



**Njau v Wangai & 6 others; National Police Service Commission & 2 others (Interested Parties)  
(Constitutional Petition E006 of 2021) [2024] KEHC 12698 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12698 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CONSTITUTIONAL PETITION E006 OF 2021**

**F GIKONYO, J  
OCTOBER 16, 2024**

**BETWEEN**

**SIMON CHEGE NJAU ..... PETITIONER**

**AND**

**HON MARY NJOKI WANGAI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MUNGAI ALIAS MUHOHO, POLICE CONSTABLE NAROK POLICE  
STATION ..... 2<sup>ND</sup> RESPONDENT**

**DENNIS NAMIANYA SIFUNA POLICE CONSTABLE NAROK POLICE  
STATION ..... 3<sup>RD</sup> RESPONDENT**

**FRANCIS KAIRU, INSPECTOR OF POLICE, OFFICER IN CHARGE OF  
CRIME NAROK POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**JUSTUS NJERU, CHIEF INSPECTOR OF POLICE, OCS NAROK POLICE  
STATION ..... 5<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 6<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... INTERESTED PARTY**

**INDEPENDENT POLICE OVERSIGHT AUTHORITY ..... INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTION ..... INTERESTED PARTY**



## JUDGMENT

### Background

1. The petitioner filed a petition dated July 8, 2021. The petition is supported by the affidavit sworn by the petitioner, Simon Chege Njau on 08.07.2021.
2. The respondents opposed the petition. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> respondents and 3<sup>rd</sup> interested party filed their respective replying affidavits all sworn on 24.09.2021 by Peter Mungai, Dennis Namianya Sifuna, Francis Kairu, Justus Njeru, and Esther Torosi respectively. The 3<sup>rd</sup> respondent, filed a replying affidavit sworn by Peter Mungai on 24.09.2021.

### The petitioner's case.

3. The petition concerns the unlawful arrest of the petitioner.
4. The petitioner contends that on 29.05.2021 around the Total area of Narok town Narok county while engaging in normal business he was unlawfully arrested by two plain cloth police officers the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The two were accompanied by the 1<sup>st</sup> respondent and her husband.
5. Before the arrest, the 1<sup>st</sup> respondent's husband had on 24.04.2021 assaulted the petitioner, and the matter was booked under OB No 03/24/04/2021 but no action was taken against the 1<sup>st</sup> respondent.
6. Upon arrest on 29.05.2021, the arresting officers bundled up the petitioner into a motor vehicle belonging to the 1<sup>st</sup> respondent and he was driven to Narok police station. He was booked in under OB No 46/29/5/2021 before being thrown into the cells.
7. The petitioner contends that his phone was withdrawn from him in an attempt to deny him the opportunity to communicate with an advocate or any other person whose assistance was necessary.
8. While in custody, the 1<sup>st</sup> respondent would from time to time visit the petitioner and he would be summoned to the 5<sup>th</sup> respondent's office to coerce him into agreeing to reimburse the 1<sup>st</sup> respondent Kshs 150,000/= being an alleged value of the defective gearbox.
9. While in custody the petitioner was ordered to surrender his motor vehicle Toyota Probox registration number KCD 089J as lien to the 1<sup>st</sup> respondent and the order was effected without his consent.
10. The petitioner contends that he was intimidated and coerced to sign the document but he did not give in and he demanded to be arraigned in court.
11. The petitioner contends that the arrest was malicious since no statements were recorded from him during the duration he was in custody.
12. The petitioner contends that while in custody he was exposed to the risk of contracting covid 19 infection given the number of suspects who were brought into the cells some of whom were arrested for not observing the covid 19 protocols.
13. The petitioner got in touch with his advocate herein on 03. 06.2021 at 5 p.m. after 6 days of being in custody without being arraigned in court. His advocate visited him on 04.06.2021 and demanded for his release vide a letter dated the same day. The letter was addressed to the OCPD and copied to the DPP. Upon receipt of the said letter, the petitioner was released and was issued with a requisition to compel attendance by the 2<sup>nd</sup> respondent.



14. The petitioner contends that he later learned that he had been booked in for the offence of stealing which does not require detention for 7 days without an order.
15. On 07.06.2021 the petitioner reported to the station and was interrogated by the 4<sup>th</sup> respondent. He later realized the document he was given to sign was one distancing him from the advocate on record.
16. The petitioner contends that the 1<sup>st</sup> respondent continues to illegally detain the petitioner's motor vehicle without justifiable cause and against the petitioner's constitutional right to own property despite demand and notice of intention to sue.
17. The petitioner contends that to date, the petitioner has continued to report to the Narok police station but no charges have been preferred against him. The 1<sup>st</sup> respondent has continued to abuse her powers as a nominated politician to frustrate the petitioner. Further, the 1<sup>st</sup> respondent's actions are hell-bent on jeopardizing the petitioner's economic interests.
18. The petitioner alleged violation of his various constitutional rights cited In the petition and sought the following reliefs;
  - a. A declaration that the conduct of the respondents is contrary to and inconsistent with the provisions of Article 10 of the Constitution of Kenya, 2010.
  - b. A declaration that the respondents violated the constitutional rights of the petitioners and in particular articles 20(1) and (2), 24(1) 25(c), 27(4), 29, 31, 39, 47, 49, 50(1) and 51 of the Constitution of Kenya 2010.
  - c. A declaration that no person should be held in custody for more than twenty-four hours after being arrested; and any such incarceration is unconstitutional.
  - d. An order that the arrest and incarceration of the petitioner for a period of seven (7) days by the respondent for the alleged offence of stealing and failure to produce them in court were unconstitutional.
  - e. An order for adequate compensation of Kshs 7,000,000 (Kenya shillings seven million) damages for unlawful arrest and incarceration for deprivation of the constitutional right to freedom of movement and their liberty by the respondents.
  - f. An order against the 1<sup>st</sup> respondent for adequate compensation of Kshs 10,000 (Kenya shillings ten thousand) daily from 31<sup>st</sup> May 2021 to the date the motor vehicle is released to the petitioner being damages for loss of use of motor vehicle and unlawful detention of motor vehicle hence deprivation of the constitutional right to property enshrined in article 40(1)(a)
  - g. Any other relief that this honourable court shall deem fit by dint of Article 23(3) of the Constitution of Kenya 2010 and are just to grant in the circumstances.
  - h. Costs of this petition.

### **The 1<sup>st</sup> respondent's case**

19. The 1<sup>st</sup> respondent filed the replying affidavit on 15.09.2023. She averred that the petition is frivolous, vexatious, devoid of merit and filed in bad faith; and ought to be dismissed.
20. She deposed that, the petition does not illustrate any actions by her that constitute any violation of the petitioner's fundamental rights and freedoms.



21. She explained the circumstances leading to her lodging a complaint with the police, the arrest and charging of the petitioner for stealing in criminal case number E1162 of 2021 which is pending before court.
22. According to her, the petitioner stole and sold her gearbox and despite agreement to pay for it, the petitioner has refused to pay. She stated that she has no police powers to arrest or charge the petitioner. Her duty and right which she exercised, was only to lodge the complaint. And, so she asked the court to dismiss the petition.

### **The 2<sup>nd</sup> Respondent's case**

23. The 2<sup>nd</sup> respondent denied the allegation contained in the petition. He averred that the petitioner has not pinpointed what the 2<sup>nd</sup> respondent particularly did to violate his rights. He contends that the petitioner has merely stated his right but failed to demonstrate how the rights have been infringed.

### **The 3<sup>rd</sup> respondent's case.**

24. The 3<sup>rd</sup> respondent denied the allegations contained in the petition. He averred that on 29.05.2021 he was on routine patrol within Narok at around 2 p.m. when he received a phone call from the officer in charge instructing him to effect the arrest of the petitioner. He was informed that the suspect had been seen around total petrol station. He was accompanied by the 1<sup>st</sup> respondent for identification of the suspect.
25. The 3<sup>rd</sup> respondent contends that at the time of the arrest, he informed the petitioner of the reasons for the arrest in Kiswahili and English language and he appeared to have understood. He escorted him to the Narok police station to conduct further investigations. He was allocated the case as an investigating officer. During investigations, he recorded five witness statements including his (the 3<sup>rd</sup> respondent).
26. On 07.06.2021 he submitted the file through the incharge vide official correspondence to the ODPP. He was later directed to cover certain outstanding areas. In a letter dated 27.08.2021, the DPP directed the petitioner be charged with the offence of stealing contrary to section 268(1) as read with section 275 of the [Penal Code](#).
27. The 3<sup>rd</sup> respondent averred that he was aware that the petitioner from the time of the arrest had been negotiating with the 1<sup>st</sup> respondent with a view of amicably settling the matter. The petitioner had requested that he should not be taken to court until he can conclude negotiations with the 1<sup>st</sup> respondent. Based on the pleas by both the petitioner and the 1<sup>st</sup> respondent particularly the plea by the petitioner he did serve the petitioner with the requisition to compel attendance under section 52 of the [National Police Service Act](#).
28. The 3<sup>rd</sup> respondent averred that the OCS had on various occasions offered to release the petitioner on police bond but he stated that he had no money and was still pursuing negotiations.
29. In the end the 3<sup>rd</sup> respondent averred that the petitioner has not pinpointed what the 3<sup>rd</sup> respondent particularly did to infringe on his rights but has merely stated his rights and not demonstrated how those rights were violated.

### **The 4<sup>th</sup> respondent's case**

30. The 4<sup>th</sup> respondent denied the allegations contained in the petition. He averred that he did not personally conduct the investigations though he was aware that the petitioner recorded a plain statement on 30.05.2021 with the 3<sup>rd</sup> respondent, the investigating officer. He was also aware that a



complaint was lodged at the Narok police station vide OB No 65/20/5/2021 by the 1<sup>st</sup> respondent and the file was allocated to the 3<sup>rd</sup> respondent. He averred that the petitioner went to the station on 07.06.2021 requesting to see the OCPD over the ongoing investigations. That was 3 days after he had been released. The OCPD directed the 4<sup>th</sup> respondent to record a statement of the. The 4<sup>th</sup> respondent complied and handed over the statement to the OCPD.

31. The 4<sup>th</sup> respondent contended that he did not coerce the petitioner who already had a legal representative.
32. The 4<sup>th</sup> respondent contends that the petitioner has not pinpointed what the 4<sup>th</sup> respondent particularly did to infringe on his rights. He argued that the petitioner had merely stated his rights but not demonstrated how those rights were violated.

### **The 5<sup>th</sup> and 6<sup>th</sup> respondents' case**

33. The 5<sup>th</sup> and 6<sup>th</sup> respondents denied the allegations contained in the petition.
34. The officer in charge averred that on 29.05.2021 he instructed the 3<sup>rd</sup> respondent who was on routine patrol to effect the arrest of the petitioner. This was pursuant to a complaint that had been lodged at the station by the 1<sup>st</sup> respondent that the petitioner had gone missing after stealing an old gearbox that belonged to the 1<sup>st</sup> respondent. The complaint had been booked vide OB No 65/20/5/2021.
35. The 5<sup>th</sup> respondent confirmed from the petitioner that he had informed of the reasons for his arrest which was duly recorded in the OB No 57/29/5/2021. He allocated the 3<sup>rd</sup> respondent the matter to conduct investigations. He was aware that five witness statements were recorded by the 3<sup>rd</sup> respondent and a plain statement by the petitioner.
36. The 5<sup>th</sup> respondent averred that on 07.06.2021 the file was submitted to the ODPP and later the IO was directed to cover certain areas which were considered outstanding. In a letter dated 27.08.2021, the ODPP directed that the petitioner be charged with the offence of stealing contrary to section 268(1) as read with 275 of the *Penal Code*.
37. The 5<sup>th</sup> respondent contends that charges against the petitioner were filed before the chief magistrate court on 31.08.2021 and a summons was subsequently issued for purposes of plea-taking vide criminal case No e1162 of 2021.
38. The 5<sup>th</sup> respondent contends that it is a standard procedure that phones are not allowed in custody as it would jeopardize the security of the facility. Further, they endured all health protocols observed in the facility including the time the petitioner was in their facility.
39. The 5<sup>th</sup> respondent averred that on numerous occasions he offered the petitioner a police bond but he initially claimed he could not raise the amount. At some point, he stated he had money in his phone but decided to withdraw the same.
40. The 5<sup>th</sup> respondent averred that he was aware that the petitioner was negotiating with the 1<sup>st</sup> respondent with a view of amicably settling the matter and he requested not to be taken to court until he can conclude negotiations despite the 5<sup>th</sup> respondent's plea to have him released on cash bail. He therefore directed the 3<sup>rd</sup> respondent to serve the petitioner with a requisition to compel his attendance pursuant to section 52 of the *National Police Service Act*.
41. The 5<sup>th</sup> respondent contends that the petitioner has not pinpointed what the 5<sup>th</sup> respondent particularly did that violated his rights. That the petitioner merely stated his rights but did not demonstrate how the same were infringed.



### **The 3<sup>rd</sup> interested party's case.**

42. The 3<sup>rd</sup> interested party stated that the 3<sup>rd</sup> interested party- Narok office received a complaint letter from the petitioner's advocate which quoted OB No 46/29/05/2021. ON 04.06.2021 THEY CALLED FOR THE FILE THROUGH THE letter referenced ODPP/NRK/ADV/6/3(68). the file was submitted to their office on 07.06.2021 through a letter dated 04.06.2021 referenced C/GEN/6/11/VOL. II/199. On 02.07.2021 vide a letter referenced ODPP/NRK/ADV/1/4/(72) directed the 3<sup>rd</sup> respondent to cover various pending aspects and re-submit the file. The file was re-submitted on 21.07.2021 through a letter dated 19.07.2021 referenced C/GEN/6/11/VOL.II/229; after perusal of the field they directed that the areas that were to be covered be sufficiently addressed and subsequently returned the file to the 3<sup>rd</sup> respondent vide letter dated 12.08.2021 referenced ODPP/NRK/ADV/1/4/(84). The file was re-submitted on 20.08.2021 vide letter referenced C/GEN/6/11/VOL.II/229.
43. The 3<sup>rd</sup> interested party averred that the brief facts of the case were that the complaint was filed with the police vide OB No 57/29/5/2021 police file No 781/119/2021 by the 1<sup>st</sup> respondent she took her motor vehicle registration number KBR 877Q to the petitioner for purposes of the repair of the gearbox. The petitioner advised her to replace the old gearbox which she did but the petitioner failed to return the old gearbox despite several requests.
44. The interested party stated that the 3<sup>rd</sup> respondent recorded 5 witness statements and the petitioner recorded a plain statement admitting dealing with the 1<sup>st</sup> respondent in respect of a motor vehicle repair.
45. The interested party averred that upon careful perusal of the entire investigative file, they concluded that there was sufficient evidence to warrant that the petitioner does face the charges of stealing contrary to section 268(1) as read with section 275 of the Penal Code.
46. The interested party's decision to charge the petitioner was informed by the sufficiency of evidence on record and the public interest.
47. The 3<sup>rd</sup> interested party averred that the averments by the petitioner are bent on harassing and embarrassing the respondents for no apparent reason and are misconceived, unfounded, unmeritorious, and baseless.
48. The 3<sup>rd</sup> interested party contends that the petitioner has not demonstrated that the 3<sup>rd</sup> interested party has acted contrary to its powers under article 157(11) of the Constitution or that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> respondents have violated any provision of the law and the Constitution.
49. The 3<sup>rd</sup> interested party averred the Constitution, criminal procedure code, and evidence act provide sufficient safeguards to ensure that the petitioner has a fair trial.
50. The 3<sup>rd</sup> interested party averred that the petitioner merely stated his rights but failed to demonstrate with particularity how his rights were breached
51. In the end the 3<sup>rd</sup> interested party averred that the petitioner is seeking through this instant petition is some illegal and unconstitutional immunity or insulation against a lawful prosecution.

### **Directions of the court.**

52. The petition was canvassed by way of written submissions. Except the 1<sup>st</sup> respondent, the other parties did not file submissions.



## Analysis And Determination.

53. The court has considered the Petition, the Affidavits on record, and the submissions by both parties.

### Issues

1. The following issues fall for determination: -
  - i. Whether this petition meets the legal threshold of a petition.
  - ii. Whether the petition is merited,
  - iii. Whether the petitioner is entitled to the reliefs sought in the petition, and
  - iv. Who bears the cost of these proceedings?

### Legal threshold: Competence of petition

2. As a bare minimum; a constitutional petition should, with some reasonable degree of precision, identify the constitutional provisions as well as the specific rights that are alleged to have been violated or threatened to be violated, and the manner of the violation and/or threatened violation (*Anarita Karimi Njeru v Republic* (1979) KLR, *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR).
3. This requirement is not merely an embodiment of technicalities. It serves noble legal purposes: Speaks to the constitutional imperative that a party should know the case he is faced with in order to prepare appropriate defense: And, enables the court to discern the cause of action it is trying and duly exercise jurisdiction.
4. This understanding forms the functional foundation for how the court relates to petitions which are devoid of the basic relevant information details, and whether relief may be granted on such petitions.
5. Applying the test: In this petition, the petitioner has alleged that his rights to human dignity, and privacy under Articles 28, and 31 of the *Constitution*, respectively, have been violated by the respondents. The petition does not suffer any deficiency or lack of procedural rectitude whatsoever. It passes the Anarita Karimi test. But, whether the allegations have been proved, is a different thing altogether.

## Alleged violation

54. The petition concerns the unlawful arrest of the petitioner.
55. The petitioner contends that on 29.05.2021 around the Total area of Narok town Narok county while engaging in normal business he was unlawfully arrested by two plain cloth police officers- the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The two were accompanied by the 1<sup>st</sup> respondent and her husband.
56. Before the arrest, the 1<sup>st</sup> respondent's husband had on 24.04.2021 assaulted the petitioner, and the matter was booked under OB No 03/24/04/2021 but no action was taken against the 1<sup>st</sup> respondent.
57. Upon arrest on 29.05.2021, the arresting officers bundled up the petitioner into a motor vehicle belonging to the 1<sup>st</sup> respondent and he was driven to Narok police station. He was booked in under OB No 46/29/5/2021 before being thrown into the cells.
58. The petitioner contends that his phone was withdrawn from him in an attempt to deny him the opportunity to communicate with an advocate or any other person whose assistance was necessary.



59. While in custody, the 1<sup>st</sup> respondent would from time to time visit the petitioner and he would be summoned to the 5<sup>th</sup> respondent's office to coerce him into agreeing to reimburse the 1<sup>st</sup> respondent Kshs 150,000/= being an alleged value of the defective gearbox.
60. While in custody the petitioner was ordered to surrender his motor vehicle Toyota Probox registration number KCD 089J as lien to the 1<sup>st</sup> respondent and the order was effected without his consent.
61. The petitioner contends that he was intimidated and coerced to sign the document but he did not give in and he demanded to be arraigned in court.
62. The petitioner contends that the arrest was malicious since no statements were recorded from him during the duration he was in custody.
63. The petitioner contends that while in custody he was exposed to the risk of contracting covid 19 infection given the number of suspects who were brought into the cells some of whom were arrested for not observing the covid 19 protocols.
64. The petitioner got in touch with his advocate herein on 03. 06.2021 at 5 p.m. after 6 days of being in custody without being arraigned in court. His advocate visited him on 04.06.2021 and demanded for his release vide a letter dated the same day. The letter was addressed to the OCPD and copied to the DPP. Upon receipt of the said letter, the petitioner was released and was issued with a requisition to compel attendance by the 2<sup>nd</sup> respondent.
65. The petitioner contends that he later learned that he had been booked in for the offence of stealing which does not require detention for 7 days without an order.
66. On 07.06.2021 the petitioner reported to the station and was interrogated by the 4<sup>th</sup> respondent. He later realized the document he was given to sign was one distancing him from the advocate on record.
67. The petitioner contends that the 1<sup>st</sup> respondent continues to illegally detain the petitioner's motor vehicle without justifiable cause and against the petitioner's constitutional right to own property despite demand and notice of intention to sue.
68. The petitioner contends that to date, the petitioner has continued to report to the Narok police station but no charges have been preferred against him. The 1<sup>st</sup> respondent has continued to abuse her powers as a nominated politician to frustrate the petitioner. Further, the 1<sup>st</sup> respondent's actions are hell-bent on jeopardizing the petitioner's economic interests.
69. The respondents denied the violations alleged and provided explanations for the arrest and prolonged detention of the petitioner before he was charged in court several months later. The prominent reason provided were that; the petitioner was negotiating an amicable settlement of the debt and he could not raise the police bond. Later, he was released with requisition to attend before the police.
70. The 1<sup>st</sup> respondent claimed not to have anything or a role in the alleged violations because she did not police powers as to infringe upon the constitutional rights of the petitioner. She stated that she merely performed her duty as the complainant and reported the matter to the police.
71. Upon consideration of the evidence provided, it has been established that, the petitioner was arrested on 29.05.2021. He was booked in under OB No 46/29/5/2021 and put into the cells where he remained for 7 days. The petitioner has shown that he got in touch with his advocate herein on 03. 06.2021 at 5 p.m. after 6 days of being in custody without being arraigned in court. His advocate visited him on 04.06.2021 and demanded for his release vide a letter dated the same day. The letter



- was addressed to the OCPD and copied to the DPP. Upon receipt of the said letter, the petitioner was released and was issued with a requisition to compel attendance by the 2<sup>nd</sup> respondent.
72. The affidavits by the Police officers involved in this matter, especially the 3<sup>rd</sup> respondent, 4<sup>th</sup> respondent and the OCS (5<sup>th</sup> Respondent, attempted to explain why the petitioner was held in custody for 7 days without being taken to court as required by the *Constitution*. The explanations are that the petitioner was negotiating with the complainant with a view to amicable settlement of the matter and so the petitioner requested not to be taken to court to enable them conclude the negotiations. The other reason was that the OCS had given the petitioner police bond but the petitioner could not raise the bond money.
73. the *Constitution* in article 49(1)(f) provides the right of an arrested person: -  
to be brought before a court as soon as reasonably possible, but not later than—
- (i) twenty-four hours after being arrested; or
  - (ii) 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;
74. The police can only hold a suspect in police custody as provided in the *Constitution* or as may be authorized by the court. They have no powers to decide to hold a suspect in police custody in contravention of the *Constitution*. The explanations given by the police in this case are totally unconstitutional because they used police powers of arrest and detention to keep the suspect in custody beyond the time prescribed by the *Constitution* in order to secure a civil settlement. Put differently, whereas the police may not prevent parties from entering amicably settlement in such cases, they are, however, forbidden by law from using police powers to coerce or force a party to agree to a settlement or to obtain a collateral advantage for the complainant; such is unconstitutional.
75. Where parties seek to settle such a matter amicably, other less intrusive methods and tools like a requisition to compel attendance, or release pending investigations, may be employed. But, the evidence in this case show that the police kept the petitioner in custody for seven days and coerced him to reach a settlement with the 1<sup>st</sup> respondent. The requisition to compel attendance by the 2<sup>nd</sup> respondent was given after holding him in custody for 7 days; and was merely an attempt to mitigate further violation of the *Constitution*.
76. The DPP has just given the chronology of how they handled the file in respect of the investigation, but avoided to say anything about the 7 days the petitioner was held in custody without a court order or of any lawful justification thereto.
77. The 1<sup>st</sup> respondent seems to distance herself from these events. But, evidence show that she was the architect of the scheme to use the police to get payment for her stolen gearbox. She also seems to suggest that she could not have violated the rights and fundamental rights of the petitioner as she has no police powers. ‘The Bill of Rights applies to all law and binds all State organs and all persons.’ (art. 20(1) of the *Constitution*). Therefore, quite a departure from the old thinking, private persons may be liable for violation of constitutional rights and freedoms of a person.
78. The petitioner also averred that, while in custody, he was ordered to surrender his motor vehicle Toyota Probox registration number KCD 089J as lien to the 1<sup>st</sup> respondent and the order was effected without his consent.



79. The petitioner contends that the 1<sup>st</sup> respondent continues to illegally detain the petitioner's motor vehicle without justifiable cause and against the petitioner's constitutional right to own property despite demand and notice of intention to sue.
80. Other than stating in paragraph 8(XV) of her replying affidavit that; 'The petitioner was unconditionally released from police custody after he guaranteed that he would make complete payment but he never did.', she did not deny the claim that the petitioner was forced while in custody to surrender to her, his motor vehicle Toyota Probox registration number KCD 089J as lien; an order was effected without his consent; and that she unlawfully continues to hold the said motor vehicle.
81. In taking the said probox vehicle registration number KCD 089J whether as a lien, in these circumstances, the 1<sup>st</sup> respondent violated the petitioner's right to property in article 40 of the Constitution and deprived him of his property and use thereof. This event is incidental to and stems from the impugned events herein, making it perfect subject of this petition.
82. The petitioner claimed for an order for adequate compensation of Kshs 7,000,000 (Kenya shillings seven million) damages for unlawful arrest and incarceration for deprivation of the constitutional right to freedom of movement and their liberty by the respondents.
83. The petitioner did not, however, anchor this kind of award on relevant judicial authorities.
84. The petitioner also claimed for an order against the 1<sup>st</sup> respondent for adequate compensation of Kshs 10,000 (Kenya shillings ten thousand) daily from 31<sup>st</sup> May 2021 to the date the motor vehicle is released to the petitioner being damages for loss of use of motor vehicle and unlawful detention of motor vehicle hence deprivation of the constitutional right to property enshrined in article 40(1)(a).
85. Nevertheless, the petitioner did not provide the specific material in support of the loss of business due to deprivation of his probox. Except, the court has found unlawful deprivation and detention of the said vehicle by the 1<sup>st</sup> respondent which may attract nominal award of damages.
86. The analysis herein leads to the conclusions that: -
- i. The 2<sup>nd</sup> – 5<sup>th</sup> respondents acted contrary to the provisions of article 10, violated the petitioner's right under article 49(1) and 40 of the Constitution.
  - ii. The 1<sup>ST</sup> respondent violated the petitioner's right to property, denied and continues to deny him of his property-probox vehicle registration number KCD 089J for which he is entitled to restitution and nominal damages.
  - iii. The respondents violated the Constitution in coercing a settlement in favour of the 1<sup>st</sup> respondent.
87. In the upshot the court makes the following orders and declarations;
- a. A declaration that the conduct of the respondents is contrary to and inconsistent with the provisions of Article 10 of the Constitution of Kenya, 2010.
  - b. A declaration that the respondents violated the constitutional rights of the petitioners and in particular articles 20(1) and (2), 24(1) 25(c), 27(4), 29, 31, 39, 40, 47, 49, 50(1) and 51 of the Constitution of Kenya 2010.
  - c. An order for restitution of Probox vehicle registration number KCD 089J by the 1<sup>st</sup> respondent to the petitioner.



- d. An award of nominal damages for deprivation and use of his property- Probox vehicle registration number KCD 089J- in the sum of Kshs 200,000 to be paid by the 1<sup>st</sup> respondent. The damages are payable by the respondent in addition to restitution of the said motor vehicle.
- e. Any other order, relief or declaration sought herein but is not specifically granted is deemed to have been denied.
- f. The relief granted is deemed to be just and appropriate relief under Article 23(3) of the Constitution of Kenya 2010.
- g. Costs of this petition goes to the petitioner.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. F. GIKONYO M.**

**JUDGE**

In the presence of: -

C/A – Otolo

Ms. Njihia for 1<sup>st</sup> Respondent – Present

Ms. Bosibori for Petitioner – Absent

Ms. Robi for AG – Absent

