REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 57 OF 2019

SYLVANUS OKIYA ONGORO..... PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

OFFICER COMMANDING STATION

BONDO POLICE STATION.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

PETER OWITI OKUNA.....5TH RESPONDENT

JUDGMENT

1. The Petitioner herein **SLYVANUS OKIYA ONGORO** filed this petition dated 15th November 2019 against the Respondents, claiming that he was arrested on 07/10/2018 by agents of the 1st Respondent who were under the command of the 2nd Respondent. That on the same day at about 5:30am he was ruffled, handcuffed and frogmarched to Bondo Police Station where he was shoved, physically abused/harassed and harangued by agents of the 1st Respondent under the command of the 2nd Respondent. That he was locked up in the Police Cells together with others wherein he demanded for the reasons for his arrest and detention but the 2nd Respondent and officers under him refused to give any.

2. He further claims that on 08/10/2018 he was charged in Bondo Principal Magistrate's Court Criminal Case No. 966 of 2018 pursuant to charge sheet prepared and approved by the 3rd Respondent that he was thereafter prosecuted and all the witnesses presented indicated that they did not know why he was charged.

3. The petitioner further claims that notwithstanding the evidence of its own witnesses the 3rd Respondent refused to withdraw the charges and that it even opposed request for bail by the Petitioner and demanded that the petitioner, together with others be remanded during the pendency of the proceedings. It is claimed that at the instance of 3rd Respondent's officers, the Petitioner was detained for 14 days from 08/10/2018.

4. The petitioner further alleges that on 14/03/2019 about 5 months after the impugned arrest, the Honourable Court acquitted the Petitioner holding that:

> ***"I have noted that the people who were at the scene, that is PW3 and PW4 have clearly stated that the 5th Accused person was not at the scene."***

5. The Petitioner claims that he persevered rigorous, tedious and expensive criminal proceedings which forced him to sell his livestock and land for him to raise cash-bail and legal fees. That he could not carry out his businesses during the time of detention and thereafter, as most of his time was taken over by Court attendances and psychological torture linked to the case. He claims that the physical abuse meted upon him by the officers of the 1st Respondent under the command of the 2nd Respondent occasioned him health challenges. Besides, that the psychological and physical strain of the process has changed his life to the negative, health wise. He further claims that the financial expenses and costs as per the Petitioner's computation is Kshs. 1,308,000/- as evidenced in the Further Affidavit.

6. According to the petitioner, by unlawfully arresting, detaining and prosecuting him, the Respondents breached his fundamental Rights and Freedoms guaranteed by the Constitution and as a result of the alleged violations, the Petitioner sought the following reliefs:

a) ***<u>A Declaration</u> that the Respondents breached, infringed and/or violated the rights and freedoms of the Petitioner enshrined in the Constitution of Kenya, 2010.***

b) ***<u>THAT</u> the Respondents, jointly and severally, be ordered to pay the Petitioner damages and/or compensation for violation of his rights and fundamental freedoms.***

c) ***The costs of the Petition.***

7. The Petition was supported by the affidavit of the petitioner Sylvanus **Okiya Ongoro** sworn on a date that is not indicated at Siaya County but Commissioned in Nairobi before P.S Kisaka Advocate and Commissioner for Oaths. The petitioner, Mr. Ongoro subsequently filed a supplementary affidavit without leave of court on 3/3/2020 which affidavit is allegedly sworn at Siaya on 2nd March 2020 but commissioned in Nairobi before J.M Mutisya Advocates & Commissioner. I shall address the issues to do with what I have identified in those two affidavits later in this judgment.

8. On the 27th February 2020, Mr. Abidha Advocate on behalf of the petitioner filed written skeletal submissions in support of his case.

9. A replying affidavit sworn by Josephine Wambua on behalf of the 1st to 4th respondents was filed by the Attorney General. The matter proceeded by way of oral submissions on the 3rd of March 2020. The 5th respondent did not take part in the Proceedings despite being served by the Petitioner's Advocate.

10. It is the petitioner's case that he was arrested on 07/10/2019 by the 1st Respondent's officers under the command and guidance of the 2nd Respondent based on a phone call from the 5th Respondent.

11. The petitioner further states that the officers of the 1st Respondent with the guidance of the 2nd Respondent failed to explain to him the reasons of his arrest and that neither the alleged complaint against him by the 5th Respondent nor his arrest was booked in the Occurrence Book.

12. The petitioner further states that the 1st Respondent's Officers then detained him until the 08/10/2018 when he was arraigned in Court pursuant to a Charge Sheet which the 2nd Respondent approved.

13. The petitioner further states that the 3rd Respondent while ignoring all his pleas from that his rights should be protected, proceeded and prosecuted him on 08/10/2018 in Bondo Criminal Case No. 966 of 2018 and that while prosecuting him, the 3rd Respondent opposed application for bail on the basis that he had received instructions from the 5th Respondent that the Petitioner and others were a threat to his life and subsequently the Honourable Court in Bondo Chief Magistrate's Court Criminal Case No. 966 of 2018 ordered that the he be remanded in Custody for 14 days pending investigations as requested by the 3rd Respondent.

14. Further, the petitioner claims that during the hearing of the case, the 5th Respondent and his witnesses indicated that they did not know why he, the petitioner, was arrested and charged. The petitioner further states that the 1st Respondent through one, PC Cornelius Cheruiyot, number 111570, the Investigating Officer, intimated that the Petitioner was arraigned in Court because he was named by one of the witnesses, Mathews Opiyo.

15. It is the petitioner's case that he was acquitted by the Chief Magistrate's Court on 14/03/2019 who stated that he noted that prosecution witnesses 3 and 4 stated that the petitioner was not at the scene of the crime alleged.

16. The petitioner thus stated that his arrest, detention and prosecution by the Respondents was unfair, mala fides, tinged with ulterior motive, irregular, unlawful and blatant/flagrant abuse of criminal justice system contrary to the Constitution, thus violating, infringing and/or contravening his rights.

17. In his supplementary affidavit the petitioner deposed that after being arrested he suffered various physical injuries from the agents of the 1st Respondent under command of the 2nd Respondent. Further deposition was that he complained of pain while at the Police Station and later received medical services at Siaya Remand Health facility and that upon being released he has been seeking and receiving medical attention from various institutions.

18. Mr. Ongoro further deposed that he was a businessman as at the time of his arrest and that due to his detention he had no opportunity to engage in his trade thus suffering immense losses. He further deposes that his arrest and subsequent charges occasioned him loss including the sale of his parcels of land and livestock to enable him pay an Advocate, for cash bail and subsequent costs of attending court sessions all amounting to Kshs. 1,305,000/-.

19. The petitioner, thus seeks general and special damages in compensation as a result of the losses and suffering in the hands of the Respondents.

20. Opposing the petition, No. 231386 Josephine Wambua, the Sub county Criminal Investigation Officer, Bondo and based at Bondo Police Station in Siaya County, on behalf of the 1st to 4th respondents swore an affidavit on 4th February, 2020 before a Senior Resident Magistrate, Kisumu. In the said affidavit, the deponent deposes that on the 6th October 2018 at 2000hrs the 5th Respondent made a report that his house was on fire and locked with a padlock prompting the police to rush to the scene and subsequently launch investigations.

21. Ms. Wambua further deposed that the investigations culminated in the arrest of the Petitioner and six others on the 7th October 2018 and subsequent arraignment at the Bondo Law Courts and on 8th October 2018 the petitioner and his co-accused were charged with two counts each.

22. Ms. Wambua further deposed that the petitioner was informed of the reason for his arrest and booked in the Occurrence Book as OB NO. 5/7/10/18 and that the police file was forwarded to the Office of the Director of Public Prosecutions after investigations had been done.

23. Ms. Wambua deposed that on the day of plea taking, the complainant in Bondo Criminal Case No. 966 of 2018 complained that the suspects were planning to kill him and that the presiding Magistrate released the petitioner and others before the investigations into the alleged threat to the complainants had been completed.

24. Ms. Wambua deposed that the petitioner was represented by an advocate throughout his trial and at no point did the Advocate raise concerns touching on violation of rights of the Petitioner as provided for under The Constitution and that the petitioner was not irregularly charged as the same was addressed by the trial magistrate in the Judgment rendered.

25. Ms. Wambua deposed that the petitioner was lawfully arrested and charged in court and as such the instant petition had been brought in bad faith as the petitioner cannot substantiate his case.

Petitioner's Submissions

26. The petitioner made both written submissions dated 27th February 2020 as well as oral submissions.

27. In his written submissions, the petitioner submits that his arrest in the wee hours of 07/10/2018 in a commando style by the agents of 1st Respondent under the command of the 2nd Respondent was illegal, unfounded and unreasonable. The Petitioner further submits that excess force was used when he was ruffled, shoved, physically humiliated, handcuffed and frog marched to the Police Station.

28. It was further submitted on the petitioner's behalf that the acts of the 2nd Respondent and officers under him both prior and post the said arrest failed to adhere to the rights under the Constitution and relevant criminal procedure laws as the petitioner was not informed of the reasons for his arrest contrary to Article 49 (1)(a) of the Constitution as well as Article 9 of the International Covenant on Civil and Political Rights which states:

> ***"Article 9***
>
> ***1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.***
>
> ***ttc2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."***

29. The petitioner further submitted that the 2nd Respondent did not book the arrest and detention of the Petitioner in their official Records as the Charge sheets at pages 4 and 5 show different OB numbers being 51/15/2018 and 5/6/10/2018 none of which reflect the complaint against the Petitioner or his arrest.

30. The petitioner further submitted relying on the testimony of PC Cornelius Cheruiyot in the criminal trial which was to the effect that the records of the 1st and 2nd Respondents stationed at Bondo Police Station did not show records of arrest of the Petitioner as per the Investigating Officer, as PC Cheruiyot testified that "*he proceeded to the scene of crime and thereafter arrested 4 suspects Joseph Obiro, Vitalis Ouma, Caroline Auma and Kennedy and that on 15/10/2018 he arrested 2 suspects, Stephen Oucho and Fredrick Ogoyo and on the 16/10/2018 he arrested Michael Obiero."*

31. Further submission was that by his detainment without a complaint being lodged against him, the Respondents limited the Petitioner's liberty contrary to Articles 24, 25 and 27 of the Constitution and as such pursuant to Article 23(3) of the Constitution of Kenya and Article 9 (5) of ICCPR, he is entitled to compensation and the Court has jurisdiction to order the same premised on the aforementioned violations.

32. It was further submitted that the 1st and 2nd Respondents did not conduct investigations as the lower Court noted that all witnesses for the 3rd Respondent did not know why the Petitioner was arraigned and further, that the Investigating Officer, apart from showing that there were no records of the arrest and detention of the Petitioner, proceeded to demonstrate that there were no investigations linking the Petitioner to any complaint at their station.

33. It was submitted further that by violating the rights and freedoms of the Petitioner and failing to adhere to the relevant laws including the Constitution and National Police Service Act, the 1st and 2nd Respondents ought to be held accountable as they deprived the Petitioner the right to fair administrative action as captured under Articles 21(1), (2) &(3) and 47 of the Constitution and that the actions of the 1st and 2nd Respondents deprived the Petitioner of due process in the proceedings before the lower court thus exposing him to untold suffering contrary to Articles, 28, 29, 48 and 50 of the Constitution.

34. Counsel for the petitioner further submitted that the acts of the 1st and 2nd Respondents were riddled with malice meant to punish him for no crime at all.

35. Further, that the 3rd Respondent whilst aware that there was no complaint or evidence against the petitioner, proceeded to approve charges and prosecute him in the said criminal case and further that the 3rd respondent in an attempt to deprive the Petitioner of his right to fair administrative action and a show of abuse of criminal justice, applied for detention of the Petitioner and others pending trial which detention lasted for 14 days.

36. Mr Abidha for the petitioner further submitted that the 3rd Respondent contravened their discretion under Article 157 of the Constitution and violated the principles under section 4 of the Office of Director of Public Prosecutions Act including but not limited to obligation to ensure fairness, impartiality, the need to serve the cause of justice, prevent abuse of the legal process and public interest secure the observance of democratic values and principles; and promotion of Constitutionalism. It is further submitted that by their impugned acts the 3rd Respondent limited the rights of the Petitioner of access to justice, liberty, fair administrative action and fair hearing.

37. In support of his case, the petitioner's counsel relied on the case of **Gaokibegwe *v* Mokokong & Another (2009) BWHC 77** where the Botswana High Court on a decision about powers of a prosecutor pointed out that:

> ***"…His decision …subjects him to the public scrutiny of a criminal trial and to a degree of social stigma, even if he is ultimately acquitted. It is a decision not to be taken lightly, and certainly not to obtain resolution of civil disputes between citizens. In my judgment a prosecutor who recklessly proceeds with a prosecution without reading the docket, or in the face of clear evidence that there is no case to answer, does so without reasonable and probable cause, and is open to a claim for malicious prosecution."***

38. Further reliance was placed on **Mohamed Feisal& 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR** where the Court held that:

> ***"In a Constitutional democracy like our own its imperative for citizens to have confidence and trust in the institutions established to safeguard the rule of law. In this regard the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. This means that chapter four of the supreme law of the land should at every juncture be the guiding light when effecting arrest and detention of suspects alleged to have committed cognizable offences."***

39. The Petitioner thus submitted that his rights and freedoms were violated and as such the court should proceed to award him Kshs. 1,308,000/- being expenses he incurred in Bondo Law Courts and general damages of Kshs. 3,000,000/- as was held in **Mohamed Feisal& 19 others (supra)** and **Akusala A. Borniface v OCS Langata Police Station & 4 others [2018] eKLR**.

40. The petitioner also relied on the cases of **Lucas Omoto Wamari v Attorney General & another [2017] eKLR, Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others [2019] eKLR** for the principle of Constitutional tort in which the Honourable Court has jurisdiction to award damages against all parties including the 4th Respondent, the Hon. Attorney General.

41. Mr. Abidha for the petitioners reiterated the issues raised in the petitioner's written submissions when the matter came up for oral submissions before court. He further submitted the fact that the petitioner was represented by an advocate during the criminal trial did not negate the petitioner's Constitutional violations as the trial court had no jurisdiction to handle Constitutional violations and as such there was no need of installment litigation. Mr. Abidha further submitted that the instant petition was not limited to malicious prosecution but Constitutional violations which can be classified as torts.

1st - 4th Respondent's Submissions

42. Mr. Okachi Senior Principal prosecution counsel holding brief for Ms Janet Langat for the 1st - 4th respondents submitted in opposition to the petitioner's petition contending that there were no violations of the petitioner's rights considering the Petitioner was a suspect of arson as complained by the 5th Respondent.

43. Mr. Okachi further submitted that the Petitioner was represented by PJ Otieno Advocates during the criminal trial during which no issue was raised on violation of the petitioner's fundamental rights which the court could have addressed at the time the Petitioner was being prosecuted.

44. Mr. Okachi further submitted that there is no evidence of torture or degrading, inhuman treatment and if there was any such torture, nothing prevented the Petitioner from raising it at the trial stage.

45. Further Mr. Okachi submitted that lack of evidence was not evidence of malice in Prosecution as arson is a serious offence and that the Petitioner was charged in accordance with the law.

46. Counsel concluded his submissions by stating that the petition was misplaced, an afterthought and abuse of court process, intended to extort money from the State fictitiously as there were no grounds to grant orders sought and thus the Petition ought to be dismissed with costs.

Analysis and Determination

47. I have considered the instant petition, the pleadings by both parties as well as the submissions made by both counsel for the petitioner as well as the counsel for the respondents together with authorities cited. In my humble view, the main issues for determination in the instant

petition are:

a) ***Whether the arrest and prosecution of the petitioner was illegal and unlawful or actuated by malice and thus whether it was done in violation of the petitioner's Constitutional rights;***

b) ***What is the legal competency of this petition?***

c) ***What general damages if any, is the petitioner entitled to?***

d) ***What orders should this court make?***

48. There are also ancilliary questions that the court will endeavour to resolve.

49. ***On the first issue*** which is quite broad, Article 49 of the Constitution guarantees arrested persons certain rights. The said Article embodies rules which have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the Rule of law prevails. The abovementioned Article provides:

"***49. rights of arrested persons***

(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than— (i) twenty-four hours after being arrested; or (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence."

50. These same rights are also protected under Article 9 of the International Covenant on Civil and Political Rights.(ICCPR) which states:

"***Article 9***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

51. In light of the above, it is important to mention that the expression of the right to liberty in Article 3 of the Universal Declaration of Human Rights (UDHR) reflects the inalienable nature of that right. The common conception of liberty formed the basis for the later

articulation of the right to liberty in Article 9 of the ICCPR.

52. Article 9(1) of the ICCPR basically prohibits arbitrary arrest and detention and the use of the term, ***"arbitrary"*** simply covers unjustifiable deprivation of liberty rather than seeking to list exhaustively all permissible causes of deprivation of liberty.

53. As regards arbitrary arrest, Article 49(1) of the Constitution which is equivalent to Article 9(2) of ICCPR comes into play. These provisions are often referred to as the ***Miranda Mights*** following a well-known **United States Supreme Court Case of Miranda-v-Arizona (1966)** where the Supreme Court ruled that detained suspects, prior to police questioning, must be informed of their constitutional right to an attorney and against self-incrimination. In that case Miranda was not informed of his rights prior to police interrogation.

54. The petitioner herein alleges that his right was violated on the account of his arrest being unlawful, detention and prosecution for the offence of arson. The petitioner further states that unnecessary force and violence was used to arrest him whereby he was ruffled, shoved, physically humiliated, handcuffed and frog marched to the Police Station and that he was not informed of the reason for his arrest.

55. Wrongful arrest involves deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Thus liability thereof is strict, and a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under *action injuriam*, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will award a contemptuous figure for the infringement of the right to liberty.

56. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be violators. Therefore Petitioner only need to prove that the arrest or detention was illegal. This was stated in the case of **Mohamed Feisal& 19 others (supra)** that a petitioner does not have to prove that the Respondents had intention to act illegally or to cause harm.

57. In order to establish the lawfulness of an arrest without a warrant, the onus of proof resides with the Respondents to show probable cause or reasonable suspicion. In exercising the power to arrest, he must act as an ordinary honest man would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. However, the suspicion need not be a matter of certainty, or even probably. It must not at the other extreme, be vague, remote or tenuous. It is a question of a feasibility possibility, a matter of likelihood.

58. As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process.

59. **Section 29 of the Criminal Procedure Code** provides for an arrest without warrant by a police officer in the following terms:

> ***"29. Arrest by police officer without warrant***
>
> ***A police officer may, without an order from a magistrate and without a warrant, arrest—***
>
> ***(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;***
>
> ***(b) any person who commits a breach of the peace in his presence;***
>
> ***(c) …***
>
> ***(d)…"***

60. **Section 36 of the Criminal Procedure Code** relates to detention after an arrest without warrant and provides:

> ***"36. Detention of persons arrested without warrant***
>
> ***When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:***
>
> ***Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge."***

61. **Section 58 of the National Police Service Act** gives a police officer power to arrest without warrant in these terms:

> ***"58. Power to arrest without a warrant***
>
> ***Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—***

(a)…

(b)…

(c) whom the police officer suspects on reasonable grounds of having

committed a cognizable offence;

(d)"

62. Having set out the constitutional and statutory provisions upon which the Petitioners' arrests were based, I must now interrogate whether in the circumstances, that arrest of the petitioner was unlawful resulting in alleged unlawful detention and prosecution of the Petitioner.

63. There is plenty of case law on false arrest. In **Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR** the court held:

> ***"False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort."***

64. In **Petition 324 of 2013 | Kenya Law Reports 2020 ,** Lenaola J (as he then was) had this to say concerning unlawful arrest:

> ***"From the foregoing and in the totality of things, I hereby find that the Police were justified in arresting the Petitioners without any warrants. Furthermore, the mere fact that the third count requires a warrant does not render the arrest unlawful since in any event, the offences are alleged to have been committed in the presence of Police officers.Iin that regard and as I understand it, "a police officer is entitled to effect an arrest without a warrant, so long as he has reasonable grounds for entertaining the suspicion at the material time. Subsequent events may show that the officer was in error at the time but the arrest will not thereby be rendered unlawful."*** - per **(Patrick Kiage, Essentials of Criminal Procedure in Kenya)**. ***This has also been the law for more than a century as may be seen from the sentiments of Lord Diplock in Dillion v O'Brien and Davis (1887) 16 Cox CC 245 where he stated that;***

> ***"In the case of an arrest, reasonable grounds for belief of guilt at the time of arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive."***

65. A determination on whether or not there is false imprisonment is predicated on the circumstances of each case. The learned judge in the case of **Daniel Waweru Njoroge & 17 Others v Attorney General (supra)**, adopted the holding in **Jorgensen v Pennsylvania R.R., 38 N.J Super 317{App. Div. 1955}** where it was held that:

> ***"The gist of an action for false imprisonment is unlawful detention, without more."***

66. For the arrests of the Petitioner to be deemed to have been lawful, I must find that the arrests were for a cognizable offence and that the Respondents had reasonable grounds to believe that the Petitioner had committed such offence.

67. In **James Karuga Kiiru v Joseph Mwamburi & 3 Others Nairobi CA No. 171 of 2000,** the court held:

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

68. On what the ***"probable and reasonable cause"*** entails, in **Hicks v Faulkner, (1878), 8 Q.B.D. 167 at para 171** Hawkins J. defined probable and reasonable cause as follows:

> ***"Reasonable and probable cause is an 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 reasonably lead an 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."***

69. Rudd, J. in **Kagane v Attorney General & Another, (1969) EA 643** aligned himself with the **Hicks** definition above by reiterating that:

> ***"... to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty."***

70. In the instant case, the 5th Respondent made a report to the police at Bondo that his house had been set on fire. This was on 6/10/2018 at about 8pm after he returned from work and found the house burning while his children who had been left behind were missing. He went to his mother's house and found the children sheltering there. These children gave evidence in the criminal trial court as PW3 and PW4. Investigations by the police culminated in the arrest of the Petitioner and six others on the morning of 7th October 2018. The petitioner and his co-accused were subsequently arraigned on the 8th October 2018 before Bondo Principal Magistrate's court where they were charged with two counts of arson and malicious damage to property each. The list of damaged-burnt property was attached to the charge sheet dated 18th October 2018 in support of the charge second count of malicious damage to property against the accused persons and the value of the burnt property was stated as 1,060,820. See annexure JWW1 to the Replying affidavit of Josephine Wambua.

71. In James **Karuga Kiiru v Joseph Mwamburi & 3 Others Nairobi CA No. 171 of 2000,** the court held:

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

72. Based on the above facts, in my humble view, the results of the investigations into the arson attack on the 5th respondent's property by the police raised reasonable suspicion in the police officers' minds to warrant the petitioner's arrest.

73. The petitioner claimed that his arrest was effected by force and violence and that he suffered various physical injuries from the agents of the 1st Respondent under command of the 2nd Respondent leading him to seek medical attention. In support of this proposition, Mr. Ongoro filed a supplementary affidavit on 3rd March 2020 which affidavit was filed without any leave of court being sought and or obtained yet it was filed on the same date that the petition was heard orally.

74. ***I must at this stage mention something about the Supplementary Affidavit filed*** in this court on 3/3/2020 and the supporting Affidavit of the petitioner The said Supplementary affidavit is said to be commissioned by J.M Mutisya Advocate and Commissioner for oaths of Nairobi yet the affidavit is said to be sworn by the petitioner at Siaya County! The affidavit is obviously drawn at Nairobi by the petitioner's counsel, commissioned without the signature or presence of the petitioner and brought to Siaya for the petitioner to sign the same for validation. The question is what is the law relating to commissioning of affidavits and what is the significance of commissioning of affidavits?

75. **Black's Law Dictionary** defines an oath as:

> ***"Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise … The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false."***

76. Bearing that definition of what an oath is, the question I must answer is whether the petitioner took an oath before a Commissioner of Oaths. Looking at his affidavit annexed to the Petition, and which affidavit annexed court proceedings and judgment in the criminal case No 966 of 2018 at Bondo Principal Magistrate's Court, and which document or court record forms the basis of this petition, the said Supporting Affidavit was sworn at Siaya County before P.S Kisaka Advocate whose address as per the commissioning stamp affixed is Nairobi and on a date that is not indicated.

77. No doubt, the petitioner signed the affidavit in Siaya after it was ***"commissioned"*** in Nairobi by a commissioner for oaths. That supporting affidavit, just like the supplementary affidavit which was nonetheless filed in court without leave of court fail to conform to the requirements of Section 5 of the Oaths and Statutory Declarations Act Cap 15 of Laws of Kenya. Those are no affidavits at all as they are not made under oath. In addition, any document annexed to those ***"affidavits"*** is no annexture at all. That being so, the same are hereby struck out. Section 5 of the Oaths and Statutory Declarations Act provides:

> ***"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made." (Emphasis added)***

78. In my humble view, this is a defect that cannot be remedied by order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of the Constitution. This is because the defects affect the veracity and probative value of the averments, which goes to the substance of the affidavits.

79. However, striking out of the affidavits does not invalidate the petition as Rule 11 of the Mutunga Rules (**The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013)** provides for **Documents to be annexed to affidavit or petition** and states:

> ***"11(1) the petition filed under these rules may be supported by an affidavit."***

80. What the Rules mean is that it is not mandatory for the petitioner to file any affidavit in support of the petition and that if the petitioner wishes to rely on any documents or evidence to support his petition, then it is expected that he annexes those documents either to the petition itself directly in which case the petition will refer directly to those documents, or to annex the documents to an affidavit duly sworn. This is the reason why Rule 10 (2) provides for the form of the petition and states that among others, ***the petition shall disclose (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition.***

81. Therefore, without commissioning of the affidavits supporting or supplementing the petition, the averments in those affidavits are akin to

unsworn evidence. That defect cannot be cured by Order 19 Rule 7 of the Civil Procedure Rules or Article 159(2) (d) of the Constitution as it goes to the core of the affidavits in question.

45. In similar instances, such affidavits have been struck off. For instance, in **Regina Munyiva Nthenge v Kenya Commercial Bank Ltd (2005) e KLR**.

82. Nonetheless, just in case iam wrong on my findings above concerning the probative value of the two affidavits filed by the petitioner herein, which affidavits are improperly commissioned, and which I have effectively struck out together with the annexures thereof, I will proceed to critically analyse the supplementary affidavit filed without leave of court and without proper commissioning. I will also continue analysing the merits of this constitutional petition to its logical conclusion.

83. On the said supplementary affidavit, the petitioner annexed a copy of referral/discharge summary dated 1/3/2020 retrieved from his hospital treatment records at the hospital, showing that he was diagnosed with ***pneumonia and malaria fever among others, retroviral disease. The latter, in medical terms include HIV-1 and HIV-2 and the known cause is AIDS, which can only be managed as there is no known treatment.*** **See the Science of HIV and AIDS-Overview accessed at https://www.avert.org/professionals/hiv-science/overview.**

84. The said annexure shows that the petitioner was admitted at ***Owens Maternity and Nursing Home Ltd, in Bondo on 24th November 2019*** and discharged on 28th November 2019. He was being treated for Pneumonia and typhoid fever and Malaria fever and other problems noted was the retroviral disease. He had gone to hospital complaining of headache and abdominal pains. The petitioner also annexed what he claims to be expenses amounting ***to Kshs 1,303, 800*** made up as follows:

i. 3 cows & 24,000 each=72,000

ii. Transportation for cows @ Kshs. 4000=12,000

iii. 3 cows sold for board @ Kshs. 35,000=105,000

iv. 1 ½ acre of land =Kshs 650,000

v. 1 acre Kshs. 350,000

vi. Transport 30 days x 36 months =180 days x 250=45,000

vii. Lunch Kshs. 400x180days=72,000

viii. Receipt Kshs. 2000

ix. Total Kshs. 1,308,800

85. The petitioner then in the said supplementary affidavit deposes that he suffered various ***physical injuries*** from the agents of the 1st respondents under command of the 2nd respondent and that he complained of pain while at the police station and later he received medical services at Siaya Remand Health facility. He alleged that after being released from prison he has been receiving medical attention from various institutions as evidenced by the annexures attached which are not even marked.

86. The petitioner also alleged that he was a business man at the time of his arrest and that due to his detention he had no opportunity to engage in his trade thus suffering immense losses hence he had to sell his land and livestock to enable him pay his advocate, pay cash bail and subsequent costs of attending court sessions and so he annexed some annexure "SOO."

87. With utmost respect to the petitioner and his advocate, if the petitioner wished to prove special damages and seek recovery, he should have sought them in the main petition or sought to amend the petition to include the same. He could not seek for special damages by way of a supplementary affidavit which was in my humble view fatally defective as an affidavit cannot be sworn in Siaya but the place of commissioning is said to be in NAIROBI. In addition, the petitioner having failed to seek for leave of court to file this supplementary affidavit which was sneaked in the court file without first obtaining leave of court, and even assuming that the said affidavit was properly on record which is not, the so called various physical injuries suffered by his incarceration are not disclosed in the discharge summary for the period 24th to 28th November 2019 yet his arrest and incarceration took place on 7/10/2018.

88. Furthermore, the petitioner was in hospital one year after the arrest in connection with the arson, and nine months after being acquitted of the offence in March 2019, when he sought treatment for pneumonia, malaria and other preexisting conditions being ***Retroviral disease***. He did not demonstrate the link between the ailments which took him to hospital in November 2019 and the arrest and detention which took place on 7th October 2018, noting that the court proceedings annexed show that he was released on bond pending trial, and that is the very reason he claims he had to sell his animals and close his business to raise money for cash bail albeit he never annexed any receipts for such cash bail if at all he paid.

89. Concerning the business venture that closed down because of his incarceration and expenditure towards the criminal case, no single receipt, not even a trade licence or nature of business venture or evidence of payment of legal fees or cash bail paid into court or transport costs incurred to and from court or to and from instructing his lawyer in Nairobi was produced. What the petitioner did was to simply scribble some figures to some listed items reproduced above and claim kshs1, 308,000. That in my humble view is not proving a special damage. It is not evidence of existence of a business or animals that were allegedly sold to sustain the petitioner as not even an agreement for

sale of his animals was produced as evidence. The nature of the business venture that he was engaged in prior to his arrest and alleged ordeal is also not disclosed

90. The petitioner, in my humble view, has sadly failed to prove any physical injuries that he alleges he suffered and neither has he proved any special damages linked to the arrest and incarceration. Physical injuries would have required that he seeks for medical attention. No evidence of medical treatment is annexed to the petition.

91. Finally on special damages sought via the supplementary affidavit, the law is very clear that not only must they be specifically pleaded but must also be strictly proved. In the instant case, no special damages were pleaded in the petition and therefore an attempt to prove the same by way of merely writing on a piece of paper and attaching it on a supplementary affidavit which is filed without leave of court and which is not properly commissioned is not pleading or proving the special damages suffered. The petition was never amended to include that prayer for special damages. The same is therefore declined and rejected.

92. Thus on the allegation that the respondents at the time of arresting the petitioner used any form of violence or brutality, I have read the court proceedings in Bondo PM Criminal case no. 966 of 2018. The petitioner herein testified as DW 5. he stated in his defence:

> ***"…..on the 7.10.2018 at 7.00am, police officers came. They came with Peter. They went to my son's house. They arrested him. My son is Peter Ouma Okiya. They also arrested me. We were then taken to the police station. That is all."***

93. The petitioner in his evidence never mentioned or at all that the police harassed him or used any violence in arresting him. He was then ably represented by an advocate and if indeed the police had used any form of violence against the petitioner, the petitioner did not have to wait until his acquittal by the criminal court of the charges before claiming that he was violated during the said arrest. Iam unable to find any evidence of such violation. Either way, his son Vitalis Ouma Okiya, the 7th accused person gave evidence in defence and never mentioned that when he and his father were arrested they were tortured or physically harassed. The said son gave evidence to the effect that after they arrested him at 7am on 7.10.2018, the police went and arrested his father then they took them to Bondo Police Station. The petitioner did not even procure an affidavit from his said son whom he claimed in his defence, was present when the petitioner was arrested on 7/10/2018, to support his claim that at the time of his said arrest he was subjected to physical or other form of violence.

94. In my humble opinion the petitioner has failed to adduce any evidence to support the use of violence or any form of violation of any of his rights guaranteed in Article 49 of the Constitution of other constitutional or statutory stipulations.

95. Albeit the petitioner claims that they arrested him in the wee hours, in his defence he stated that he was arrested at 7am. That time, in my humble view, is no wee hours. In addition, albeit the petitioner claims that he was never booked in the Occurrence Book (OB), in an attempt to confuse or blur their illegal and irregular actions, the petitioner did not seek to produce the OB for the Bondo Police station and the entries for the said 7/10/2018 to show that he was never booked therein.

96. Further, although the petitioner claims that the 3rd respondent failed to verify whether there was a complaint by the 5th Respondent herein, the court proceedings annexed to the fatal affidavit I have referred to hereinabove show that the 5th Respondent testified as PW1 and clearly stated that he reported to the police on finding his house on fire and his children missing. He traced the children to his mother's house and the said Children PW3 and PW4 explained to him what had happened and they mentioned the petitioner as one of those eight people who had invaded them and set the house on fire.

97. In addition, it is not true from the criminal court proceedings that all witnesses for the prosecution exonerated the petitioner or that they were shocked to see the petitioner in court. I have elsewhere in this judgment analysed that evidence and it is clear that the witnesses did not exonerate the petitioner. Rather, the petitioner selectively picked pieces and portions of that evidence and founded a case for violation of his constitutional rights.

98. Additionally, the petitioner's own annexure or exhibit to this petition which is proceedings in the criminal trial show that on 22/10/2018 when the consolidated charge sheet was read to all the seven accused persons, he responded as follows to the charge in Count 1: ***"It is true". All the other accused persons responded: "It is not true" in both counts 1 and 2". The petitioner has however not said anything about that plea which was nonetheless taken by the trial magistrate to be a plea of not guilty.***

99. I add that in criminal proceedings, Article 50(2) of the Constitution guarantees certain rights of all accused persons among them: the right ***to be (j) informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence"*** that being the case, and as the petitioner was ably represented by an advocate, he had in his possession al statements of witnesses and documents which the prosecution intended to rely on at the trial. If he read those statements and found that therein none of the intended prosecution witnesses ever mentioned him as one of the suspects who was seen at the scene of crime, he had the option of instituting judicial review proceedings against the Respondents seeking to quash the charges against him.

100. On issues to do with objecting to bail application, it is my humble view that bail is a constitutional imperative which is not absolute and the refusal to grant bail was by the court which is not a party to this petition. Furthermore, an order made by a court of law refusing to grant orders cannot form a basis of a petition for violation of constitutional right that order is appealable to a superior court or is amenable for review by the same court. Further, detention of the petitioner under an order of the court for 14 days cannot found a claim for violation of rights under the constitution

101. On allegations of violation of Articles 27 (1) and 28 of the Constitution, albeit the petitioner has claimed that his right to equal protection of the law and that following his arrest he was deprived of his liberty arbitrarily as there was no complaint against him and that he has suffered losses and limitation of rights and freedoms following unlawful and *malafides* acts of the Respondents, this court is unable to find any evidence of the alleged acts complained of by the petitioner

102. The petitioner also alleged that the 3rd Respondent while ignoring all his pleas proceeded and maliciously instituted prosecution proceedings against him on 08/10/2018 in Bondo Criminal Case No. 966 of 2018 and that while prosecuting him, the 3rd Respondent opposed application for bail on the basis that he had received instructions from the 5th Respondent that the Petitioner and others were a threat to his life.

103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was unjustified.

104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in **MURUNGA -VS- ATTORNEY GENERAL (1979) KLR, 138** as follows: -

(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.

(b) The Plaintiff must show that the prosecution terminated in his favour.

(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.

(d) He must also show that the prosecution was actuated by malice.

105. The four principles were adopted in similar matters as follows:-

(i) J. B. Ojwang, J (as he then was) in THOMAS MBOYA OLUOCH & ANOTHER -VS- LUCY MUTHONI STEPHEN & ANOTHER (2005) e KLR

(ii) Ruth N. Sitati, J in PATRICK MURIITHI KUKUHA -VS- EDWIN WARUI MUNENE & 5 OTHERS (2005) e KLR.

(iii) Anashir Visram, J (as he then was) in KIRAGU -VS- MURIUKI & ANOTHER (2004) e KLR.

(iv) D. K. Maraga, J (as he then was) in ZABLON MWALUMA KADON -VS- NATIONAL CEREALS & PRODUCE BOARD (2005) eKLR.

106. It is my view that the claim for unlawful arrest and detention/false imprisonment and injury of reputation is one and the same thing as malicious prosecution. This is so because when a person is arrested and detained and not prosecuted, he could claim that that arrest and detention that did not materialize into prosecution was actuated by malice – See **JOSEPHAT MUREU GIBIGUTA -VS- HOWSE & MC GEORGE LTD e KLR H.C. AT NAIROBI CIVIL CASE NO. 2646 OF 1993** in which Githinji, J (as he then was) stated:-

"In my view the arrest, detention and prosecution consists of one transaction which has given rise to the Plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when Plaintiff was acquitted."

107. The above four ingredients for the tort of malicious prosecution were settled in several cases among them; ***Kagane and Others v Attorney General and Another*** **[1969] EALR 643**, ***Mbowa v East Mengo District Administration*** **[1972] EA 352,** ***Murunga v Attorney General*** **[1979] KLR 138**

108. These elements were summarized by the East Africa Court of Appeal in ***Mbowa v East Mengo District Administration*** **(Supra)** as follows;

"The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."

109. **On allegations that the DPP and DCI misused or abused the criminal justice system, the petitioner alleges that the 1st to 4th respondents in arresting, detaining and prosecuting the petitioner were protecting the 5th Respondent complainant who was a police informer ; that the 1st and 2nd respondents failed to investigate the alleged activities at the 5th Respondent's home; that the 3rd Respondent after hearing from the witnesses that the petitioner was not involved in the crime as charged persisted and sustained the charges against the petitioner ; which actions resulted in the petitioner losing financially, loss of liberty, inhumane treatment and physical and psychological torture.**

110. It is not in dispute that the 3rd respondent DPP was responsible for the prosecution of the petitioner. Although under **Article 157(4)** the Director of Public Prosecutions has powers to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct, this does not give the 3rd respondent general oversight powers over investigations conducted by the National Police Service. The power is a discretionary power that may only be invoked by the 3rd respondent in appropriate cases and circumstances.

111. The question that arises from the plead facts by the petitioner on misuse of the criminal justice system by the 1st to 4th respondents is whether the arrest, detention and prosecution of the petitioner was actuated by malice and whether in the process, he was tortured physically and or psychologically.

112. Malice is demonstrated when the action taken is without a sincere or "genuine" or truthful pursuit of interests of justice in a prosecution, but is aimed at achieving other ulterior motive. **Black's Law Dictionary, 8th Edition (2004)** defines malice, (material), to be ***"the intervention, without justification or excuse, to commit a wrongful act,"*** **and malicious prosecution as** ***"the institution of a Criminal or Civil proceeding for an improper purpose and without probable cause. The tort requires an adversary to prove your claimants: (1) the initiation or continuation of a law suit; (2) lack of probable cause; (3) malice; and (4) favourable termination of the law suit."***

113. Apart from proving absence of reasonable and probable cause, a petitioner in a malicious prosecution claim must prove malice or wrongful intention on the part of the prosecution.

114. The petitioner herein claimed that he was maliciously prosecuted as was evidenced by the trial court's judgement that acquitted him on the 14/03/2019 wherein it noted that the prosecution witnesses number 3 and 4 stated that the petitioner was not at the scene of the crime alleged.

115. It is undisputed that following the prosecution of the petitioner, he was acquitted of the charges under section 215 of the Criminal Procedure Code. The petitioner was accused number 5. Therefore, the prosecution was determined or ended in his favour.

116. The only issue is whether the prosecution of the petitioner was without any reasonable or probable cause and with malice. It is worth noting that from the judgment of the lower court, out of the seven accused persons, only the petitioner was acquitted of the charge. The rest were all convicted. The petitioner claims that his arrest and prosecution was not justified and that it was done in abuse of the criminal justice system. He backs this claim with the fact that some of the prosecution witnesses testified that they never saw the petitioner at the scene of crime and that the prosecution refused to terminate proceedings against the petitioner.

117. **Article 157(6)** of the Constitution mandates the Director of Public Prosecutions to exercise state powers of prosecution pursuant to which he may:

> ***"(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.***
>
> ***(b)Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***
>
> ***(c) Subject to clauses 7 and 8, discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecution or taken over by the Director of Public Prosecution under paragraph (b)."***

118. My examination of the criminal court proceedings which were annexed to the affidavit supporting the petition and which affidavit I have pointed out is fatally defective is that the trial court page 12 of the typed judgment also observed that :

> ***"as such, iam of the respectful opinion that it is not true that the investigating officer conspired with the complainant and arrested the accused persons. It is clear that there was evidence which the investigating officer relied upon before arresting and charging the accused persons. Based on the foregoing, iam of the finding that the accused persons are rightly charged in this case."***

119. The trial magistrate further refused to accept the submission that the case was based on mere suspicion. He further found that there was no grudge between the accused persons and the complainant. He however found that it was the accused persons who were at the scene were on a revenge mission against the complainant for allegedly causing the husband of the 6th accused person to be arrested.

120. Albeit the petitioner was acquitted of the charges because PW3 and PW4 stated that he was not at the scene (see page 11 of the judgment), PW1 the complainant received information from his children that they had seen all the accused persons including Boss Okiya who went to his house armed with pangas seeking to cut the complainant but that when they did not find the 5th respondent, they removed the children from the house and set the house on fire. The children are named as Felix and Mathews Owiti-PW3 and PW4. The complainant was not at his home when his house was set on fire. He then made a report to the police using the information that he had received from his children. The police acted on this report and arrested the accused persons including the petitioner. There were two Okiyas in the criminal case. One was the petitioner herein who was the 5th Accused person whereas the other Okiya was the seventh accused person. No one, not even the criminal trial court questioned these witnesses as to who this Boss Okiya was yet it emerged quite clearly that the Petitioner was the father to DW7, the seventh accused Vitalis Ouma Okiya whom the petitioner in his evidence called "Peter".

121. The 5th respondent complainant did not say in his testimony that he saw the petitioner burn his house. In my humble view, it cannot be true that the 5th respondent gave any false report to the police concerning the petitioner or that the police and prosecution had no justifiable or reasonable or probable cause to arrest and prosecute him.

122. I am persuaded that there was reasonable and probable cause and belief that the petitioner was one of the eight persons who invaded the house of the 5th respondent and wanted to cut him but when they did not find him, they set the house on fire. The fact that PW3 and PW4 stated that they did not see the petitioner as observed by the trial court does not in itself mean that there was no reasonable or probable cause to suspect that the petitioner was one of the seven people suspected on arson.

123. The evidence of PW2 Winnie Achieng Owiti was similar to what PW1 her husband adduced as both were away on the material day when they returned home at about 8pm and found their house burning. Their children were missing but were found to be at PW1's mother's house. It is the children who named all the accused persons including the petitioner herein as being among the eight people who went,

removed them from the house and burnt it while threatening to kill their father, PW1, the 5th respondent herein**.**

124. From the evidence adduced in the criminal case, it is obvious that PW1 and PW2 were not at home when their home was invaded and house set on fire. They however received information from their children PW3 and PW4 and relying on that report on the identity of the arsonists, PW1 and PW2 did report to the police of what they had seen and heard. They cannot, therefore, be said to have been malicious in their reporting of the incident and what they were told.

125. Furthermore, from the evidence of PW3 Mathew Owiti the child who informed PW1 and PW2 of what had happened on that night also testified and mentioned the name of the petitioner as one of the attackers. In cross examination the child stated that he did not see what Okiya was wearing and on being asked about Sylvanus Okiya he stated that Sylvanus Okiya was not there. My view of this evidence of a minor is that it was simply contradictory as far as the petitioner was concerned. This is because the child told the court all names of persons whom he saw that night including the petitioner whom he only mentioned one name as Okiya but in cross examination after saying that he did not see what Okiya was wearing, he answered a question that appear to have been put to him deliberately to confuse him on the name of the petitioner.

126. The same scenario was replicated in the evidence of PW4 also a minor aged 12 years who clearly stated in his evidence in chief that he saw eight people among them Okiya but on being cross examined, he was asked about Sylvanus and he said that "Sylvanus did not come to our house." These two witnesses were never questioned whether they knew the petitioner by all his names and therefore in my humble view, I find that the petitioner was acquitted on a technicality. He cannot use that technicality to claim malicious prosecution and violation of his constitutional rights.

127. PW5 and his colleagues arrested all the persons who had been named by the children as told to their parents. There is evidence adduced in the trial court that indeed the property of the 5th respondent was razed as listed in the charge sheet. The persons who set the property on fire were identified through recognition by PW3 and PW4 minors who informed PW1 and PW2 their biological parents. There was no evidence of an existing grudge between the petitioner and the 5th respondent or any of the police officers who arrested the petitioner and caused him to be charged with the offence.

128. The facts being as they are and as elicited from the trial court record of proceedings, Iam not persuaded that Respondents in arresting and the 3rd respondent prosecuting the petitioner acted without reasonable or probable cause. A crime was committed and the 3rd respondent was well within its statutory duty to decide to charge the petitioner. The petitioner has not demonstrated before this that in prosecuting him, the 3rd respondent applied extraneous considerations.

129. I am satisfied that on the evidence adduced before the criminal trial, the 3rd respondent by accepting the recommendation of the 1st respondent to charge the petitioner, the 3rd respondent had reasonable and reasonable cause to suspect that the petitioner had committed the offences charged.

130. As explained above, the fact that the petitioner was acquitted for lack of sufficient evidence in itself cannot sustain a claim for malicious prosecution especially where, like in this case, no iota of malice can be inferred on the part of the prosecution and the complainant whose property was burnt.

131. I find that the petitioner herein has selectively picked parts and portions from the trial court proceedings which are favourable to him and used the same to found a claim for violation of his constitutional rights. That, in my humble view, is unacceptable.

132. I associate myself with the holding in the case of **Robert Okeri Ombeka v Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR** where the court stated:

> ***"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. A malicious prosecution plaintiff cannot establish lack of probable cause based on having obtained in an earlier action an acquittal based on insufficiency of the evidence. Successfully defending a prosecution or a law suit does not establish that the suit was brought without probable cause. It is the state of mind of the one commencing the arrest or imprisonment, and not the actual facts of the case or the guilt or innocence of the accused which is at issue. Probable cause is determined at the time of subscribing a criminal complaint and it is immaterial that the accused thereafter may be found not guilty."***

133. Similarly, in the case of ***Socfinaf Kenya Ltd v Peter Guchu Kuria & Another, Civil Appeal No. 595 of 2000 (2002) eKLR,*** Aganyanya, J *(as he then was)*, observed as follows:

> ***"Moreover, when there is a case of suspected theft the first step is to report the matter to police, who in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such case is whether or not there is a reasonable and/or probable cause for the arrest and/or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution. As to the prosecution of the respondents, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant this. If the respondent's case fell in the latter category, then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill-will, lack of reasonable and probable cause must be established."***

134. In the instant case, having established that there was reasonable and probable cause to warrant the arrest and prosecution of the petitioner it is my considered view that the act of prosecuting the petitioner was warranted. Furthermore, no evidence was laid before this court to show that the Director of Public Prosecutions was party to the investigation of the petitioner's alleged criminal conduct, or that he had no reason to exercise his discretion under **Article 157(4)** of the Constitution.

135. ***Accordingly, it is my considered opinion that the petitioner has failed to prove his case on a balance of probabilities that his constitutional rights have been violated and as such he is not entitled to the any of the reliefs sought.***

136. Nonetheless, had the petitioner succeeded in his claim for general damages I would have made the following decision on damages awardable, besides special damages which I have found were not pleaded and neither were they proved to the required standard of balance of probabilities.

137. Had I found the petition herein merited, on general damages, I would apply the principles espoused in various decisions including **Mohamed Feisal& 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)** (supra) where Nyakundi J applied several of those decisions in calculating the damages awardable in constitutional petitions for violation of constitutional rights.

138. The Court of Appeal in **Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR stated:**

> ***"…It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. (Emphasis added) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."***

139. In **Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004** the Privy Council held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. Lord Nicholls at Paragraphs 18 & 19 stated:

> ***"When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.***
>
> ***All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award." (Emphasis supplied)***

140. A similar position is held by the Constitutional Court of South Africa in **Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** where it held:

> ***"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.***
>
> ***"…The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

141. In the **Petition Number 351 of 2017[2018] e KLR,** on the question of damages, the court held:

> ***"42. In the instant case I find that the appropriate determination is to award reasonable damages in addition to the declaration of violation of constitutional rights. As I have already noted in this judgment, the petitioner prayed for an award of Kshs. 10 million for damages, I am however of the view that an award of Kshs. 2 million will be appropriate in the circumstances of this case. I am guided by the decision in the case of Lucas Omoto Wamari v Attorney General & another [2017] eKLR wherein the Court of Appeal upheld an award of Kshs. 2 million for violation of constitutional rights under circumstances that were similar to the instant case."***

142. On the question of damages for false imprisonment, Mativo J in the **Daniel Waweru Njoroge Civil Appeal No. 89 of 2010 [2015] eKLR** held:

> ***"On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:***
>
> ***i. Damages should not be inordinately too high or too low.***
>
> ***ii. Should be commensurate to the injury suffered.***
>
> ***iii. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.***
>
> ***iv. Awards in past decisions are mere guides and each case depends on its own facts.***
>
> ***This court has applied the above principles to the facts herein and it makes a finding that the action of the defendant was high handed and an award of Kshs.100,000/= will be an adequate compensation for each of the plaintiff herein as general damages for unlawful arrest and false imprisonment."***

143. Drawing from the principles laid out in the judicial precedents above, I agree with Nyakundi J that where a Petitioner is entitled to compensation for a violation of his constitutional rights by the state, such compensation ought to be both general and exemplary or punitive in nature. This is so because such an award is meant to vindicate the violation of the Petitioners rights and deter future infringements.

144. In the **Daniel Waweru Njoroge case (supra),** finding in favour of the Plaintiffs in a tort for unlawful arrest, the court awarded each Plaintiff a sum of Ksh. 100,000/-. For the violation of the rights of an officer of the court who was acting in the general course of his duty to uphold justice. Okwany J. in the **Akusala case (supra)** citing the case of ***Lucas Omoto Wamari v Attorney General & another [2017] eKLR,*** awarded the Petitioner Kshs. 2,000,000.

145. In the instant case, although the petitioner asked for Kshs 3,000,000 general damages based on the Feisal and Akusala cases cited herein, had the petitioner succeeded in proving his claims, guided by the precedents I have cited, I would have awarded him a global figure of general damages for violation of rights in the sum of **Kshs 1,500,000**, to be paid by the 1st to 4th respondents.

146. I would not have condemned the 5th respondent complainant to pay any damages for the reasons that there was absolutely no evidence that he made a false report to the police that his house was burnt by the petitioner herein. I have already stated the circumstances under which the arrest and prosecution of the petitioner occurred as per the evidence contained in the criminal trial record.

147. In **In Catherine Wanjiku Kariuki v Attorney General & Another [2011] e KLR** the court held that:

> ***"It is the duty of every citizen to report to the police any crime suspected, upon reasonable ground, to have been committed, or being committed. Once that civic duty is done, it is the business of the police to independently investigate the matter and arrive at their own conclusion on whether to charge anyone with such crime."***

148. In **Douglas Odhiambo Apel & Another v Telkom(K) Ltd CA 115/2006** the Court held that:

> ***"The plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney General (now Director of Public Prosecution) as public prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General."***

149. The petitioner in this case did not establish any malice on the part of the witnesses who testified against him including the 5th Respondent herein. Furthermore, as was held in **James Karuga Kiiru Vs Joseph Mwamburi & 3 Others CA Nairobi 171 of 2000**;

> ***"The mere fact that a complaint is lodged does not justify the institution of a criminal prosecution. The law enforcement agencies are required to investigate the complaint before preferring a charge against a person suspected of having committed an offence. In other words, the police or any other prosecution arm of the government is not a mere conduit of complaints……."***

150. Moreover, as was observed by Aganyanya J in **Socfinac Kenya Ltd V Peter Guchu Kuria(supra) that:**

> ***"When there is a case of suspected theft the first step is to report the matter to police who, in their own way find out how to carry out investigations. And it is up to the police to take further steps like taking a suspect to court if they have sufficient evidence against such suspect to warrant such action. This then is the action by police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police. What is of great significance in such a case is whether or not there is reasonable and or probable cause for the arrest and or prosecution of the culprit. And the onus of proving that there was no reasonable and probable cause for the arrest and prosecution of the suspect lies on him/her who queries such arrest or prosecution.***

As to the prosecution of the respondent, the complainant could not force police to do so when there was no evidence to take them to court. Police carry out investigations before taking suspects to court and there are various incidents when police have declined to prosecute a suspect when investigations have disclosed no offence to warrant thus. If the respondent's case fell in the latter category then I am sure they would not have taken to court. That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established."

151. The above decision of the High Court was cited with approval in **Robert Okeri Ombeka v Central Bank of Kenya [2015] e KLR** where the Court of Appeal further observed that:

"Public policy favours the exposure of crime, and the co-operation of citizens possessing knowledge thereof is essential to effective implementation of that policy. Persons acting in good faith who have probable cause to believe that crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused."

152. There was also no evidence of the 5th Respondent insisting that the petitioner herein must be charged or prosecuted. Accordingly, any damages awardable would not be against the 5th respondent.

153. However, in this case, as there is no proof of violation of the petitioner's constitutional rights, and award him nothing. The petition is accordingly found to be devoid of merit and the same is dismissed. Each part to bear their own costs of the petition.

154. In conclusion, I must emphasise that this Court takes alleged violations of the Bill of Rights very seriously. As was aptly stated by Lenaola J, without the Bill of Rights, the Constitution will be rendered a ***"feel good"*** document.

155. However, parties seeking orders with regard to such alleged violations must read the Constitution as a whole and contextualise it properly. A selective reading of it and a selective approach to what is only beneficial to such parties will receive no consideration from the Court. (**See Hussein Khalid and 16 others v Attorney General & 2 others [2014] eKLR).**

156. ***In the end, this petition is found to be devoid of any merit and the same is hereby dismissed with each party to bear their own costs of the petition.***

Orders accordingly.

Dated, Signed and delivered at Siaya this 7the Day of May 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE