



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL PETITION NO. 336 OF 2019**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10, 25(C), 27, 29(A) (D), 47, 49, 50, 157(11) AND 244(C) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF CHIEF MAGISTRATES COURT CASE NO. 2362 OF 2015 AT MAKADARA REPUBLIC V FREDRICK MUTHOGA & ANTHONY MURIMI WAIGWE**

**BETWEEN**

**ANTHONY MURIMI WAIGWE.....PETITIONER**

**AND**

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

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

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

**INDEPENDENT POLICING OVERSIGHT AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**NO. 38026 CORPORAL J. OCHIENG.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**PETITIONER'S CASE**

1. The Petitioner through a Petition dated 22<sup>nd</sup> August 2019 seek the following reliefs:-

- i. A declaration that failure by the agents of the 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents to present any witnesses in court in Makadara Criminal case Number 2362 of 2015 Republic v Fredrick Muthoga & Anthony Murimi Waigwe for a period of 23 months was a violation of the Petitioner right to fair trial and fair administrative action guaranteed under the constitution of Kenya.*
- ii. A declaration that failure by the 3<sup>rd</sup> and the 4<sup>th</sup> Respondents to conduct investigations into the complaints raised by the Petitioner about his case vide a letter dated 5<sup>th</sup> September 2016 was a violation of the Petitioner's right to protection of the law and fair administrative action guaranteed under the constitution of Kenya.*
- iii. A declaration that the incarceration of the Petitioner for a period of 8 days between 22<sup>nd</sup> July 2015 without being presented to a court of law was a violation of the petitioner's rights as guaranteed under Article 49(1) (f) (i)*
- iv. A declaration that failure by the agents of the 2<sup>nd</sup> Respondent to inform the petitioner promptly the reason for his arrest was a violation of the Petitioner's rights as guaranteed under Article 49 (1) (b) (i).*
- v. An order for general and exemplary damages suffered consequential to the declarations of violations of the petitioner's*

*fundamental rights and freedoms.*

*vi. Any other just and expedient order the court may deem fit to make.*

*vii. Costs of this petition.*

2. The Petitioner's case is that he was arrested while heading to his place of work on the morning of 22/7/2015 after he encountered with Police Officers at Kayole area within Nairobi County. On his arrest he was headed to Donholm where he used to work as an attendant at Kamindi Selfridges Supermarket. He was not informed of the reason of the arrest and was immediately locked at Kayole Police Station from 22<sup>nd</sup> July 2015 to 31<sup>st</sup> July 2015.
3. On 31<sup>st</sup> July 2015 the Petitioner and another young man were arraigned at Makadara Law Court where they were charged with the offence of robbery with violence.
4. The alleged complainant in the robbery case participated in an identification parade which was conducted on 29<sup>th</sup> July 2015 and the Petitioner was never identified as the one who robbed the alleged complainant. That inspite of the fact that there was no evidence linking the Petitioner with the offence, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents agents preferred a very serious charge of robbery with violence against the Petitioner and based on that the trial court set a very high bond terms of 1 million with surety of same amount, which the Petitioner could not afford and as such he remained in custody for the period of the trial which was twenty three (23) months. For a period of 23 months the prosecution did not present even a single witness in court against the Petitioner.
5. On 27<sup>th</sup> June 2017 the prosecution withdrew the matter against the Petitioner under Section 87A of the Criminal Procedure Code after their application for further adjournment of the case was denied by the trial Court. While the Petitioner was still in custody, he wrote a letter dated 5<sup>th</sup> September 2016 calling on the Respondents to intervene, however he did not get any response or assistance.
6. That as a direct consequences of various violations of the Petitioner's rights and the negligence of the Respondents and their agents, the Petitioner lost his employment at Kamindi Selfridge Supermarket where he used to earn Kshs.35,000/= monthly. That it has since not been possible for the Petitioner to secure another gainful employment due to the high level of unemployment facing the youth in Kenya and the stigma associated with the serious charges he was facing.

#### **THE 1<sup>ST</sup> RESPONDENT'S CASE**

7. The 1<sup>st</sup> Respondent filed grounds of opposition dated 6<sup>th</sup> November 2019 being as follows:
  - a) That the 1<sup>st</sup> Respondent is wrongly enjoined in the Petition vide Article 156 of the Constitution of Kenya which categorically states at subsection (4) (b) that the Honourable Attorney General "shall represent the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings;"
  - b) That the 2<sup>nd</sup> Respondent is mandated vide Section 24 of the National Police Service Act, that provides for the functions of the police as "(a) provision of assistance to the public when in in need; (b) maintenance of law and order; and (c) preservation of peace" and was well within the law to commence criminal investigations against the accused person in CMCR 2362/2015.
  - c) That the 3<sup>rd</sup> Respondent, the Director of Public Prosecution, was well within the law to commence criminal proceedings against the Petitioner pursuant to Article 157 910 of the Constitution and Section 5(1) (a), (b) (i), (iii) and 6(b) of the Office of the Director of Public Prosecution Act, 2013.
  - d) That the Petition is frivolous, vexatious and an abuse of the court's process and only seeks to circumvent the mandate of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent under the National Police Service Act and the Office of the Director of Public Prosecution Act.
  - e) That this Petition offends the doctrine of exhaustion as the Petitioner herein has not exhausted the remedies available particularly with regard to the issue raised against the conduct of the 5<sup>th</sup> Respondent which ought to be handled by the Independent Police Oversight Authority, the 4<sup>th</sup> Respondent which has the mandate to "conduct impartial and independent investigations, inspections, audits and monitoring of the National Police Service to prevent impunity and enhance professionalism in the interest of the public."
  - f) That the Petitioners have not demonstrated the violation or threatened violation of their fundamental rights and the manner in which his rights have been violated by the Respondents thus the Petition is omnibus and in contravention of the principles espoused in the case of Anarita Karimi Njeru (1976-1980) KLR 1272.
  - g) That the Petitioner has not demonstrated the violation or threatened violation of their fundamental rights and the manner in which his rights have been violated by the 1<sup>st</sup> Respondents.
  - h) That the Petition does disclose any reasonable cause of action against the 1<sup>st</sup> Respondent as no order are sought against him and as such the Petition is mischievous and an abuse of the due process of this Honourable Court and should therefore should be dismissed against the 1<sup>st</sup> Respondent.

## THE 2<sup>ND</sup>, 3<sup>RD</sup> AND 5<sup>TH</sup> RESPONDENT'S RESPONSE

8. The 3<sup>rd</sup> Respondent filed grounds of opposition raising 10 grounds of opposition being as follows:

- a) That the Director of Public Prosecutions in exercise of his Constitutional mandate conferred by Article 157 of the Constitution, 2010 made a decision to charge the Petitioner based on sufficiency of evidence and the public interest underlying prosecution of robbery with violence cases.
- b) That in making the said decision, the Director of Public Prosecutions has not abrogated, breached, infringed or violated any provision of the Constitution or any human and fundamental rights of the Petitioner or any other written law or regulations made thereunder.
- c) That the Petitioner has not demonstrated an arguable case on breach of any Constitutional provision or fundamental and human rights or any other provision of the law that would warrant grant of the orders sought.
- d) That the Petitioner was granted bond in compliance with the provisions of Article 49(1)(h) of the Constitution commensurate with the nature of charges he was facing.
- e) That the 3<sup>rd</sup> Respondent in compliance with Article 157(11) of the Constitution and having due regard to the Public Interest, the interest in the administration of justice and prevent and avoid abuse of the criminal legal system proceeded and withdrew the charges of robbery with violence as against the Petitioner on 27<sup>th</sup> June 2017 under Section 87 (A) of the Criminal Procedure Code.
- f) That the 3<sup>rd</sup> Respondent therefore in withdrawing the charges acted within the stipulated provisions of the law after reviewing the Petitioner's file in Criminal Case NO. 2362 of 2015 in the lower court and in accordance with its mandate and did not violate the rights of the Petitioner in any way.
- g) That the Petitioner has failed to demonstrate any liability on the part of the police or the 3<sup>rd</sup> Respondent with respect to issues of reasonable and probable prosecution which is a vital ingredient of malicious prosecution.
- h) That the Petitioner has failed to demonstrate that the 3<sup>rd</sup> Respondent in his actions was actuated by malice or any improper or wrongful motive.
- i) That the Petition does not in any way demonstrate any evidence whatsoever to prove that he suffered any damages.
- j) That in view of the foregoing we pray that the Petition dated 22<sup>nd</sup> August 2019 be dismissed as against the 3<sup>rd</sup> Respondent.

## THE 4<sup>TH</sup> RESPONDENT'S RESPONSE

9. The 4<sup>th</sup> Respondent in opposition of the Petitioner's Petition aver that Section 5 of the Independent Policing Oversight Authority outlines the objectives of the 4<sup>th</sup> Respondent which include among others:-

- a) Hold the police accountable to the Public in the performance of their functions;
- b) Give effect to the provisions of Article 244 of the Constitution that the police shall strive for professionalism and discipline and shall promote and practice transparency and accountability; and
- c) Ensure independent oversight of the handling of complaints by the National Police Service.

10. It is further asserted that Section 6 of the Act outlines the functions of the 4<sup>th</sup> Respondent which include among others:-

- a) *Investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations.*

11. The 4<sup>th</sup> Respondent contend that **Section 26 of the Act** bars the 4<sup>th</sup> Respondent from investigating any matter which is the subject of proceedings before Court of law or Judicial Tribunal. That it is asserted that the objectives, powers and functions of the 4<sup>th</sup> Respondent do not entail overlooking the actions and /or decision of the 3<sup>rd</sup> Respondent or the Prosecution of criminal cases against anyone including the Petitioner.

12. The 4<sup>th</sup> Respondent urge that under **Article 157 of the Constitution of Kenya** read together with **Section 5 (1) (b) of the Office of the Director of Public Prosecution Act No. 2 of 2013** clearly stipulate the powers of the 3<sup>rd</sup> Respondent to include among others

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

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

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

The 4<sup>th</sup> Respondent further state that under **Article 157 (10) of the Constitution of Kenya** the 3<sup>rd</sup> Respondent in exercise of its powers or functions is not subject to the directions or control of any person or Authority.

13. The 4<sup>th</sup> Respondent contend that on 7/9/2016 it received a letter by the Petitioner dated 7<sup>th</sup> September 2016 addressed to the office of DPP and copied to it (DW 1). That upon review of the issues raised in the letter it noted that the issues concerned the decision by the 3<sup>rd</sup> Respondent to institute charges against the Petitioner in Criminal Case No. 2362 of 2015 which matter was at the time ongoing at Makadara Law Courts and which decision the Petitioner was appealing to the 3<sup>rd</sup> Respondent for review. That since the decision whether to institute criminal charges falls summary within the mandate of the 3<sup>rd</sup> Respondent and not the 4<sup>th</sup> Respondent, the 4<sup>th</sup> Respondent noted the Petitioner had addressed his complaint to his right office, (the 3<sup>rd</sup> Respondent) which was the entity properly mandated by the Constitution to handle his complaint. The position was communicated to the Petitioner through 4<sup>th</sup> Respondent's letter dated 7<sup>th</sup> November 2016 (DW 2) and which the Petitioner did not indicate to the 4<sup>th</sup> Respondent that he was dissatisfied with the response.

14. It is 4<sup>th</sup> Respondent's averment that it acted within the stipulated provisions of the law and in accordance with its mandate and it did not violate the rights of the Petitioner in any way. It prayed for the Petitioner's Petition against it to be dismissed.

#### **ANALYSIS AND DETERMINATION**

15. I have very carefully considered the Petitioner's Petition, affidavits in support, the Respondents grounds of opposition and Replying Affidavit by the 4<sup>th</sup> Respondent, Counsel rival written submissions by the Petitioner, 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent and form the same the following issues arise for consideration:-

**a) Whether Respondents failure to inform the Petitioner of the reason for his arrest violated his constitutional rights under Article 49 (a) (b) (c) and (d)?**

**b) Whether the Respondents holding the Petitioner for over 24 hours breached Article 49 (1) (f) and Article 29(a) (b) of the Constitution?**

**c) Whether the Respondents breached the Petitioner's right to protection of the law and from administrative action?**

**d) What relief is the Petitioner entitled to?**

#### **A. WHETHER RESPONDENTS FAILURE TO INFORM THE PETITIONER OF THE REASON FOR HIS ARREST VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER ARTICLE 49 (a) (b) (c) AND (d)?**

16. The Petitioner contend that on 22<sup>nd</sup> July 2015 while on his way to his place of work at Donholm where he used to work as an attendant at Kamindi Selfridges Supermarket the agent of the 2<sup>nd</sup> Respondent rudely interrupted him and arrested him. He was not at that time of the arrest informed of the reasons for his arrest. He states that he only suspected the offense he probably was facing when he over-heard agents of the 2<sup>nd</sup> Respondent whisper to each other that he was a robbery suspect as he was being handed over to officers from criminal investigation Directorate (CID).

17. The 2<sup>nd</sup>, and 5<sup>th</sup> Respondents did not file ground of opposition nor any Replying Affidavit asserting that indeed the Petitioner was at the time of his arrest informed of the reason for his arrest. It is the 3<sup>rd</sup> Respondent who filed grounds of opposition raising 10 grounds herein none of which addressed the issue of failure to inform the Petitioner of his reasons for his arrest. The response on the issue raised by the Petitioner would have been properly responded to by the agent of the 2<sup>nd</sup> Respondent or by 5<sup>th</sup> Respondent by way of Replying Affidavit, which the Respondents opted not to file.

18. **Article 49 (1) (a) (b) (c) and (d) of the Constitution** deals with rights of arrested persons and are meant to ensure an accused person enjoys fair trial immediately from the time of the arrest. **Article 49 (a) (a) (b) (c) and (d) of the Constitution** 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”*

19. **Article 9 of the International Covenant on Civil and Political Rights** provides that no one shall be subjected to arbitrary arrest, detention or exile. In the case of *Christie vs. Leachnisky (1947) A.C 573 at 600 (1947) UKHL 2*. Lord Du Parq stated that;

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

20. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent’s Counsel in response to Petitioner’s averment urged that she relies on the mandate of the 3<sup>rd</sup> Respondent as provided under **Article 157 of the Constitution** and **Section 6 of Office of the Director of Public Prosecution Act No. 2 of 2013** and **Article 245 of the Constitution**. It should however be noted that the Articles referred to and the Section of ODPP Act do not except the Respondents from complying with clear provisions of **Article 49 (1) (a) of the Constitution** on rights of an accused persons as regards being informed promptly in a language that the person understands of the reason of his arrest amongst other rights as stated under the Article. The Respondent contention that it did not violate the Petitioner’s rights under the Constitution which demonstrates its compliance with the Constitution is just not sufficient.

21. From the Petitioner’s uncontroverted affidavit under paragraph 10. I find that he was not informed of reason for his arrest promptly, in a language that he understood or at all. In view of the above there is no doubt in my mind the Respondents failure to comply with provisions of **Article 49(1) (a) – (d) of the Constitution** amounts to violation of the Petitioners constitutional rights to be informed of reason for his arrest. The Petitioner was not immediately informed of reasons for his arrest but just overheard why he was arrested during his handover to CID the following day. The failure by the agents of the 2<sup>nd</sup> Respondent to inform the Petitioner promptly of his reason of his arrest and continued detention without informing the Petitioner the reason of his arrest was a breach of the Constitutional safeguard as provided for under **Article 49 of the Constitution**.

**B. WHETHER THE RESPONDENTS HOLDING THE PETITIONER FOR OVER 24 HOURS BREACHED ARTICLE 49 (1) (F) AND ARTICLE 29(A) (B) OF THE CONSTITUTION?**

22. **Article 49(1) (f) of the Constitution** provides for the period within which an arrested person ought to be brought before Court. it is provided under the Article as follows:

***“49.Rights of arrested persons***

***1)An arrested person has the right***

***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;”***

23. The Petitioner herein was arrested on 22<sup>nd</sup> July 2015 and detained at Kayole Police station between 22<sup>nd</sup> July 2015 and 31<sup>st</sup> July 2015, when he was arraigned before court after he had spent 8 days at Kayole Police Station before he was arraigned before the Court. It is interesting to note that the Petitioner was being held being unaware of the offence he was alleged to have committed.

24. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent’s Counsel in response urged that the Respondents did not violate any of the Petitioner’s Constitutional Rights or any rights under either written law or regulations. She alleged the Petitioner was referred to a Court and an order was issued giving police time to have the Petitioners held in custody and giving police more time to investigate the matter before taking of the plea. She referred to annexure “AMN 4” being a statement of the Cpl. J. Ochieng under the last paragraph which states:-

***“they both signed the id parade form P.156 accordingly and since they were arrested together in one place and at the same time they were brought to court for the application of being remanded at Kayole Police Station for 5 days. We had to return them to court for trial.”***

25. The Respondent Counsel contention is that the Petitioner was held in lawful police custody pursuant to a Court order granting police officers time to complete their investigation from 22<sup>nd</sup> July 2015 to 31<sup>st</sup> July 2015 when the other suspects were formally charged in Court for robbery with violence.

26. From the Respondents pleadings, the Respondents only field grounds of opposition to which annexure “AMN 4” referred in the 3<sup>rd</sup> Respondent’s submissions is not anywhere attached. Its source is mysterious and cannot be authenticated. No case number is disclosed and no dates to when the alleged referred order was issued nor is there an attached extracted court order to confirm that indeed the court granted the Respondents more time to detain the Petitioner pending investigation and for how long. The Respondents have had all the time to extract the order allowing detention of the Petitioner for more than 24 hours immediately after the date of arrest but none has been extracted and no reason for failure to do so has been given. In absence of the Courts order to that effect I find that the Respondent have failed to demonstrate that they held the Petitioner beyond 24 hours within the confine of **Article 49 of the Constitution**. I find to the contrary that holding the Petitioner for 8 days without an order of the Court allowing them so to do, the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents breached the provisions of **Article 49(1) (f)**, and **Article 29 (a) and (b) of the Constitution**.

27. The Petitioner sought to rely in the case of **Salim Kofia Chivui v. Resident Magistrate Butali Law Courts & Another [2012] eKLR**, where the court stated as follows:

**“... I therefore find and hold that the petitioner’s right under Article 49(1) (f) were breached when he was arrested on 24<sup>th</sup> March 2011, detained in police custody and arraigned before the court in Butali on 29<sup>th</sup> March 2011”... “The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date in any other case an detention beyond 24 hours must be authorized by court as provided by Article 49(1) (g). Once the person’s attendance has been secure within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.”**

28. I am from the facts of this case satisfied that the Petitioner has demonstrated that his rights as an arrested person to be brought before Court as soon as reasonably possible but not later than 24 hours after being arrested were violated by the Respondents who took him to court after 8 days from the date of his arrest. The Respondents has not shown that there was any reason to hold the Petitioner at Kayole Police Station beyond the provided time frame of 24 hours as prescribed under **Article 49(1)(f) (i) of the Constitution**.

### **C. WHETHER THE RESPONDENTS BREACHED THE PETITIONERS RIGHT TO PROTECTION OF THE LAW AND FROM ADMINISTRATIVE ACTION?**

29. The Petitioner was on 31<sup>st</sup> July 2015 charged with an offence of robbery with violence before **Makadara Chief Magistrate’s Court, Criminal Case No. 2362 of 2015 Republic v. Fredrick Mathoga & Another**. The matter was set down for hearing on 27/11/2015 but on 27/11/2015 for undisclosed reason the case did not take off. On 16<sup>th</sup> May 2016 the case could not proceed as the state had not availed any witnesses and P3 form was yet to be filled; almost a year since Petitioner had been charged. The prosecution sought adjournment which was granted, and matter set down for hearing on 16/11/2016. On 16/11/2016 the prosecution stated that the matter had been erroneously listed in Court No.8 and that the Police file was not in Court. This was in spite of the fact that the case was listed and being heard before the right court only that prosecution is the one who did not have the police file. The trial Court made an order that the Petitioner and his co-accused be remanded at the Police station to be brought by the investigating officer with an explanation as to why the witnesses were not bonded or why the police file was not availed in Court. This matter was set down for mention on 18/11/2016. On 18/11/2016 the investigating officer explained to the Court that former investigating officer had gone on transfer without handing over the file, and sought for another date. The hearing was adjourned to 12<sup>th</sup> April 2017 and court ordered the investigating officer to ensure all the witness were bonded.

30. On 12<sup>th</sup> April 2017 the prosecution stated that the two witnesses were bonded but they were not present in Court, leading to hearing being adjourned to 27/6/2017. On 27/6/2017 the prosecution stated that they did not have any witnesses as the complainant had not been bonded. The Petitioner and his co-accused protested the prosecutor’s application for adjournment. The court in its ruling for application for adjournment stated that:

**“on 16.11.16 when this matter came for hearing there were no witnesses. Accused were remanded at the police station to be brought by the investigating officer with an explanation why witnesses were not bonded. The investigating officer came and promised to avail witnesses. Two consecutive dates’ witnesses have been absent and the accused continue to suffer in remand. I do find the prosecution is not interested in pursuing this case.”**

31. In view of the courts ruling the prosecution made an application to withdraw the case under **Section 87 A of the Criminal Procedure Code** which application was allowed and the Petitioner was discharged.

32. The 1<sup>st</sup> Respondent avers that it is wrongly enjoined in the Petition vide **Article 156 of the Constitution of Kenya** which categorically states at subsection (4) (b) that the Honourable Attorney General **“shall represent the national government in Court or in any legal proceedings”**, to which the national government is a party, other than criminal proceedings. It is on that basis the 1<sup>st</sup> Respondent on 18<sup>th</sup> September 2019 sought to be struck out from the proceedings because the 2<sup>nd</sup> Respondent was represented by counsel to which the Petitioner’s counsel objected. The court declined to struck out 1<sup>st</sup> Respondent from the proceedings and directed the 1<sup>st</sup> Respondent to file and serve formal application which to date has not been filed.

33. The 3<sup>rd</sup> Respondent’s response is that the 3<sup>rd</sup> Respondent while exercising its mandate as provided under **Article 157 of the Constitution** and **Section 6 of the ODPP Act** made a decision to charge the Petitioner based on a reasonable and probable cause on the sufficiency of evidence and the public interest underlying prosecution of robbery with violence cases. It is the Respondent’s contention that the Petitioner’s claim surrounds the law of tort of malicious prosecution. That the Petitioner does not allege lack of reasonable and probable cause. It is argued the petitioner assumed the withdrawal under Section 87A CPC was enough to pursue his claim in malicious prosecution. The Respondent contend that it cannot be blamed for serial adjournments of the matter; pointing out the witnesses were bonded on 12/4/2017 and the prosecution on its own motion made an application for withdrawal of the case under Section 87A CPC. That from the proceedings it is urged the prosecution only occasioned 3 adjournments for various reasons that they cannot be held accountable for.

34. It is 3<sup>rd</sup> Respondents' contention that the reason for the lengthy of delay cannot be solely blamed on the Respondents as the period of time that the case had to await from one hearing to another was very lengthy owing to the court's diary and not necessarily by the actions of any one of the Respondents. It is further contended the Petitioner and his counterparts were granted bond term commensurate with the charge they were facing.

35. The 4<sup>th</sup> Respondent contend that the decision whether to institute criminal charges falls squarely on the 3<sup>rd</sup> Respondent and not on the 4<sup>th</sup> Respondent. Secondly the Petitioner's complaint to the 3<sup>rd</sup> Respondent was addressed to the right office which was the only entity properly mandated by the Constitution to handle his complaint. That the 4<sup>th</sup> Respondent communicated its response to the Petitioner through its letter of 7/11/2016 (DW 2) to which letter the Petitioner did not communicate its dissatisfaction. Its 4<sup>th</sup> Respondent averment that it acted within the stipulated provision of the law and in accordance with its mandate and as such even it did not violate the rights of the Petitioner.

36. The 4<sup>th</sup> Respondent further states that **Section 26 of the Independent Policing Oversight Authority Act, 2011** bars the 4<sup>th</sup> Respondent from investigating any matter which is the subject of proceedings before Court of Law or Judicial tribunal and further the objectives and powers of the 4<sup>th</sup> Respondent do not entail over-sighting the actions or decisions of the 3<sup>rd</sup> Respondent as prosecution of criminal cases against anyone including the Petitioner. Further the 3<sup>rd</sup> Respondent in exercise of his or her powers or functions is not under the decision on control of any person or authority.

37. From the results of the investigation, it is clear that the complainant did not identify the Petitioner as one of the persons who had robbed him. There was no incriminating evidence connecting the petitioner with the robbery which the prosecution had charged the Petitioner, with yet they decided to charge and prosecute the Petitioner herein. That matter took 23 months without the prosecution availing either witness or exhibits even after the court granted the prosecution sufficient time to bond and avail prosecution witnesses. It is evidently clear the prosecution were out to keep the matter pending as they were not interested in prosecuting the Petitioner at all or to do so within a reasonable time. The Petitioner was in custody during all the time of trial. All the 5 consecutive adjournments were occasioned by the prosecution. The prosecution did not seem to care and never thought that delay of prosecution amounts to denial of justice.

38. In the case of **Julius Kamau Mbugua v. Republic (2010) eKLR** the Court among other principles mentioned the following from the consideration of the common wealth and international jurisprudence on the right to a trial within a reasonable time.

**"(i) the trial within a reasonable time guarantee is part of international human rights law and although the right may 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. "**

39. **Article 50 of the Constitution** clearly states every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court which include the right to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer, to have the trial began and concluded without unreasonable delay. **Article 159(2) (b) of the Constitution** provides justice shall not be delayed.

40. From the above it is clear that it is the duty of the state in criminal justice system to expedite the trial so that an accused person knows his fate within the shortest time possible. It is further their responsibility to ascertain the chance of success of any intended prosecution before the accused is arrested and charged with a particular offence. It is also the duty of a state to bring an accused person to trial expeditiously as well as for the provision of facilities and adequate time and to see to it that an accused person is tried within a reasonable time. There should in matters of prosecution, be no institutional inertia before the beginning of the trial and once the trial commences any flaccid motion should be avoided. There should be no excuse such as the investigating officer is away on other duties or / on leave or on transfer as if such foreseeable incident occurs accidentally. Once an officer is assigned to handle a matter in good time, he should avoid unreasonably delay in prosecution of the matter. I find a reasonably and speedy trial ensures an accused person maintains liberty and security of a person. It also no doubt ensures a person is quickly freed from the stigma that accompany criminal charges if acquitted. It is further true that, a trial devoid of slow motion ensures that the merits of both the defence and prosecution case is not prejudiced or compromised through lost or misplaced evidence memory or otherwise.

41. **Article 25 (c) of the Constitution** provides that despite any other provision of this constitution, the following rights and fundamental freedoms shall not be limited.

“25. Fundamental Rights and freedoms that may not be limited

**Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

- a) freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b) freedom from slavery or servitude;**
- c) the right to a fair trial; and**
- d) he right to an order of habeas corpus.”**

42. The Petitioner referred to the case of **R v. Askor (1990) 2 SCR 119 (SCC)** which had similar circumstances of delay of trial for almost two years, the Court established the factors to consider when deciding whether the delay in bringing the accused to trial has been

unreasonable. The court stated at page 1231 and 1232 of its judgment as follows:

**"The Court should consider a number of factors in determining whether the delay in bringing the accused to trial has been unreasonable:**

- 1) **The length of the delay;**
- 2) **The explanation for the delay;**
- 3) **Waiver; and**
- 4) **Prejudice to the accused**

*The longer the delay, the more difficult it should be for a court to excuse it, and very lengthy delays may be such that they cannot be justified for any reason. Delays attributable to the Crown will weigh in favour of the accused. Complex cases, however, will justify delays longer than those acceptable in simple cases. Systemic or institutional delays will also weigh against the Crown. When considering delays occasioned by inadequate institutional resources, the question of how long a delay is too long may be resolved by comparing the questioned jurisdiction to others in the county. The comparison of similar and thus comparable districts must always be made with the better districts, not the worst. The comparison need not be too precise or exact; rather, it should look to the appropriate ranges of delay in determining what a reasonable limit is. In all cases it will be incumbent upon the Crown to show that the institutional delay in question is justifiable. Certain actions of the accused, on the other hand, will justify delays. A waiver by the accused of his rights will justify delay, but the waiver must be informed, unequivocal and freely given to be valid.*

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

43. In the instant suit, the Petitioner's case was delayed for 23 months; almost 2 years. In keeping the Petitioner however for close to 2 years of waiting for trial to commence, whilst in custody and not out on bond due to stringent terms of the bond, when 1st Petitioner could not offend, I find the delay was unreasonable and intolerable. This I further find went against **Articles 50(2) and 159(2) (b) of the Constitution**. The delay to start the trial was wholly attributable to state agents who were under obligation to ensure trial was conducted without unreasonable delay. The state was supposed to bond and avail the witnesses and exhibits on the day for trial but failed to do so all the times set for trial. The Petitioner was highly prejudiced by the actions of the 3<sup>rd</sup> Respondent, considering that he was facing trial at his youthful years. The Petitioner who before his arrest was employed, due to being arrested charged, and on discharge he joined the unemployed class as he could not go back to his employment with his former employer M/s Kamindi Selfridge Supermarket. It should be noted that failure of justice system for whatever reason to fail to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt of court procedures, whether the delay comes from the prosecutor or other quarters; therefore this calls for courts to ensure unnecessary adjournments or delays are not entertained for criminal justice system to work.

44. The Petitioner seek to blame the 5<sup>th</sup> Respondent whose role was to investigate the case. The Petitioner urge from the statements that were supplied to the defence, it is clear the 5<sup>th</sup> and 3<sup>rd</sup> Respondents were aware of the fact that the Petitioner was innocent. From the identification parade and charging the Petitioner in Court of law by 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents while nursing serious doubts of his guilty, the Petitioner urges, was a mockery to criminal justice system. That it is contended the 3<sup>rd</sup> Respondent did not help the situation as his office was ahead to have the Petitioner charged with a capital offence despite the fact that there was exculpatory evidence, thus, negative identification of the Petitioner by the complainant.

45. From the facts of this case it is clearly demonstrated that the change was orchestrated by malice as the facts clearly show that no reasonable and sincerely honest person could have believed that the prosecution against the Petitioner for the offence of robbery with violence was likely to succeed, taking into account that the Petitioner was not found in possession of any stolen goods and was charged immediately after an identification parade in which no single witness identified him.

46. The Petitioner argues further the Respondents breached his rights to protection of the Law and fair administrative action. **Article 47 of the Constitution** accords an accused person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner avers he did not receive any fair, impartial administrative action from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. It is his case that **Article 27 of the Constitution** gives all persons the right to equal protection and benefit of the law.

47. I find that it is not properly right in a civilized society like ours to close our eyes, ears and mouths when police officer arrests and charges innocent Kenyan Youths and have them taken through unnecessary criminal trial like in the instant petition.

48. It is no doubt clear that under **Article 157 (1) of the Constitution** the ODPP is enjoined in exercising the powers conferred by the aforesaid Article to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. Interest of the administration of justice dictates that only those whom the DPP believes have a prosecutable case against them be arraigned in Court and those who DPP believes have no prosecutable case against them be let free. This is why **Article 159(2) of the Constitution** is crying loudly everyday, every hour that **"justice shall be done to all, irrespective of status"**. Justice demands that it should not be one way and for some of us but for all of us irrespective of who one is or one has.

49. The Petitioner in support of interest of administration of justice Dictates referred to the National Prosecution policy, revised in 2015 at page 5 where it provides that: **"Public Prosecutors in applying the evidential test should objectively assess the totality of the evidence both for and against the suspect and satisfy themselves that it establishes a realistic prospect of conviction. In other words, Public Prosecutors should ask themselves; would an impartial tribunal convict on the basis of the evidence available?"**

50. In the case of *Republic v. Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No. 78 of 2015* while quoting the case of *R vs. Attorney general ex Kipngeno Arap Ngeny High Court Civil Application No. 406 of 2001*; the Court held;

***"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. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."***

51. From the aforesaid it is my view that any good prosecution must be purposeful and should not be used to stage - managed cases. In a democratic society like ours no one should be charged without the authorities conducting proper investigation. The prosecutor on the other hand is under duty to consider both incriminating and exculpating evidence. In the case of *Republic v. Director of Public Prosecutions & Another ex parte Kamani Nairobi Judicial Review Application No. 78 of 2015 (supra)*, the court expressed itself as follows:

***"this court appreciates that the court should not simply fold its arms and stare at the squabbling litigants/disputants parade themselves before the criminal court in order to show-case dead cases. The seat of justice is a hallowed place and ought to be preserved for those matters in which the protagonists have a conviction stand a chance of seeing the light of the day. In my view the prosecution ought not to institute criminal cases with a view of obtaining an acquittal. It is against the public interest as encapsulated in section 4 of the Office of the Director of Public Prosecutions Act to stage-manage criminal proceedings in a manner intended to obtain an acquittal. A criminal trial is neither a show-biz nor a cat-walk."***

52. In the instant Petition I repeat that the identification of the petitioner was negative. The prosecution had no other evidence against the Petitioner according to the statement supplied to the defence, which was pointing to culpability of the petitioner. I find the arrest and prosecution of the Petition without proper investigations was a gross violation of his constitutional rights. The fact that the 3rd Respondent acts independently, he must act within the law that establishes his office. The law do not give the office right to act illegally or in abuse of the law.

53. The Supreme Court in the case of *RE the matter of the Interim Independent Electoral commission [2011] eKLR* at para 60 stated as follows:

***"While bearing in mind that the various Commissions and Independent offices are required to function free of subjection to "direction or control by the person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or person outside their ambit. The Commissions or independent offices must, however, operate within the term of the constitution and the law; the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the constitution and the law."***

54. As regard the 2<sup>nd</sup> Respondent and 5<sup>th</sup> Respondent, the police are expected to be professional in the conduct of the investigations and ought not to be driven by malice or other collateral considerations which can either be express or can be gathered from the circumstances surrounding the prosecution. It should be noted that a mere fact that a complaint is lodged does not justify the institution of criminal proceedings where there is no evidence against anyone, but a complaint is required to be properly investigated before preferring a charge against a person suspected to having committed an offence. It should be clear in the mind of investigating officers that prosecution arm and Government is not a mere conduit for complaints. That the police must act impartially and independently on receipt of a complaint and carry out thorough investigations which should ordinarily involve taking into account the versions presented by both the complaint and the suspect. The petitioner herein was arrested on his way to his place of work and there was no indication that the police had been looking for him or investigating him. From the statements of the witness after the arrest of the Petitioner and from identification parade conducted on 29/7/2015 it is clear the petitioner was not involved in the robbery. The act of subsequently arraigning the Petitioner in court was in my view not in good faith as this was not supported by any evidence. In the case of *Nairobi HCC No. 1729 of 2001 – Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another* the Court addressed itself thus:-

***"...policemen and prosecutors who fail to act in good faith, or are led by pettiness, chicanery or malice in initiating prosecution and in seeking conviction against the individual cannot be allowed to ensconce themselves in judicial immunities when their victims rightfully seek recompense ... I do not expect that any reasonable police officer or prosecution officer would lay charges against anyone, on the basis of evidence so questionable, and so obviously crafted to be self-serving. To deploy the State's prosecutorial machinery, and to engage the judicial process with this kind of litigation, is to annex the public legal services for malicious purposes."***

55. From the above, I am of the view that the 5<sup>th</sup> Respondent failed in his duties as a investigating officer to conduct a thorough investigation in accordance with the National Police Service Act and in particular under **Section 24 (e), and (f)** on investigation of crimes and collection of criminal intelligence. I further find that due to his incompetence the Petitioner herein suffered in remand and his subjection to an unnecessary and dead criminal trial.

56. In *CK (a child) through Ripples International & 11 others vs. Commissioner of Police, Director of Public Prosecutions and Another*

**Petition No. 8 of 2012**, the court held that the police were liable under the constitution for failing to investigate complaints made before them. The Judge stated thus:-

**“needles 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. The centrality of police in criminal justice system is evidenced by their functions as set out under Part III of the Police Act (Now repealed), which has been re-enacted at Section 24 of the National Police Service Act (Act No.11A of 2011) as follows:-**

**“24. The functions of the Kenya Police Service shall be the-**

**Provision of assistance to the public when in need; (b) maintenance of law and order; (c) investigation of crimes; (f) collection of criminal intelligence; (g) prevention and detection crime; (h) apprehension of offenders; (i) enforcement of all laws and regulations with which it is charged....”**

57. From the above case, it’s clear that the 5<sup>th</sup> Respondent had duty to investigate crimes and only act within the confines of the law. The duty of the 2<sup>nd</sup> Respondent agents in criminal justice system is very critical and the same must be carried out diligently to avoid miscarriage of justice. **Article 244 of the Constitution** sets out the objects and functions of the National Police Service, and demands compliance by the police with constitutional standards of human rights and fundamental freedoms.

58. The Petitioner herein wrote a letter dated 5<sup>th</sup> September 2015 complaining about violation he underwent in hands of 2<sup>nd</sup> Respondent which up-to-date the Petitioner urges the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have not bothered to respond to. The Petitioner urges he has been denied the protection of the law by the Respondents, specifically the 3<sup>rd</sup> Respondent under **Article 157 (4) of the Constitution** which had a duty mandated by the constitution to require the inspector General of Police, the 2<sup>nd</sup> Respondent herein to carry out investigations and report back to him. The Petitioner contend the 3<sup>rd</sup> Respondent’s failure to act amounts to gross abdication of his constitutional obligation under **Article 157 (5) of the Constitution** to present the abuse of the criminal legal system.

59. **Section 4 of the ODPP of 2012** provides the guiding principles of the Office of Director of Public Prosecution. The failure to investigate the petitioner’s complaint compromises the very validity of that government and more so when the executive fails to protect a citizen from victimization it calls into question the legitimacy of its exclusive prosecutorial powers. The ultimate result is victim frustration and alienation, and even vigilantism, as victims decide to protect their interest with extra-legal measures.

60. The 4<sup>th</sup> Respondent it is submitted has a clear mandate to investigate from members of public on misconduct of the police. In the case of **Republic v Independent Policing Oversight Authority Ex parte Kenya Ports Authority & 2 Others [2016] eKLR**, a complainant had made a complaint to IPOA to investigate the conduct of certain police officers. The complainant filed a Judicial Review and in their defense the 4<sup>th</sup> Respondents alleged that they had delegated the investigations of the case to Internal Affairs Unit of the police who were yet to file back their report. In upholding the fact that the 4<sup>th</sup> Respondents could not abandon their mandate, Justice M. J. Anyara Emukule, MBS held:

*“There is no doubt in my mind that the Respondent had absconded its primary duty to investigate any complaint related to disciplinary or criminal offences committed by any member of the Service. Whether on its own motion or on receipt of a complain and to make recommendations to the relevant authorities or to take over on-going internal investigations into misconduct or failure to comply with any law or such investigations are inordinately delayed or manifestly unreasonable.*

*Besides under Section 7(2) of its Act, the Respondent has authority to request and receive assistance form the national Police Service or any other governmental or international body or person as may in its opinion be necessary in exercise of its powers. In the current case, it is not merely a case of misconduct, it is a complaint related to disciplinary or criminal offences for which the Police Internal Affairs investigation on the four officer seem to be saying – “Upelelezi bado unaendelea, upelelezi bado unaendelea” “Upelelezi bado unaendelea” – as President Magufuli of Tanzania would put it.*

*In my humble opinion, that is a case of not merely bias, but also dereliction of duty on the part of the Respondent. The Respondent has a mandate under Section 791(b) to take over on-going internal investigations into misconduct or failure to comply with the law if such investigations are inordinately delayed and make recommendations including for prosecutions... I think the Respondent has neglected its duty by putting a blind eye to the never ending investigations by the Internal Affairs Unit of the Kenya Police Service. It is no answer to the ex parte Applicant’s complaint that we have referred the complaint to the Internal Affairs Unit for investigations. That sounds like asking a game poacher go investigate itself. What Section 6 (a) of the Act clearly requires the Respondent to do is to carry out investigations into the complaint. How it does so is a matter of its internal arrangements. What a complainant expects and the law requires is an answer to its complaints – recommendation for prosecution, compensation or disciplinary action and publication of results, and if not, the reasons for deciding otherwise. No such reasons have been offered by the Respondent.*

61. The 4<sup>th</sup> Respondent has demonstrated that the letter by the Petitioner in respect of his complaint was address to the 3<sup>rd</sup> Respondent and only copied to the 4<sup>th</sup> Respondent, who was the right office mandated by the constitution to handle the complaint. The 4<sup>th</sup> Respondent communicated to the Petitioner through a letter dated 7/11/2016 (DM2), who never raised any further issue to the 4<sup>th</sup> Respondent. The 4<sup>th</sup> Respondent in its Replying Affidavit has shown that it acted within the stipulated provisions of the law and in accordance with its mandate and did not violate the rights of the Petitioner in anyway.

62. Further to the above, the 4<sup>th</sup> Respondent has shown that **Section 26 of the Independent Policing Oversight Authority Act, 2011** bars it from investigating of matter which is subject of proceedings before a court of law or judicial tribunal. Further its objectives, powers and functions do not entail over-sighting the actions and / or decision of the 3<sup>rd</sup> Respondent on the prosecution of criminal cases against anyone including the petitioner herein.

63. From contents of the 4<sup>th</sup> Respondent's Replying Affidavit it is clear that it responded to the Petitioners letter copied to it. It did not deny the Petitioner the protection of the law by its actions as it explained the petitioner its position and the Petitioner never came back to it with any further complaint. I find from the 4<sup>th</sup> Respondent's Position, its mandate and the stage at which the proceedings were and the fact that the law did not allow it to carry out any investigation of the matter being prosecuted then by the 3<sup>rd</sup> Respondent as of the time of the complaint, that the 4<sup>th</sup> Respondent did not violate any of the Petitioner's rights.

64. I find that the Petitioner has only satisfied that there is existence of constitutional and statutory duty on party of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents, which duty the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents failed to perform and therefore denying the Petitioner the protection of this law.

**D. What relief is the Petitioner entitled to?**

65. The Petitioner is a young Kenyan who at the time of his arrest was an attendant at Kamindi Selfridge Supermarket Donholm at a monthly salary of Kshs.35,000/=. He spent 23 months awaiting his trial that never was. He was arrested on 22nd July 2015 and locked at Kayole Police Station for a period of 8 days before being arraigned in Court.

66. It is urged that during the time of the arrest of the Petitioner he was not informed the reason for his arrest and sought intervention from the Respondents and remedy without any positive response. It is further claimed the Petitioner suffered psychological pains and have evidenced rejection by his peers and members of community who thought the petitioner was serving a prison sentence.

67. The Petitioner's Petition is not as submitted by the 3<sup>rd</sup> Respondent a claim for malicious prosecution but it is a claim for violation of the Petitioner's Bill of Rights as enshrined in the Constitution of Kenya. Upon considering the rival submissions I am satisfied the Petitioner's rights were violated. The Petitioner's rights were violated as follows:

**a) The violation of the right to a fair trial and fair administration action as granted in the constitution.**

**b) The violation of the Petitioner's right to be promptly informed of the reason for his arrest.**

**c) The violation of the right to protection of the law and administrative action under Article 27**

**d) The violation of Petitioners right to be presented before court within 24 hours from the time of arrest.**

68. The Petitioner seeks damages as a redress in respect of each of the above constitutional rights that were breached in relation to him and seeks a global sum of Kshs.5,000,000/=. The Petitioner further seeks punitive damages amounting to Kshs.1,000,000/= as a way of deterring the Respondents from violating the rights of other citizens, more so the young poor Kenyan like the Petitioner. The Petition further seeks costs.

69. In support of seeking the above prayers the Petitioner sought support from the case of **John Atelu Omilia & another v Attorney General & 4 Others [2017] eKLR**, where the court while awarding the Petitioners damages for various constitutional torts stated:

***"It is now an established principle that violations of fundamental human rights must be remedied.... Considering the nature of the violations of the constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify violation of fundamental rights and freedoms, particularly the agony of being subjected to criminal proceeding, and taking into account the period the petitioners were in custody and the length of the trial, and the genuine fear of the possibility of being sentenced to death if convicted, I find that the Petitioners are entitled to an award of damages. Doing the best I can, I find that an award of global sum of Kshs.2,000,000/- to each of the petitioners would be reasonable compensation for violation of their rights."***

70. Furthermore, it is clear that under **Article 23 (3) (e) of the Constitution** that in any proceedings brought under Article 22 a Court may grant appropriate relief including an order for compensation which in my view can take a form of an award of damages. I have in this matter concluded that the Petitioner was arrested for no apparent reasons, arraigned in court when there was no evidence against him and waited for hearing for 23 months which never ever took place. He lost his employment and his reputation has been damaged. I am of the view that General Damages and punitive damages should be awarded in this matter.

71. To the extent of my findings I find that the Petitioner's Petition is meritorious and I proceed to enter judgment in favour of the Petitioner as follows:

**a) A declaration be and is hereby issued that failure by the agents of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents to present any witnesses in court in Makadara Criminal case Number 2362 of 2015 Republic v Fredrick Muthoga & Anthony Murimi Waigwe for a period of 23 months was a violation of the Petitioner's right to fair trial and fair administrative action guaranteed under the Constitution of Kenya, 2010.**

**b) A Declaration be and is hereby issued that failure by the 3<sup>rd</sup> Respondent to conduct investigation into the complaints raised by the Petitioner about his case vide a letter dated 5<sup>th</sup> September 2016 was a violation of the Petitioner's right to protection of the law and fair administrative action guaranteed under the Constitution of Kenya, 2010.**

**c) A Declaration be and is hereby issued that the incarceration of the Petitioner for a period of 8 days between 22<sup>nd</sup> July 2015 and 31<sup>st</sup> July 2016 without being presented to a court of law was a violation of the petitioner's rights as guaranteed under Article**

49(1) (f) (i) of the Constitution of Kenya, 2010.

*d) A Declaration be and is hereby issued that by the failure of agents of the 2<sup>nd</sup> Respondent to inform the petitioner promptly the reason for his arrest was a violation of the Petitioner's rights as guaranteed under Article 49 (1) (a) (i) of the Constitution of Kenya, 2010.*

*e) The claims against the 1<sup>st</sup> Respondent and 4<sup>th</sup> Respondent is not provided and the Petition against the 1<sup>st</sup> Respondent and 4<sup>th</sup> Respondent is dismissed with no orders as to costs.*

*f) General damages of Global figure of Kshs.4,500,000/= award to the Petitioner.*

*g) Punitive damages of Kshs.500,000/=*

*h) The Petitioner is awarded costs of the Petition against the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents.*

**Dated, Signed and Delivered at Nairobi on this 4<sup>th</sup> day of June, 2020.**

.....

**J. A. MAKAU**

**JUDGE**