial are enshrined under Articles 49 and 50 of *the Constitution*. In essence an accused person is to be presumed innocent until proven guilty which is a crucial component in criminal justice as held in the *State vs Zuma (CCT5/94) (1995) ZACC 1*. Equally such a person is entitled to communicate with an advocate or person whose assistance is necessary and be presented in court within 24 hours.

24. Similarly, an accused person has the right to be given written reasons to justify actions taken as provided under Article 47 of *the Constitution*. The duty to give reasons was emphasized in *Zachary Wagunza and another vs Office of the Registrar Academic Kenyatta University and 2 others* (2013)eKLR where it was held that:

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, those in authority should give reasons and if they give none the court may infer that they had no good reasons.”

25. Identical reliance was placed in *Republic vs Attorney General and another ex parte Waswa and 2 others* (2005)1 KLR 280, *Baker vs Canada (Minister of Citizenship and Immigration)* (1999) 2SCR 817 and *Hussein Khlaid and 16 others vs Attorney General and 2 others* (2017) eKLR.

26. On the final issue, Counsel stated that the general limitation provision is Article 24 of *the Constitution* which is subject to key constitutional parameters. First, the optimization principle under Article 20(2) of *the Constitution* which dictates that every person enjoys their rights in the Bill of Rights to the greatest extent consistent with the nature of the right. In support counsel cited the case of *Karen Njeri Kandie vs Alassane Ba and another* (2017)eKLR where it was stated that:

“The rights and freedoms in the Bill of Rights can only be limited under Article 24 of *the Constitution* and neither the State nor any State functionary can arbitrarily do so.”

27. Second the primacy principle under Article 19(3) of *the Constitution* that the rights and freedoms under the bill of rights belong to each individual and are not granted by the State. Reliance was placed in *Attorney General vs Kituo cah Sheria and 7 others* (2017)eKLR where it was held that:

“There is duty to recognize, enhance and protect the human rights and fundamental freedoms found in the bill of rights with a view to the perseverance of the dignity of individuals and communities. The clear message is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because are not granted nor are grantable by the State.”

28. Additional reliance was placed in *Mtana Lewa vs Kahindi Ngala Mwangandi*(2015)eKLR. It is Counsel’s contention therefore that the limitation of persons rights should not be subjected to the vagueness of official practice and that such limitation can only be justified by the law.



1st, 2nd and 3rd Respondents' Submissions

29. Counsel, Esther Njuguna on behalf of these respondents filed written submissions and a list of authorities dated 15th March 2019. Counsel sought to submit on the issue whether these respondents had contravened Articles 10, 22, 23, 35, 47, 48, 50, 156, 157, 232 and 258 of *the Constitution*; whether this court has jurisdiction to interfere with their actions in the circumstances and whether the matter is a public interest matter.
30. On the first issue, Counsel commenced by highlighting the constitutional mandate of the 1st respondent under Article 157 of *the Constitution* which is operationalized by the Office of Director of Public Prosecutions Act. In addition to this, the 1st respondent's mandate is also governed by the National Prosecution Policy which provides the guidelines on the test to be applied before the decision to charge is made. It was argued that the decision to institute criminal proceedings is discretionary and ought not to be interfered with unless the decision to charge is proved to have been made contrary to the law, borne out of irrelevant considerations, unreasonable or actuated by spite, malice or ill will.
31. In support of this argument Counsel cited the case of Paul Ng'ang'a Nyaga vs Attorney General and 3 others (2013) eKLR where it was held that:
- “The court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of *the Constitution*.”
32. Parallel reliance was placed in Francis Anyango Juma vs the Director of Public Prosecutions and another (Petition No. 160 of 2012), Kenya Commercial Bank Limited and 2 others vs Commissioner of Police and another (2013) eKLR, Republic vs Royal Media Services, JR Case No.221 of 2013, Mohit vs Director of Public Prosecutions of Mauritius (Mauritius) (2006) UKPC 20 and Alfred Mutua vs Ethics and Anti-corruption Commission and 4 others (2016)eKLR.
33. Counsel further argued that contrary to the petitioner's averments, the suspected persons in line with Article 47 of *the Constitution* are afforded an opportunity to present their case in each matter. In view of this, it was stated that the order of prohibition sought was not available as the respondents had not acted ultra vires as seen in Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji Njoroge and 9 others (1997)eKLR. Additional reliance was placed in London Boroug of Wandsworth vs Rashid (2009) EWHC 1844(Admin).
34. Turning to the 2nd and 3rd respondents' mandate, Counsel stated that this was anchored in Article 244 of *the Constitution* which is operationalized by the *National Police Service Act*. It is Counsel's submission that these respondents have been carrying out their mandate in line with the law and that the petitioner has not shown how these respondents acted in excess of their powers. Reliance was placed in Republic vs Commissioner of Police and another ex parte Michael Monari and another (2012)eKLR where it was held that:

“The police have a duty to investigate any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said not to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”



35. On the issue of the 1st respondent’s press statements in such cases, Counsel submitted that this decision is informed by the dictates of Articles 35 and 157(11) of *the Constitution*. Moreover that Section 5 and 6 of the Fair Administrative Actions Act obligates the 1st respondent to communicate his decision to any person likely to be affected including the accused persons, the complainant, the victim of the offense and other persons.
36. In the same breath Counsel noted that these respondents had no control over the effect of their media briefs once released. This is because the media has its freedom guaranteed under Article 34 of *the Constitution*. In support Counsel cited the case of Republic vs AG and others (Misc. Application No.305 of 2012) where it was held that:
- “Adverse media publicity can only be curtailed within the limitations set out in *the Constitution*...where media publicity is seen as carrying the potential to infringe upon any right of an accused person, it should be for the trial court to intervene and set parameters of reporting in respect to such rights.”
37. Equal dependence was placed in William S.K. Ruto and another vs Attorney General, HC Civil Suit No.1192 of 2005 and Republic vs Director of Public Prosecutions and 2 others (2018)eKLR.
38. On whether the petitioner’s rights were violated, Counsel argued that the petitioner had failed to give the specific details of breach to the outlined constitutional provisions contrary to the requirement in Anarita Karimi Njeru vs Republic (1979) eKLR. Counsel further stated that the petitioner had failed to demonstrate how issuance of the sought orders were unlawful. Additionally, citing Article 49(1) (f) of *the Constitution*, Counsel submitted that this requirement has always been complied with while Article 49(1)(h) of Constitution on bail and bond is not an absolute right. Still, Counsel submitted that the petitioner had not demonstrated how in making the decision to grant or deny bail/bond had violated *the Constitution*.
39. On whether this matter qualifies as a public interest matter, Counsel answered in the negative. This is because the cause of action is geared towards giving special protection to the powerful in the community. For this reason, Counsel argued that the petition was filed out of mischief hence should be dismissed. Reliance was placed in Republic vs Independent Electoral and Boundaries Commission and 2 others ex parte Alinoor Derow Abdullahi and others(2017)eKLR where it was held that:
- “The right to institute such proceedings ought not to be abused in order to achieve collateral purposes such as to in effect litigate on behalf of other persons who are able to litigate on their own but for some ulterior motives do not want to be in the forefront of litigation.”
40. Equal reliance was placed in Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya and another (2012) eKLR.

4th and 5th Respondents’ Submissions

41. These respondents written submissions are not in the court file or CTS.



Analysis and Determination

42. Flowing from the pleadings and the submissions herein, I find that there is only one singular issue for determination in this Petition, namely:

Whether the petitioner's rights under Articles 10, 22, 23, 35, 47, 48, 50, 156, 157, 232 and 258 of *the Constitution* were violated by the actions of the Respondents.

43. The key contention in this matter is that the respondents' in carrying out their mandate of arresting suspected persons for non-cognizable offences, detaining them without granting bail/bond, seeking court orders to further detain them during pendency of investigations and prosecuting them without sufficient evidence violated the petitioner's members and the members of public's constitutional rights.
44. On the contrary the respondents asserted that these averments are baseless as none of its actions was taken outside the confines and dictates of the law. Accordingly, the respondents, assert their actions were at all times carried out within the defined legal parameters.
45. It is incontrovertible that this Petition raises constitutional issues because the Petitioner is questioning the manner the Respondents (All State organs) have been executing their constitutionally assigned mandate as against the members of the Petitioner and other members of the public suspected of crime. The Respondents deny and insist that their actions have always been conducted as permitted by the both *the Constitution* and all other enabling legislation.
46. The dispute in this Petition touches on protection accorded by the Bill of Rights vis-à-vis the conduct of State Organs in the exercise of their mandate, hence it is my humble view that it falls within the jurisdiction of this Court to determine pursuant to Article 165 (3) (b) and 165 (3) (d) (ii) of *the Constitution* which among others provide that the High Court shall have jurisdiction:

165 (3) (b) -to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Further, on whether any action or conduct is in violation with *the Constitution*, the Court under Article 163 (d) (ii) is given the jurisdiction to determine:

- (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.

47. The petitioner complained that the respondents conduct and actions are in violation the constitutional rights of the suspects of criminal offences. The Petitioner went on to enumerate various violations attributable to the Respondents that have necessitated the filing of this Petition.
48. It is now accepted that Constitutional Petition must meet the precision test. The Articles of *the Constitution* that are alleged to have been infringed or threatened, the manner which the violation was occasioned and the nexus with the person aggrieved must be demonstrated. It is not enough to merely cite Constitutional provisions and fasten some facts onto them; the particulars of violation must set out the grievances with sufficient details to enable the respondent to answer. This was the holding of the Supreme Court in Communications Commission of Kenya vs. Royal Media Services Ltd & 5 Others (2014) eKLR which upheld the decision in Anarita Karimi Njeru v R (1979) KLR by stating thus:

“... Although Article 22 (1) of *the Constitution* gives every person the right to institute 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 right said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* (1979) KLR 154; the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays positive role, as a foundation of conviction and good faith, in engaging the Constitutional process of dispute settlement...”

49. In terms of satisfying the benchmark required for framing Constitutional Petitions, the instant Petition is deficient. It consists of generalized grievances against the Respondents. The Petition of this nature is pleaded in a wide-ranging manner without giving particulars of the incidents or naming the persons that were subjected to the alleged whimsical arrests, or where or when they were allegedly charged. It omits details of who among them, if any, were charged prior to completion of investigations or in which cases and those, if any, were denied bail without justifiable grounds and before which Court, all these details are not given. The same applies to the claim that there are those that were held without being given a chance to give alternative facts before their incarceration. This manner of pleading in fact goes against Rule 10 (2) (e) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which requires that a Petition should provide, where applicable: “details regarding any civil or criminal cases, involving the Petitioner or any of the Petitioners, which is related to the matters in issue in the Petition.” The Petition as framed does not meet the precision threshold required of Constitutional Petitions and does demonstrably show the nexus between the alleged violations and the persons whose rights were violated.
50. Further, even if I assume that the Petition is properly pleaded (which is not); it is still incumbent upon the Petitioner to adduce evidence of these allegations. The Petitioner did not provide even a single affidavit by any of these persons on whose behalf the petition is brought to confirm the assertions made on their behalf in the Petition. In that regard, I find that none of the allegations was proved. As was held by the Court in *Edward Akong’o Oyugi & 2 others v Attorney General* (2019)eKLR:

“

- “72. Section 107 (1) of the *Evidence Act* provides 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.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked: -

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”...

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill - considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to



a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

51. The Respondents have been established by law and have a Constitutional and Statutory mandates to execute. The Courts have respect to those mandates unless it is proved that they have acted outside their legally defined scope. In *Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others* [2019] eKLR the Court affirmed this position by stating thus:

“The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

51. Odunga J. in *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, said with regard to the power of the police to investigate:

“42. ... In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

In *Pauline Adhiambo Raget v. DPP & 5 Ors.*, (2016) eKLR, a case where breach of right to equality was alleged to have been violated by investigations of an offence, Onguto J. held, and I agree, that-

“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by *the Constitution*. The investigations may take them to anyone including the petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking...”

52. In *Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 Others* (2014) eKLR the Court discussing the mandate of the 1st Respondent held as follows:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):

- i. he has acted without due regard to public interest,
- ii. he has acted against the interests of the administration of justice,
- iii. he has not taken account of the need to prevent and avoid abuse of Court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st Respondent. I say so taking into account the following decisions where the issue has been addressed.”



53. The Court of Appeal in *Diamond Hasham Lalji and another v Attorney General and 4 others* (2018)eKLR also observed:

“

“(41) Thus, the exercise of prosecutorial discretion enjoys some measure of judicial deference and as numerous authorities establish, the courts will interfere with the exercise of discretion sparingly and in the exceptional and clearest of cases. However, as the Privy Council said in *Mohit v Director of Public Prosecutions of Mauritius* [2006] 5LRC 234:

“these factors necessarily mean that the threshold of a successful challenge is a high one. It is however one thing to conclude that the courts must be sparing in their grant of relief to seek to challenge the DPP’s decision to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any such review at all...”

In *Regina v. Director of Public Prosecutions ex-parte Manning and Another* [2001] QB 330, the English High Court said partly at para 23 page 344:

“At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the tests were too exacting, an effective remedy could be denied.”

Although the standard of review is exceptionally high, the court’s discretion should not be used to stultify the constitutional right of citizens to question the lawfulness of the decisions of DPP.

“(42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

54. In view of the above, it is necessary to set out briefly the respondents’ mandate. The National Police Service is listed as one of the National Security Organs under Article 239 (1) (c) and is specifically established under Article 243, headed by the Inspector General of Police per Article 245(1) (b). Article 245(4), (a) of *the Constitution* provides as follows:

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

a. The investigation of any particular offence or offences;

55. The *National Police Service Act*, 2011 under Section 24 (e) states that one of the functions of the Police among other functions provided in that Section is the investigation of crimes. Further in Section 28 establishes the Directorate of Criminal Investigations Department to be under the direction, command and control of the Inspector-General with functions under Section 35 of the Act which include:

a. collect and provide criminal intelligence;

b. undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;

c. maintain law and order;



- d. detect and prevent crime;
 - e. apprehend offenders;
 - f. maintain criminal records;
 - g. conduct forensic analysis;
 - h. execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157 (4) of *the Constitution*;
 - i. co-ordinate country Interpol Affairs;
 - j. investigate any matter that may be referred to it by the Independent Police Oversight Authority; and
 - k. perform any other function conferred on it by any other written law.
56. Concerning the Office of the Director of Public Prosecutions (the 1st respondent), it derives its powers from Article 157, in particular; 157(4), (6), (10) and (11) of *the Constitution* which provides as follows:
- (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
 - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
57. Further, there is the Office of the Director of Public Prosecutions, 2013; Section 5 (1) which states as follows:
- Pursuant to Article 157 of *the Constitution* the Director shall—
- a. have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;
 - b. exercise State powers of prosecution;



58. The Office of the Director of Public Prosecutions is accorded independence in performance of its functions. Section 6 provides:

“Pursuant to Article 157(10) of *the Constitution*, the Director shall—

- a. not require the consent of any person or authority for the commencement of criminal proceedings;
- b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under *the Constitution*, this Act or any other written law; and
- c. be subject only to *the Constitution* and the law.”

59. The Petitioner cannot expect the Court to act on assumptions regarding allegations of abuse of power, Claims were made without matching them with the requisite proof. As was held by the Supreme Court in John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR:

“299. the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard.”

60. As regards the allegations by the Petitioner that the conduct of the Respondents to announce in the names of people whose cases have been recommended for prosecution in public media tantamount to condemning them in the the court public opinion thus violating their right to a fair hearing, I am not persuaded that this is so. I am guided in this resolve by the holding in William S.K. Ruto & Another v Attorney General, HC Civil Suit No. 1192 of 2005 where the Court held:

“... The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant’s fears...”

61. Consequently, the Court cannot sanction the 1st, 2nd and the 3rd respondents based on assumptions (rather than evidence) in regard to the allegations of contravention of the law or *the constitution*.

62. Turning to the complaints made against the 5th Respondent, (the Chief Justice of the Republic of Kenya); the Petitioner stated that there were instances where suspects were denied bond without justifiable reasons, courts had been issuing orders to hold arrested persons without giving them a chance to give alternative facts and so forth. To start with, there was no evidence of any particular case presented for examination by this Court where this had happened. Further, it is important that I make this observation. The issue of denial or grant of bail or bond, including a decision made on the terms of bail by the trial court is both reviewable and appealable. No blanket order can apply in all applications for bail as each case must be considered on its own merits. I would thus expect specific grievances to be pursued separately in individual cases as opposed to making a sweeping statement regarding issuance or denial of bail by courts. A person who is aggrieved by an order of the Court in which an appeal or review is allowed does not file a Constitutional Petition seeking a declaration of unconstitutionality of the order of the court. He instead applies for a review or appeals that decision. This Petition is to that extent misconceived.



63. In view of the foregoing analysis and findings, this Court must now reach the inevitable conclusion that this Petition lacks merit. It is badly pleaded. It makes broad allegations that the Petitioner could not substantiate. It was not proved at all.

64. The Petition is unsuccessful. The upshot is therefore is that it is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2024.

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L N MUGAMBI

JUDGE

