



REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
CONSTITUTIONAL PETITION NO. E.326 OF 2020  
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 2, 10, 22(1) 25(C), 27, 29 (a), (d), (f), 47, 49, 50, 157(11), 224 (c) AND 258 (1) OF THE  
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF PROTECTION OF ABUSE OF THE CRIMINAL PROCESS

IN THE MATTER OF CHIEF MAGISTRATE COURT CASE NO.101 OF 2016 AT JKIA

ROSEMARY KAGWIRIA MUGAMBI.....PETITIONER

VERSUS

NO.63288 PAUL MWAMBERE JUMWA.....1<sup>ST</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION..... 3<sup>RD</sup> RESPONDENT

ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

ABSA BANK KENYA LIMITED..... 5<sup>TH</sup> RESPONDENT

JUDGMENT

1. The Petitioner filed a Petition dated 5<sup>th</sup> October 2020 seeking the following orders:-

*i. A declaration that failure by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents and/or their agents to present crucial witnesses and evidence in Chief Magistrate Court Nairobi JKIA Criminal Case No.101 of 2016, R v Rosemary Kagwiria was a violation of the Petitioner's right to fair trial and fair administrative action guaranteed under the Constitution of Kenya.*

*ii. A declaration that failure of the 2<sup>nd</sup> Respondent and/or the agents of the 2<sup>nd</sup> Respondent, including but not limited to the 1<sup>st</sup> Respondent, to conduct investigations as to the culpability of the Petitioner was a violation of the Petitioner's right to protection of the law and fair administrative action.*

*iii. A declaration that failure of the 5<sup>th</sup> Respondent and/or the agents of the 5<sup>th</sup> Respondent, to conduct investigations as to the culpability of the Petitioner was a violation of the Petitioner's right to protection of the law and fair administrative action.*

*iv. An order for compensation for damages jointly and/or severally for malicious prosecution.*

**v. Compensation for detention for eight (8) days imprisonment and violation of the Petitioner's rights fundamental rights and freedoms under Article 27, 29, 47, 49 and 50 of the Constitution.**

**vi. Compensation for damages for defamation due to injured reputation or disparagement of character.**

**vii. An order for general and exemplary damages jointly and/or severally suffered consequential to the declarations of violations of the Petitioner's fundamental rights and freedoms.**

**viii. Costs of this suit.**

**ix. Costs incurred during the defence of the primary suit JKIA CR.10 of 2016.**

**x. Interest on (iv), (v), (vi) and (vii) above at Court rates until payment in full jointly and severally.**

**xi. Any other relief that the Court may deem fit.**

2. The petition is supported by the petitioner's affidavit of even date and a further supporting affidavit filed on 25<sup>th</sup> January, 2021. The petitioner averred that the 5<sup>th</sup> respondent (a body corporate established as a bank and licenced by the Central Bank of Kenya to carry out banking business in Kenya) lodged an unfounded complaint against her with the goal of covering up fraudulent transfer of funds by its employees to third parties. She claims that the 1<sup>st</sup> respondent failed to carry out objective and independent investigations of the complaint which in turn led to the instigation of malicious prosecution against her by the 3<sup>rd</sup> respondent.

3. The petitioner an account holder No. [203xxxxxx] with the 5<sup>th</sup> respondent was on 14<sup>th</sup> September 2016 arrested and detained at its Jomo Kenyatta International Airport Branch (JKIA) where she had gone to withdraw KShs.350,000. It is averred that the 1<sup>st</sup> respondent and other officers based at JKIA police Station seized her phone, national identity card, sim card, ATM cards which they claimed would be used in the investigation.

4. She was thereafter on 15<sup>th</sup> September 2016 arraigned in the Chief Magistrate's Court at JKIA under *Criminal Case No. JKIA 101 of 2016* where she took a plea for the offence of stealing. The charge was based on the 5<sup>th</sup> respondent's allegation that she was part of a criminal syndicate that defrauds citizens electronically. It is claimed that she accessed the bank's internal Information Technology (IT) infrastructure where she virtually manipulated the mobile network system of the complainant's customer's account. It is claimed that the petitioner stole KShs.610,000 from the complainant's customer account named William Andrew Kerr. She avers that she was thereafter denied bond at the JKIA Police Station where she was detained for two days before being transferred to Lang'ata Women's Prison where she was remanded for 8 days before she could raise money for her court bail.

5. It is her averment that at the point of arrest the arresting officers failed to inform her of the reason for her arrest and proceeded to limit her right to liberty by detaining her. Secondly that the complaint lodged against her was malicious, as it could be seen from the 1<sup>st</sup> respondent's failure to carry out an objective investigation prior to her arrest. She deponed that failure to avail witnesses to prove its claim coupled with failure to execute the court's order for retrieval of evidence from Safaricom explain their malice.

6. Thirdly she depones that despite the malicious complaint the 3<sup>rd</sup> respondent failed to withdraw the case against her in light of the absence of evidence against her. This led to the alleged malicious prosecution which could have been prevented at the early stage of the trial. Fourthly she avers that her reputation has been injured due to the vilification of her character by the public due to the nature of the case levelled against her.

7. The petitioner in view of the said account accuses the respondents of violating her constitutional right to equality and freedom from discrimination under Article 27 of the Constitution as she was not subjected to equal treatment of the law due to the subjective malicious prosecution levelled against her. She also complains of violation of her freedom and security of person under Article 29 of the Constitution owing to her unlawful arrest and detention. She deponed that her right to fair administrative action under Article 47 of the Constitution, Sections 3 and 4 of the Fair Administrative Actions Act and Article 50 were violated due to the manner in which the prosecution was conducted and the misuse of the criminal justice system. It is her case that the 3<sup>rd</sup> respondent violated the provisions of Article 157(11) of the Constitution by preferring a malicious charge against her.

8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent's relied on the replying affidavit sworn by Njoki Kihara on 4<sup>th</sup> November 2020. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted the inquiry file at the end of the investigations, to the 3<sup>rd</sup> respondent who determined that there was sufficient evidence founded on a reasonable and probable cause. This informed the decision to charge the petitioner. He added that the decision was based on public interest, the evidential test and the guidelines under the National Prosecution Policy. He deponed that under Article 157 (10) of the Constitution, the 3<sup>rd</sup> respondent cannot be directed by anyone on the decision to charge. That upon one being charged the available evidence is subsequently tested by the trial court. In light of these facts the 3<sup>rd</sup> respondent argues that their failure to prove their case beyond reasonable doubt is not proof that there was no case against the petitioner.

9. It is further deposed that contrary to the petitioner's allegations, her continued detention in remand at Lang'ata Women's Prison was attributed to her not fulfilling the terms of bail which had already been granted by the trial Court. It is averred that the petitioner was granted a fair trial within the meaning of Article 50 of the Constitution by the trial court. He deposed that the petitioner has failed to demonstrate how the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted maliciously and/or abused the legal process. Similarly, that she has failed to prove the elements of malicious prosecution against the respondents. Lastly, she has equally failed to demonstrate how her constitutional rights were violated by the said respondents and therefore the petition should be dismissed with costs.

10. The 4<sup>th</sup> Respondent did not file any response to the petition but relied on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' replying affidavits dated 4<sup>th</sup> November 2020.

11. The 5<sup>th</sup> respondent filed its response through a replying affidavit sworn by Fredrick Omondi Ogada, a Forensic Investigations Manager at the bank on 9<sup>th</sup> November 2020. He avers that its clients' accounts are constantly monitored by its surveillance team through its e-channels every two hours for 24 hours. It was during these checks that the surveillance team on 13<sup>th</sup> September 2016 noticed suspicious activity in account No.094xxxxxxx held in the names of William Andrew Kerr and his wife Julia Kerr. He deponed that it was noted by the team that 2 transactions of KShs.70,000 each were transferred to Mpesa number 0706xxxxxx and 0712xxxxxx. Further an internal transfer of KShs.470,000 from William Andrew Kerr's account went to the petitioner's account No.203xxxxxxx. The team immediately blocked both accounts to prevent further fraudulent transactions.

12. He averred that the surveillance team proceeded to call William Andrew Kerr whose number was picked by a man suspected not to be him. The team was however able to get him through his wife and he confirmed that he had not authorized the indicated transactions. Following investigations by its Forensic investigations unit it was discovered that the transfer had been made possible through a sim-swap of Mr. Kerr's phone line leading to access to his account using mobile banking.

13. The deponent avers that when the petitioner received the KShs.470,000, she made two withdrawals of KShs.20,000 at its Moi Avenue branch ATM on the same day. She then made a cash-send purchase of KShs.40,000 before appearing at its Jomo Kenyatta International Airport branch at around 8:30 pm purporting to withdraw KShs.350,000. It is at this point that the cashier noticed her account had been flagged. The branch Operations Officer upon being notified immediately alerted the police who apprehended the petitioner. It is deposed that the petitioner sought to reach an out of court settlement with the 5<sup>th</sup> respondent during the pendency of the trial. It is further claimed that the petitioner made her way to its Forensic investigations department at Bishop's Gate two times indicating that she would reimburse the said amount.

14. The 5<sup>th</sup> respondent has averred that the petitioner has not proved the tort of malicious prosecution and further that her supporting affidavit is defective by virtue of being overleaf. He finally depones that the petitioner has failed to meet the legal threshold for a constitutional petition hence prays for the striking out of this petition.

15. The petitioner filed written submissions dated 9<sup>th</sup> November 2020 and further supplementary submissions dated 18<sup>th</sup> January 2021 through Mwangi Kihanga Advocates. Counsel identifies the following as the issues for determination:

(i) Breach of the right to fair trial;

(ii) Breach of right to protection of the law and fair administrative action;

(iii) Whether a private party such as the 5<sup>th</sup> respondent violated the constitutional right of the petitioner; and

(iv) Award of damages.

16. On the first issue, Counsel submits that the prosecution of her case for four years violated her right to have the matter determined within a reasonable time under Article 50(2) (e) of the Constitution. This duty as submitted lay on the 3<sup>rd</sup> respondent who failed to observe reasonable timelines. In support reliance was placed on the case of **Julius Kamau Mbugua v Republic (2010) eKLR** where it was observed that:

*“i) the trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical. ii) the purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.”*

Further reliance was placed on the case of **R v Askov (1990) 2 SCR 119 (SCC)**. To supplement this argument the petitioner submits that the right to fair trial falls in the category of the rights that cannot be limited under Article 25 (c) of the Constitution.

17. On the second issue, it is submitted that Article 157(11) of the Constitution enjoins the 3<sup>rd</sup> respondent to be guided by public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process which involves upholding Articles 27 and 47 of the Constitution. Further that according to the National Prosecution Policy the decision to prosecute comprises of two elements being that the evidence available is admissible and sufficient and that public interest necessitates prosecution. To buttress this argument the petitioner quoted the case of **Republic v. Director of Public Prosecutions & Another ex parte Kamani Nairobi Judicial Review Application No.78 of 2015** where the court held thus:

*“a criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case.”*

18. Counsel submits that the officials of the 2<sup>nd</sup> respondent deliberately arrested and prosecuted the petitioner without proper investigations and any evidence linking her to the alleged crime as evidenced by paragraph 5 on page 9 of the trial court's judgement. This she contends was a gross violation of her constitutional rights adding that the 3<sup>rd</sup> respondent is obligated to operate within the law albeit independent as expressed by the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission (2011) eKLR** which was cited in support.

19. It is Counsel's contention that the 1<sup>st</sup> respondent failed to conduct exhaustive investigations in accordance with Section 24 (e) and (f) of the National Police Service Act. In support reliance was placed on the case of **CK through Ripples International & 11 others v Commissioner of Police, Director of Public Prosecutions and another Petition No.8 of 2012** where it was held that:

*“needless to say in criminal justice system, police play a critical role and its abdication from that role would inevitably deprive claimant's access to courts and lead to miscarriage of justice or deny justice altogether.”*

Additionally the petitioner relied on the case of **Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another Nairobi HCCC No.1729.**

20. It is submitted that according to Section 4 (f) and (i) of the Office of the Director of Public Prosecutions Act, 2012 the 3<sup>rd</sup> respondent is obligated to serve the cause of justice by preventing abuse of the legal process and public interest while promoting constitutionalism. It is Counsel's contention that the 3<sup>rd</sup> respondent failed to observe this prerequisite which in turn led to the violation of her rights.

21. Turning over to the third issue, Counsel while relying on the Court of Appeal case of **Baobab Beach Resort and Spa Limited v. Duncan Muriuki Kaguuru & another (2017) eKLR** submits that all citizens owe a constitutional duty to protect the constitutional rights of all other citizens which is the vertical operation of the fulfilment of fundamental rights and freedoms. The Court also noted that this obligation no longer only applied to government's horizontal relationship in relation to enforcement of constitutional rights.

22. In a nutshell, Counsel asserts that the petitioner's constitutional rights were violated by the respondents and as a consequence she is entitled to an award of damages. He submits that the court should consider awarding a global sum of KShs.5,000,000 and general damages. It is further submitted that owing to the continuous violation of her rights the petitioner should be awarded punitive damages of KShs.1,000,000 plus costs of the petition. To buttress this argument Counsel relied on the case of **Said Fondo Kalume v Attorney General (2013) eKLR** where Justice Lenaola awarded the global sum of KShs.5,000,000 as damages for violation of the petitioner's fundamental rights. Further reliance was placed on the case of **John Atelu Omilia & Another v. Attorney General & 4 others (2017) eKLR.**

23. Counsel for the petitioner filed supplementary submissions dated 18<sup>th</sup> January, 2021. He cited the following to be the issues for determination:

*i. Whether the instant petition as couched is fatally defective for reason that the affidavit in support of the petition ends in one page with the jurat appearing overleaf.*

*ii. Whether this honourable court ought to strike out the instant petition as couched on the basis of the principle of constitutional avoidance.*

24. One the first issue he submitted that contrary to the 5<sup>th</sup> respondent's assertion, this anomaly does not suffice to render the affidavit fatally defective. He adds that **Order 19 Rule 1 of the Civil Procedure Rules, 2010** grants this court discretion to admit an affidavit despite any irregularity on its face. To buttress this argument he associates himself with the case of **Jimoko Enterprises LTD v. Deposit Protection Fund Board & 2 Others (2006) eKLR** where it was held that:

*“on the other hand, I do appreciate that it is good practice to have the jurat on the same page whereat the text of an affidavit ends. By so doing the jurat would definitely be linked to the affidavit, so that even if the last page were to become disconnected from the rest of the affidavit, the court or anybody else handling the matter would easily connect the two pieces.”*

Additional reliance was placed on the case of **Standard Chartered Bank LTD v Lucton (Kenya) LTD HCCC No.462 of 1997.**

25. He further submitted that the respondents have not demonstrated how the appearance of the jurat on another page prejudices them. He submitted that striking out of pleadings on this basis would be an extreme measure which should be used cautiously as underscored in the case of **Kivanga Estates Limited v. National Bank of Kenya Limited (2017) eKLR.**

26. On the second issue Counsel relied on the case of **Josphat Koli Nanok & Another v Ethics and Anti-corruption Commission (2018) eKLR** which discussed the principle of constitutional avoidance by expressing that:

*“the jurisdiction of the High Court as the Constitutional Court is not ousted by such stance, nor is the court abdicating its role as the interpreter of the constitution under Article 165(3) (d) of the Constitution. The Court only considers that there is adequate and appropriate remedy elsewhere.”*

27. He submits that the petition not only raises issues on the deprivation of the petitioner's liberty and violation of right to fair administrative action, it also raises issues on abuse of the criminal process by the respondents. To him the issues raised cannot solely be determined by recourse to statute without invoking constitutional issues. To buttress this point he cited the case of **Kimunai Ole Kimeiwa & 5 Others v Joseph Motari Mosigisi (the then District Commissioner, Rongai District) & 3 others (2019) eKLR** where it was held that:

*“however looking at the pleadings the substance of the suit can only be called a constitutional tort. Almost always a suit for malicious prosecution involves some allegation of deprivation of liberty as guaranteed in the Bill of Rights. This then implicates the concept of a constitutional tort in cases such as this one. As Prof. Michael Well explains the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power.”*

Additional reliance was placed on the case of John Atelu Omilia (supra).

28. It is the petitioner's case therefore that contrary to the 5<sup>th</sup> respondent's assertions, the issues raised in this petition cannot be fully canvassed by a civil action. Furthermore, the remedies sought can only be granted through the constitutional mechanism.

29. Learned Counsel Judy Kabillah for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed written submissions and a list of authorities dated 26<sup>th</sup> February 2021. She has identified, two issues for determination as follows:

i. *Whether the petitioner's rights have been violated*

ii. *Whether the petitioner is entitled to the reliefs sought*

30. The respondents on the first issue submit that as an established principle one who claims violation of fundamental rights and freedoms is required to identify the right with precision and demonstrate the manner in which the right has been infringed by the other party as set out in the case of Anarita Karimi Njeru v the Republic (1976-1980) eKLR 1272. Further while relying on Article 24(1) of the Constitution they submit that fundamental rights and freedoms can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society such as that applied in the criminal justice system. In support of this argument Counsel relied on the case of Leonard Otieno v. Airtel Kenya Limited (2018) eKLR where it was held that:

*“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not a mere technicality rather it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses...”*

31. Borrowing from the pleaded facts Counsel submitted that the petitioner in the trial court was granted a fair trial within the meaning of Article 50 of the Constitution and her arrest was in line with Article 49 of the Constitution. This she argues can be seen from her arraignment in court within 24 hours following her arrest at the 5<sup>th</sup> respondent's JKIA branch. Subsequently the petitioner after the plea taking was granted cash bail of KShs.200,000 in accordance with Article 49(1) (h) of the Constitution. She was not able to raise the cash bail hence her being remanded at Lang'ata women's prison. It is their further submission that based on this fact, it cannot be claimed that the respondents violated her right to liberty.

32. It is submitted that the respondents in this matter were only carrying out their constitutional mandate which they do independently as stipulated by the Constitution and enabling law. This mandate is carried out without interference even from courts unless their actions are in contravention of the dictates of the Constitution.

33. To support this argument reliance was placed on the case of Michael Monari & Another v Commissioner of Police & 3 Others, Misc. Application No.68 of 2011 where it was held that:

*“It is not the duty of the court to go into merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of any evidence to be tendered against an accused person. It would be improper for this court to determine the intended criminal case which is not before it. There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”*

The case of Paul Ng'ang'a Nyaga v Attorney General & 3 Others (2013) eKLR was cited in support.

34. It is submitted that the prosecutorial authority of the 3<sup>rd</sup> respondent flows from Article 157 of the Constitution and Section 6 of the Office of the Director of Public Prosecutions Act. Moreso, the 3<sup>rd</sup> respondent does not require the consent of any person or authority to instigate criminal proceedings and neither can he be directed by any person or authority as emphasized in the case of Hon. James Ondicho Gesami v. the Attorney General & Others, Petition No.376 of 2011.

35. Counsel submitted that owing to the facts of the case the 3<sup>rd</sup> respondent made the decision to charge the petitioner and the trial begun. The trial court found the petitioner to have a case to answer which to them demonstrated that the prosecution had a good case. Secondly that according to Odunga's Digest on Civil Case Law and Procedure the essential ingredients to prove malicious prosecution entails the following:

- (i) The criminal proceedings be instituted by the defendant.
- (ii) The defendant must have acted without reasonable or probable cause
- (iii) The defendant acted maliciously.
- (iv) The criminal proceedings were terminated in the plaintiff's favour.

36. The respondents argue that while the first and fourth elements are certain in this case it is in no way an indication that the prosecution was malicious. To buttress this argument Counsel relied on the case of **Robert Okeri Ombeka v. Central Bank of Kenya (2015) eKLR** where it was held that:

*“Comparative judicial experience in other jurisdictions also shows an emerging legal principle that an acquittal or discharge in a criminal prosecution should not necessarily lead to a cause of action in malicious prosecution law suits.”*

Further reliance was placed on the cases of **Glink v Mclver (1962) AC 726** and **Diamond Hasham Lalji & Another v Attorney General & 4 Others (2018) eKLR**. It is accordingly their case that the petitioner whose burden it is to prove her case on a balance of probabilities did not discharge the said burden.

37. On the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ mandate it is submitted that the same is established under Article 245 of the Constitution and Section 35 of the National Police Service Act. It is urged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted upon a complaint lodged by the 5<sup>th</sup> respondent. According to them it cannot be said that they violated the petitioner’s constitutional rights since they are charged with the duty to investigate and apprehend offenders. They cited the case of **Michael Monari (Supra)** where it was held that:

*“...the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges...as long as the prosecution and those charged with the responsibility of making the decision to charge act in a reasonable manner the High Court would be reluctant to intervene.”*

38. It is the respondents’ case that the petitioner failed to show how each of the alluded rights was violated. They therefore argue that the petitioner has failed to prove violation of any of her constitutional rights. Further that she has not shown that the respondents acted ultra vires while carrying out their constitutional mandate. They have called for the dismissal of the petition with costs.

39. The record reflects that the 4<sup>th</sup> respondent did not file any written submissions in this petition but adopted the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ submissions.

40. The 5<sup>th</sup> respondent filed written submissions dated 4<sup>th</sup> March 2021 through Miller & Company advocates. Counsel identified the issues for determination to be as follow:

- i. Whether the supporting affidavit is irregular and incurably defective as the jurat is overleaf and should be struck out;
- ii. Whether the petition has been pleaded with reasonable precision to sustain a cause of action as pleaded;
- iii. Whether the petition has been properly brought before this Honourable Court;
- iv. Whether the components of malicious prosecution have sufficiently been proved;
- v. Whether the petitioner has proved the tort of defamation; and
- vi. Whether the petitioner is entitled to an award of damages as prayed for in the petition.

41. On the first issue the 5<sup>th</sup> respondent submits that the Petitioner’s supporting affidavit sworn on 5<sup>th</sup> October 2020 ought to be struck out on a technicality for being defective. To buttress this argument Counsel cited the case of **Republic v. Registrar of Cooperatives Societies & Another – Ex Parte John Wangondo (2005) eKLR** which was cited with approval in the case of **Patrick Vonyoli Kavuli v. Board of Management, Kenya Medical Training & 2 Others (2009) eKLR** where it was held that:

*“I do uphold the submission that the affidavit sworn by Fredrick Odhiambo in support of this application is defective as the affidavit does not indicate the place where the affidavit was sworn and the jurat is also on a separate page.”*

42. He next submitted that the petition before this court has not met the threshold set out for constitutional petitions. This he argued is because the petitioner has not clearly brought out the set of facts and demonstrated how those set of facts relied upon lead to the violation of her rights. In essence Counsel submits that the facts have not been pleaded with reasonable precision. It is his contention that the petitioner has merely cited provisions of the constitution without providing the particulars of the complaint and the manner of the alleged infringement which is prejudicial to the respondents and hence ought to be struck out. In support he relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** where the Court of Appeal held thus:

*“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”*

43. Counsel went on to argue that owing to the fact that the petition does not disclose a cause of action premised on the Constitution the claim is not properly before this court. This is because there exists a clear remedy provided by legislation for such a cause of action. This argument was supported by the cited case of **Communication Commission of Kenya & Others v Royal Media Services Limited & 5 Others (2014) eKLR** where the Supreme Court observed thus:

*“The Petitioners in this case are seeking to invoke the principle of avoidance also known as constitutional avoidance. The principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis.”*

Also relied on is the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & Anor (2019) eKLR**.

44. It is further submitted that the petitioner’s averment that the matter is a constitutional tort does not apply to the 5<sup>th</sup> respondent as it is a private entity and not a government institution as held in the case of **John Atelu Omilia & Another v Attorney General & 4 others (2017) eKLR**.

45. According to the 5<sup>th</sup> respondent, the elements of what constitutes malicious prosecution were set out by the Court of Appeal in the case of **Kioko Mwakavi Makali v. Attorney General & Another (2019) eKLR**. The Court cited with approval the case of **Mbowa v. East Mengo District Administration (1972) EA 352**, where it was opined that:

*“the tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit.”*

46. Counsel has submitted that at the point of detecting the suspicious activity in their client’s account, the monitoring team was doing its usual system check. Once they took note of the activity they immediately took action. Furthermore the petitioner’s urgency to withdraw funds where there was Nil balance in the account as at 13<sup>th</sup> September 2016 raised a reasonable apprehension which caused it to summon police officers to arrest her. He submitted that the decision to charge in the long run lay with the 3<sup>rd</sup> respondent upon further investigations and findings by the 1<sup>st</sup> respondent. To buttress this argument Counsel relied on the case of **Thomas Mutsotso Bisembe v. Commissioner of Police & Another (2013) eKLR** where it was held that, *the mere fact that a complaint is lodged does not justify the institution of a criminal prosecution*.

47. It is submitted that an acquittal of an accused person does not usually imply malice on the part of the prosecution as noted in the cited case in support of **Nzoia Sugar Company v. Collinsus Fauguti (Civil Appeal No.7 of 1987)**. Further the burden of proving malicious prosecution lay on the petitioner. Cited in support is the case of **Anthony Shiveka Alielo v Kenya Post Office Savings Bank & Another (2019) eKLR** and **Dr.Lucas Ndungu Munyua v Royal Media Services & another (2014) eKLR**. In light of the facts set out in the 5<sup>th</sup> respondent’s affidavit it is argued that the petitioner has not proved the tort of malicious prosecution.

48. On whether the petitioner has proved the tort of defamation it is submitted that no witness was summoned to corroborate the tort, which was therefore not proved. To buttress this argument Counsel cited the case of **Daniel N. Njuguna v. KGGCU LTD (2000) eKLR** where the Court of Appeal held that:

*“we note from the record that the appellant was the only person who testified in support of his claim. In those circumstances, we cannot see how a claim based on defamation could have possibly succeeded even in the absence of the essence of the defence of qualified privilege.”*

49. According to the 5<sup>th</sup> respondent the petitioner is not entitled to an award of damages. While submitting on this issue Counsel stated that the law necessitates that special damages be specifically pleaded and proved as emphasized in the case of **Capital Fish Kenya Limited v. the Kenya Power and Lighting Company LTD(2016) eKLR**. It is their assertion that prayer No. (ix) of the petition is not complete as it is not specifically pleaded as amount has not been stated and proved. Counsel referred to the case of **Bonham Carter v. Hyde Park Hotel LTD (1948) 64 TR 177** where it was held that:

*“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars...”*

The 5<sup>th</sup> respondent concludes by submitting that the petition is incompetent and should be dismissed.

### **Analysis and Determination**

Upon considering the petition, all affidavits, all submissions and cited authorities I find the following to be the issues for determination:

- i. *Whether the petition is properly before this court;*
- ii. *Whether the petitioner’s supporting affidavit dated 5<sup>th</sup> October 2020 is defective; and*
- iii. *Whether the Petitioner’s rights under Articles 25(c), 27, 29(a), (d), (f), 47, 49, 50, 157(11) of the Constitution were violated.*

#### **(i) Whether the Petition is properly before this court**

50. The 5<sup>th</sup> respondent contends that owing to the fact that the petition is majorly premised on the tort of malicious prosecution it does not disclose a cause of action centered on the Constitution and therefore the claim is not properly before this court. Its argument is that there is a clear remedy provided by legislation for such a cause of action.

51. This was opposed by the petitioner in her supplementary submissions, where it is argued that the petition not only raises issues on the deprivation of her liberty and violation of the right to fair administrative action but it also raises issues on abuse of the criminal process by the respondents. In essence it is her contention that the issues raised cannot solely be determined by recourse to statute but must be considered as constitutional issues.

52. It is clear that this is a preliminary issue that should be determined before answering any question as it touches on the jurisdiction of this court. In the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** the court observed as follows:-

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

53. The jurisdiction of the High Court to determine constitutional issues is provided under Article 165(3) (d) of the Constitution. This Article provides as follows:

*jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--*

***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***

***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***

***(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and***

***(iv) a question relating to conflict of laws under Article 191; and***

54. Further, Rule 4 of the *Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013* provides that one can petition the High Court:

*i. Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.*

My interpretation of the above provision is that the jurisdiction of this Court is confined to interpretation of any constitutional question on whether a law is in contravention of the Constitution, whether an act is claimed to be done under the authority of the Constitution as well as a question on whether a right under the bill of rights has been violated.

55. The Court in the case of **C N M v W M G [2018] eKLR** sheds light on what constitutes a constitutional question by stating as follows:

***"18. ...A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute....."***

56. The Court went on further to state that:

***"20. ...When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values..."***

***21. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others[18] in which Justice O'Regan recalling the Constitutional Court's observations in S vs. Boesak [19] notes that:-***

***"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."*[20]"**

57. The matter before this court is twofold, first is the exercise of constitutional power donated by the Constitution to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and second is the alleged violation of the petitioner's fundamental rights by both state organs and a private party which operate both horizontally and vertically. An answer to this question will entail a determination of the legality of the acts done pursuant to the Constitution by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as state organs which directly impacts the values and principles set out in Article 10 of the

Constitution. Next is the alleged violation of the petitioner's fundamental rights by a private entity being the 5<sup>th</sup> respondent.

58. A reading of the facts in this case makes it clear that the issues raised in this petition require interpretation of constitutional provisions relating to constitutional powers of these parties. In light of this it is plausible to conclude that the petition herein raises constitutional questions which clearly fall within the ambit of this Court's jurisdiction under Article 165 (3) (d) of the Constitution.

**Whether the Petitioner's supporting affidavit dated 5<sup>th</sup> October 2020 is defective**

59. The 5<sup>th</sup> respondent contends that the petitioner's supporting affidavit is defective for the reason that the jurat is on a separate page. The petitioner in opposing this argument contends that this anomaly does not suffice to render the affidavit fatally defective. This is because the Court has discretion under Order 19 Rule 1 of the Civil Procedure Rules, 2010 to admit an affidavit despite any irregularity on its face.

60. The second preliminary issue that should be determined is the competence of the petitioner's affidavit dated 5<sup>th</sup> October 2020 which is one of the pleadings in any petition. It is worthy to note first that the Civil Procedure Rules, 2010 do not apply in constitutional petitions. This was aptly captured in the case of **Offshore Trading Company Limited v Attorney General & 2 others [2021] eKLR** where it was opined as follows:

***“29. Secondly the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under “The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions...”***

61. The new Constitution dispensation has seen a shift from the rigid rules that saw matters being struck out on mere technicalities denying parties a right to access justice. One of the principles that guides exercise of judicial authority is captured under Article 159 (2) (d) of the Constitution which reads as follows:

*justice shall be administered without undue regard to procedural technicalities;*

62. This principle is also echoed under Article 22 of the Constitution as seen below:

*(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—*

*(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*

*(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;*

63. The scope of constitutional petitions as expressed under Rule 3 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* is as follows:

*3. (1) These rules shall apply to all proceedings made under Article 22 of the Constitution.*

*(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.*

*(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the—*

*(i) rights and fundamental freedoms enshrined in the Bill of Rights; and*

*(ii) values and principles in the Constitution.*

64. The Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR** however gives a word of caution while applying this principle. The Court at paragraph 42 held that:

***“...In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:***

***“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] eKLR”.***

65. Procedural technicality is defined in the case of **Kenya Ports Authority V Kenya Power & Lighting Co. Limited [2012] eKLR** as:

**“18. “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice...”**

66. Similarly the Court in the case of **James Muriithi Ngotho & 4 Others V Judicial Service Commission [2012] eKLR** opined as follows:

**“... We all know that what is normally regarded as procedural technicalities would be in the nature of procedural lapses that do not go to the root of the matter under consideration.”**

67. The question therefore is whether the jurat being on a separate page is fatal. In my humble view and as guided by the cited authorities this error does not go to the core of the matter in issue. This accordingly does not render it fatal as would be if it were not sworn, dated or signed as seen in the Supreme Court decision in the case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**. I find that the jurat being on a separate page falls squarely within the meaning of Article 159 (2) (d) of the Constitution and accordingly does not therefore render the supporting affidavit fatally defective.

**(iii) Whether the Petitioner’s rights under Articles 25(c), 27, 29(a),(d),(f), 47, 49, 50, 157(11) of the Constitution were violated:**

68. The petitioner’s central assertion is that the 5<sup>th</sup> respondent lodged an unfounded complaint against her with the goal of covering up fraudulent or negligent transfer of funds by its employees to 3<sup>rd</sup> parties. The petitioner claims that the 1<sup>st</sup> respondent failed to carry out objective and independent investigations of the complaint which in turn led to the instigation of malicious prosecution against her by the 3<sup>rd</sup> respondent.

69. It is well appreciated by this court that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are state officers whose mandate is stipulated in the Constitution while the 5<sup>th</sup> respondent is a private party carrying out banking activities in the Republic of Kenya. It is important to first highlight what the respondents responsibilities are before making a determination on whether or not the constitutional and statutory basis for criminal investigations, prosecution and due process were violated.

70. One of the national security organs established under Article 239 (1) (c) of the Constitution is the National Police Service which is established under Article 243 of the Constitution. It is commanded by the Inspector General (I.G) as provided in Article 245(1) (b) of the Constitution. Article 245(4), (a) of the Constitution provides one of the functions of the Inspector General (I.G.) to be as follows:

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

*(i) The investigation of any particular offence or offences;*

71. The National Police Service Act, 2011 which gives effect to the operations of the National Police Service under the Constitution provides under Section 24 (e) that one of the functions of the Police among other functions is the investigation of crimes.

72. The court in the case of **Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others [2019] eKLR** while discussing the mandate of the police in investigation of crimes cited with approval a number of authorities and noted as follows:

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

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

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

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

***“I have also been unable to see how in investigating an alleged criminal conduct or activity there could be discrimination or a practice of inequality before the law. The respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the petitioner. They could***

***investigate on their own prompting or upon being prompted by any member of the public as did the interested party in this case. In so doing, it is a legal mandate they would be undertaking.”***

73. Turning over to the prosecution, the Director of Public Prosecutions derives his powers from Article 157 of the Constitution and his mandate spelt out in the following sub-Articles:

*(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*

*(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—*

*(i) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*

*(ii) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*

*(iii) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).*

*(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*

*(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*

74. This Article is operationalized by the office of the Director of Public Prosecutions Act, 2013. Section 5 (1) of the Act and states as follows:

*Pursuant to Article 157 of the Constitution the Director shall—*

*(a) have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;*

*(b) exercise State powers of prosecution;*

75. For the Office of the Director of Public Prosecutions to be able to perform its functions it enjoys independence where in Section 6 of the said Act it is provided as follows:

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

*(a) not require the consent of any person or authority for the commencement of criminal proceedings;*

*(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and*

*(c) be subject only to the Constitution and the law.*

76. The Court in the case of **Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others [2021] eKLR** while discussing the mandate of the 3<sup>rd</sup> Respondent as espoused in Article 157 of the Constitution the court noted as follows:

***“37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the constitution.”***

***38. Further in the case of Francis Anyango Juma v The director of Public Prosecutions and another the Court observed that:-***

***“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”***

77. From the foregoing, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have a constitutional mandate to investigate any crimes and offences

suspected to have been committed by any person. Upon conclusion of the investigations, they are required to submit their findings to the 3<sup>rd</sup> respondent whose constitutional mandate is to initiate the criminal prosecution of the matter once it evaluates the evidence and is satisfied of there being a good case. These functions are independently and separately carried out by each recognized body.

78. This was aptly captured in the case of **Kenya Commercial Bank Ltd & 2 Others V Commissioner of Police and the Director of Criminal investigations Department & Another Interested Party Benjoh Amalgamated Ltd [2012] eKLR** where it was held that:

***“25. The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.”***

79. The 5<sup>th</sup> respondent on the other hand being a bank has an obligation to act diligently to its clients while holding their accounts. This has been underscored in a plethora of authorities. The Court in the case of **Samuel Kahiri Karanja v Barclays Bank of Kenya [2020] eKLR** while dealing with a bank’s mandate noted as follows:

***“(14) ... The Plaintiff was therefore a client of the Defendant Bank. As such the Defendant owed to the Plaintiff as its client a duty to exercise reasonable care and skill in carrying out its operations with respect to the Plaintiffs accounts held with the said Bank. In the case of KARAK BROTHERS COMPANY LIMITED –VS- BURDEN [1972]ALL ER it was held as follows:-***

***“... a bank has a duty under its contract with its customer to exercise “reasonable care and skill” in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stock broker into his account of proceeds of sale of his client’s shares) of necessity does not suggest that it is out of the ordinary course of business. If “reasonable care and skill” is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in the exercise of reasonable care and skill again depends on circumstances.”***

80. Similarly in the case of **Barclays Bank of Kenya Limited v Diana Sambo Mwasela [2020] eKLR** it was held as follows:

***“...if the bank allowed dubious, unauthorised transactions to slip through, then it takes the risk of being held accountable to the customer and in the process losing money....When a customer opens an account with the bank, there is a reasonable expectation on the part of the customer that the bank will apply its skill, expertise and all manner of safeguards to ensure that the customer’s money is safe from unwarranted and unauthorised withdrawals.”***

81. Further the Court of Appeal in the case of **Fidelity Commercial Bank Limited v Italian Market Kenya Limited [2017] eKLR** opined as follows:

***“A bank’s duty of care to its customers includes protecting the customer from exposure to fraud by agents such as directors, business partners and others. In this case the appellant’s customer was the respondent because the account in question was in the company’s name. It was the responsibility of the Bank to protect the company from 3rd parties and also from its own directors if it became evident that the said directors were acting in a questionable manner.”(Emphasis mine).***

82. As can be deduced from the foregoing discussion, it is reasonable to infer that courts will not be quick to interfere with the mandate of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents if it was carried out within the confines of the Constitution and the law. Secondly, the 5<sup>th</sup> respondent has a duty of care to its clients which it’s expected to uphold. Having established the mandate of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> respondents as state organs and the 5<sup>th</sup> respondent as a private entity, the question for determination is whether the petitioner’s rights as guaranteed under the Constitution were infringed by the 5<sup>th</sup> respondent’s complaint, the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s investigations, and lastly commencement of prosecution by the 3<sup>rd</sup> respondent hence warranting this court’s intervention.

83. According to the petitioner as detailed in the petition, the complaint lodged by the 5<sup>th</sup> respondent of the fraudulent transaction of KShs.610,000 was malicious as it sought to cover up fraudulent transfer of funds by its employees and thus used her as a scapegoat yet failed to adduce any evidence against her. It is her assertion that the 1<sup>st</sup> respondent did not conduct internal investigations of the 5<sup>th</sup> respondent’s officials nor proper investigations of the case. She asserts that the 5<sup>th</sup> respondent was therefore not able to adduce any evidence in the trial. Moreover she claims that the 3<sup>rd</sup> respondent initiated discriminatory prosecution against her to the exclusion of other suspects working with the 5<sup>th</sup> respondent and further continued with the prosecution despite the lack of evidence against her.

84. These allegations have been denied by the respondents who argue that the petitioner has failed to demonstrate how they acted maliciously and consequently abused the legal process. It is their further contention that the petitioner has not identified with precision the manner in which the violation of the fundamental rights was perpetuated by them.

85. The threshold of what constitutes a competent constitutional petition was established in the case of **Anarita Karimi Njeru (supra)** as

ably submitted by the respondents. The Court held that:

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

86. This principle was later reaffirmed by the Court of Appeal in the Mumo Matemo case (*Supra*). The Court while expounding on this principle opined as follows:

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

**(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:**

**“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”**

87. Equally for the claim of malicious prosecution to succeed one has to prove the presence of four elements that are now well established. These elements were highlighted in the case of Bethwel Omondi Okal v Attorney General & another [2018] eKLR where it was held that:

**“21. The law on false imprisonment and malicious prosecution is now well settled. For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise, there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That is the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff’s favour having been acquitted of the charge laid against him. (See *Egbema v West Nile District Administration* [1972] EA 60)**

**22. From the above principles, it is therefore the law that a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful...”**

88. It is reasonable to infer from a reading of the cited authorities that, for this petition to succeed the petitioner is first required to demonstrate the manner of infringement of her constitutional rights laying a factual basis for that allegation by way of evidence and secondly to prove that there was malice on the part of the respondents in this matter.

89. To satisfy the threshold set out in the Anarita Karimi case, the petitioner is required to detail the facts that led up to the violation of the mentioned rights. If there is a claim that the trial was not fair, she has to detail facts that show for example that she was not given adequate time to prepare; that the trial was not public; that the delay was unreasonable in light of the standard trial time frame; and was not allowed to have an advocate to represent her, among others.

90. If it is on discrimination she has to show that her treatment in the trial was not the same as that accorded to other accused persons. If her right to liberty was curtailed she was to show that she was not granted cash bail or bond and no reasons were given for that refusal. If it is the right to fair administrative action it had to be shown that she was not accorded an opportunity to be heard, nor given reasons for actions taken out against her that would have an adverse effect on her. Further she had to show that she was not given an opportunity to cross-examine witnesses, challenge the evidence or have access to the evidence to be used against her among others.

91. Taking all this into account, I do find that the petitioner has not properly and with the required precision demonstrated how her rights have been infringed upon by the respondents as per the particulars in the petition. The petitioner has merely made allegations without detailing the facts of the breach. Moreover the petitioner admits that she was granted cash bail by the trial Court hence cannot claim to have had her right to liberty and freedom curtailed. While there is a claim that the right to fair trial and fair administrative action were breached no facts and evidence are adduced to prove that the process was contrary to what is stipulated in law.

92. It cannot be left to the court once the constitutional provisions are highlighted to speculate on behalf of the petitioner how the rights were infringed and to fill the gaps in their pleadings. As a consequence I am of the humble opinion that the petitioner has failed to meet the threshold set out in the **Anarita Karimi case** (*supra*).

93. On the claim of malicious prosecution, it is imperative that the element of malice be present hence leading to the definite conclusion that the primary purpose of the prosecution was one of malice other than that of carrying the law into effect. The petitioner had to show that there was no reasonable and probable cause from the facts and evidence presented to court for one to soundly believe that the petitioner might have committed a crime. A key question to be answered primarily is whether there was a probable cause in this matter.

94. The facts leading up to the petitioner's case are that the 5<sup>th</sup> respondent noticed an anomaly in its system and decided to investigate on it. Generally as seen in the cited authorities herein above a bank is obligated to have a duty of care to its clients, one of which is protecting its client's monies. This matter was reported to the police who arrested the petitioner. Once a crime is committed or suspected to have been committed the police are mandated to apprehend the suspect and carry out investigations. These investigations are then submitted to the prosecutor who examines the evidence and guided by the evidence, the laws and the public interest test, then makes a decision whether or not to charge the suspect. Up until this point it is rational to say each of the first three (3) respondents was carrying out his/her mandate leaving the petitioner with the burden to prove otherwise.

95. The record before this court shows that although the petitioner claims that the respondents' actions were malicious no evidence has been adduced to support the claim and neither has she laid any factual basis to support the assertions. A prosecution does not have to result in a conviction for the court to find that the charge and prosecution were without malice. There are several reasons that would lead to the acquittal of an accused person.

96. The petitioner was placed on her defence under Section 211 of the Criminal Procedure Code by the trial court. She has failed to rebut the respondents based on their conviction that a crime had indeed taken place, and in the circumstances had to act on the complaint raised. It seems that the basis of her claim is the finding of the Chief Magistrate's Court dated 25<sup>th</sup> April, 2019 that acquitted her under Section 215 of the Criminal Procedure Code. This acquittal only fulfils one element in this claim. All the elements must be proved for the claim to succeed. I find it necessary to reiterate what has been captured in a number of authorities that the petitioner bears the burden of proof in respect of the propositions she raises in order for her/him to prove her/his claims.

97. In the case of **Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR** the 5 judge bench noted as follows:

***“...Should there be credible evidence that the prosecution is being used or may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice, then a scrutiny of the facts and circumstances of the case is not only necessary but desirable. This is because it would enhance the administration of justice if the challenged charges were to be properly tested so that any fears of ill motive are dispelled.”***

98. The record shows that a complaint was raised against the petitioner by the respondent and the same was investigated and a charge preferred. The case was fully heard and the petitioner was acquitted under Section 215 of the Criminal Procedure Code. The petitioner complains that the case took unnecessarily too long. Cases are conducted by the court. It has not been stated and/or explained to this court why the case took the period it took. The court that heard the case is not a party to this case. The petitioner has not exonerated herself from being part of the cause of the delay. She has failed to prove how the due process was breached. No evidence was adduced to show the alleged unconstitutional exercise of police and prosecutorial power which may appear to a reasonable man to be deployed for an ulterior or collateral motive other than for advancing the ends of justice as noted in the **Philomena Mbete case** (*supra*)

99. The actions of the respondents cannot therefore be condemned as they were both procedural and lawful. In fact failure by the respondents to carry out their mandate would have amounted to violation of their constitutional mandate as provided in Article 157 and 245 of the Constitution and breach of the duty of care owed to the complainant by the 5<sup>th</sup> respondent. I am compelled to come to the conclusion that the respondents in this matter did not violate the petitioner's rights under Articles 25(c), 27, 29(a),(d),(f), 47, 49, 50, 157(11) of the Constitution, as alleged.

100. The upshot of all the above is that the petition lacks merit and is hereby dismissed with costs.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 11TH DAY OF NOVEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG'UDI**

**Judge of The High Court**