REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 120 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 156, 157, 165, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS UNDER ARTICLES 10, 25, (C), 29 (A), 47, 48, AND 50(N) OF THE CONSTITUTION

AND

IN THE MATTER OF THE TOURISM ACT NO. 28 OF 2011 OF THE LAWS OF KENYA

AND

IN THE MATTER OF TOURISM REGULATORY AUTHORITY REGULATION 2014

AND

IN THE MATTER OF ARTICLES 9, 10, AND 11 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF ARTICLES 9, 10 AND 15 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF ARTICLE 7 OF THE AFRICAN CHARTER ON HUMAN RIGHTS

AND

IN THE MATTER OF ARTICLE 5 AND 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

AND

IN THE MATTER OF THE CHIEF MAGISTRATE CRIMINAL CASE NO. 1165 OF 2018

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHTS OF FAIR HEARING AND RIGHT TO FAIR ADMINISTRATIVE ACTION

BETWEEN

MOLLINE TRADERS LIMITED.....1ST PETITIONER

TABITHA WAIRIMU MBURU.....2ND PETITIONER

VERSUS

TOURISM REGULATORY AUTHORITY.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

CHIEF MAGISTRATE COURTS

MILIMANI LAW COURTS.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE .....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.5TH RESPONDENT

JUDGMENT

PETITION

1. The Petitioner through a Petition dated 25th March 2019 seek the following reliefs:-

a) A declaratory order does issue declaring that the arrest and prosecution of the 2nd Petitioner before the 3rd Respondent amounts to abuse of prosecution powers by the Respondents and the provisions of the Tourism Act and a breach of the Petitioner's rights and freedoms and in particular the provisions of Article 47 and 50 of the Constitution.

b) A declaratory order does issue declaring that the continued prosecution of the 2nd Petitioner is unlawful, illegal and unconstitutional and thus violating, denying and breaching her rights to a fair hearing as enshrined under Article 50 of the Constitution of Kenya, 2010.

c) A declaratory order do issue declaring that the Petitioner's rights and fundamental freedoms enshrined under Article 10, 25(c), 29 (a), 47, 48 and 50(n) of the Constitution of Kenya have been denied and violated by the Respondents.

d) A declaratory order do issue that the Interpretation of "Restaurant" in the Tourism Act is vague and over-broad especially with regard to the purpose and ambit of the said Act hence unconstitutional and invalid for unjustifiably violating Article 29(a) and 50(2) (n) of the Constitution.

e) An Order in the nature of certiorari do issue to bring before court for purpose of quashing the decision, proceedings and charges preferred against the 2nd Petitioner in Milimani Chief Magistrate's Criminal Case number 1165 of 2018.

f) An order of prohibition do issue prohibiting the 2nd and 4th Respondents from arresting and prosecuting the 1st and 2nd Petitioners on offences under the Tourism Act in connection with their trade.

g) An order for General damages as against the 1st, 2nd, 4th and 5th Respondents for subjecting the 2nd Petitioner to psychological torture, anguish, suffering, mental torture and breach of the Petitioner's constitutional rights and fundamental freedoms and loss of opportunities.

h) An award of exemplary damages to the 2nd Petitioner for violation and breach of her constitutional rights and fundamental freedoms.

i) Cost of this Petition.

j) Any other such orders as this Honourable Court shall deem just to grant.

BRIEF FACTS

2. The 1st Petitioner owns and runs a small business namely Rhino Cafe that deals with selling tea and light snacks to matatu operators along Racecourse Road in the area otherwise known as Grogan Cafe managed by the 2nd Petitioner.

3. On or about 23rd May 2018; persons claiming to be officers from the 1st Respondent office visited Rhino Café herein, where they demanded from the 1st Petitioner to see the Tourism License permitting the Petitioners to operate as a business. The 1st Petitioner did not

produce the said license and instead wrote to the 1st Respondent in a letter dated 24th May 2018 voicing concern as to the demand in view of the purpose and ambit of the Tourism Regulatory Authority.

4. The 1st Respondent, however never responded to the said letter and instead sent a letter dated 5th June 2018 to the 1st Petitioner citing the alleged offence of operating a tourism enterprise without a valid tourism license.

5. The Petitioners then instructed their advocates herein Messrs Gitau Gikonyo & Company Advocates who then wrote to the 1st Respondent in a letter dated 20th June 2018 explaining that Rhino Cafe did not fall under the ambit of the definition of a restaurant as intended under the Tourism Act. The Petitioners' Advocates further wrote to the 2nd Respondent vide a letter dated 13th August 2018 for his intervention, expressing the abuse of the provisions of the Tourism Act particularly to its definition of "Restaurant". However there was no response to the said letter.

6. On 22nd June 2018, the 2nd Petitioner was arrested and charged with the offence of "operating a class "B" restaurant without a tourism license contrary to ***Section 98(1)*** as read with ***Section 114 of the Tourism Act 333 Laws of Kenya***" in the Chief Magistrate's Court at Milimani Criminal Case Number 1165 of 2018.

PETITIONERS' CASE

7.The Petitioners contend that the arrest and charge of the 2nd Petitioner is unlawful, unconstitutional and illegal as the Rhino Cafe operated by the Petitioners does not fall under the ambit of the Tourism Act.

8. The Petitioners further contend that the definition of "Restaurant" under the Tourism Act is "any premises on which the business of supplying food or drink for reward is carried on" is unconstitutional.

9. The Petitioners contend, if anything, the definition of "Restaurant" under the Tourism Act should be read together with the purpose of ambit of the Tourism Act which Act is intended for development, management, marketing and regulation of sustainable tourism and tourism – related activities and services.

10. The Petitioners as they contend, the Tourism Act under Section 2 defines "tourist" as "a person travelling to and staying in a place outside his or her usual abode for more than twenty-four hours but not more than one consecutive year, for leisure, business or the other purpose, not being a work-related activity remunerated from within the place visited."

11. The Petitioners contend that the definition of a "tourist" above connotes that a person must be staying in a place for the stipulated timelines under the Act, which definition clearly removes the Petitioners' cafe from the definition of a restaurant under the Act. It is Petitioners' position that going by the aforesaid, definition; the 1st Petitioner's café does not fall under the nature of the establishments as envisioned under the Tourism Act.

12. The Petitioners state therefore, the 2nd Petitioner's arrest and prosecution has no basis and amounts to an abuse of the powers bestowed upon the Tourism Regulatory Authority contrary to ***Article 2(1) of the Constitution*** and further a violation of the 2nd Petitioner's right of freedom from arbitrary arrest contrary to ***Article 29 of the Constitution***.

THE 1ST RESPONDENT'S CASE

13. The 1st Respondent is opposed to the Petition and relies on a Replying Affidavit sworn by the 1st Respondent's Acting Regional Manager, Nairobi, Mr. Yusuf Mohammed dated 29th April 2019 and further Affidavit dated 11th June 2019 filed on 27th June 2019.

14. The 1st Respondent contend that in May 2018, its officers in exercise of their obligations under ***Regulation 29 of the Tourism Regulations Authority Regulations, 2014***, inspected the 2nd Petitioner's premises as contended in annextures "YM 1" of the 1st Respondents Replying Affidavit filed on 2nd May 2019.

15. The 1st Respondent's officers aver that they discovered that the 2nd Petitioner neither had a licence for that premises, nor was it registered with the 1st Respondent as required by law. It is urged the 2nd Petitioner was operating a class "B" Restaurant without a Tourism License contrary to ***Section 114 of the Tourism Act, Cap 383 of the Laws of Kenya***. It is stated that a reminder was issued to the 1st Petitioner's director requesting the 1st Petitioner to pay for the license stating that the total amount due as Kshs.451,800.00, being arrears in license fees particularized as from the year 2014 – 2018; penalties of 10% per month for 48 months, Application fees all set out under annexture "YM 2" in the 1st Respondent's Replying Affidavit filed on 2nd May 2019.

16. The 1st Respondent state that on 28th May 2018 the 1st Respondent received a letter from the 1st Petitioner's Advocates seeking clarification on the aforesaid reminder. That on 5th June 2019, the 1st Respondent responded clarifying the position and requiring the 1st Petitioner to regularize its operations. The 1st Respondent aver that this was never done.

17. The 1st Petitioner then filed a complaint with the 4th Respondent which culminated into the prosecution of the 2nd Petitioner for operating a restaurant without license. The 1st Respondent state that the 2nd Petitioner was specifically operating a class "B" Restaurant without a Tourism License contrary to ***Section 114 of the Tourism Act, (Cap 383) Laws of Kenya***.

THE 2ND AND 4TH RESPONDENTS' CASE

18. The 2nd and 4th Respondents filed grounds of opposition dated 21st May 2019 setting down the following seven grounds.

i) The Prayers sought by the Petitioner are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

ii) Under Article 157(1)) of the Constitution and Section 6 of the Office of The Director of Public Prosecution Act (2013) the 2nd Respondent does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of the powers or functions, shall not be under the direction of control of any person or authority.

iii) Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.

iv) The Petitioner has not adduced reasonable evidence to show that the criminal proceedings are mounted for an ulterior purpose.

v) The Petitioner must demonstrate that substantial injustice would otherwise result if the criminal proceedings proceed. The cases are determined on merit.

vi) It is in the public interest that complaints made to the police are investigated and the perpetrators of crimes are charged and prosecuted.

vii) The Petition is without merit and should be dismissed with costs to the 2nd Respondents.

THE 3RD AND 5TH RESPONDENTS' RESPONSE

19. The 3rd and 5th Respondents did not file any response as the dispute is between the 1st, and 2nd PetitionerS and the 4th Respondent. On application the 3rd and 5th Respondents were struck out of the proceedings.

ANALYSIS AND DETERMINATION

20. I have very carefully considered the Petition; affidavit in support and all annextures; the 1st Respondent's Affidavits, and annextures thereto; the 2nd and 4th Respondents' grounds of opposition, parties rival submissions and from the above the following issues arises for determination:-

a) Whether Tourism Act is unconstitutional and invalid in its definition of "Restaurant" and the requirement for a "restaurant" to have a Tourism License, and the Criminal sanctions flowing there from?

b) Whether the arrest and prosecution of the 2nd Petitioner was a violation of her rights under the Constitution?

A) WHETHER TOURISM ACT IS UNCONSTITUTIONAL AND INVALID IN ITS DEFINITION OF "RESTAURANT" AND THE REQUIREMENT FOR A "RESTAURANT" TO HAVE A TOURISM LICENSE, AND THE CRIMINAL SANCTIONS FLOWING THERE FROM?

21. The 2nd Petitioner contend that on 22nd June 2018, she was arrested and charged on 26th June 2018 in the Chief Magistrate's Court at Milimani in Criminal Case No. 1165 of 2018, with the alleged offence of "operating a class "B" restaurant without a tourism license contrary to ***Article 98 (1) as read with Section 114 of the Tourism Act (Cap 383) Laws of Kenya***.

22. The Petitioners contend that the small business operated by the 1st Petitioner does not fall within the ambit of the ***Tourism Act***. It is thus urged that this renders the prosecution of the 2nd Petitioner illegal and unconstitutional as the charges preferred against the 2nd Petitioner by the 1st and 2nd Respondents are inapplicable, thus violating her fundamental rights and freedoms enshrined in the Constitution.

23. It is trite that the burden of proving that the statute or statutory provision is unconstitutional is on the person alleging the constitutional invalidity. In such a situation or that being the cases, the Court should presume a statute on statutory provision to be constitutional unless the contrary is shown.

24. Further the Court has to look at the statute alongside the provision or Article of the Constitution alleged to be offended by the statute or statutory provision and determine whether the statute is in conformity with the constitution.

25. In interpretation of statute and determining its constitutionality, or otherwise available Courts ought to look at the intention of the legislature. The intention may be revealed directly through the preamble or purpose statement. The language of the text of statute should serve as the statutory point for interrogation into the meaning of the statute. This means the court while doing so, has to consider the purpose and effect of the implementation of the statute or statutory provision. If the purpose does not infringe the right guaranteed by the Constitution, the court must go further and determine whether its implementation does infringe the constitutional right.

26. To understand and interpret a statue, one must closely read the wording of the statute. Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.

27. If the words of a statute are clear and unambiguous, the court need not look any further; constructions of statute is guarded by a number of principles including:

a) Presumption against "absurdity" - meaning that a court should avoid a construction that produces an absurd result;

b) The presumption against unworkable or impracticable result – meaning that a court should find against a construction which produces "unworkable or impracticable" result;

c) Presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an "anomaly" or otherwise process an "irrational" or "illogical" result and;

d) The presumption against artificial result – meaning that a court should find against a construction that produces "artificial" result and, lastly,

e) The principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," "economic", "social" and "political" or "otherwise."

28. The Constitutional Court of Uganda in the case of ***Olum and another v Attorney General of Uganda [2002] 2 EA 508*** made the position clear when it stated thus:-

"To determine the constitutionality of a section of a statue or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implantation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."

29. The 1st Respondent submit that the Tourism Act is a composite statute repealing the statutes under the Tenth Schedule. The primary function of the ***Tourism Regulatory Authority***, is urged that it is outlined in ***Section 6 of the Act*** which states that the "***object and purpose of the Authority shall be to regulate the Tourism Sector."***

30. It is further 1st Respondent's contention that ***Section 7(1) of the Act*** provides for functions of the Authority.

31. ***Section 2*** 'defines' "tourism activities and services" to mean any of the activities and services specified in the ***Ninth Schedule of this Act.*** It further defines a "***restaurant" to mean any premises on which the business of supplying food or drink for reward is carried on" and this definition is instructive because it forms the gravamen of the petition and interpretation of the word "restaurant". The 1st Respondent submissions are specifically premised on this point and states that the definition is clear and unequivocal.***

32. According to the 1st Respondent the ***9th Schedule of the Act*** provides for provisions related to Regulated Tourism Activities and Services. The schedule gives classes of what the Act means by ***Tourism Activities and Services, Part (B) of the said schedule provides:- Class "B" Enterprises and they include (1) Restaurant and other food and beverage services***.

33. It is 1st Respondent's position based on definition in ***Section 2*** of the word ***"restaurant"*** and the classification in the ***9th Schedule***; ***a restaurant is classified as part of tourism activities or services that are subject to regulation and licensing by the 1st Respondent***. It is 1st Respondent position that there is no vagueness or ambiguity in the definition as alleged by the Petitioners.

34. The 1st Respondent further urge that ***Section 98 of the Act*** provides for the requirement for licenses and ***subsection (2)*** provides that:-

"A person shall not undertake any of the tourism activities and services specified in the Ninth Schedule, unless the person has a license issued by the Authority."

35. The 1st Respondent assert that after establishing the 1st Petitioner operates an establishment that offers food and drinks in the form of a restaurant, then the 1st Petitioner is required to have a license to operate its business and the failure thereof will result in criminal prosecution. It is urged by the 1st Respondent that it is common ground that the 2nd Petitioner operates a business that is within the ambit of the Ninth Schedule. It is further urged that there is no prayer in the petition that the impugned sections, or entire Act is unconstitutional.

36. The 1st Respondent relies in ***Petition Nairobi 291 of 2015, David Mwaure Waihiga v. The Public Service Commission & 4 Others [2017] eKLR,*** where Justice J. M. Mativo stated as follows:

"Indisputably, there exists a presumption as regard constitutionality of a statute. The rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles. But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits."

37. Further in Supreme Court of India in ***Hambardda Wakhana v Union of India Air, [1960] AIR 554,*** it was held that:

""In examining the constitutionality of a statute, it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment*." [Emphasis added)*

38. Similarly the Court of Appeal of Tanzania in ***Ndyanabo v Attorney General, [2001] E.A 495,*** restated the law as set out in the English case of ***Pearlberg v Varty, [1972] 1 WLR 34.*** In the former, the court held that:

"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative."

39. The 1st Respondent urge that the Petitioner have not discharged the burden of proof that the statute is unconstitutional. It is further urged the Petitioners have no viable grounds in support of their allegations but simply do not want to pay for a license for the business to a regulation set up by statute without impugning the statute setting it up. The 1st Respondent contend the license is required by law and the Petitioners cannot be allowed to determine who will regulate them and the manner in which they want to be regulated. The 1st Respondent urge further that the Petitioners do not argue that the law itself is "vague" but that their business is not covered by the term "restaurant" as defined in the Act. They attack the word "restaurant" as vague which the 1st Respondent do not agree and submit from the plain reading of the definition in the Act and ninth schedule thus word "Restaurant" is not vague.

40. The purpose and effect of implementation of the statute or statutory provisions, thus implementing the ***Tourism Act,*** in as much as it defines a ***"restaurant"*** and requirements for a license on any premises selling food or drink as submitted by the 1st Respondent, and applying definition of ***Section 2 of the 'Act***, this would entail application of the provision on millions of outlets, in which there is business of supplying food and drink for reward is carried on, including informal outlets in Kenya, contrary to the intentions of parliament, if that would be the criteria to be considered in seeking licenses to be obtained. If the 1st Respondent's position would be taken as correct then, any premises on which the business of supplying food and drink for reward is carried on should not be exempted for obtaining license.

41. The selective application usually employed by the 1st Respondent, as in the Petitioners case, amount to discrimination and this infringe on the Petitioners' right under ***Article 27 of the Constitution***, which guarantees everyone equality and freedom from discrimination.

42. The Petitioners urge that the Tourism Act is unconstitutional and invalid in its definition of the ***"Restaurant"*** and the requirement for a ***"Restaurant"*** to have a Tourism License and the Criminal sanctions flowing there from. The Petitioners argue the Court in applying the canons of statutory interpretation must look at the entire Act and give an holistic interpretation. The Petitioners seek support from the Court of Appeal in the case of the ***Engineers Board of Kenya v. Jesse Waweru Wahome & others Civil Appeal No. 240 of 2013*** where it was held that;

"One of the canons of statutory interpretation is a holistic approach….no provisions of any legislation should be treated as 'stand – alone' - An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act." *(Emphasis added)*

43.In construing the impugned provisions, ***Article 259 of the Constitution*** obligates the Court not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. The court is obliged to pursue an interpretation that permits development of the law and contributes to good governance. The court is also obliged to be guided by the provisions of ***Article 159 (e)*** which requires it to promote and protect the purposes and principles of the Constitution. (***See Apollo Mboya v. Attorney General & 2 Others [2018] eKLR)***

44. In interpreting a statute, the Court should strife to give life to the interest of the parliament instead of stifling it. Courts have in numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. I find that Courts cannot in such circumstances shrink from their duty and refuse to fill the glaring gap. In performing such duty, courts do not foist upon the society their value judgments. They indeed represent and accept the prevailing values and do what is expected of them. The Courts will, on the other hand, fail in their duty if they do not rise to the occasion, but approve helplessly of an interpretation of a statute, which is certain to subvert the social goal and endanger the public good.

45. I find that there are two key assumptions relied upon by courts to explain and justify statutory interpretation. One is the assumption that meaning in legislative texts is "plain" – that is, clear and certain, not susceptible of doubt. This assumption is the necessary basis for the plain meaning rule. The other assumption is that legislatures have intentions when they enact legislation and these intentions are knowable by courts when called on to interpret legislation.

46. In the Liberal construction rule, all that court has to see at the very outset is, what does the provisions say? If the provision is unambiguous and if from that provision the legislature interest is clear, the other rules of construction of statute need not be called into but are called to and only when the legislature intention is not clear.

47. It is noted that the great advantage of the plain meaning rule is that, in theory at least, it creates a zone of certainty – an interpretation-free zone, in effect. It tells the public that if the text is plain, it means what it says and it is safe to rely on it. This emphasis on text at the expense of intention ensures that the law is certain and that the public has fair notice, both of which are prerequisites for effective law. Does the definition ***of "restaurant"*** as ***"any premises on which the business of supplying food or drink for reward is carried on"*** make the law certain? Do members of public have any fair notice? The answer is clearly no because it has no outline and would even include open outlets at construction sites or any place providing such service.

48. The Courts have laid down the importance of considering both text and context in interpreting statutes as was emphasized by the Supreme Court of India in ***Reference Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1*** thus:-

> ***"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statue is looked at, in the context of its scheme, the sections, clauses, phrase and words may take colour and appear different than when the statue I s looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statue can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."***

49. The same Court pointed out in ***Commercial Tax Officer, Rajasthan v M/s Binan Cement ltd [2014] SCR*** that the Court should be mindful of the principle that it should examine every word of a statute in its context and must use context in its widest sense.

50. Further to the above it is imperative that when interpreting a statute the Court takes a holistic approach to that interpretation. This proposition was considered by the Court of Appeal in the case of ***The Engineers Board of Kenya v. Jesse Waweru Wahome & others Civil Appeal No. 240 of 2013*** thus;

> ***"One of the canons of statutory interpretation is a holistic approach. As stated in Halsbury's Laws of England 4th Edition Vol. 44 paragraph 1484, no provisions of any legislation should be treated as 'stand – alone' - An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."***

51. It is of paramount importance to note that parliament intends its legislations to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

52. From the above I find that it is important in the interpretation of the statute for the Court to examine the constituting instruments namely; ***The Tourism Act No. 28 of 2011 and The Tourism Regulatory Authority Regulations, 2014*** therein to discern the legislation intent, so as to have a proper interpretation of these statutes; looking at not only the text, but also the context of the statutes.

53. The Tourism Act was asserted to on 16th September 2011 and commenced on 1st September 2012. It repealed ***The Tourism Industry Licensing Act, Cap. 381; The Kenya Tourist Development Corporation Act, Cap 382; The Hotel Accommodation Act, Cap 478; and The Hotels and Restaurants Act, Cap 494***.

54. In this regard the Court has to consider what was the intention of this legislative? In interpreting a statute, the Court should give life to the intention of legislative in enacting the statute. In the case of ***Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2*** where Higgins J stated as follows:-

> ***The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statue as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable."***

55. The 1st Respondent contend that the Petitioners in this Petition question parliament's wisdom in repealing the statute that regulated hotels and restaurants and bringing them under a composite statute which is the "Tourism Act." It is urged that the effect of allowing the Petition would be that the court would be stepping in to the field of legislation in breach of the doctrine of separation of power. The 1st Respondent urge the Petitioners cannot be allowed to selectively apply the Tourism Act, 2011 as they have not denied that they remit their Tourism Levy under ***Section 105 of The Tourism Act 2011*** which is payable by owners of activity and services specified in the ***Ninth Schedule of the Tourism Act, 2011***.

56. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied by the statutory propositions in question. The intention of the legislation can be discerned from the preamble to the Act which reads:-

> ***"An Act of Parliament to provide for the development, management, marketing and regulation of sustainable tourism and tourism-related activities and services, and for connected purposes".***

57. From the reading of the intention of the legislature it is clear that the intention of the statute was to provide for development; management, marketing and regulation of sustainable tourism and tourism-related activities and services, and for connected purposes.

58. The Act proceeds to define the following terms:-

> ***"Restaurant" means any premises on which the business of supplying food or drink for reward is carried on"***
>
> ***"Sustainable tourism" means tourism development that meets the needs of present visitors and hosts while protecting and enhancing opportunity for the future;***
>
> ***"Tourism activities and services" means any of the activities and services specified in the Ninth Schedule of this Act;***
>
> ***"Tourism product" means a good or service which contributes to the total visitor or tourist experience in a tourism destination are;***
>
> ***Tourist" means a person travelling to and staying in a place outside his or her usual abode for more than twenty-four hours, but not more than one consecutive year, for leisure, business or other purpose, not being a work-related activity remunerating from within the place visited."***

59. Clear reading of the Act and definitions in the Act, it is clear that the Act, is intended first and foremost for the tourist who is a person travelling to and staying in a place outside his or her usual abode. This is made clear is a person looking for "tourism product" in a "tourism destination area." The Act is silent on what is "tourist destination area". But it is clear that there is such an area where the tourist is expected to visit.

60. The 1st Respondent contend "Restaurant is as defined under ***Section 2 of the Act***; thus a ***"Restaurant"*** means ***"any place on which the business of supplying food or drinks for reward is carried on."*** The 1st Respondent further urge based on the definition in ***Section 2 of that Act***, the word ***"restaurant"*** and the classification in the ***9th Schedule***, a restaurant is classified as part of tourism activities or services that are subject to regulation and licensing by the 1st Respondent.

61. From the provisions of the ***Tourism Act*** the definition of ***"Restaurant"*** under Tourism Act should be read together with the purpose and ambit of the Tourism Act. First the ***"restaurant"*** must be in a tourist destination area offering a ***"tourism product"***. It must also be able to offer the tourists a place to stay meaning accommodation together with other tourism activities and services. When the definition of a restaurant is considered and looked at in this way, it is clear that the Act targets a specific establishment(s) and is intended for the development, management, marketing and regulation of sustainable tourism and tourism related activities and services but not each and every place in the Republic on which the business of supplying food or drink for reward is carried on.

62. In the instant Petition it is urged and submitted that the Petitioner is a small business namely Rhino Café, which deals with selling food and light snacks to matatu operators along Racecourse Road in the area otherwise known as Grogan in Nairobi. It is an area with the modest stretch of mind, no one can consider as ***"tourism destination area"*** offering a ***"tourism product"*** or a place to stay or having an accommodation together with other tourism activities and services.

63. It has not been demonstrated that Rhino Cafe offers accommodation as envisaged for tourists and neither does it offer any tourism product. The 1st Respondent contention is that Rhino Café sells tea and light snacks and qualifies to be a ***"restaurant".***

64. The 1st Respondent contend that the term ***"restaurant"*** must be read together with terms ***"tourism activities and service"*** as defined under ***Section 2*** to mean any of the activities and services specified in the ***Ninth Schedule of the Act***. I have considered the activities and services specified in the ***Ninth Schedule of the Act*** and the definition of ***"Restaurant"*** under the ***Tourist Act, 2011*** and it turns out that the term ***"restaurant"*** is not very clear as alluded to by the 1st Respondent. The reading of definition under ***Section 2 of the Act***, read together with the definition of tourism activities and services under the Act and the ***Ninth Schedule*** do not give clear meaning of the term ***"restaurant"*** as contended by the 1st Respondent. The reading of the **Section 2** together with the definition of tourism activities and services do not lead to clear intention and applicability of the ***Tourism Act 2011***.

65. The definition of ***"Restaurant"*** in the Tourism Act as ***"any premises on which business of supplying food or drink for reward is carried on"*** is vague and over-loaded especially with regard to the purpose and ambit of the said Act. It does not define ***"premises"*** thereby rendering ***"any premises"*** such a wide interpretation. It offends the principle of legality which requires that a law, especially one that limits a fundamentals right and freedom, must be clear enough to be understood and must be precise enough to cover only the activities connected to the law's purpose.

66. I find the definition of ***"Restaurant"*** under ***Section 2 of the Act*** to be so wide and vague that it includes inter alia; also a supermarket, butchery, roadside kiosk, any store that sells soda; liquor stores or any informal provisions where food and drink are sold within the Republic of Kenya. However all these premises including liquor stores and supermarkets as well as informal premises or outlet where food and drinks are sold, do not have a Tourist License issued by the 1st Respondent for the operations.

67. The Petitioners stated that the principle applicable in construction of statues were outlined in the case of ***Ekuru Aukot v. Independent Electoral & Boundaries Commission & 3 Others (2017) eKLR where at paragraph 63 – 64 Hon. Justice Mativo*** stated,

> ***"There are important principles which apply to the construction of statues such as:***
>
> ***a) <u>Presumption against "absurdity"</u> – means that a court should avoid a construction that produces an absurd result;***

b) <u>The presumption against unworkable or impracticable result</u> – meaning that a court should find against a construction which produces "unworkable or impracticable" result;

c) <u>Presumption against anomalous or illogical result</u>, - meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result and

d) <u>The presumption against artificial result</u> – meaning that a court should find against a construction that produces "artificial" result and, lastly,

e) <u>The principle that the law should serve public interest</u> – meaning that the court should strive to avoid adopting a construction which is in many way adverse to "public interest," "economic", "social" and "political" or "otherwise".

68. In the instant Petition I find that the definition ***"Restaurant"*** under ***Section 2 of the Tourism Act*** as ***"any premise or where the business of supplying food or drink for reward is carried out"***, to be vague, absurd and anomaly for the following reasons:-

a) Produces an absurd result in that it is plain ridiculous.

b) Produces an unworkable or impracticable result in that there are endless premises within the Republic of Kenya selling food or drink;

c) Creates an "anomaly" or otherwise produces an "irrational" or "illogical" result to expect all premises selling food or drink to have a tourist license.

d) Produces "artificial" result as it is practically unworkable and its implementation is thus arbitrarily and prone to abuse.

e) Is adverse to "public interest", "economic", "social" and "political" or "otherwise" in that it is not in public interest to require all food and drinks outlets to have a licence, neither is it economically and socially acceptable.

69. The 1st Respondent contend in executing its mandate in requiring Restaurant to get a license and in further, in filing a complaint when they refuse to comply there are penal consequences for non-compliance. The 1st Respondent aver that the Petitioners have not demonstrated how that execution of the mandate is unfair and unconstitutional.

70. The 1st Respondent further aver that the Petitioners ought to have demonstrated to the Court, how, in the discharge of its mandate under the Act, the 1st Respondent infringed on their constitutional rights as alleged. Simply stating that they operate a small establishment that is not subject to oversight by the 1st Respondent on the basis that they are not a restaurant is not sufficient. The Petitioners do not deny that their business is within the mandate of the Act but allege that the definition is vague. This is factually incorrect in view of the elaborate definition and classification in the Act and Schedules. Its noteworthy that the Petitioners are not stating why they do not want to be regulated by the only statutory body mandated to regulate and licence hotels and restaurants.

71. Considering the above, I find that the end result of having vague definition of the term ***"Restaurant"*** is the creation of vague criminal offences, as the vagueness of the definition under the ***Section 2 of the Act,*** is too wide a margin of subjective interpretation; misinterpretation and abuse particularly where criminal sanctions and penalties are concerned. I find that the definition of the term ***"Restaurant"*** in the Act does not render a precise or objective legal definition or understanding especially considering the scope and need of all establishments in Kenya to fall within that definition. The aforesaid definition does not tell people such as the Petitioners on which side of the line they fall; this as such can result in authorities acting arbitrary and at whimsical as they like in booking persons under the Section.

72. The Petitioners' view is reinforced on examination of the ***Tourism Regulatory Authority Regulation, 2014***, particularly ***Part II, V and the Schedule*** thereof. It is of great importance to note that the ***First Schedule Number G*** provides that the ambit of the ***Tourism Act*** considers restaurants that are of three stars and above category. The Petitioner herein runs a small business namely Rhino Café that deals with selling tea and light snacks to matatu operators along Racecourse road in the area otherwise known as Grogan, Nairobi. It does not qualify to be termed as three star category Restaurant.

73. ***Regulation 22 of the Tourism Regulatory Authority Regulation 2014*** further advances the view that the Petitioner's Café does not fall under the ambit of the Act by providing that:-

"22. (1) A holder of a license issued under these Regulations shall every month submit data in respect of the tourism activities and services as may be specified by the Authority, in particular –

a) Bed occupancy;

b) Number of visitors by country of origin;

c) Revenue earnings;

d) Expenditure per visitor; and

e) Number of employees both local and expatriates."

74. The 1st Respondent has not made comment on the ***First Schedule Number G*** which provides the ambit of the ***Tourism Act*** as regards consideration of restaurants that are ***three stars and above category*** under ***Regulation 22 of the Tourism Regulatory Authority Regulations 2014***.

75. Further to the above ***Regulation 27(1) of the Tourism Regulatory Authority Regulations 2014*** provides:-

> ***"27 (1) A holder of an enterprise license shall keep a register in the holder's facility and shall enter or cause to be entered in the register particulars of every guest, employee and trainee and such other particulars as may be prescribed."***

76. The above mentioned provisions and Regulations of the ***Tourism Regulatory Authority Regulation 2014*** do not only bring out clearly the intention of the legislature but also points out that the 1st Petitioner's Cafe and many other such outlets in Kenya are not falling within the intended ***"restaurant"*** in the Act. I find that it would be preposterous to require the ***"Rhino Cafe"*** that deals with selling tea and light snacks to matatu operators along Racecourse Road in Nairobi and any other outlet in Kenya where food and drinks are sold to have a tourism License.

77. The law that is aimed at promoting legitimate public interest is certain, fair, reasonable, and consistent with the provisions of the constitution. I find that flowing from that it is clear that the impugned provisions of the ***Tourism Article 28 of 2011*** of the ***Tourism Regulatory Authority Regulation 2011*** do not promote any legitimate public interest, neither are they fair and reasonable in regard to the Petitioners' Petition.

B) WHETHER THE ARREST AND PROSECUTION OF THE 2ND PETITIONERS WAS A VIOLATION OF HER RIGHTS UNDER THE CONSTITUTION?

78. The 2nd Petitioner was arrested and charged with the offence of "operating a class "B" restaurant without a tourism license contrary to ***Section 98(1) as read with Section114 of the Tourism Act (Cap 33) Laws of Kenya*** in Chief Magistrate's Court at Milimani Criminal Case number 1165 of 2018.

79. The Petitioner aver that through the Constitution of Kenya 2010, the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, social justice and the rule of law.

80. In order to achieve these aspirations, the Constitution has established a framework through which all the laws of the Republic must operate; that all the protections found in the Constitution flow through the promise of ***Article 28*** which guarantees to everyone inherent dignity and the right to have that dignity respected. It is the Petitioner's case that because a person has inherent dignity, he should not be arbitrarily arrested, oppressed, manipulated, or abused by the State.

81. The Petitioners' case stems from the recognition of the said inherent dignity of all which is recognised in the Constitution of Kenya, both in the Preamble and in ***Article 28***; Equality and Freedom from Discrimination under ***Article 27*** and Freedom and Security of Person under ***Article 29***.

82. ***Article 28 of the Constitution*** recognizes the right to inherent dignity. It states that:-

> ***"28. Every person has inherent dignity and the right to have that dignity respected and protected."***

83. Whereas ***Article 27 of the Constitution*** guarantees to everyone equality and freedom from discrimination in the following terms:-

> ***"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms."***

84. Further ***Article 29 of the Constitution*** guarantees to everyone freedom and security of the person in the following terms:-

> ***"29. Every person has the right to freedom and security of the person, which includes the right not to be –***
>
> ***a) Deprived of freedom arbitrarily or without just cause;***

85. ***Article 2(5) of the Constitution*** on the other hand expressly imports the general rules of international law and makes them part of the law of Kenya. It is now recognised as part of the rules of international law that the principle of legality is an integral part of the rule of law and as was appreciated by ***Nyamu, J (as he then was) in Keroche Industries Limited vs. Kenya Revenue Authority & 5 others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240*** where it was stated thus:-

> ***"One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law."***

86. The aforesaid principle was expounded by the European Court of Human Rights, sitting, in accordance ***with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")*** in ***Kokkinais vs. Greece 3/1992/348/421***

in which a majority of the Court expressed themselves as follows:-

> ***"The Court points out that Article 7 para. 1 (art.7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know form the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."***

87. The Petitioners contend that the definition of "Restaurant" is vague and that a reasonable man would not expect that, the Act the ***"Tourism Act"*** to be intended to regulate even the smallest of an outlet like kiosk selling food or drink along the streets of Kawangware in Nairobi, hence proceed to procure the requisite license. The Petitioners state the law with respect to legislation which impose penal consequence was enunciated in ***Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629***, where it was held that where the provisions of an enactment have penal provisions, they must be construed strictly and that in such circumstances there ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language.

88. The Petitioners therefore contend those who like the Petitioners ought not to be brought within the Tourism Act should not be subjected to it.

89. The 1st Respondent urge the ***Tourism Act 2011*** I clear on what a ***"restaurant"*** is and that it is clear that the penal consequences, of failure to take a license under the Act the criminal prosecution it is urged is therefore not contrary or illegal, unconstitutional. The 1st Respondent urge the proposition that the 1st Petitioner's business does not fall under the classification of ***"restaurant"*** in the Ninth Scheduled is bizarre and intolerable and proceed to contend there were reasonable and probable grounds to prefer charges against the petitioners by the Respondents, there being a clearly defined and cognizable offence under the Act.

90. The 1st Respondent sought reliance from the case of ***Kipoki Oreu Tasur vs. Inspector General of Police & 5 Ors (2014) eKLR*** where it was stated that:-

> ***"The criminal justice system is a critical pillar of our society. It is underpinned by the Constitution, and its proper functioning is at the core of the rule of law and administration of justice. <u>It is imperative, in order to strengthen the rule of law and good order in society that it be allowed to function as it should, with no interference from any quarter, or restraint form the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated."</u>***
> *(Emphasis added)*

91. In the case ***of Benret vs. Horseferry Magistrates Court & Another.*** The Court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

> ***(i) Where it would be impossible to give the accused a fair trial; or;***
>
> ***(ii) Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.***
>
> ***In his article "Judicial Termination of Defective Criminal Prosecutions: Stay Applications", Chris Corns argues that the grounds upon which a termination of prosecution will be granted have been variously expressed in many judicial decisions. These grounds can be classified under three categories:***
>
> > ***i) When the continuation of the proceedings would constitute an "abuse of process".***
> >
> > ***ii) When any resultant trial would be 'unfair' to the accused, and;***
> >
> > ***iii) When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.***

92. The 2nd and 4th Respondents urge that the order of prohibition sought in the Petition is discriminatory and is only tenable when a public body or officer has acted in excess of their power and in such the order requires the public body to cease from performing a certain act. In this case it has not been demonstrated there is misuse of power or contravention of rules of natural justice by 2nd Respondent. The Director of Public Prosecutions (DPP) the 2nd Respondent herein is mandated to 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 omitted.

93. ***Article 157(10) of the Constitution 2010***, clearly states that the DPP 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 function, shall not be under the direction or control of any person or authority.

94. To buttress the aforesaid proposition the 2nd and 4th Respondents rely on the ***Miscellaneous Application No. 658 of 2004, David Njogu vs. The Director of Criminal Investigations Department***, where the court observed that;-

> ***"the powers exercised by the Attorney General under the old Constitution, now the Director of Public Prosecutions under Article***

157 of the Constitution 2010, are exercised without reference to any person or authority."

95. It is submitted on behalf of the 2nd Respondent, that State powers of prosecutions are exercised by the DPP personally or by persons under his control and directions and in exercise of such powers the Director of Public Prosecutions, is subject only to the constitution and the law; he/she does not require the consent of any person or authority and is independent and not subject to the direction or control of any person or authority.

96. The 2nd and 4th Respondents contend that the Court would be crossing into the line of independence of the DPP to descend into the arena of finding whether there is a prima facie case against the Petitioners. In the instant Petition it is urged that the Petitioners have not demonstrated that the DPP has not acted independently or has acted capriciously or in bad faith or has abused the powers in a manner to trigger this court's intervention. Secondly it is averred that it has not been shown that the DPP lacked the requisite authority, or acted in excess of jurisdiction or has departed from the rules of natural justice in directing that the Petitioner be charged with the offence disclosed by the evidence gathered.

97. It is also stated that the Petitioners have not demonstrated evidence of malice, or evidence of unlawful actions, or evidence of excess or want of authority or evidence of harassment or intimidation or even manipulation of the Court process so as to seriously depreciate the likelihood, that the Petitioner might not get a fair trial as provided for under the Constitution to warrant Court interfere with the Criminal process before the subordinate Court. The Petitioners have however managed to demonstrate that there is ambiguity as to the definition of ***"Restaurant"*** in the ***Tourism Act 2011*** but all the same have not met the prerequisite requirements for the grant of the orders of Judicial Review sought herein. I find that the High Court cannot quash criminal proceedings by way of writs of certiorari or prohibition or in the manner sought herein.

98. In the case of ***Carlito Emelson v Republic [2017] eKLR,*** Justice J. Mativo in dismissing the Petitioner's Petition stated that;

> ***"The High Court has inherent powers to quash, stay or prohibit criminal proceedings. These powers are wide as they imply the exoneration of the accused even before the proceedings have been culminated by way of trial. Noting the amplitude of these powers and the consequences which they carry, the Supreme Court of India revisited the law on the issue and held that 'these powers should be exercised sparingly and should not carry an effect of frustrating the judicial process."***

The Court delineated the law in the following terms:-

> ***"The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rare cases and the Court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at uncalled for stage nor can it 'soft-pedal the course of justice' at a crucial stage of proceedings… The power of judicial review is discretionary, however, it***

99. In the ***High Court Petition No. 21 of 2012 Beatrice Ngonyo Kamau & 2 Others vs. Commissioner of Police and the Director of Criminal Investigations & Another,*** the court held that,

> ***"…the point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial but merely show a prima facie case before mounting a prosecution. The proof of the charge is made at trial…"***

100. Further in ***HC Petition No. 153 of 2013, Thuita Mwangi & Another vs. The Ethics and Anticorruption Commission & 3 Others*** further sums up the issues raised in the above cases and reiterates that acts of the DPP can only be interfered with by Court where it is proved that he has exercised the same in excess of jurisdiction resulting to an abuse of office.

101. I find that though the High Court has inherent powers to quash, stay or prohibit criminal proceedings,, it is however important for courts to exercise restraint, and let the criminal justice system function as it should with no interference. This in itself is good for rule of law and strengthening the rule of law and good order in the society. This would ensure an accused person is not exonerated even before the proceedings have been culminated by way of trial. The power of quashing criminal proceedings should only be exercised in the clearest of the circumstances in which violation of the fundamental rights of an individual facing criminal trial is clearly demonstrated or where it is necessary to prevent the miscarriage of justice or where it is necessary for correcting grave errors or injustices so as to ensure public interest and administration of justice is served. However it is important that care and caution is exercised in invoking these powers.

102. The Petitioners have tendered their defence before this court, which is not the trial court. The Petitioners will have their day at the trial Court where they will have an opportunity before the subordinate court to tender evidence, controvert, refute and challenge their prosecution. This court is much aware that it cannot at this stage play the role of a trial court. Further it has not been shown either the DPP or the National Police Service acted without powers or in excess of the powers conferred upon them by the law or have infringed, violated, contravened or in any other manner failed to comply with or in respect and observe the provisions of the Constitution of Kenya 2010 or any other provision thereof or any other relevant provisions of the law. It has also not been shown that the DPP did not independently review and analyse the evidence, content in the investigation file compiled by the Directorate of Criminal Investigation including witnesses statements, documentary exhibits and statements of the Petitioners as required by law. It is on the basis of the said review and analysis that DPP gave direction to prosecute the Petitioner. The decision to charge was informed by the sufficiency of evidence on record and the public interest and it has not been shown otherwise.

103. The Petitioner herein invokes various provisions of the Constitution in support of her contention that her fundamental rights as enshrined under the constitution of Kenya 2010 have been violated. It is an established principle in Constitutional Petitions; that where a party alleges a breach of fundamental rights and freedoms, he / she must state and identify the rights with precision and how the same have been infringed in respect to him/her. This proposition was enunciated in the case of ***Anarita Karimi Njeru vs. the Republic (1976 – 1980) KLR 1272*** in which the court stated;

> ***"Constitutional violations must be pleaded with a reasonable decree of precision.***
>
> ***The Articles of the constitution which entitles rights to the Petitioner must be precisely enumerated and how one is entitled to the same.***
>
> ***The violations must be particularized in precise manner.***
>
> ***The manner in which the alleged violations were committed and to what extent."***

104. Similarly in the case of ***Matiba v AG (1990) KLR 666*** the Court held that, ***'bringing an application under Sections 70-83 of the Constitution (old Constitution***), ***one must plead with precision, the section, subsection or paragraphs under which he alleges the breach and spell out the nature of infringement***.

105. The Petition as drawn and filed has not complied with the principles set in the ***Anarita Karimi Njeru case (supra)***. The Petitioner has simply set out several Articles on their own from paragraph 9 - 23. The Petitioner under facts from paragraph 24 and violation of the Petitioners Constitutional rights has not stated and identified the rights with precision showing how the same has been infringed nor have the Articles of the Constitution which entitles rights to the Petitioner has been precisely enunciated and how she is, entitled to the same.

106. It is trite that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In the case of ***Leonard Otieno v Airtel Kenya Limited (2018) eKLR; Hon Justice Mativo***, held that:-

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

107. There is no doubt that the independence of the Judiciary as enshrined under ***Article 160 of Constitution*** is a key tenet in the administration of justice. The court is independent and impartial. ***Article 160 of the Constitution*** clearly provides; in the exercise of judicial authority, the judiciary as constituted by ***Article 165***, shall not be subject to the control or direction of any person or authority. The Petitioner's contention that Rhino Cafe do not fall under the category of ***"Restaurant"*** and that there is ambiguity to the definition of ***"Restaurant"*** is her defence, which the Petitioner shall be at liberty to raise and argue before the trial Court, and the same will be considered and a determination made. This Court is not a trial court and it is not within its mandate to determine a pending criminal case before a subordinate court. Let the Petitioner appear before the appropriate court for hearing and determination of the criminal case she is facing. The Petitioner shall enjoy the right to equal protection in the Court of law and a fair administration process as matters are determined on merits.

108. The upshot is that I find no merits in the Petition and the same is dismissed. Each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this ***5th*** day of ***November,*** **2020.**

……

J. A. MAKAU

JUDGE