



REPUBLIC OF KENYA



**Mogaka v Attorney General & 2 others (Petition E021 of 2022)  
[2023] KEHC 22388 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22388 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS**

**PETITION E021 OF 2022**

**FROO OLEL, J**

**SEPTEMBER 21, 2023**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLE 10, 20, 21, 22, 23, 25, 27, 28, 29 (A), 40(3), 47,  
49, 50, 51, 156(4)(A)& (B) & (6), 157(4) & (C) AND  
ARTICLE 245(2) (B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
SECTION 8, 8A, 9, 10 & 58 OF THE NATIONAL POLICE  
SERVICE ACT NO. 11A OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
SECTION 36, 87 & 210 OF THE CRIMINAL PROCEDURE  
CODE**

**MACHAKOS CONST. PETITION NO.E021 OF 2022 - JUDGMENT<sup>1</sup>**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
ORDER 7, 8 & 9 OF THE NATIONAL POLICE STANDING  
SERVICES STANDING ORDERS**

**AND**

**IN THE MATTER OF PRINCIPAL MAGISTRATE'S COURT  
AT MAVOKO CRIMINAL CASE NO. 226 OF 2015  
REPUBLIC –VRS- JOSEPHAT MWATHI MWENDO & 3**



**OTHERS**

**BETWEEN**

**JOSEPHAT KIBGENDI MOGAKA ..... PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition before Court for determination was filed by the Petitioner Josephat Kibagendi Mogaka (herein after Referred to as the “Petitioner”) he stated that he was an adult of sound mind and was a resident of Kicheko Village in Syokimau area within Machokos County.
2. The 1<sup>st</sup> Respondent is The Hon Attorney General of the Republic of Kenya and the Principal adviser of the Government of Kenya as established Under Article 156(4) & (b) & (c) of *the Constitution* of Kenya.
3. The 2<sup>nd</sup> Respondent is The Inspector General of the National Police and head of Kenya Police and has autonomous command and authority over police officers discharging their duty as provided Under Section 8, 8a & 10 of the *National Police Service Act* No. 11A of 2011 enacted pursuant to provision of Article 245 of *the Constitution* of Kenya 2010, while the 3<sup>rd</sup> Respondent The Director of Public Prosecution is an office constitutionally established Under Article 157 of *the Constitution* and as part of his duties is mandated to direct the 2<sup>nd</sup> Respondent to investigate allegations of criminal commission and/or omission and to prosecute criminal cases
4. In this Petition, the Petitioner sought for orders that;
  - a. A declaration that the Principal Magistrates Court Criminal Case No. 226 of 2015 at Mavoko Law Courts i.e Republic –Vrs- Josephat Mwachu Mwenda; Samuel Mogaka Ondicho, Josephat Kibagendi, Mogeke and Jotham Waswa in which the Petitioner was charged and acquitted of the offence of gambling and resisting arrest which case was instituted without any factual foundation, was an abuse of the police and prosecutorial powers vested in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.
  - b. A declaration that the 2<sup>nd</sup> Respondent is vicariously liable for the acts of the Police Officers at Mlolongo police station that falsely arrested the Petitioner and were at all material times working as a servant and/or agent of the Government of Kenya.
  - c. A declaration that the Respondents are in breach of the Petitioner’s right and fundamental freedoms particularly; Article 25, 28, 29 (a), 47, 48, 49 and 50 of *the Constitution* of Kenya.



- d. A declaration that the Respondents are jointly and severally liable for the infringement of the Constitutional Rights of the Petitioner as outlined under prayer (b) above.
- e. An order for compensation in the form of General and exemplary damages for the abuse of the Petitioner's Rights and fundamental freedoms listed above and as read with Article 23 (3) of *the Constitution* of Kenya.
- f. An order that quantum of damages shall attract interest at Court rates from the date of judgment until payment in full.
- g. Any other just and expedient order the Court may deem fit to make.

## **B. The Petitioner Cases**

5. The Petitioner herein and three other accused persons were charged in the Principal Magistrate Court Criminal Case No. 226 of 2015 at Mavoko Law Court i.e Republic-Vrs- Josephat Mwathi Mwendwa, Samwel Mogaka Ondicho, Josephat Kibagendi Mogaka and Jotham Waswa. They were all charged with the offence of gambling and resisting arrest contrary to Section 55(1) of the Betting and Gambling Act Cap (3) of the Laws of Kenya. In addition, the Petitioners co-accused Josephat Mwathi Mwendwa was additionally charged with an additional charge of being in possession of cannabis sativa contrary to Section 3(1) and 3(2) of the Narcotic Drugs and Psychotropic Control Act No. 4 of 1884. The offence were allegedly committed on 10<sup>th</sup> April 2015 at Syokimau area in Mlolongo township within Athi River District, Machakos County.
6. The Petitioner maintained that the charge leveled against him were based on fabrications as on the said date he was neither gambling nor did he resist arrest as alleged. Unbeknown to him, his arrest and subsequent charging was also part of a wider scheme hatched up by police officers from Mlolongo Police Station to cover up the shooting and subsequent injuries of Josephat Mwathi Mwendwa by Senior Sergeant Fredrick Lelima who had on the said 10<sup>th</sup> April 2015 inadvertently discharged his personal firearm and shot the said Josephat Mwathi Mwendwa on his arm in the process of arresting boda boda operators.
7. It emerged that after shooting the said Josephat Mwathi Mwendwa using his private firearm, the said Senior Sergeant Leliman rushed Josephat Mwathi Mwendwa for treatment at Athi River District Hospital and later to Machakos Level 5 Hospital because of the serious nature of the injuries sustained. To cover up for his mistake and in fear of losing his job the said Senior Sergeant Leliman and his colleague Corporal Jane Ngige took Josephat Mwathi Mwendwa to Mlolongo Police station and placed him in the same holding cell as the Petitioner, Samuel Mogaka and Jothan Waswa. On 14<sup>th</sup> April 2015 they were jointly arraigned in Court where they denied the charges and were released on cash bail of Kshs.5000/=.
8. During the intervening period before the trial started, Josephat Mwathi Mwendwa sought legal assistance from International Justice mission and he was assigned counsel to assist him, he also filed a formal complaint as against Senior Sergeant Fredrick Leliman (who later testified as PW1) In the instituted criminal case. On 26<sup>th</sup> April 2016 after attending a Court session the Petitioners co-accused Josephat Mwathi Mwendwa, his lawyer Willie Kimani and the taxi driver Joseph Muiruri were abducted as they left Court and later the three were found brutally murdered and their bodies dumped at Ol Donyo Sabuk River. Subsequently Senior Sergeant Fredrick Leliman, who was the 1<sup>st</sup> prosecution witness in Mavoko Criminal Case No. 226 of 2015 Republic- Vrs- Josephat Mwathi Mwendwa and others were charged with the murder of Josephat Mwathi Mwendwa, Willie Kimani and Joseph Muiruri in Nairobi High Court of Kenya Milimani Criminal Case No. 57 of 2016 Republic –Vrs- Fredrick Ole Leliman



and 4 others, where four out of the five accused persons were found guilty of the murder of the three persons above mentioned. From the above facts. It was rather evident that Senior Sergeant Fredrick Leliman had worked in cahoots with other police officers based at Mlololngo police station to prefer fabricated charges against the petitioner herein and his co accused in Mavoko Criminal Case No. 226 of 2015 in a bid to cover up the shooting of Mr. Josphat Mwathi Mwenda.

9. Further in the said Criminal case (At Mavoko) apart from Senior Sergeant Fredrick ole Leliman no other witness testified. The prosecution kept as adjourning the case even after It had become apparent that the case was brought with ulterior motive and the subsequent kidnapping and murder of Josephat Mwathi Mwenda and his lawyer had exposed the soft under belly of its prosecution. Eventually on 27<sup>th</sup> June 2018, the Petitioner was discharged under Section 210 of the Criminal Procedure Code.
10. After full trial in Hcc Milimani Criminal Murder Case No. 57 of 2016 on 22<sup>nd</sup> July 2022 judgment was delivered where a specific finding was made that the charges preferred against Josephat Mwathi Mwenda and by extension the Petitioner herein in Mavoko Criminal Case No. 226 of 2015 Republic-Vrs- Josephat Mwathi Mwenda & 2 Others were trumped up and were geared towards silencing Mr. Josephat Mwathi Mwenda not to peruse his complaint against Mr. Fredrick Ole Leliman, who had unlawfully shot his hand.

#### **Particulars of violation of *the Constitution* by the 2<sup>nd</sup> Respondent**

11. The Petitioner averred that his arrest without any cause or basis was in contravention of Article 29 of *the constitution* which protects the petitioner from being deprived of his freedom without justifiable cause and his incarceration at Mlolongo Police Station in the period between 10<sup>th</sup> April 2015 to 13<sup>th</sup> April 2015 deprived him of his right to freedom of movement as guaranteed under Article 29 and Article 39(1) of *the Constitution* of Kenya. The 2<sup>nd</sup> Respondents Agents also failed to promptly inform him of the Reason of his arrest and his continued detention was in violation of Article 49(1) of *the constitution* of Kenya.
12. Further the petitioner averred that the 2<sup>nd</sup> Respondent agent's action contravened provision of the *National Police Service Act* in that even after being notified and becoming aware of the abuse of power by concerned officers, they made him attend Court for 39 months which had negative psychological impact and deeply traumatized him. The Petitioner further averred that he had to be put under witness protection programme due to threats posed by the police officers concern. His right to fair administrative action that is expeditious efficient, lawful, reasonable and procedurally fair as espoused under Article 47 was thus abused.

#### **Particulars of Violation of *the Constitution* by the 3<sup>rd</sup> Respondent.**

13. Article 157 (10) and (b) of *the Constitution* did establish the office and role of office of director of public prosecution, who was (amongst other duties) mandated to direct the Inspector General of the National Police Service to investigate allegation of Criminal conduct and to institute, take over, continue criminal proceedings or discontinue such proceeding at any stage before judgment is rendered in any court. Section 4 & 5(1)(b) (iii) (c), & (4) (e) of the *Office of the Director of Public Prosecutions Act* (Act No. 2 of 2013) provided the guiding principles which in addition to Article 157 of *the constitution* guided the DPP in the performance of his powers and functions and also granted the DPP powers to Review a decision to prosecute or not to prosecute any criminal offence.
14. The Petitioner averred that the decision to charge and subsequently prosecute him was made without any proper factual basis as it was based on ulterior motive of police officers of Mlolongo Police Station



and the 3<sup>rd</sup> Respondent officer's sanction the same in violation of his right to fair trial as espoused by Article 50 (2) of *the Constitution* of Kenya 2010.

15. The 3<sup>rd</sup> Respondents officers further occasioned numerous adjournments even when they had enough material information to allow for withdrawal of the case against the Petitioner since 25<sup>th</sup> July 2016. This would have prevented further violation of the Petitioner's rights but they failed to do so within a reasonable time frame and therefore infringed on the Petitioner's right to have a trial begin and conclude without unreasonable delay and thus also violate his rights under Article 50 (2) of *the Constitution*.

### **C. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Grounds of opposition.**

16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not file a Replying Affidavit in Response to this petition but they did file ground of opposition on 27<sup>th</sup> April 2023 wherein they averred that the Petition was incurably defective, incompetent and misconceived for the reasons that;
- a. The Petition is incurably defective, incompetent, untenable, frivolous, scandalous, vexatious and devoid of substance, while the affidavit in support of the petition are full of falsehoods, misrepresentations of fact and law, inconsistent and unsupported conclusion and only tailored and stage managed to unfairly and improperly hoodwink this Court.
  - b. The petition is hopeless, misleading and devoid of any merit as the Petitioner/Applicant has failed to demonstrate the actions of the Respondents were laced with abuse of process.
  - c. That the notice of motion neither meets tenants for granting the orders sought nor has the Petitioner satisfied the threshold for a constitutional Petition as set out in Anarita Karimi Njeri-Vrs-Republic (1976-1980) KLR 1272 and reiterated in Mumo Mtemu –Vrs-Trusted Society of Human Right Alliance & 5 Others (2013) eKLR
    - i) The Petitioner had not precisely and distinctly defined which of his Constitutional Rights of fundamental freedom had been violated or is threatened to be violated.
    - ii) The Petitioner had not demonstrated how and in what manner the alleged but undisclosed constitutional right or freedom was violated.
    - iii) The Petitioner did not tender any evidence to suggest that he suffered or is threatened to suffer as a result of the violation or threatened violation.
  - d. The Petitioner has miserably failed to demonstrate by evidence or at all which of his fundamental rights and freedoms were violated hence the Petition is and remains unproven hearsay and devoid of substance and specificity.
  - e. That the Petition is a veiled smoke screen to evade the statutory time limitation to institute malicious prosecution as against the Respondents.'
  - f. In the upshot this Petition is an abuse of the due process of this Court as the Petitioner is not supported by evidence of infringement of fundamental rights and freedoms.
17. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore prayed that the said Petition be dismissed with costs.
18. The 3<sup>rd</sup> Respondent did not file any pleadings in this matter.

### **D.The Petitioners Submission**

19. The Petitioner rehashed all the facts as pleaded and submitted that this Court had jurisdiction to hear and determine this Petition based on the issues as framed. The Petition was brought under provisions



- of Article 25, 28, 29 (a), 47, 48, 49 & 50 of *the Constitution* and he had clearly particularized how his rights were violated in the petition. The violation included;
- a) Violation of Article 157(11) by the 3<sup>rd</sup> Respondent, where a decision to charge and subsequently, prosecute the Petitioner was commenced in the absence of proper factual foundation and based on improper or ulterior motive of police officers of Mlolongo Police Station and the prosecution of the Petitioner was therefore an abuse of the legal process which the 3<sup>rd</sup> Respondent was enjoined to prevent and avoid.
  - b) The violation of the Right to a fair and expeditious trial as granted in *the constitution* under Article 50 of *the Constitution*.
  - c) The violation of the Petitioners right to be promptly informed of the Reason of his arrest.
  - d) The violation of the right to protection of the law and administrative action under Article 27 and Article 47.
20. This Court had jurisdiction under Article 23 of *the Constitution* to hear and determine applications for the Redress of a denied or violation or infringement of a right or fundamental freedom in the bill of Rights. Reliance was placed on John Atela Omilla & Anor –Vrs-Attorney General & 4 Others (2017)e KLR.
21. Under Article 49 of *the Constitution* of Kenya 2010, an accused person had a right to be promptly informed of the reason of his arrest in a language he understood, to be allowed to communicate with his advocate and any other person whose assistance was necessary and not to be compelled to make a confession or admission, which could be used in evidence against him. It was the Petitioner’s contention that he was not informed promptly of the reason of his arrest and this fact remained uncontroverted. Further there was no mention or evidence tabled by the Respondent to show that the Petitioner resisted arrest and he only got to know about the reason of his arrest when he was produced in Court. Reliance was placed on Antony Murimi Waigwe-Vrs- Attorney General & 4 Others (2020) eKLR, Christie –Vrs- Leachrisky (1947) A.c 573 at 600(1947) UKHL 2 and Article 9 of the International Covenant on Civil and Political Rights.
22. *The Constitution* of Kenya 2010 had ushered in a new set of values, a new bill of rights and a new system of Government, which reset the Relationship between the state and its citizens. Under Article 10 and Article 73 of the said constitution, the new set of values was clearly articulated and had to be adhered to by all public servant and state officers.
23. The National Police Service was under the command and control of the Inspector General of police as prescribed under Article 245 (2) (6) & (4) of *the Constitution*. Police officer senior sergeant Fredrick Ole Leliman and his fellow police officers were agents of the 2<sup>nd</sup> Respondent and therefore the said 2<sup>nd</sup> Respondent was vicariously liable for actions carried out by his officer based at Mlolongo Police Station in bring up trumped up charges against the Petitioner and thus he could not be heard to distance himself from their action to abuse their power and oppress hopeless members of the public. Reliance was place on the case of Muwange-Vrs- AG (1967) EA.
24. The police officers from Mlolongo police station too were expect to adhere to the values and principle espoused under Article 10 and 73 of *the Constitution* of Kenya. They were expected to professionally conduct investigations and ought not to have been driven by malice or other collateral considerations. As illustrated in the pleadings, the Institution of Mavoko Criminal Case No. 226 of 2015 was done to achieve ulterior motive and extraneous purpose i.e to silence the 1<sup>st</sup> accused person. In particular Senior Sergeant Fredrick Leliman abused his powers by rounding up boda boda riders in the area and



- instigating the case to cover up the fact the he had shot Josephat Mwathi Mwenda and therefore used the case to settle personal scores. Reliance was placed on Rosemary Wanja Mwagira & 2 Others – Vrs- Attorney General & 2 Others (2013)eKLR and Nairobi Hcc No. 1729 of 2001. Thomas Mboya Oluoch & Ano –Vrs- Lucy Muthoni Stephen & Anor.
25. In Nairobi Milimani in Criminal case No. 57 of 2016 Republic-Vrs-Fredrick Ole Leliman and 4 Others, Lessit JA had made a specific finding that officer Fredrick Leliman had developed a personal Vendetta against the Josephat Mwathi Mwenda and brought trump up charges against the deceased in Mavoko Criminal Case No. 226 of 2015 Joseph Mwathi Mwenda and 2 Others. The Petitioner and the other co-accused persons were thus collateral damage to these schemes by Senior Sergeant Fredrick Ole Leliman. This clearly proved that the prosecution against the Petitioner was commenced without proper investigations and lead to the irresistible conclusion that his prosecution was based on ulterior motive and accentuated by malice. He was thus subjected to an unnecessary criminal trial.
  26. Having established that the 2<sup>nd</sup> Respondent was liable for the actions of the police officers under him and having established that trumped up charges were brought against the Petitioner. It is clear that his rights as enshrined under Article 50 (2) (c) and Article 159 (2) (6) were breached/violated. The trial was not commenced in good faith nor was it concluded without unreasonable delay. Reliance was placed on Julius Kamau Mbugua –Vrs Republic (2010) eKLR and Republic –Vrs-Askor (1990) 2 SCR 119 (SCC),
  27. The 3<sup>rd</sup> Respondent was an office which was established as an independent office, and under Article 157(10) of *the constitution* they did not require the consent of any person or authority to commence criminal proceedings and in exercise of that power the DPP would not be under direction or control of anybody or authority. Further the 3<sup>rd</sup> Respondent had the power to under Section 5(4) of the ODPP Act to review a decision to prosecute or not to prosecute. These powers were donated to the 3<sup>rd</sup> Respondent to enable him/her act fairly and to ensure that the citizen constitutional and fundamental rights were not violated.
  28. It was an undisputed fact that the 3<sup>rd</sup> Respondent became aware that the charges against the Petitioner and his Co-accused persons were trumped up upon the death of the 1<sup>st</sup> accused Josephat Mwathi Mwenda, who was murdered by PW1 Senior Sergeant Fredrick Leliman and it was for these reasons that the Dpp officer stationed at Mavoko court did seek direction from his superiors to drop the case against the Petitioner and other accused persons. When this opportunity to drop the charges came. The 3<sup>rd</sup> Respondent ought to have moved with speed after the conspiracy of Senior Sergeant Leliman and his colleagues was unearthed to forestall any further injustice meted on the accused persons In Mavoko Criminal Case No. 226 of 2015 Republic-Vrs- Josephat Mwathi Mwenda & 2 Others.
  29. The 3<sup>rd</sup> Respondent failed to act independently and/or fairly and did not withdraw the said criminal case to the Petitioner's detriment. He continued to attend Court until they were discharged under Section 210 of the Criminal procedure code on 28<sup>th</sup> June 2018. It was also to be noted that on the said date P.C Charles Waweru took the stand and explained that they had forwarded the police file for advice to the office of the ODPP but no feedback was forthcoming.
  30. Prosecution had to be conducted in a purposeful manner and should not have been be stage managed. The 3<sup>rd</sup> Respondent allowed the Criminal case to proceed, even when they were aware that there were no witnesses, thereby allowing the case to take an inordinately long time to conclude and thus failed to act independently as mandated under Article 157 of *the Constitution*. This infringed upon the Petitioner right.



31. The Petitioner further did contend that he was not the only person who complained of excessive delay. After the murder of Josephat Mwathi Mwenda, he had placed under witness protection and the Agency ensured he did attend all his Court sessions. On 5<sup>th</sup> March 2018 the said Agency did write a letter to the 3<sup>rd</sup> Respondent expressing their concern about the delay in concluding the case against the Petitioner who by then was a protected witness. The said letter did not elicit any response from the 3<sup>rd</sup> Respondent and he attended court from April 2015 to June 2018 when he was discharged under Section 210 of the Criminal Procedure Code.
32. It was to be noted that all the witnesses called were police officers who could be easily summoned by the DPP to attend court, but they failed to ensure the said witness's attendance, until he was eventually acquitted indicated that there was no basis of preferring charges against him.
33. The final issue submitted on was that he was entitled to damages as Article 23(3)(e) of *the Constitution* provided for the same. Reliance was placed on MWK & Anor-Vrs- Attorney General & 3 Others (2017) eKLR.
34. As regards quantum, the petitioner relied on the case of John Atelu Omilia & another vrs Attorney General & 4 others (2017) eKLR where the Court award Kshs.4,500,000/= as well as punitive damages of Kshs.500,000/=. Also in Jeremiah Ole Dashii Pellangyo –Vrs Attorney General & 4 others (2021) eKLR. The Court awarded the Petitioner therein Kshs.4,000,000/= as general damages and Kshs.1,000,000/= plus cost of this Petition.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions**

35. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent brought forth three issues for determination being whether the prosecution was malicious, whether the Petitioner constitutional rights were violated and whether the Petitioner is entitled to all or any of the reliefs sought.
36. Malice was defined as the presence of some improper and wrongful motive or intent to use the legal process in question for some other reason other than its legally appointed and appropriate purpose. The definition given in Joseph C. Mumo –Vrs Attorney General & Another (2008) eKLR where malice was defined as “prosecution for a reason other than the vindication of Justice”. The burden of proving malice was on the Petitioner and he had to prove that there was ulterior motive by the prosecution.
37. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner had failed to demonstrate that his arrest and prosecution was actuated with malice and no action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. Reliance was placed on Williams-Vrs- Taylor (1829) 6 and Susan Mutheu .
38. For the petitioner to succeed in a claim for malicious prosecution the Petitioner had to satisfy and prove four elements which were;
  - a. The Plaintiff must show that prosecution was instituted by the Defendants, or by someone for whose acts he is Responsible.
  - b. That the prosecution was terminated in the Plaintiff's favour.
  - c. That the prosecution was instituted without reasonable and probable cause.
  - d. That the prosecution was actuated by malice.



39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent stressed that the Petitioner did not prove malice as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents agents nor was it proved that the 3 Respondent acted without reasonable or probable cause. Reliance was placed on *Katerrage –Vrs-The Attorney General (1973)EA 287*, *Stephen Gachau Githaiga & Another-Vrs- Attorney General (2015)eKLR* & *James Kahindi Simba-Vrs-Director of Public Prosecution and 2 other (2020) eKLR*.
40. With Regard to violation of the Petitioner Constitutional right, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent averred that the Petitioner did not ignore any evidence of the same and never pleaded/frame his issues with reasonable precision. The petition as filed was thus devoid of any iota of precision and base on unsupported allegations, that his constitutional rights were breached. Reliance was placed on *Anarita Karimi Njeru –Vrs- The Rep (1976-1980) KLR 1272* *Mumo Matemu –Vrs- Trustee- Society of Human Right Alliance & 5 Others 2013 Eklr* & *Thorp –vrs –Holdworth (1876) 3 Ch.D.637*.
41. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further submitted that the Petitioner was not deserving of equity. It was apparent from the pleadings that the delay in the case was caused by other factors like abduction and killing of Josephat Mwenda and also due to the fact that the Petitioner was placed under witness protection. To attend Court for three years was not an infringement of the Petitioner’s Constitutional right. The Petition had been brought after unreasonable and undue delay and should not be condoned as his hands were soiled in equity.
42. The final issue raised was that the Petitioner was not eligible for the orders sought and had filed this Petition to defeat the time limitation of instituting a claim of malicious prosecution as against the Respondents under *Public Authorities Limitation Act* Cap 39 Laws of Kenya. The delay in instituting the suit was by over three (3) years and the Petition had been filed as an afterthought and the same should be dismissed.
43. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further submitted that had the Petitioner proved his claim, he would have been entitled to an award of damages for breach of his fundamental rights and but exemplary and punitive damage were not awardable. Reliance was placed on *Mareta –Vrs- Attorney General (1987) KLR 690*, *Simpson & Anor- Vrs- Attorney General (1994) NZLR 667*, *Peter Nari Kagume & 7 Others –Vrs- The Attorney General (2009) eKLR* and *James Mwangi Wanyoike and 9 Others –Vrs-Attorney General (2012) eKLR* which all stressed that exemplary or aggravated damages should not be award for alleged violation of the fundamental right.
44. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did submit that in the unlikely event that the Court finds in favour of the Petitioner they proposed that an award of Kshs.2,000,000/= would be adequate compensation. Reliance was placed on the authority of *Sylvance OkIya Ongoro –Vrs- Director of Criminal Investigation 7 4 Others (2020)eKLR*

## E. Determination

45. I have considered all the pleadings filed and submissions by the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondent in this petition and from the same do consider that the following issues arise for determination.
  - a. Whether this court has jurisdiction to hear and determine this petition as framed and/or if the appellants claim is time barred and brought to defeat time limitation imposed under *Public Authorities Limitation Act*, Cap 39 laws of Kenya.
  - b. Liability of the Attorney General
  - c. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents officers violated the petitioner’s constitutional rights.
  - d. Whether the petitioner is entitled to be paid damages



**I. Whether this court has jurisdiction to hear and determine this petition as framed and/or if the appellants claim is time barred and brought to defeat time limitation imposed under Public Authorities Limitation Act, Cap 39 laws of Kenya.**

46. There is no doubt that Article 22(1) allows every person a right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. Further Article 23(1) and (3) grants exclusive jurisdiction to the high court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights and where appropriate may grant appropriate relief, including; -
- a. A declaration of rights;
  - b. An injunction;
  - c. A conservatory order;
  - d. A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights and is not justified under Article 24;
  - e. An order for compensation; and
  - f. An order for judicial review.
47. It was the 1<sup>st</sup> and 2<sup>nd</sup> respondents position that this petition had been brought in bad faith and that the petitioner was not eligible for the orders sought due to the fact that this petition had been brought to defeat the time limitation of instituting a suit for malicious prosecution as against the Respondents under the Public Authorities Limitation Act, Cap 39, which provided a window of twelve (12) months from the date of the alleged violation or termination of suit. The petitioner herein is alleged to have filed this petition after a delay of over three (3) years and the said delay was not explained and the petition filed as an afterthought.
48. As to whether the instant petition is time barred, the question of limitation of time with regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of Joan Akinyi Kaba Sellah and 2 others vs Attorney General, Petition No. 41 of 2014, the learned judge observed inter alia that in a line of cases such as Dominic Arony Amollo vs Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, Otieno Mak' Onyango vs Attorney General and another, Nairobi HCCC No. 845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
49. Also, in HCCC at Nairobi Constitutional and Human rights Division Petition No. 204 of 2013 Njuguna Githu and the Attorney General where the petitioner had claimed that he had suffered various violations of his constitutional rights by the state at the Nyayo torture chambers in the year 1989. The petition was filed in 2013, 24 years later. In dealing with the preliminary objection to dismiss the petition on grounds of limitation of time, Lenaola J. High Court judge then, now Supreme Court judge stated after reviewing several relevant authorities including HCC Petition No. 306 of 2012 Ochieng' Kenneth K'ogutu vs Kenyatta University and 2 others, Joseph Migere Oloo vs Attorney



General Petition No. 424 of 2013. GERAL GICHOKI and 9 others vs Attorney General Petition NO. 487 of 2012 stated at paragraph 37 as follows:

“In agreeing with the above decisions, I must also agree with the petitioners that the dictates of transitional justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the Legacies of massive human rights abuses with Kenya being no exception. This court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs and various kinds of institutional reforms. Having said so however, it is imperative for a petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the awareness and measurements for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. I say so because as early as the year 2003, persons aggrieved by the acts of the Moi Regime approached the courts for redress pertaining to alleged violations of their constitutional rights and fundamental freedoms”

50. The point was further successfully made in Abraham Kaisha Kanzila alias Moses Savala Keya t/a Kapco machinery services and Milamo investments limited vs Government Central Bank of Kenya and 2 others, Misc. Civil Application 1759 of 2004 where the court observed;

“In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in *the constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitation periods”.

51. It is thus clear that in petition where a violation of right is claimed, the high court has wide original jurisdiction as provided for under Article 165 of *the constitution* to hear and determine the same even though the same might have been brought several years after the said violation had occurred and this petition is no exception.

## **II Whether the Attorney General is liable acts of public officers acting in the cause of duty.**

52. *The constitution* of Kenya places an obligation on the state to protect the lives and property of its citizen’s and for state officials to adhere to the national values and principles of governance espoused therein, which include upholding human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance, integrity, transparency, accountability amongst others.
53. This petition revolves around the action of the police, which is an organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as prevention and detection of crime including apprehension of offenders. Article 245(8) of *the constitution* empowers parliament to enact legislation giving effect to that provision. Consequently, parliament enacted the *National Police service Act* No 11A of 2021 under which the functions of the police are stipulated under section 24 of the said Act.
54. The petition too revolves around the omission and or commission of the 3<sup>rd</sup> respondents’ officers. The said 3<sup>rd</sup> respondent too is an office established under Article 157 of *the constitution* and Office of the director of public prosecution Act, No 2 of 2013 (ODPP Act ). Both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent perform their duties through delegated authority.



55. In particular section 24 of the *National police service Act* imposes a negative obligation on the part of the government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the agencies to protect the people from threats of violation of the said fundamental rights and freedoms. To this extent the state is liable for violations of fundamental rights and freedoms by private and/or third parties.

56. In *Association of victims of post-election violence and inter rights Vs Camerron (272/2003)* at para 88 and 89 it was held that;

“The respect for the rights imposes on the state the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individual’s do not violate these rights. In this context, the commission ruled that the negligence of a state to guarantee the protection of the rights of the charter having given rise to a violation of the rights constituted a violation of the rights of the charter which would be attributable to this state even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individual’s.....

According to the permanent jurisprudence of the commission, Article 1 imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because, it has failed to exercise the conscientiousness required to prevent it from happening and not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.”

57. The principle of positive obligation has also been recognized by the European court of Human Rights In *Mahmut Kaya Vs Turkey Application No 22535/93*. The European Court of Human rights held that;

“the court recalls that the first sentence of Article 231 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction..... this involves a primary duty of the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provision’s. it also extends in appropriate circumstances to positive obligations on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from criminal act against individual.”

58. The petitioner was arrested by police officers from Mlolongo police station, and all witnesses listed in the criminal case that was filed being in Mavoko criminal case No 226 of 2015 were the said police officer. It is not in doubt that the said officers were acting in the cause of their duty. The law as to the



vicarious liability of a master in tort for the acts of his servant was stated by sir Charles Newbold. P In *Muwonge v Attorney-General of Uganda* [1967] EA 17 as follows —

“An act may be done in the course of a servant’s employment so as to make his master liable even though it is done contrary to the orders of the master; and even if the servant is acting deliberately, wantonly, negligently or criminally, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable.”

59. As was also said by Sir Raymond Evershed MR in *Canadian Pacific Railway v Lockhart* [1942] All ER 464, cited with approval by this Court in *Patel v Yafesi and others* [1972] EA 28 at p 31 —

“A master ... is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not only for what he authorizes a servant to do, but also for the way in which he does it ...”

60. The Government proceeding Act, Cap 40 laws of Kenya does provided that indeed the Government can be sued and under section 12 thereof, any case as against the Government and/ or its Agents shall be instituted as against the Attorney General. The upshot is that indeed the Attorney General is liable to be sued on behalf of the Government for act carried out by its agents.

### **III. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents officers violated the petitioner’s constitutional rights.**

61. The petitioner pleaded that it was a common occurrence for police officers from Mlolongo police station to arrest Boda boda riders in would be operations with the intention of soliciting bribes and it was in this context that he was arrested on 10<sup>th</sup> April 2015 and subsequently charged with three others accused persons in the Principal Magistrate’s court criminal case No 226 of 2015 at Mavoko law courts i.e Republic Vs Josephat Mwathi Mwenda, Samuel Mogaka Ondicho , Josephat Kibagendi Mogaka & Jotham Waswa. They were charged with the offence of gambling and resisting arrest contrary to section 55(1) of the Betting and Gambling Act Cap 131 of the laws of Kenya and section 254(b) of the penal code Chapter 63 laws of kenya respectively.

62. Additionally, Josephat Mwathi Mwenda was charged with the offence of being in possession of cannabis sativa contrary to section 3(1) and 3(2) of the Narcotic Drugs and psychotropic control Act No 4 of 1994. Unbeknown to the petitioner at the time of his arrest and subsequent charging was also part of a wider scheme hatched by police officers from Mlolongo police station to cover up the shooting and subsequent injuries sustained by the said Josephat Mwathi Mwenda by senior sergeant Fredrick Leliman.

63. During the intervening period Josephat Mwathi Mwenda sought intervention of international justice mission and had counsel assigned to him. The said mission wrote a complaint letter to the 2<sup>nd</sup> respondent to investigate the misconduct of the said police officer Senior Sergeant Fredrick ole Leliman through its internal Affairs unit. On 26<sup>th</sup> April 2016 when the said Josephat Mwathi Mwenda attended court for his Traffic case No 1650 of 2015 Rep Vs Josphat Mwenda. After attending court, he together with his advocate willie Kimani and taxi driver Joseph Muiruri were abducted by the said Senior sergeant Fredrick ole Leliman and his fellow police officers and later the three were found brutally murdered and their bodies dumped at Ol donyo sabuk river.

64. Subsequently Senior sergeant Fredrick ole leliman & 4 others were charged with the murder in High court of Kenya at Milimani in criminal case 57 of 2016 Rep Vs Fredrick ole Leliman & 4 others Where



they found guilty of murdering Josephat Mwathi Mwenda, lawyer Willie Kimani and Joseph Muiruri. Following the murder, it was rather evident that case instituted as against the petitioner was made up of trumped up charges to cover up for the shooting of Josephat Mwathi Mwenda by the said Senior sergeant Fredrick ole Leliman and no doubt was instituted with ulterior motive.

65. The petitioner averred that his rights were breached as he was not informed the reason of his arrest until he was arraigned in court and he was denied and deprived of his freedom without justifiable cause. Further the decision to charge and subsequently prosecute him was commenced without any basis and in the absence of a proper factual foundation and/or was based on improper and ulterior motive of police officers from Mlolongo police station and therefore was carried out in breach of Article 157 (11) of *the constitution* and also infringed on his rights as guaranteed under Article 50 (2)(e) of *the constitution*.
66. The 3<sup>rd</sup> respondent too had enough information to allow for withdrawal of the case against the petitioner since 25<sup>th</sup> July 2016 and had the option to prevent further violation of the petitioner's rights by withdrawing the case but failed to do so and thereby violated the petitioner's right to have a trial begin and conclude without unreasonable delay in violation of Article 47 and 49(1)(a) of *the constitution*.
67. As a result of the negligent action of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' agents, the petitioner (an innocent man) continued to have a criminal case hanging over his head in excess of 39 months which had a great psychological impact on the petitioner
68. The Respondents did not file any replying affidavit in response to the petition and therefore the facts as pleaded remained uncontroverted.

**(a). Whether failure to inform the petitioner of the reasons of his arrest and subsequent detention for a period of three (3) days before being taken to court violated his rights under Article 49(1)(a) & (f) of *the constitution*.**

69. The petitioner's contention that he was not informed of the reason of his arrest and was incarcerated at Mlolongo police station from 10<sup>th</sup> April 2015 to 13<sup>th</sup> April 2015 before being arraigned in court was not rebutted in any manner by any of the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondent grounds of opposition as filed did not in any manner refer to this issue and thus the facts as pleaded remained uncontroverted.
70. Article 49(1) (a)(b)(c) and (d) of *the constitution* deals with the rights of arrested persons and are meant to ensure an accused person enjoys fair trial immediately from the time of Arrest. The said Article provides that;

Article Rights of Accused persons

49.
  - (1) An arrested person has a right: -
    - (a) to be informed promptly, in a language that a person understands of
      - (i) the reason for his arrest;
      - (ii) the right to remain silent; and
      - (iii) Consequence of not remaining silent
    - (c) to communicate with an advocate, and other persons whose assistance is necessary.
    - (f) to be brought before court as a 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.

71. Article 9 of the international convention on civil and political rights also provides that no one shall be subjected to Arbitrary arrest, detention or exile. In the case of *Christie Vs Leachnisky* (1947) UKHL 2 Lord Du Parq stated that;

“The omission to tell a person who has been arrested at , or within a reasonable time of, the arrest with what offence he Is charged cannot be regarded as a mere irregularity. Arrest and imprisonment without a warrant, on a charge which does not justify arrest, are unlawful and therefore constitute false imprisonment, whether the person making the arrest is a policeman or a private citizen.”

72. The petitioner’s uncontroverted affidavit under paragraph 5 to 15 detailed his arrest and subsequent detention for three (3) days. I do find that he was not promptly informed of the reason of his arrest, in a language that he understood and was also unlawfully held for three (3) days at Mlolongo police station before being arraigned in court. The failure by the agents of the 2<sup>nd</sup> Respondent to inform him of the reason of his arrest and continuous detention for more than 24 hours without any valid reason violated the petitioner’s rights as prescribed under Article 49(1)(a) to (g) of *the constitution* of Kenya 2010.

**(b)Whether the Respondents breached the petitioner’s rights to fair trial and fair administrative Action**

73. Article 50 of *the constitution* clearly provides that every person has a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court which includes the right to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer, to have the trial begin and concluded without unreasonable delay. Further Article 159(2)(e) of *the constitution* also provides that justice shall not be delayed.

74. First and foremost it should be noted that a finding has been made by lessit JA in Nairobi Milimani Criminal Case No 57 of 2016 Republic Vs Fredrick ole Leliman & 4 others that the said officer Fredrick ole Leliman had developed a personal vendetta against the first accused person ( Josephat Mwathi Mwenda) and brought charges against him and his co accused, the petitioner included in Mavoko criminal case No 226 of 2015 Rep Vs Josephat Mwathi Mwenda & 2 others and another traffic case as against the said Josephat Mwathi Mwenda in a bid to silence him. The petitioner and the other co accused were therefore just collateral damage to these schemes which have already been established and this courts takes cognizance of the evidential value of the judgment in Nairobi Milimani Criminal Case No 57 of 2016 Republic Vs Fredrick ole Leliman & 4 others in line with section 84 of the *Evidence Act*.

75. Police officers are expected to act professionally and conduct investigations in an impartial manner. The uncontroverted evidence herein indicates otherwise and the petitioner and other co accused were rounded up and eventually charged to cover up for the shooting of Josephat Mwenda by the said Senior Sergeant Fredrick ole leliman. In other words, the court process was being used to settle personal scores.

76. In *James Karugu Kiiru Vs Joseph Mwamburi and 3 others* Nrb C.A No 171 of 2000 the court held that;

“To prosecute a person is not prima facie tortuous, but to do so dishonestly and unreasonably is. And the burden of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted.”



77. Also in *Kagane Vs Attorney General (1969) EA 643*, Rudd J set the test for reasonable and probable cause thus;

“Reasonable and probable cause is a honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true, would lead to ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

78. Similarly, it was also held in *Simba Vs Wambari (1987) 601* that;

“The plaintiff must prove that the setting of the law in motion by the inspector was without reasonable and probable cause..... if the inspector believed what the witnesses told him then he was justified in acting as he did and I am satisfied the plaintiff has not established that he did not believe them or alternatively that he proceeded recklessly and indifferently as to whether there were genuine grounds of prosecuting the plaintiff or not”.

79. The law also enjoins the 3<sup>rd</sup> Respondent and officers working under him to act fairly and make independent decisions not influenced by any person or authority so as to ensure that the petitioner’s constitutional and fundamental rights were not violated. Section 4 of the ODPP Act does stipulate the guiding fundamental principles which guide officers of the ODPP in performance of their duties. Section 5(4)(e) of the ODPP Act, too allows officers of the ODPP to review a decision to prosecute or not to prosecute any criminal offence and where necessary terminate any ongoing prosecution.

80. The brutal Murder of Josephat Mwenda and two others, and subsequent arraignment in court of Senior sergeant Fredrick Ole leliman and other police officers on the charge of Murder exposed the soft underbelly of the criminal case filed. It was for this reason that the prosecuting counsel in Mavoko criminal case No 226 of 2015, applied to court time and again for adjournment as he had sort directions from his bosses in dropping the case as against the petitioner and other co accused as the case had been founded on ulterior motive.

81. The 3<sup>rd</sup> respondent failed to act fairly by not taking appropriate and expeditious administrative action within a reasonable time to terminate the said criminal case. The petitioner who was under witness protection programme was still made to attend court for over two years (after the apparent facts had come to light) until 28<sup>th</sup> June 2018 when he was discharged under provisions of section 201 of the Criminal procedure Code.

82. In *John Atelu Omilia & Another Vs Attorney General & 4 others* the court held that;

“A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to law has been committed by the accused. There is a continuing obligation to assess the evidence as the matter proceeds. The decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction.....”



However application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.”

83. In R Vs Askor (1990) 2SCR 119 (SCC), there were similar circumstances of delay of trial for almost two years. The court established the factors to consider when deciding whether there had been a delay in trial. The said factors were;

- a. The length of the delay;
- b. The explanation for the delay;
- c. Waiver
- d. Prejudice to the accused,

The longer the delay, the more difficult it should be for the court to excuse it, and very lengthy delay maybe such that they cannot be justified for any reason. Delays attributable to the crown will weigh in favour of the accused. Complex cases, however will justify delays longer than those acceptable in simple cases. Systemic or institutional delays will also weigh against the crown.....”

Here, the delay of almost two years following the preliminary hearing was clearly excessive and unreasonable. The crown did not show that the delay did not prejudice the appellants, and nothing in the case was so complex or inherently difficult as to justify the length of the delay. This trial was to be heard in judicial district notorious for the time required to obtain a trial date for figures from comparative district’s demonstrate that the situation there is unreasonable and intolerable

84. The 3<sup>rd</sup> respondent inaction and omissions of failing to make a decision on whether or not to withdraw the criminal case Mavoko criminal case No 226 of 2015 and continuously causing the matter to be adjourned for two (2) years thus did infringe on the rights of the petitioner to fair administrative action and right to fair hearing.

### **(c) Whether the petitioner is entitled to be paid damages**

85. It is clear that under Article 23 (3) of *the constitution* that in any proceedings brought under Article 22 of *the constitution*, a court can grant appropriate relief including an order for compensation, which can be in the form of an award of damages.

86. An award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. The jurisprudence that has emerged in cases of violation of fundamental rights has cleared any doubts as to the nature and scope of public law remedy in awarding damages and monetary compensation for violation of human rights and enforcement and protection of fundamental rights; such a claim is distinct from, and in addition to remedy in private law for damages in tort.

87. Kriegler J in the south African case of Ntanda zeli Fose Vs The Minister of safety and security did stated that ;

“..... Our object in remedying these kinds of harms should, at least be vindicate *the constitution*, and to deter its further infringement. Defence speaks for itself as an object, but vindication needs elaboration. Its meaning strictly defined, is to “defend against



encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in *the constitution*. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defence of *the constitution*- its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement and strike effectively at its source.....”

88. The petitioner citing the case of John Atelu Omilia & another Vs Attorney General & 4 others (2017) eKLR & Jeremiah ole Pallangyo Vs Attorney General & 4 others (2021) eKLR did pray that he be awarded Ksh.5,000,000/= and punitive damages of Ksh.1,000,000/=.
89. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand did submit that the petitioner was not entitled to any compensation, but if this court was to find otherwise the petitioner would only be entitled to an award of damages and not both damages and exemplary damages/ aggravated damages, as to award both under the circumstances would amount to making a double award in respect of the same violation’s. See Simpson & co Vs Attorney General (1994) NZLR 667, Peter Ngari Kagume & 7 others Vs Attorney General ( 2009 ) eKLR & James Mwangi Wanyoike & 9 others Vs Attorney General (2012) eKLR.
90. The respondent did further submit that if the court were to find in favour of the petitioner then an award of Ksh 2,000,000/= would be sufficient. Reliance was placed on Sylvanus Okya Ongoro Vs Director of criminal Investigations & 4 others (2020) Eklr.

### **Disposition**

90. To the extent of my findings above, I do find that this petition is meritorious and I proceed to enter judgment in favour of the petitioner jointly and severally as against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents as follows;
  - a. A declaration be and is hereby issued that Principal Magistrate court criminal case No 226 of 2015 at Mavoko law courts i.e Republic Vrs Josephat Mwathi Mwendwa, Samuel Mogaka Ondicho, Josephat Kibegendi Mogaka and Jotham waswa wherein the petitioner was charged and acquitted of the offence of gambling and resisting arrest was instituted without any factual foundation, was an abuse of the police and prosecutorial powers vested in the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.
  - b. A declaration be and is hereby issued that the 2<sup>nd</sup> respondent is vicariously liable for the acts of the police officers at Mlolongo police station that falsely arrested the petitioner and did so working as servants and/or Agents of the Government of Kenya.
  - c. A declaration be and is hereby issued that the respondents did breach the petitioner’s fundamental rights and freedoms, particularly Article’s 25, 28, 29(a), 47, 48, 49, 50 of *the constitution* of Kenya and they are jointly liable for the aforestated infringement.
  - d. General damages for infringement of the petitioner constitutional rights is awarded at– Kshs 3,000,000/=.
  - e. Interest on the decretal sum shall attract interest at court rates from the date of judgment until date of payment in full
  - f. Cost of this petition is assessed at Ksh.400,000/= all inclusive.

**JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**FRANCIS RAYOLA OLEL**



**JUDGE**

