



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION 217 OF 2018**

JOHN SIWO NYANJWAYA.....1<sup>ST</sup> PETITIONER

MAURICE OCHIENG' ONYANGO.....2<sup>ND</sup> PETITIONER

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT

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

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

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

SYNERGY LUBRICANT SOLUTIONS LIMITED.....5<sup>TH</sup> RESPONDENT

DILACH BHAYANI.....6<sup>TH</sup> RESPONDENT

**JUDGMENT**

**PETITION**

1. The Petitioners by way of an Amended Petition brought pursuant to *Article 19, 25, 27, 28, 35, 40(1), 47 & 51(1) of the Constitution of Kenya* and dated 24<sup>th</sup> June 2019 pray for the following reliefs:-

a. A DECLARATION that the 1<sup>st</sup> to 6<sup>th</sup> Respondents have breached, infringed and/or violated the rights and freedoms of the Petitioners enshrined in the Constitution of Kenya, 2010;

b. THAT the Honourable Court be pleased to declare the criminal investigations of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' agents on report OB No. 52/13/4/2017 as illegal, unprocedural and unconstitutional this null and void and quash the proceedings instituted by the 3<sup>rd</sup> Respondent in City Court Criminal Case No. 726 of 2018. Alternatively, the Court be pleased to find and hold that CPL Owaga is an interested party in the investigation of the said report and bar him from further acting as an Investigating Officer in the matter concerning the Petitioners;

c. A CONSERVATORY ORDER admitting the 1<sup>st</sup> Petitioner to bail or bond on reasonable terms pending proper, legal and procedural investigations by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or commencement of criminal proceedings or prosecution by the 3<sup>rd</sup> Respondent;

d. THAT the Honourable Court be pleased to Order the Respondents to supply the Petitioners with documents listed under paragraph 30 and 31 hereinabove

e. THAT the Respondents be ordered to pay the Petitioners damages and/or compensation for violation of their rights and fundamental freedoms;

**f. Any other relief the Honourable Court may see fit to grant;**

**g. The costs of the Petition.**

### **PETITIONER'S CASE**

2. The facts of the Petition as supported by the Petitioners' Affidavit sworn on 24<sup>th</sup> June 2019; are that the Petitioners were employees of the 5<sup>th</sup> Respondent between 2011 and 2017. In or about March, 2017 the Petitioners alleges that the 6<sup>th</sup> Respondent accused them of failing to recover various debts owed to the 5<sup>th</sup> Respondents by different customers and threatened the use of the services of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to coerce them to recover or pay back the debts.

3. The Petitioners left the service of 5<sup>th</sup> Respondent under circumstances as disputed in the **Employment and Labour Relations Court Petitioner No. 56 of 2018 and Cause No. 1574 of 2018**. The Petitioners claim that the above court actions prompted the 5<sup>th</sup> and 6<sup>th</sup> Respondents to engage the services of officers from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stationed at Gigiri Police Division to harass and intimidate them.

4. The Petitioners assert that there has been misuse and abuse of the criminal justice system as the complaint lodged against them to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on 13/04/2017 under OB No.52 was for the recovery a civil debt under which they have no jurisdiction over as it is a civil dispute. Furthermore, they claim that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to carry out an investigation into the alleged customer debts and therefore failed to properly exercise their prosecutorial powers as envisaged in the Constitution.

5. The 2<sup>nd</sup> Petitioner claims that his rights under Article 49 (1) of the Constitution have been violated by the 1<sup>st</sup> to 4<sup>th</sup> Respondents as he was not given any, reason for his arrest. Furthermore, the Petitioners opine that 5<sup>th</sup> and 6<sup>th</sup> Respondents colluded with CPL Owaga to publish a notice warning the public about the 1<sup>st</sup> Petitioner, which notice was published irregularly, illegally and unprocedurally.

6. The 1<sup>st</sup> Petitioner contend that his right to privacy and other rights envisaged under Article 31, 28, 29, 33, and 39 of the Constitution were infringed by the alleged tracking of his mobile communication by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in an effort to arrest him.

7. The 2<sup>nd</sup> Petitioner asserts that his rights as envisaged under Article 49 of the Constitution was infringed as he was arrested by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as instructed by the 5<sup>th</sup> and 6<sup>th</sup> Respondent and was not detained in Parklands Police Station where the report was made and which was nearer to the scene of his arrest but rather detained at Gigiri Police Station. Furthermore, he was detained from 20<sup>th</sup> to 22<sup>nd</sup> July 2017 at Gigiri Police Station and was not charged within 24hours. Later he was moved to Parklands Police Station on 23<sup>rd</sup> July 2017 where he was detained until late in the evening.

8. The Petitioners aver that the investigations of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not conducted fairly or impartially as they were acting under the instructions of the 5<sup>th</sup> and 6<sup>th</sup> Respondents. This is evidenced by the fact that they failed to investigate other employees working in their teams.

9. The Petitioners claim that they are entitled to the documents requested from the Respondents under paragraphs 30 and 31 as it is their right under **Article 35 of the Constitution** to be furnished with the documents.

10. It is further alleged that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have relied on notes alleged to have emanated from the 2<sup>nd</sup> Petitioner contrary to his right not to incriminate himself under Article 50 of the Constitution. They claim that they have been treated as criminals by the 4<sup>th</sup> and 6<sup>th</sup> Respondents contrary to the presumption of innocence.

11. Finally, the Petitioners assert that the officers of the 1<sup>st</sup> Respondent under the supervision of the 2<sup>nd</sup> Respondents are being used to suppress their rights and freedoms contrary to Section 47 of the Constitution and the Fair Administrative Actions Act.

### **1<sup>ST</sup> TO 3<sup>RD</sup> RESPONDENT'S CASE**

12. The Respondents reply on a Replying Affidavit sworn by Emily Cherop No. 81666 sworn on 13<sup>th</sup> July 2018, one of the investigating officers in this Petition. The Respondent deposes that the Petitioner along with his associates colluded to steal from the company.

13. The Respondents assert that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have acted within their respective mandates and independently discharged their duties after conducting a thorough investigations as mandated under Article 244 of the Constitution of Kenya; and contend that the Petitioner has failed to demonstrate that the 3<sup>rd</sup> Respondent has acted without or in excess of their powers and has not acted independently, but acted in bad faith, or has abused the legal process.

14. It is further purported that the right to liberty under Article 24 of the Constitution is not absolute.

### **4<sup>TH</sup> RESPONDENT'S CASE**

15. The 4<sup>th</sup> Respondent filed Grounds of Opposition dated 3<sup>rd</sup> June, 2019 asserting that the Petitioners have not specified with precision how it has denied or is likely to infringe and violate their fundamental rights.

16. It is contended that there is insufficient evidence to demonstrate that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent acted unlawfully or *ultra vires*; and that the actions by the Respondents complained about were undertaken within their Constitutional mandate.

17. The 4<sup>th</sup> Respondent avers that although Article 31 of the Constitution guarantees the right to privacy, the right is not absolute as it is limited under Article 24 of the Constitution.

### **5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENT'S CASE**

18. The 6<sup>th</sup> Respondent filed Replying Affidavit sworn on 26<sup>th</sup> July 2019 in response to the Amended Petition dated 24<sup>th</sup> June, 2019, and on behalf of the 5<sup>th</sup> Respondent herein.

19. The 5<sup>th</sup> Respondent denies the allegation that it is stifling the 1<sup>st</sup> Petitioner's desire to seek justice against his alleged unfair termination. It is further averred that the Newspaper advertisement by the 1<sup>st</sup> Respondent was done procedurally as the 1<sup>st</sup> Petitioner was in hiding, and the same was not done at the behest of the 5<sup>th</sup> and 6<sup>th</sup> Respondents. The said advertisement was not intended to embarrass, harass or intimidate the 1<sup>st</sup> Petitioner but instead to serve justice by having the 1<sup>st</sup> Petitioner arrested so as to appear before court.

20. They contend that the 1<sup>st</sup> Petitioner's rights have not been breached or infringed and that the 1<sup>st</sup> -3<sup>rd</sup> Respondents are merely exercising their powers granted under the Constitution. Moreover, the Respondents deny that they have ever compromised, bribed and/ or unduly influenced any officer of the 1<sup>st</sup> Respondent.

21. The Petitioners by way of a Further Affidavit dated 28<sup>th</sup> August 2019 sworn by the two Petitioners, reject the assertions of the 5<sup>th</sup> and 6<sup>th</sup> Respondent in their Replying Affidavit sworn on 26<sup>th</sup> July 2019.

### **ANALYSIS AND DETERMINATION**

22. I have very carefully considered the Petition, Affidavits in support, the Respondents grounds of opposition as well as the Replying Affidavits, Counsel rival written submission for the Petitioners and Respondents and from the above the following issues arise for determination: -

- a. Whether the Petitioners constitutional rights were violated by the Respondents?**
- b. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were compromised by the 5<sup>th</sup> and 6<sup>th</sup> Respondents as alleged by the Petitioners?**
- c. Whether the Petitioners constitutional rights to fair hearing will be upheld at the criminal court?**
- d. What orders are Petitioners entitled to?**
- e. Who should bear the costs.**

#### **A. WHETHER THE PETITIONERS CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE RESPONDENTS?**

23. The Petitioners in the instant Petition challenges the process of the investigation of report OB No.52/13/04/2017 by the 5<sup>th</sup> Respondent and the proceedings in City Court Criminal Case No.726 of 2018. The 5<sup>th</sup> and 6<sup>th</sup> Respondents in their Replying affidavit sworn on 26<sup>th</sup> July 2019 aver that they made the impugned Report after noticing that a lot of Debtors had huge outstanding payments from credit sales generated by the 2<sup>nd</sup> Petitioner, the sales executive and 1<sup>st</sup> Petitioners, colleague and co-accused in the criminal case upto 30<sup>th</sup> November 2016. The Petitioners were instructed to collect the outstanding payments but by January 2017 they had not made material collection against the debtors.

24. The 5<sup>th</sup> and 6<sup>th</sup> Respondents aver in their affidavit that Mr. Baraka, the managing Director of the 5<sup>th</sup> Respondents made decision to check on payments with some of the alleged debtors and travelled to Nakuru and was shocked by response of one of the purported Debtor, who confirmed that he was not owing any monies on account of any goods purportedly supplied to it by the 5<sup>th</sup> Respondents or its sales executive.

25. It is deponed that the 2<sup>nd</sup> Respondent was summoned following disclosing of false Debtors; who verbally is said to have admitted liability of having created false invoices / Debtors and had actually misappropriated some stock which had been released to him by 1<sup>st</sup> Petitioner without proper authority from the 5<sup>th</sup> Respondent. The 2<sup>nd</sup> Petitioner is alleged to have made proposal to repay the loss of stock attributable to him by mortgaging a property to one of the Saccos to get money to pay. The 5<sup>th</sup> and 6<sup>th</sup> Respondents proceeded to take stock and confirmed that most of the shortfalls was attributable to the 2<sup>nd</sup> Petitioner and also found 1<sup>st</sup> Petitioner could not explain all variances or give the management proof that most of the discrepancies were attributable to the 2<sup>nd</sup> Petitioner. The Petitioners were given time to reconcile the accounts and provide detailed explanation and analysis of the missing stock attributable to each of them.

26. It is deponed in the 5<sup>th</sup> and 6<sup>th</sup> affidavit that it is clear the two petitioners had colluded in stealing/misappropriating the 5<sup>th</sup> Respondent's stock and money. The 5<sup>th</sup> Respondent decided to terminate their services from employment and decided to report the loss/theft of its stock to the 1<sup>st</sup> Respondent, by making a formal complaint of theft by servant on 13<sup>th</sup> April 2017 at Parklands Police Station under OB/52/13/04/2017.

27. The Petitioners urge the 5<sup>th</sup> and 6<sup>th</sup> Respondents made the impugned report because they could not recover debts from their customers who were allegedly supplied by Petitioners and as such lost their stock. The Petitioners contend the issues of outstanding debts of the 5<sup>th</sup> Respondents' customers have no criminal elements and the same ought to be pursued against the customers in civil forum. The 5<sup>th</sup> and 6<sup>th</sup> Respondents state the Petitioners were stealing from the 5<sup>th</sup> Respondent by creating false debtors and had colluded to steal their stock so an offence having been committed they acted properly by reporting the matter to the police.

28. I find from the 5<sup>th</sup> and 6<sup>th</sup> Respondents they had acted within a reasonable and probable cause by laying a formal complaint to the 1<sup>st</sup> Respondent to investigate the matter and from the contents of the parties affidavits, this court cannot make a finding to the effect that the report was actuated by malice and was intended to harass, intimidate and embarrass the Petitioners and/or was made in effort to instil fear in them against taking action against the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

29. The Petitioners urge that their constitutional rights were violated. It is clear that the constitution provides for unfettered right of every citizen who is aggrieved with the conduct of another party to report crime and/or suspected crime to proper agency. In the case *Catherine Wanjiku Kariuki v. AG & another (2011) eKLR* the Court stated:

**“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, or about to be 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 whether crime has been committed or is about to be committed and whether to charge anyone with such a crime. The further role of any person making the initial report or complaint to the police can only be that of a witness. (Emphasis added)”**

30. I find that the law imposes a duty on an aggrieved party to report a criminal offence against a suspect and it is the duty of the police upon receipt of a complaint against any suspect to investigate the complaint and it is solely for the Director of Public Prosecution and no one else to decide whether the complaint discloses any criminal offence and whether the same amounts to reasonable and probable cause.

31. Article 157 (10) & (11) of the Constitution provides:

**“157. Director of Public Prosecutions**

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

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

32. In the case of *Jaribu Credit Traders Limited vs. Amendo Centre (K) Ltd & another (2018) eKLR* Justice L. Njuguna citing from *Kagame & Others v. the AG (1969) E.A 643 citing Hicks Vs. Faulkner (1878) 8 QB167 at 171 of 2000, Herniman vs. Smith (1938) A.C 308 and Glinsia Vs. Malver (1962) A.C 726* stated that:

**“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 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.”**

33. In the instant Petition, the evidence on record is, that the Petitioners are alleged to have colluded in stealing/misappropriating the 5<sup>th</sup> Respondent's stock and monies. The 5<sup>th</sup> respondent in order to establish the loss of stock commissioned full audit from M/s Devani – Devani Company to undertake comprehensive forensic audit of the 5<sup>th</sup> Respondent's stock for the period between January 2015 to December 2016. The report confirmed loss of stock worth Kshs.10,428,791/=. The information and supporting evidence was thereafter forwarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as part of the formal complaint of theft by servant on 13<sup>th</sup> April 2017 at Parklands Police Station under OB/52/13/04/2017.

34. I therefore find that the arrest and arraignment of the petitioners was not arbitrary and was preceded by proper investigation conducted by the 1<sup>st</sup> respondent. This I find is further supported by replying affidavit of No.81666 Emily Cherop dated 13<sup>th</sup> July 2018 and annexures “EC1”, the witnesses statements, “EC2”. Devani-Devani & Company Audit report of the 5<sup>th</sup> Respondent for January 2015 to December 2016; EC3, copy of the charge sheet; and EC4 copy of application and order authorizing all police and members of public to execute the warrant issued against 1<sup>st</sup> Petitioner.

35. I find the information and evidence availed by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents was credible to satisfy a prudent and cautious man that the Petitioners were indeed connected in one way or other with the offence of theft by servant and for which they were charged with. I therefore find from the above that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have met the test of a prudent and cautious man in having been satisfied that there was a proper case to put before the criminal court against the petitioners. I further find that there is evidence on record that after the 5<sup>th</sup> Respondent made a report to the police, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents investigated the case and made the decision to charge the petitioners with a criminal offence of theft by servant.

36. The Respondents herein in receiving the report from the 5<sup>th</sup> and 6<sup>th</sup> Respondents; proceeded to investigate; arresting and charging the

petitioners they were carrying out their constitutional mandate and cannot in my view be victimized in exercising their duty, unless it is shown that they acted contrary to the constitution or statutory provisions and abused their power. The action taken by 5<sup>th</sup> and 6<sup>th</sup> Respondents was lawful and cannot be criminalized for reporting unlawful act. It was the mandate of the police who proceed to carry out independent investigation to forward the file to the Director of Public Prosecution to decide whether to charge or not to charge the Petitioners.

37. The Petitioners contend that there was collusion between the 5<sup>th</sup> and 6<sup>th</sup> Respondents with 1<sup>st</sup> and 2<sup>nd</sup> Respondents to harass and embarrass the Petitioners. They further averred that there has been misuse and abuse of criminal justice system as the complaint lodged against them was a civil dispute and police has no jurisdiction over it. It is urged the police failed to carry out investigation into alleged customer debts and failed to properly exercise the prosecutorial powers.

38. I find contrary to the petitioners contention, the Respondents gathered and recorded evidence from witnesses, carried out investigation and that police has jurisdiction over this matter being a complaint related to theft by servant. The Petitioners have not demonstrated that the Respondents have misused and abused criminal justice system in lodging the complaint against them to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents on 13/04/2017 under OB No.52, which related to stealing by servant. The evidence that ultimately lead to the criminal case against the petitioners strongly show that there was no ill or malice on part of the 5<sup>th</sup> and 6<sup>th</sup> Respondents in making a report to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but rather there was a reasonable and probable cause. I find on the other hand no evidence has been laid down before this court by the Petitioners to suggest malice on part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. I find the pending prosecution of the petitioners was not actuated by malice.

39. From the above findings, the 5<sup>th</sup> Respondent has right as a protected entity within the Republic of Kenya to report any malpractice conducted against it. The 5<sup>th</sup> Respondent through various in-house investigations undertaken by it though its authorized agents, the Petitioners were found to be suspects to various forms of dishonest dealings, with regard to its stock and the 5<sup>th</sup> Respondent exercised its rights of entitlement to report a suspected case to the relevant agency.

40. The Petitioners contend that the 5<sup>th</sup> and 6<sup>th</sup> Respondents allege that the Petitioners failed to recover debts from the 5<sup>th</sup> Respondent's customers or failed to account for stock valued at Kshs.10,428,791/=. They contend further the 6<sup>th</sup> Respondent believed that the 2<sup>nd</sup> Respondent colluded with the 1<sup>st</sup> Petitioner and with assistance with other employees. The Petitioners urge that it is notable that the said other employees were never part of the internal investigations as the 5<sup>th</sup> and 6<sup>th</sup> Respondents had decided to implicate the Petitioners.

41. The Petitioners urge therefore in internal investigations and the auditing of the 5<sup>th</sup> Respondent's by the firm of M/s Devani –Devan Company their rights to equal protection of the law was violated as it adjudged them to culpable while failing to involve other concerned parties.

42. The Petitioners therefore contend the 5<sup>th</sup> and 6<sup>th</sup> Respondents flagrantly discriminated against the Petitioners by purporting to isolate them as criminals prior to any process to confirm the same while neglecting to investigate other employees and Directors thereby denying the petitioners rights envisaged under **Article 27 of the Constitution** while subjecting the petitioners to degrading treatment contrary to **Article 28 of the Constitution**.

43. The Petitioners further argue the agents of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents further violated the petitioners rights to equal treatment of the law by failing to take into account the roles of alleged undisclosed debtors, other employees and directors of the 5<sup>th</sup> Respondent thus condemning them in advance.

44. In the case of **Peter K. Waweru v. Republic (2006) eKLR** the Court held:-

**“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected ... restrictions to which persons of another description are not made subject to have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex,, a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”**

45. **Article 27(1), (4) and (5) of the Constitution** provides as follows:

**“27.Equality and freedom from discrimination-**

**(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”**

46. The 5<sup>th</sup> and 6<sup>th</sup> Respondents state that from the Management Accounts they noticed that a lot of debtors had huge outstanding payments from credit sales generated by the 2<sup>nd</sup> Petitioner, the sales executive and the 1<sup>st</sup> Petitioners colleague and co-accused in the criminal case.

The Petitioners have not demonstrated that out of the people working with them any one else was treated differently from them and that they were isolated as criminals prior to any process. They were indeed given an opportunity to explain before any action was taken or before any investigation was carried out. The fact the investigation was not extended to all other employees, who had no issue about the debtors is not a discrimination against the Petitioners. The investigation turned out that the debtors were false debtors. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not violate the Petitioners right to equal protection of the law as investigation was carried out before action was taken.

47. The Petitioners herein being the two people dealing with the credit sales in which there were outstanding payments were given time by the 5<sup>th</sup> Respondent to collect payments for all goods they had supplied and prepare debtors list which they failed to do. The Petitioners were thereafter summoned to explain what was happening. This was followed by collecting of physical stock at random which disclosed loss of stock. The Petitioners were afforded an opportunity to give written explanations and schedules of all the stock variances and false debtors. The petitioners were also given time to bank any collection from the unexplained variances including the debtors disclosed under the cash sales as admitted by the 1<sup>st</sup> Petitioner. A number of meetings between the Petitioners and the 5<sup>th</sup> and 6<sup>th</sup> Respondents followed. The 5<sup>th</sup> and 6<sup>th</sup> Respondents clearly discovered that the Petitioners had colluded to steal/ misappropriate the 5<sup>th</sup> Respondents stocks and monies.

48. The Petitioners have failed to demonstrated how they have been discriminated by the 5<sup>th</sup> and 6<sup>th</sup> Respondents and 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Petitioners were the only people dealing with credit sales and have not shown that there were other people in their department who were involved and were afforded different treatment to the Petitioners. The Petitioners have not shown that they were treated unfairly or denied normal privileges because of their race, sex, marital status, ethnic or social origin, colour, age, disability, religion, culture, dress, or language or birth. From the above I find that it has not been shown and no evidence has been availed to show that the 5<sup>th</sup> and 6<sup>th</sup> Respondents discriminated against the Petitioners in any way hence leading to the impugned report OB 52/13/04/2017. Further no evidence has been tabled before the Court to show that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the Petitioners right to equal protection of the law in carrying out their investigations leading to the report forwarded to the 3<sup>rd</sup> Respondent.

49. The Petitioner further contend the Respondents contravened their rights under **Article 47 of the Constitution** by abusing criminal justice system. It is urged by the Petitioners that the 5<sup>th</sup> and 6<sup>th</sup> Respondents, out rightly and with ill motive targeted the Petitioners leading to the Report OB No.52/13/04/2017 initiated just few days after what the Petitioners term as illegal, or wrongful termination of services.

50. The Petitioners urge the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had a duty to investigate the complaint pursuant to **Article 10, 232, 238, and 244 of the Constitution** and the **National Police Service Act**, however according to the Petitioners, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents proceeded to adopt the illegal and unconstitutional position of the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

51. The Petitioners claim the 5<sup>th</sup> and 6<sup>th</sup> Respondents outrightly targeted at them and other than making mere allegations the Petitioners have not shown how the 5<sup>th</sup> and 6<sup>th</sup> Respondents outrightly targeted at them. They have not controverted the averments made in the 5<sup>th</sup> and 6<sup>th</sup> Respondents affidavits dated 26/7/2019. The 5<sup>th</sup> and 6<sup>th</sup> Respondents lodged a complaint on suspension of theft by the Petitioners. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents carried out investigation as mandated by the constitution. The affidavit of No.8166 Emily Cherop of 13<sup>th</sup> July 2018, states that she was one of the investigating officers in the criminal case subject of the Petition. She has deponed that on the 13<sup>th</sup> April 2018 they received a complaint from the 5<sup>th</sup> Respondent alleging the Petitioners had colluded to steal from the company being employees. That they commenced investigation, visited the complainant's offices, recorded statement from employees in Accounts Department and from Maurice Ochieng as per attached witnesses statements. From the aforesaid, I find the Petitioners have failed to establish that the 5<sup>th</sup> and 6<sup>th</sup> Respondents outrightly and with ill motive targeted the Petitioners leading to the report OB No.52/13/04/2017. The report was justified in view of the evidence put forward by the 5<sup>th</sup> and 6<sup>th</sup> Respondents. On the other hand the 1<sup>st</sup> and 2<sup>nd</sup> Respondents upon receipt of the complaint carried out their constitutional mandate by investigating the matter and upon completion of the same, forwarded the Report to the 3<sup>rd</sup> Respondent who as per his constitutional mandate made a decision to charge the Petitioners.

52. **Article 47(1) of the Constitution** provides: -

**“47. Fair administrative action**

**(1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

53. The Petitioners have not demonstrated how their constitutional rights to administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair was violated by the Respondents. I find in the instant petition the 5<sup>th</sup> 6<sup>th</sup>, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acted expeditiously, efficiently, lawfully, reasonably and procedurally fairly, in making the Report to 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents carried out their obligations and made a decision on the Report.

54. The Petitioners urge that the detention of the 2<sup>nd</sup> Petitioner was irregular, illegal and constitutional. It is averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents arrested 2<sup>nd</sup> Petitioner on 20<sup>th</sup> July 2017 and detained him till 23<sup>rd</sup> July 2017. This is well captured from paragraph 46 – 49 of the Petitioner's amended Petition. The Petitioner urge the 2<sup>nd</sup> Respondent ought to have been presented to Court on 20<sup>th</sup> July or 21<sup>st</sup> July 2017 within 24 hours. However the 2<sup>nd</sup> Petitioner was detained for a period of more than 24 hours.

55. **Article 49(1) (f) (i) (ii) 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;

(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;

56. The contents of the petitioners supporting affidavit under paragraph 5 to 12 and paragraphs 46 – 49 of the Petitioners Petition are not controverted by the Respondents. I therefore find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents agents stationed at Gigiri and Parkland Police Stations violated the 2<sup>nd</sup> Petitioner’s rights to be charged timeously and /or to be released on bond/bail pending charging contrary to **Article 29(b) and (f)** of the Constitution which provides:

**“29. Freedom and security of the person Every person has the right to freedom and security of the person, which includes the right not to be—**

**(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;**

**(f) treated or punished in a cruel, inhuman or degrading manner.”**

57. The agents of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted maliciously in arresting and detaining the 2<sup>nd</sup> Petitioner as the Report OB 52/12/04/2017 had been reported at Parklands Police Station and not Gigiri Police Station. The 2<sup>nd</sup> Petitioner should have been taken straight away to Parklands Police Station but not Gigiri Police Station. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to explain the reasons for the detention of the 2<sup>nd</sup> Petitioner at Gigiri Police Station contrary to Article 47 of the Constitution. The detention of the 2<sup>nd</sup> Respondent was contrary to clear provisions of the constitution and without any explanation or justification, thus it is a clear violation of rights of an arrested person and an abuse of criminal justice system by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

58. In the case of **Michael Rotich v. Republic [2016] eKLR**, Kimaru J. considered the provision for 24 hour rule and held as follows:

**“...It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010. A person’s right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the Constitution says so.”**

59. The Petitioner submit that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the 2<sup>nd</sup> Petitioner’s rights as enshrined under **Article 29 (b) and (f) and 47(1), 49(f) of the Constitution** and implores the court to award the 2<sup>nd</sup> Petitioner compensation of Kshs.2,000,000/=.

60. In the case of **Akusala A. Bonface v. OCS Langata Police Station & 4 others [2018] eKLR** the Court in addressing illegal detention held that:

**“I find that the Petitioner suffered both mental and physical torture while in custody for which he deserves compensation in damages...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 where 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.”**

61. The 1<sup>st</sup> Petitioner avers that his right to privacy was violated as stated under paragraphs 44 and 45 of the petition and paragraphs 18 to 21

of the supporting Affidavit in that Cpl Owaga, the agent of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, indicated that they accessed the 1<sup>st</sup> Petitioner's transactions, activity and communications on mobile phone number 0722656065 until it was switched off thus promptly him to publish the public notice on 7/6/2018.

62. Article 31 of the Constitution provides:

**“31. Privacy**

**Every person has the right to privacy, which includes the right not to have—**

- a. their person, home or property searched;**
- b. their possessions seized;
- c. information relating to their family or private affairs unnecessarily required or revealed; or**
- d. the privacy of their communications infringed.”**

63. In the case of *Coalition for Reforms Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 others [2015] eKLR* the Court held that:

**“We are clear in our minds that surveillance in terms of intercepting communication impacts upon the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of Kennedy vs. Ireland (1987) I.R. 587 it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In this view:**

**“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephone, are deliberately, consciously and unjustifiably intruded upon and interfered with.”**

64. Further in the case of *M W K & another vs. Attorney General & 3 others (2017) eKLR* the Court stated:

**“This Court, in line with its constitutional mandate to promote and protect the values and ethos that underpin our Constitution, will undoubtedly find and hold that an arrest, search and detention of a child that violates privacy and dignity of the child is unconstitutional. The thrust of this conclusion is that, because an arrest, search and detention constitutes an infringement of a person's rights to his or her liberty, dignity and privacy, all of which are enshrined in the Bill of rights, the action must be justifiable according to the dictates of the Bill of Rights. Thus, in line with our nascent human rights culture, before every arrest, search and a detention of a child is executed, police officers must consider whether there are no less invasive methods which may be used to bring the suspect before court and to secure the evidence.”**

65. The right to privacy has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under *Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples' rights.*

66. B. Rossler in his book, *The Value of Privacy* (Polity, 2005) p. 72 explains the right to privacy as follows:-

**“The concept of right to privacy demarcates for the individual realms or dimensions that he needs to order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to.”**

67. As to whether there is need to protect privacy, he goes on to write that:

**“Protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part”.**

68. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents in the affidavit of No.81666 Emily Cherop contend that Maurice Ochieng Onyango was arrested and charged with the offence of theft by servant. He however went into hiding and switched off, the phone forcing the officers to put up his phone in the dialling. The deponent urges the decision to publish the Petitioners photograph in the newspapers was made pursuant to a court order and after numerous efforts made by police to trace the petitioner who had gone into hiding once he found out that his accomplice had been arrested.

68. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents have attached copy of the application and the order as “EC.4”. The Notice of Motion “EC.4” dated 24<sup>th</sup>

May 2018 sought an order for the warrant of arrest to issue against John Siwo Nyajwaya for stealing by servant contrary to section 281 of the Penal Code. It also sought any other orders that court may deem fit and just to grant. **The order issued and signed on 24<sup>th</sup> May 2018 authorized all Police Officers in Kenya and members of public to execute the warrant** issued therein.

70. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge that they acted within a valid courts order as averred in the affidavit of No.81666 Emily Cherop. The Court had only issued warrant of arrest but not an order to access the 1<sup>st</sup> Petitioners transactions, activities and communications in his mobile phone number 0722656065. Warrant of arrest in my view is totally different from access of one's mobile transaction, activity and communication in his mobile phone. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in accessing the 1<sup>st</sup> Petitioner's transactions, activities and communications were in violation of the 1<sup>st</sup> Petitioners right to privacy. The 1<sup>st</sup> Petitioner dignity and freedom of individual was violently infringed. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents acts violated the Petitioner's right to privacy as clearly provided at **Article 31 of the Constitution**.

71. The Petitioner's counsel implores the Court to award the Petitioner Kshs.5,000,000/= for violations on his right to privacy as he ought to be compensated.

72. The Petitioner urge that Respondents have contravened the principle against self-incrimination. The 5<sup>th</sup> and 6<sup>th</sup> Respondents. It is urged in their Replying Affidavit they aver that all the pieces of information they provided to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and which were forwarded to the 3<sup>rd</sup> Respondent emanated from the 2<sup>nd</sup> Petitioner as per paragraph 5, 6, 7 and 8. It is also urged that the report alluded to in paragraph 9 of the Replying Affidavit, Devani & Devani Company adopted the statements of the 5<sup>th</sup> and 6<sup>th</sup> Respondents line, book and as per paragraph 3, 4, 5, 6, 10, 11 and 12 of the report attached to the Replying Affidavit.

73. The Petitioners once again reiterate that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to investigate the Report OB/52/04/2017 but choose to adopt the self-incriminating evidence purportedly manufactured by the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

74. The Petitioners in support of the above preposition relies on the case of **R vs. Mark Lloyd Stevenson [2016] eKLR (Kiambu Criminal Revision No. 1 of 2016)**, which authoritatively quoted European court of Justice in **Saunders v United Kingdom A/702 (1997) 23 EHRR 313** to the extent that:

**“that the right against self-incrimination lies ..in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence...The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.”**

75. **Article 50(1) (l) of the Constitution** provides:-

**“50. Fair hearing**

**1. 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 or, if appropriate, another independent and impartial tribunal or body.”**

76. From the above article it is clear that every accused person has a right to a fair trial which include the right to refuse to give self-incriminating evidence. The Petitioner in this Petition is seeking to have a purported self-incriminating statements to the 5<sup>th</sup> and 6<sup>th</sup> Respondents by the 2<sup>nd</sup> Petitioner declared, that it controverted the principle against self – incrimination. If I understand the 2<sup>nd</sup> Petitioner correctly he is trying to stray from the court seized with his criminal case from considering the alleged self-incriminating statements.

77. He is further seeking to have the reports and statements currently held by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents regarding OB 52/13/04/2017 and City Court Criminal Case No.738 of 2018 declared as violating his constitutional rights as against self-incrimination as envisaged **under Article 49(1)(b) and (d) of the Constitution**. The alleged statement were made before the 5<sup>th</sup> and 6<sup>th</sup> Respondents by which time the 2<sup>nd</sup> Petitioner was not under arrest but under a non-judicial investigation. This I find may not be invoked to justify the use of the answers that might have been obtained through force or duress or contrary to principles governing obtaining of confessions. The documents and exhibits obtained from the Petitioners are awaiting to be used in criminal court. This court is not the trial court and there is a process under which the 2<sup>nd</sup> Petitioner can challenge that evidence before the trial court, which is seized with the subject matter. I find that, the attempt of the Petitioners to bring the trial to this Constitutional Court is not proper. However I have to point out that **Article 50(2)(f) of the Constitution** provides that every accused person has a right to fair trial which includes the right to refuse to give self-incriminatory evidence. **Article 49(1) (b) and (d) of the Constitution** provides that an accused person has right to remain silent and not to be compelled to make any confession or admission that could be used in evidence against the person. That if any of the rights of the Petitioners were breached the petitioner has the right to raise the issue with the trial court, which is competent enough to consider the complaint and upon following due process make a decision on the subject matter. I find that would be reasonable and prudent not to delve into that matter relating to hearing criminal case before a trial court but let the issue to be canvassed at the appropriate time before the trial court.

78. As regards the legal position over this matter this court is guided by decision in vase of **Saunders v United Kingdom [1997] 23 E.H.R.R. 313** in which it was held:

**“69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of**

compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.”

“74. Nor does the Court find it necessary, having regard to the above assessment as to the use of the interviews during the trial, to decide whether the right not to incriminate oneself is absolute or whether infringements of it may be justified in particular circumstances.

It does not accept the Government’s argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure. Like the Commission, it considers that the general requirements of fairness contained in Article 6 (art. 6), including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings. It is noteworthy in this respect that under the relevant legislation statements obtained under compulsory powers by the Serious Fraud Office cannot, as a general rule, be adduced in evidence at the subsequent trial of the person concerned. Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.”

79. The right not to incriminate oneself, is only attainable if the right to remain silent and not to be compelled to make any confession or admission is respected by all as material, which are obtained from an accused person through use of compulsory powers or force or duress and against independent will of the suspects should not be relied upon in criminal proceedings. The departure from the laid down procedure in matters of investigation or the confession as regards obtaining statements from the accused persons which may result in breach of the basic principles of a right to fair trial should not be allowed. The constitutional requirements of fairness contained in *Article 49 and 50 of the Constitution* including the right not to incriminate oneself, apply to all criminal proceedings in respect of all types of criminal offences without distinction from either simple or most complex cases. The public interest under *Article 157(iii) of the Constitution* cannot be a basis or be invoked to justify the use of answers or statements compulsorily obtained in a non-judicial investigation to incriminating the accused during the trial proceedings. In brief I am of the view that answers and/or responses or confessions obtained under such circumstances cannot be adduced at the subsequent trial of the person concerned. Further as regards statements made by the accused prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.

80. The Petitioners aver that the Respondents have violated their right to access information. The Petitioners contend that they have requested for production of the documents listed at paragraphs 30 and 31 of the petition as envisaged under *Article 35(1) of the Constitution*. It is claimed the documents were sought through various letters annexed to the Petitioner’s affidavits, to the chamber summons dated 20<sup>th</sup> October 2018 to which court made orders on 28/11/2018 for the said documents to be availed. Unfortunately, the Respondents ignored and/or neglected the Petitioners requests and the court order. The Petitioners contention is that the Respondents are withholding the requested documents intentionally to cover up their illegal, irregular and unconstitutional activities.

81. *Article 35(1)(a) and (b) of the Constitution* provides that every citizen has a right of access to information held by the state and information held by another person required for the exercise of protection of any right or fundamental freedom.

82. In the case of *Katiba Institute v. Presidents Delivery Unit & 3 others (2017)* the Court stated:-

“... therefore, the right to access information becomes a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

...The right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the Constitution and is protected by the same Constitution...The right to access information as a basis for accountability, responsiveness and openness...”

83. The Constitution speaks in unambiguous manner as regards information held by the state or by another person that it is accessible by citizens and should be availed on request without undue delay. The availing of the information is not subject to conditions nor is it negotiable as long as the information is in possession of the state, state officer or public body. In the instant Petition I find that the petitioners are guaranteed the right to access documents which affect their rights to fair trial. The respondents abdication from discharging their obligation under *Article 35(1) of the Constitution* together with *Sections 2, 9, and 21 of the Access to Information Act*, is tantamount to denying the Petitioners right to fair hearing contrary to *Article 25(a), & (c) of the Constitution* which provides that despite any other provision in the Constitution, the following rights and fundamental freedoms shall not be limited; freedom from torture and cruel, inhuman or degrading treatment or punishment and the right to fair trial. The Respondents have no alternative in this matter but to avail the information in their possession on request and following the court’s order issued on 20/11/2018.

**B. WHETHER THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS WERE COMPROMISED BY THE 5<sup>TH</sup> AND 6<sup>TH</sup> RESPONDENTS AS ALLEGED BY THE PETITIONERS?**

84. The Petitioners aver that while employed by the 5<sup>th</sup> Respondent, the 6<sup>th</sup> Respondent indicated to them in no uncertain terms that he was going to compromise the officers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to make their lives miserable and worthless. The Petitioners contend that the complaint lodged on 13/04/2017 under OB No. 52 was for recovery of debt which the agents of 1<sup>st</sup> to 3<sup>rd</sup> Respondents have no jurisdiction over as the same constitutes civil disputes and without any criminal elements.

85. The Petitioner aver that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted outside the law and abused their powers in being used by the 5<sup>th</sup> and 6<sup>th</sup> Respondents in coercing and harassing the Petitioners into recovering the debts of the 5<sup>th</sup> Respondent notwithstanding alleged glaring irregularities, omissions and misrepresentations from the 5<sup>th</sup> Respondent's agents. The Petitioners further allege CPL Owaga acted in a manner suggesting that he was compromised by the 5<sup>th</sup> and 6<sup>th</sup> Respondents, urging the long detention of the 2<sup>nd</sup> Petitioner was a clear indication of the ulterior motive. The Petitioners contend therefore it was wrong, irregular and erroneous for the 3<sup>rd</sup> Respondent to act on tainted investigations by 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It is further contended that the 3<sup>rd</sup> Respondent joined the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in using the criminal justice system for ulterior motives and harassment of the Petitioners. The Petitioners further urge that the report Number OB/52/13/04/2017 and charges in City Court criminal case no.726 of 2018 were mere tools and results of abuse of criminal justice system in blatant violation of **Articles 28, 29(1) (d) & (f), 47, 49 and 50(1) of the Constitution** and same ought to be quashed.

86. In support of the above proposition the petitioners sought to rely on the case of **Macharia & another v. AG & Another (2001) KLR 448** where the Court stated:

**“a) it is for a purpose other than upholding the criminal law;**

**b) it is meant to bring pressure to bear upon the Applicant/Accused to settle a civil disputes;**

**c) it is an abuse of the criminal process of the Court;**

**d) it amounts to harassment and is contrary to public policy;**

**e) it is in contravention of the Applicant's constitutional right to freedom”.**

87. The Petitioners further urge that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are being used for purposes of illegally recovery of debts from the 5<sup>th</sup> Respondent's debtors and/or using the criminal justice system to frustrate, coerce, harass and intimidate the Petitioners with a view to receiving personal gain and in blatant breach of the Constitutionally guaranteed cardinal, principles and safeguard.

88. The Petitioner rely on the case of **John Muiruru Kigwe & another v. Republic HCCR 223 of 2000** where it was held that the court has the inherent power to terminate proceedings that are an abuse of the process and thus protect citizens from malicious prosecution that may lead to unnecessary infringement and curtailment of their rights.

89. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents aver that they received complaint from the 5<sup>th</sup> Respondent company of alleged collusion of the petitioners to steal from the company; carried out investigation relating to the theft by servant and the investigation revealed, the alleged customers did not have any outstanding balances and from the 5<sup>th</sup> Respondent's evidence it was revealed the Petitioners were culpable of the allegations levelled against them by the 5<sup>th</sup> Respondent. That pursuant to the investigation the Petitioners were arrested and charged with the offence of theft by servant.

90. The relevant evidence arising out of the investigation was forwarded to the 3<sup>rd</sup> Respondent for review and appropriate directions. The 3<sup>rd</sup> Respondent directed that an audit report be conducted and thereafter made a decision to charge the two Petitioners which decision was based on the law and evidence on record and not on any other collateral reasons. It has not been demonstrated that in making the decision to prefer criminal charge against the Petitioners, the 3<sup>rd</sup> Respondent acted without or in excess of the powers conferred upon him by the law or have infringed, violated, contravened or in any other manner failed to comply with or respect and observe the relevant provision of the constitution of Kenya 2010 or any other provision of any statute thereof.

91. It is further asserted the Petitioners have failed to demonstrate the 3<sup>rd</sup> Respondent have not acted independently or has acted capriciously or in bad faith or has abused the legal powers in a manner to trigger the High Court's interventions.

92. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents urge that there is no evidence of malice, unlawful actions, excess or want of authority, harassment or intimidation or even manipulation of the court process so as to seriously deprecate the likelihood that the Petitioner might not get a fair trial, as provided for under the constitution, to warrant this Court to interfere with the independent decision of the 3<sup>rd</sup> Respondent. It is urged further the right to liberty is not absolute, as **Article 24 of the Constitution**, is clear that a right or fundamental freedom in the Bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

93. The 3<sup>rd</sup> Respondent further urge the prayers sought by the Petitioners are unconstitutional as they seek to prevent the 3<sup>rd</sup> Respondent from exercising its constitutional mandate as provided under **Article 157 of the Constitution**.

94. It is further averred by the 4<sup>th</sup> Respondent, that there is insufficient material disclosure to demonstrate, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted unlawfully or outside their powers or that the prosecution in question was commenced without proper or reasonable foundation nor is there any evidence that the action or prosecution was actuated on malice or bad faith. That the fact the criminal charges have been preferred against the petitioners is not a violation of their constitutional rights, especially since the actions complained of the petitioners fall within the

constitutional mandates of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

95. The Petitioners have not demonstrated violation or infringement of their rights by the 4<sup>th</sup> Respondent.

96. Under **Article 157 of the Constitution of Kenya 2010**, the 3<sup>rd</sup> Respondent is mandated to institute and undertake criminal proceedings and its provided that the Director of Public Prosecution shall not require the consent of any person or authority for commencement of any criminal proceedings. It is also provided that in the exercise of the powers of the DPP, he shall not be under the direction or control of any person or authority.

97. The clear and unambiguous import of the above provision of the law, is that the responsibility to investigate, determine the credibility of the complaint and prosecution is solely left for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents under the direction and control of the 3<sup>rd</sup> Respondent, the Director of Public Prosecution. The predominant fact being, that they must act in accordance with the law and so long as they do not exceed the limits or act in bad faith, then a court should not prohibit the prosecution of an individual. The investigation of a criminal offence or complaint cannot be easily prohibited or stopped unless there is credible and reasonable evidence to show the same is mounted for an ulterior purposes or objectives, which the petitioners have failed to demonstrate and establish in this petition. Once a complaint is lodged the investigative agency is expected to carry out investigation with regard to public interest, the interest of administration of justice and need to prevent and avoid abuse of the legal process.

98. In the case of **Cape Holding Limited v Attorney General & another (2012) eKLR**, Justice M. Warsame, relying on the High Court Civil Case No.61 of 2006 and 196 of 2006 **Bryan Yongo vs. Hon. Attorney General**, the Court, at page 10-11, had this to say regarding the charge, in this case of forgery.

**“It is important to recall the principle in (WILLIAM & OTHERS v SPAUTZ (1993) 2LRC 659) case that the purpose of criminal proceedings generally speaking is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account is deserving of punishment. In the context of this case, forgery is an offence under our law and it would be necessary to have this determine by a competent court.”** (Emphasis added).

99. The Petitioners in this Petition have raised allegedly several Constitutional infringements among them, accusing the 5<sup>th</sup> and 6<sup>th</sup> Respondents of using their financial muscle to influence the purported unlawful detention of the petitioners by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, which the 5<sup>th</sup> and 6<sup>th</sup> Respondents have denied. The Petitioners other than making averments have not tendered any evidence at all in support of the 5<sup>th</sup> and 6<sup>th</sup> Respondents allegedly use of their financial power to influence the respondents to arrest and charge the petitioners.

100. The evidence on record is, that the 5<sup>th</sup> Respondent made the report and/or lodged a formal complaint with the 2<sup>nd</sup> Respondent. The 5<sup>th</sup> Respondent was not involved in the decision making to investigate, charge and prosecute the petitioners. The decision was for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to make and the only role for the 5<sup>th</sup> Respondent was to record witness statement and appear in court as a witness through its directors. I find therefore it was sole responsibility of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, to decide to prosecute the petitioners depending on the outcome of their investigations which they independently carried out without any directions and/or influence from the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

101. The 5<sup>th</sup> and 6<sup>th</sup> Respondents rely on the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal no. 115 of 2006** where the court held, inter alia that:

**“The plaintiffs were arrested and charged by the pole. And the prosecution was undertaken by the Attorney –General (now DPP) 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...”** (Emphasis Mine).

102. The Petitioners have alleged that the Report and/or the formal complaint by the 5<sup>th</sup> Respondent with the 2<sup>nd</sup> Respondent, was made with the view to stifle the Petitioners desire to seek justice against the alleged unfair termination of their services by the 5<sup>th</sup> Respondent and have thus compromised the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. I find the Petitioners have not demonstrated by way of evidence how the 5<sup>th</sup> and 6<sup>th</sup> Respondents have influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to proceed to charge the Petitioners. The Petitioners only made serious allegations, which they have not bothered to demonstrate by way of evidence.

103. Justice Isaac Lenaola, as he then was in dismissing Petition in **Paul Ng’ang’a Nyaga & 2 others v. Attorney General & others (2013) eKLR** acknowledged the function of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stating their recognition under the constitution and statute. He therefore reiterated precedent set in **Luka Angaiya Lubwayo & Another vs. Gerald Otieno Kajwang & Another Petition No. 120 of 2013** where he stated that;

**“In that regard, I am alive (as stated above) to the fact that this Court under Article 165 (3) (a), cannot enter into matters reserved for another body established by statute. I am also aware that this Court, under Article 165(3) (d) (i) and (ii) of the Constitution can exercise its jurisdiction to determine whether any law or anything done under the authority of the Constitution is inconsistent with the Constitution. Article 165(3) (a) of the Constitution states that the High Court can; “hear and question relating to the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the constitution or any law is inconsistent with or in contravention of the Court.”** (Emphasis added).

104. The Petitioners in the above case had expressed fear that the interested party had used its financial might to compromise the DPP. The Petitioners also believed the 3<sup>rd</sup> Respondent being the complainant at Criminal Court was acting in cahoots with the police to defeat the criminal justice system. Justice Lenaola (as he then was) stated that :

**“The Petitioners in this case must also demonstrate with particularity how their rights have been infringed and the violation or threat they face and the damages suffered by this alleged infringement – See Anarita Karimi Njeru vs. The Attorney General (1979) KLR 154”.**

**It is therefore obvious to me that looking at the facts and the law as I have rendered above, the Petitioners are jumping the gun and are seeking orders that this court cannot properly grant. In any event, I see no violation or threatened violation of any constitutional right or freedom due to them.**

**For the above reasons, I find no merit in the petition before me and the same is dismissed. As to costs, clearly the Petitioners were pursuing personal interests. Costs follow the event and so they shall pay costs to the Respondents and Interested Party.”**  
(Emphasis added).

105. The Petitioners herein contend that the 5<sup>th</sup> Respondent report related to the civil claim, for which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on to charge the Petitioners in misusing the criminal justice system. The law is clear, that in respect of civil matter arising from the same facts and circumstances that also point to possible commission of a criminal offence, that cannot of itself be an ulterior motive in the prosecution of the criminal offence. *Section 193A of the Criminal Procedure Code* provides thus:

**“193A. Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”**

106. From the above I am persuaded, on facts before me, in this petition and from the provision of *Section 193A of the Criminal procedure code*, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents action upon investigation on complaint of theft by servant, that there is no ulterior or improper motive for the petitioners’ prosecution nor is there evidence that the DPP has abused his constitutional mandate under *Article 157 of the Constitution*.

107. It is trite law, that he who alleges must prove. The petitioners have made averments to the effect that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were compromised by the 5<sup>th</sup> and 6<sup>th</sup> Respondents. The Petitioners have not given any substantial basis or proof of the 5<sup>th</sup> and 6<sup>th</sup> Respondents’ involvement or interference with the functions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It is trite law that mere suspicion cannot be a basis for conviction or proving of a case against an accused person. The Petitioners have failed to prove their serious allegations herein. I find following such a failure the Petitioners should therefore allow the criminal court to carry out its function and reach its final determination.

108. I further find that the Petitioners have failed to demonstrate the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lack of jurisdiction or acted in excess of jurisdiction or have not complied with the Rules of Natural Justice. I find that it is at any event, outside the jurisdiction of this court to supervise how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should conduct their investigations, unless there is evidence to show that the investigation is/was conducted in a manner prejudicial to the rights and the interest of the petitioners. It has in this matter not been shown that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in their investigations were not in any way compromised as alleged. It has been demonstrated that 1<sup>st</sup> and 2<sup>nd</sup> Respondents executed and performed their statutory functions in accordance with the constitution and statute in determining whether criminal offence had been committed by the Petitioners.

### **C. WHETHER THE PETITIONERS CONSTITUTIONAL RIGHTS TO FAIR HEARING WILL BE UPHELD AT THE CRIMINAL COURT?**

**109. Article 50 (1) of the Constitution of Kenya 2010**, provides that every person is entitled to a fair hearing, which right is non-derogable constitutional guarantee and a critical ingredient to natural justice. The principles of natural justice imply and includes; fairness, reasonableness, equity and equality. I find the allegations made by the Petitioners in this Petition imply a predisposed fear of the unknown while awaiting the trial. The law is clear that a criminal court has the proper jurisdiction to accord any accused person, including herein the Petitioners a fair hearing and protect any of their rights, the Petitions purport to have been infringed.

110. In the case of *Hannah Wambui Githire v. Director of Public Prosecutions & 3 Others (2018) eKLR* Hon. Justice G. V. Odunga dismissing an application seeking inter alia; order of Prohibition directed at the DPP and principal Magistrate Kibera seeking to restrain them from undertaking, conducting or conducting any form of criminal proceedings against the applicant stated that:

**“However it must also be taken into account that our criminal process entails safeguards which are meant to ensure that an accused person is afforded a fair trial and the trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit he accused. Our criminal process also provides for a process of an appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution.”**  
(Emphasis added).

111. The Legal principle of *audi alteram partem accentuates* is the rule of fair hearing which dictates that no persons should be condemned unheard. This principle requires that those who are likely to be directly affected in a matter should be given prior notification of the action proposed to be taken, of the time and place of any hearing. That is to be conducted, and informed of the charge or case they will be called

upon to meet. In the instant Petition, presently there is no decision as to whether the petitioners are guilty or otherwise, as none has been entered at any point.

112. The Court record is clear, that the 1<sup>st</sup> Petitioner sought for anticipatory bail orders from this court and the same were granted on 3<sup>rd</sup> July 2018. I find accordingly the Petitioners should not be apprehensive given that there are adequate safeguards in the Kenyan Criminal Justice System anchored on the Constitution to ensure an accused person gets fair trial.

113. I find as per Constitutional safeguards in place, the Petitioners need not fear as they will be afforded a fair trial before a criminal court, which is better placed to consider the evidence placed before it; the merits and demerits of the case and ultimately decide whether or not to place the accused (Petitioners) on their defence or find they have no case to answer; and even after being placed on their defences, the court may well upon hearing them, proceed to acquit the accused (Petitioners). Further the criminal processes also provides for a process of an appeal, where an accused, who is aggrieved by the decision in question can challenge the conviction. The acquitted person in addition has an avenue for compensation by way of a claim for malicious prosecution. From the above the Constitution has put in place adequate safeguards to ensure constitutional right to fair hearing are upheld at the criminal court.

#### **D. WHAT ORDERS ARE THE PETITIONERS ENTITLED TO?**

114. The Petitioners pray that all orders sought in their Petition be granted as prayed. The Petitioners further seek anticipatory bail, as an alternative relief on behalf of the 1<sup>st</sup> Petitioner, in case the Honourable court directs that the charges be preferred, the same terms of anticipatory bail be maintained.

115. On an order for disclosure of documents in paragraph 30 and 31 of the Petition, the Petitioners pray that the same be supplied within 21 days or in the alternative the Respondents be barred from taking any further action against the Petitioners before compliance.

116. The Petitioners on claim for damages/compensation for violations of rights, the Petitioner pray for damages of Kshs.2,000,000 for unlawful detention for 2<sup>nd</sup> Petitioner and Kshs.5,000,000 for the 1<sup>st</sup> Petitioner and damages for other violations.

117. The Petitioners in seeking an award of damages relies on the decision in the case of *Edward Akong'o Oyugi & 2 Others vs. Attorney General (2019) eKLR* to the extent that :

**“Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. [63] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court.”**

118. The Respondents contention are that the orders sought by the Petitioners are orders of prohibition seeking to prohibit the 3<sup>rd</sup> Respondent; DPP from prosecuting the criminal case filed against the Petitioners for the offence of theft by servant in City Law Court Criminal Case No. 726 of 2018. This Court has power and duty to prohibit the continuation of criminal prosecution, if it is demonstrated that extraneous matters guide the basis of the prosecution or where public power and authority are used as tools to intimidate, harass or achieve an ulterior motive not pertaining to that which the system was even formed to perform.

119. Further to the above, an order of prohibition should be granted where compelling, an accused to stand trial would violate the fundamental principles of justice underline on societies sense of foul play and decency and/or where the proceedings are oppressive or vexatious. In the instant petition and contrary to assertions by the Petitioners, it has not been shown or demonstrated to this court, that indeed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents used public power and authority to intimidate, harass or achieve an ulterior motive not pertaining to that which the system was formed to perform but rather simply executed their mandate and function.

120. In Civil Appeal No. 266 of 1996 *Kenya National Examination Council* Case, the Court of Appeal laid down the principles upon which the orders sought by the Petitioners would be issued. The Court of Appeal held that:

**“an order of prohibition would issue against an inferior tribunal or body forbidding the tribunal or the body from continuing proceedings in excess of jurisdiction or in contravention of the laws of the land. An order of Prohibition lies not only for excess of jurisdiction or lack of it, but also for a departure from the rules of natural justice. It does not lie to correct the course practice or procedure of an inferior tribunal.” (Emphasis added).**

121. I find that, it is imperative in dealing with cases similar to the instant one, for the court to be extremely cautious in its findings so as not to prejudice the intended or pending criminal proceedings. The court in its findings ought to walk on a thin and straight path so as not to usurp the mandate of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents herein, to investigate and undertake prosecution in exercise of their discretion, conferred upon that office under *Article 157 of the Constitution*, and that the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting these proceedings by way of Judicial Review or Constitutional Petition.

122. It should be noted that Judicial Review or Constitutional Petition are not concerned with the merits but with the decision making process. Where it is contended that the Petitioner has a good defence in the criminal process, that ought not to be relied upon by a court in order to halt criminal process undertaken bonafide since that defence is open to the Petitioners in those proceedings.

123. In the case of *Republic vs. Commission of Police and another Ex-parte Michael Monari & Another (2012) eKLR* the Court stated that:-

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

124. Justice G. V. Odunga in the case of *Hannah Wambui Githira v. Director of Public Prosecution & 3 others (2018) eKLR* relied on the case of *Republic v. Chief Magistrate Court at Mombasa Ex-parte Ganijee & Another [2002] 2 KLR 703*, the Court was of the view that;

**“it is when the predominant purpose of the criminal proceedings is to further that ulterior motive that the High Court steps in. In other words where that motive is not the predominant purpose of the criminal proceedings, the High Court may well allow the proceedings to proceed.”** (Emphasis mine).

125. I find though this Court has power to prohibit the 3<sup>rd</sup> Respondent, DPP, from prosecuting the Petitioners for the offence of theft by servant, it can only do so upon the Petitioners discharging the burden of proof placed on them. I find no justification or sufficient grounds to justify prohibiting the 3<sup>rd</sup> Respondent from proceeding with the prosecution of the Petitioners. I find the Petitioners ought to be ready to face their accusers and prove their innocence or otherwise and submit to the consequences of the law should they be found culpable. I find further hold that in the circumstances of this case, it would be in the interest of the Petitioners; the Respondents, the complainant, and the public at large, that the criminal prosecution instituted against the Petitioners, be heard and determined promptly, in order to know where the truth lies and set the issues to rest and the petitioners to have an opportunity to clear their names.

#### **E. WHO SHOULD BEAR THE COSTS?**

126. The Petitioners pray for costs at any event.

127. The 5<sup>th</sup> and 6<sup>th</sup> Respondents seeks for costs and relies on a decision by Hon. Justice John Mativo in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR*, relied on the case of *Republic vs Rosemary Wairimu Munene, Ex-parte Applicant Vs. Ihururu Dairy Farmers Co-operative Society Ltd* where the court held as follows:-

**“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”** (Emphasis added).

128. **Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that the award of costs is at the discretion of the court. The Court in exercising discretion to award costs, is required to take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. The basic rule is however, that costs always follows the event but that should however not be used to penalise the losing party, but rather for compensating the successful party for. Costs and troubles undergone in the litigation.

129. To the extent of my findings I find the Petitioners Petition partially succeeds and fails. I therefore make the following orders:-

**a. Prayers (a), (b) and (c) of the Petitioners Petition are without merit and are dismissed.**

**b. A Declaration be and is hereby issued that the 1<sup>st</sup> Petitioner’s Rights to privacy were violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**c. A Declaration be and is hereby issued that the 2<sup>nd</sup> Petitioner’s rights to freedom were violated by 1<sup>st</sup> and 2<sup>nd</sup> Respondents for being detained for a period of 4 days.**

**d. The 1<sup>st</sup> Petitioner is awarded Kshs.2,000,000 for violations of his rights to privacy.**

**e. The 2<sup>nd</sup> Petitioner is awarded Kshs.1,200,000/= for illegal detention.**

**f. A Declaration be and is hereby issued that the Petitioners right to access to information was violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**g. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents do supply the Petitioners with documents listed under paragraph 30 and 31 of the petitioners Petition and all documents which the prosecution intend to rely on, save under 30(d) of the Petition as it has not been demonstrated nor specified which right will be protected by obtaining information with regard to Mpesa record of the officer. The documents to be relied upon at criminal trial be supplied to the Petitioners within 14 days from the date of this Judgment.**

**h. In the instant Petition both the Petitioners and the Respondents have partially succeeded and considering the nature of the Petition and the outcome. I direct each party to bear its own costs.**

Dated, Signed and Delivered at Nairobi on this 16<sup>th</sup> day of July, 2020.

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**J. A. MAKAU**

**JUDGE**