REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL PETITION NO. 47 OF 2019

HON. RASHID MOHAMMED ECHESA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE HON.ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petitioner was on the 17th May, 2019 arrested by the officers of the 2nd respondent and incarcerated in various police stations on allegation that he was involved in some killings that had taken place in Matungu Sub-County of Kakamega County. He was on the 19th May, 2019 released without charges upon the intervention of the Director of Public Prosecutions (the DPP) who released a press statement to the effect that the evidence gathered against the petitioner did not meet the threshold of a prosecution. The petitioner thereupon filed the instant petition dated 20th May, 2019 seeking for:-

> ***(a) A declaration that the initial maintenance and intended prosecution of the petitioner herein is an abuse of the criminal justice system and a contravention of the petitioner's constitutional rights of freedom and security of the person, right to movement and right to secure protection of the law.***
>
> ***(b) A declaration that the arrest and intended re-arrest of the Petitioner is oppressive, malicious and an abuse of the justice process.***

The petitioner had together with the petition filed a notice of motion of even date stating that the officers of the 2nd respondent (DCIO) had confiscated his firearm. He sought for orders that the 2nd respondent (the DCIO) be ordered to restore his firearm to him.

2. The petition is supported by the affidavit of the petitioner in which he states that he was arrested on Friday 17th May, 2019 ostensibly on the so called "*Matungu killings"* and placed in police custody until Sunday 19th May, 2019 when he was released without charges on the orders of the DPP. That he later learnt that there were instructions for him to be re-arrested.

3. The petitioner contends that his rights as envisaged under the constitution have been infringed and that he fears that he may be re-arrested without any probable cause. That there was no complaint made against him that led to his arrest nor was there any evidence available against him for him to be arrested.

4. The petitioner depones in his supporting affidavit that he is a politician. That he has nothing to do with the *Matungu killings*. That his arrest is purely political and has nothing to do with him committing any crime. That he is a victim of oppression by the executive through the 2nd respondent. That his arrest and intended arrest is an abuse of the process of the law. That his arrest and prosecution is aimed at permanently denting his image. That he was poised for a political appointment which prospects have been thwarted by the illegal arrest and subsequent detention. He is thereby seeking for protection from this court. He depones that this court has power to prevent abuse of the process of the justice system by a state organization and to prevent unfair treatment of a citizen by the Ministry of Interior through the 2nd respondent.

5. The petitioner further complained that officers from the DCI took away his licenced firearm on the 16th March, 2019 and never returned it to him.

6. The petition was opposed by the respondents through their grounds of opposition filed by a State Counsel, **Mr. Gilbert C. Tarus** that:-

> ***1. The application is bad in law, an abuse of the court process as the same is an attempt by the applicant to evade investigations and probable prosecution.***
>
> ***2. The application is against the independence of the 1st, 2nd and 3rd Respondents' constitutional mandate under Article 157 and 245 (4) (a) and (b) of the Constitution of Kenya, 2010.***
>
> ***3. Granting the orders sought by the applicant in the application will be tantamount to clothing the applicant with immunity against any criminal proceedings and which are in contravention of the 1st, 2nd and 3rd Respondents' constitutional mandate.***
>
> ***4. The allegation by the applicant that he is being targeted politically are false and not backed by any evidence, speculative but only meant to attract sympathy from this Honourable Court.***
>
> ***5. The applicant has failed to prove that his intended arrest and prosecution as alleged will be a breach of any law to warrant an order of prohibition against his arrest and prosecution to be issued by this Honourable Court.***
>
> ***6. The issue of firearm is not the mandate of the DCI but the Firearm Licensing Board.***

7. The grounds of opposition were supported by the affidavit of the officer who was investigating the petitioner's case, Cpl. Erick Ogutu. Cpl. Ogutu admitted that the appellant was arrested on 17/5/19 and released on 19/5/19. He however says that the petitioner was released pending investigations. That there was no malice in the arrest of the petitioner. That his detention was necessary to control the flow of information and to prevent the possibility of the petitioner influencing the flow of the same and at the same time protecting their sources. That at the conclusion of investigations, the applicant may be required to attend the police station as a witness or a suspect to be charged before a court of law.

Submissions by Petitioner's Advocates –

8. The advocates for the petitioner **Namatsi & Co. Advocates**, submitted that the replying affidavit sworn by Cpl. Ogutu on behalf of the 1st respondent, the DPP, did not sufficiently answer the issues raised in the affidavit of the petitioner. That the Attorney General on behalf of the 2nd, 3rd and 4th respondents only filed grounds of opposition but did not file any statement under oath. That failure by them to rebut on oath the disposition of facts by the deponent shows that most of the facts deponed by the petitioner are unchallenged. That the affidavit of Cpl. Ogutu itself only dwells on points of law and is evasive and non-committal. That it does not show that there was good reason for the arrest. That the 2nd, 3rd and 4th respondents did not give an explanation as to the circumstances under which it became necessary to have the petitioner arrested. That in the absence of this there is no reasonable ground for the petitioner's arrest. Therefore that the arrest was made under ulterior motives and was unlawful and an abuse of the process of the court.

9. The advocates cited the case of **Director of Public Prosecutions –Vs- Martin Maina & 4 Others (2017) eKLR** where the court considered the grounds upon which criminal proceedings may be prohibited and cited the decision of the Supreme Court of India in **State of Maharahar & Others –Vs- Aran Gutab & Others Cri App. No. 390 of 2007** that:-

> ***"1. Where institution, continuance of proceeding against an accused person may amount to the abuse of the process of the Court or that the quashing of impugned proceeding may secure ends of justice.***
>
> ***2. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding e.g. want of sanction:***
>
> ***3. Where the allegation in the 1st information, reports or complaint taken at their face value and accepted in their entirely do not constitute an office alleged, and***
>
> ***4. Where the allegation constitute an offence but there is either no legal evidence clearly or manifestly to show the Court."***

10. The advocates submitted that this court has a duty to protect the rights of citizens against harsh and unfair treatment by State organs. They cited the case of **Alfred Nyandieko –Vs- DPP & 3 Others Nairobi Constitution and Human Rights Division Petition No. 223 of 2017** where the Court held that:-

> ***"The Court not only has a right but a duty to protect its citizen against harsh and unfair treatment. The duty of this Court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner."***

11. The advocates submitted that the 2nd respondent (DCI) has not given any reason why its officers withdrew the petitioner's gun from him. That failure to give any reason is a manifestation that the officers of the DCI are using the State power maliciously, capriciously and to intimidate the petitioner. That the withdrawal of the petitioner's gun has left him exposed to insecurity.

Submissions on behalf of 1st Respondent –

12. The 1st respondent through the Senior Prosecution Counsel **Mr. Ng'etich** submitted that the office of the Director of Public Prosecutions

is an independent constitutional office established under Article 157 of the Constitution. That the article provides inter alia, in Article 157 (10) that:-

> ***"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 powers or functions, shall not be under the direction or control of any person or authority."***

13. It was submitted that to grant the orders sought would be tantamount to ordering the DPP not to discharge his constitutional mandate and functions. That the petitioner has not presented evidence before the court that the 1st respondent, the DPP, has made a decision to prefer charges against the petitioner. That to prohibit the charge against the applicant when no decision has been arrived at by the 1st respondent is premature at this stage. To buttress his point on the powers of the DPP in prosecuting cases the prosecution counsel cited the case of **Charles Okello Mwande –Vs- Ethics and Anti-Corruption Commission & 3 Others (2014) eKLR** where Mumbi Ngugi J. held that:-

> ***"I would also agree with the 4th Respondent (DPP) that the Constitutional mandate under 2010 Constitution with respect to prosecution lies with the 4th Respondent, and that the 1st Respondent has no power to 'absolve' a party and thereby stop the 4th Respondent from carrying out his constitutional mandate. Article 157 (10) is clear … However, in my view, taking into account the clear constitutional provisions with regard to the exercise of prosecution powers by the 4th Respondent set out in Article 157 (10) set out above, the 1st respondent (EACC) has no authority to 'absolve' a person from criminal liability … so long as there is sufficient evidence on the basis of which criminal prosecution can proceed against a person, the final word with regard to the prosecution lies with the 4th Respondent (DPP) ..."***

14. It was also submitted that it is the duty of the police to investigate commission of crime. That the mere fact that the allegations made are likely to be found worthless, is not a ground for halting investigations into the complaints or even prosecutions made or brought to the attention of the respondents. The case of **Republic –Vs- Commissioner of Police and Another Exparte Michael Monari & Another (2012) eKLR** was cited to buttress that position where it was held that:-

"The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."

15. The DPP submitted that the applicant has not demonstrated any excess in jurisdiction and or contravention of the law, either by the office of the DPP or by the National Police Service. That if the court were to grant the orders sought, it will be interfering with the powers granted to the respondents pursuant to the Constitution. That the court can only interfere with the exercise of the powers in exceptional circumstances where the officers to whom the power is given fail to exercise it in a just manner and in the interest of justice. That in this case the 1st respondent is yet to exercise its authority. That the 1st respondent's application is therefore pre-mature as there is no file compiled and forwarded to the 1st respondent to enable it make the decision to prefer charges against the petitioner. That the petitioner was arrested and released pending further investigations in compliance with Article 49 (h) which allows for the arrest and later release of an arrested person on bond or bail and when charges are not to be preferred immediately.

Submissions on behalf of the 2nd, 3rd and 4th Respondents –

16. **Mr. Tarus** on behalf of the Attorney General submitted that the petition does not meet the constitutional threshold of filing constitutional petitions as was outlined in the case of **Anarita Karimi Njeru –Vs- Republic (1979) KLR** and in **Mumo Matemu –Vs- Trusted Society for Human Rights & 5 Others (2013) eKLR** in which the courts stated that the pleadings in a Constitutional Petition should be precise on the provisions violated, the rights said to be infringed, the manner of infringement and the juridical basis for it. That the petition herein does not have any of the above. That the petitioner has only stated that there was malice in his arrest without linking it to the various Articles of the Constitution. That there are no particulars in support of the alleged violations of his constitutional rights.

17. It was further submitted that the arrest and release of petitioner is not tantamount to violations of rights and freedoms under the Constitution. That investigations are still ongoing and the petitioner cannot pre-empt the outcome of such investigations. Counsel referred to the case of **Pamela Akinyi Odhiambo –Vs- Ethics & Anti-Corruption Commission (2018) eKLR** where the Court held that:-

> ***"Furthermore, if the matters in question are still under investigations the outcome of those investigations cannot be pre-empted by the applicant or by this court. Should the investigations culminate in the arrest of the applicant, arrest and arraignment are known process of our legal system and per se do not amount to infringement on the fundamental rights and freedoms of the applicant. In any case she will be entitled to bail as provided by the Constitution. To my mind, the apprehension by the applicant does not meet the threshold of serious breach of his rights by a state organ."***

Analysis and Determination –

18. The questions for determination are –

> ***(1) Whether the initial maintenance and intended prosecution of the petitioner is an abuse of the criminal justice system and a contravention of the petitioner's constitutional rights.***

(2) Whether the arrest and intended re-arrest of the petitioner was oppressive, malicious and abuse of the justice process.

(3) Whether the petition meets the threshold of a constitutional petition.

Arrest and Prosecution –

19. The powers of the Director of Public Prosecutions are set out in Article 157 (6) (a) of the Constitution that provides that:-

> ***"The Director of Public Prosecutions shall exercise State powers of prosecution and may—***
>
> ***a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;***
>
> ***b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***
>
> ***c. subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)."***

20. Further powers are granted by Article 157 (10) that provides that:-

> ***"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."***

21. Though the DPP enjoys such wide powers of prosecution under Article 157 that does not mean that the powers are unfettered or absolute. It is the duty of the court to ensure that the DPP acts within the law without infringing on the fundamental rights of citizens. Where the DPP abuses those powers, the court has the cardinal duty to intervene. Odunga J. in the case of **Francis Matheka & 10 Others – Vs- Director of Public Prosecutions & Another (2015) eKLR** considered the issue and held that:-

> ***"The law in these kinds of cases is that the court ought not to usurp the constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the court will not hesitate in putting a halt to such proceedings."***

22. In the case of **Bitange Ndemo –Vs- Director of Public Prosecutions & 4 Others (2016) eKLR**, Aburili J. held that:-

> "*The Office of Director of Public Prosecution is an independent office and the court will therefore in an ideal situation be reluctant to prohibit that office from exercising its statutory and constitutional powers except in the clearest of cases. In* ***Rosemary Wanja Mwagiru & 2 Others V Attorney General & 2 Others Mumbi J*** *stated that:*
>
> > ***"The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute."***

23. In **Joram Mwenda Guantai –Vs- The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 (2007) 2 EA 170**, the Court of Appeal held that:-

> ***"It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."***

24. The police have powers to arrest without warrant as provided in Section 58 of National Police Service Act that provides that:-

"Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person –

(a) ……

(b) ……

(c) Whom the police officer suspects on reasonable grounds of having committed a cognizable offence;

(e)……

(f)……

(g) Whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or

(h) ……"

Further powers of arrest without warrant are provided in Section 29 of the Criminal Procedure Code.

25. Besides the powers of arrest, the police have power to summon any person believed to have information which may assist in investigation to appear before a police officer in a police station. Section 52 (1) of the National Police Service Act provides that:-

"A police officer may, in writing, require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is."

26. The petitioner herein was arrested without warrant. It was therefore the duty of the police to establish that there were reasonable grounds to suspect that the petitioner had committed a cognizable offence.

27. What constitutes reasonable cause was defined a long time ago in the case of **Hicks v Faulkner, (1878), 8 Q.B.D. 167 at para 171 where** Hawkins J. held as follows:-

"Reasonable and probable cause is an honest belief in the guilt of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

28. Rudd, J. in **Kagane V Attorney General & Another, (1969) EA 643** reiterated the same definition and stated as follows:-

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

29. The House of Lords in **O'Hara v Chief Constable of the Royal Ulster Constabulary (cited in Kenneth Omondi Ochiengo & 38 Others –Vs- Republic, Nairobi Criminal Revision No. 141 & 143 of 2019 (Consolidated) (2019) eKLR)** considered whether the police had established whether there were *prima facie* grounds for the arrest of the appellant. The court, in interpreting **Section 12(1)** of the English **Prevention of Terrorism (Temporary Provisions) Act 1984** which read as follows:

"…a constable may arrest without warrant a person whom he has reasonable grounds of suspecting to be –

(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this part of this act applies…"

held thus:

"Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: Hussien v. Chong Fook Kam [1970] A.C. 942,949. (2) Hearsay information may therefore afford a constable a reasonable grounds to arrest. Such information may come from other officers: Hussien's case, ibid. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. (4) The executive "discretion" to arrest or not as Lord Diplock described it in Mohammed-Holgate v. Duke [1984] A.C. 437,446, vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers. Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1)." Per Lord Steyn.

Lord Hope of Craighead held thus:

> ***"My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised."***

30. It is the duty of the police to investigate commission of crime. Warsame J. (as he then was) in **Republic –Vs- Commissioner of Police & Another Ex parte Michael Monari & Another** (Supra), held 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. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene."***

31. It is then clear that it is not unlawful for the police to arrest a person where there is reasonable suspicion that the person has committed a crime. Mere arrest of a person who is suspected to have committed a crime cannot amount to a breach of a fundamental right. Neither is undergoing a lawful investigation a breach of fundamental right. In **Hassan Ali Joho –Vs- Inspector General of Police & 3 Others (2017) eKLR**, Ogolla J. held that:-

> ***"In my view, threat of arrest itself or threat of violation of fundamental rights and freedoms per see is not a reason enough to stop the DPP from carrying out his functions. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, the Constitution anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. Therefore, a threat of arrest of a person per see is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed."***

32. In the instant case the respondents were expected to show that there was reasonable cause to arrest the petitioner and that there was no ulterior motive to the arrest other than investigation of commission of a crime or crimes. The explanation given by Cpl. Ogutu as to why they arrested the petitioner was that "***his detention was necessary to control the flow of information and to prevent the possibility of the petitioner influencing the flow of the same at the same time protecting our sources***." Further that the petitioner was "***questioned on various issues and he refused to have his statement recorded***."

33. It is then clear form the statement of the investigating officer that the petitioner's arrest had nothing to do with any complaint that he was linked to the *Matungu Killings*. The investigating officer did not state that the petitioner was arrested because there were reasonable grounds to believe that he had committed an offence. It is preposterous to urgue that the petitioner was arrested simply to stop the petitioner influencing the flow of police information and to protect police sources. That cannot be a reasonable cause for the arrest of a citizen. It simply means that there was an ulterior motive to the arrest of the petitioner other than that he was suspected of committing a crime. It would be a sad day for our country that if police wanted to protect their sources of information they would go around arresting innocent citizens. They have better ways of protecting sources of their information than arresting innocent citizens. The petitioner has demonstrated that the officers of the second respondent arrested him arbitrarily and without just cause.

34. The petitioner contends that he was apprehensive that the officers of the second respondent intended to re-arrest him for no apparent cause. The fact that the officers of the 2nd respondent arrested the petitioner for no apparent cause means that his apprehension that they could re-arrest him again for no reasonable cause was not unfounded. The arrest of the petitioner for no just cause reeks of arbitrariness, was unlawful and an abuse of the constitutional mandate bestowed on the respondents. The act can only have been meant to embarrass and harass the petitioner.

35. The petitioner further contends that the 1st respondent intended to prosecute him over the *Matungu Killings*. However there was no evidence that the Director of Public Prosecutions (DPP) intended to prosecute the petitioner. As submitted by Mr. Ng'etich no file has been compiled in the matter that can lead to the prosecution of the petitioner. There was no evidence that witnesses have recorded statements that can lead to the prosecution of the petitioner. The petitioner then has not demonstrated that the 1st respondent intended to prosecute him over the *Matungu Killings*. If however investigations were conducted and there was reasonable suspicion that the petitioner had committed an offence, it would be utterly wrong for this court to block the ensuing prosecution. It is the duty of the DPP to prosecute those who are suspected of committing crimes. This court cannot interfere with such a legally mandated process and thereby issue a blanket bar to the prosecution of the petitioner.

Whether the petition meets the threshold of a Constitution petition –

36. The petition does not cite the articles of the Constitution under which it is brought. The application that was filed together with the petition indicates that it was made under Rule 3 (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that provide that:-

> "***4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or***

threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."

The said rule is made pursuant to Article 22 of the Constitution that entitles a party who alleges that his rights have been threatened, infringed or violated to move to the High Court for redress. A petitioner in a constitution petition is required to set out with due particularity the nature of his claim by identifying the specific right violated and how it is violated. This principle was set out in the case of **Anirita Karimi Njeri –Vs- Republic** (supra) where the court held that:-

"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." (see also Meme Vs. Republic & another [2004] 1 KLR 637)

37. The same was emphasized by the Court of Appeal in **Mumo Matemu –Vs- Trusted Society for Human Rights & 5 Others** (Supra) where it stated that:-

"…the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court… Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

38. The petition herein does not comply with the principles set out in the above two cases as the petitioner has not linked his arrest to a breach of any article of the Constitution. The question is whether the court should dismiss the petition or whether it should identify from the pleadings and the evidence the particular articles of the Constitution that were infringed.

39. In **Mumo Matemo –Vs- Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, the High Court seemed to be of the view that as long as the breach of the Constitution is apparent on the face of the petition and the evidence the court has the duty to enforce the right though the right may not have been stated in the petition. Stated the court:-

"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

40. In **ANM & Another (Suing in their own behalf and on behalf of ANM (Minor) as parents and next friend) –Vs- FPA & Another (2019) eKLR**, Odunga J. was of the view that the principle in *Anirita Karimi* case ought not to be religiously followed and held that:-

"52. It must therefore be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the later ought to prevail over the former."

41. I am of the view that the court should not dismiss a petition alleging contravention of the Constitution where it is apparent from the petition and the evidence that there was a breach of the Constitution. Article 22 of the Constitution provides that when considering a petition touching on contravention of the Constitution, the court though required to observe the rules of natural justice should not be unreasonably restricted by procedural technicalities. The **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides the procedure of filing constitutional petitions. It is evident from the provisions of the rules that a petition need not be that formal. Rule 10 (3) allows filing of a petition by informal documentation. The Rule provides that:-

"Subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom."

In my considered view the fact that the court can accept an oral petition by implication means that a petition should not be dismissed for want of form. The spirit of the Constitution and the Rules seem to be that the priority of the court should be to enforce the rights infringed notwithstanding the defect in form of the petition. Only a petition that is hopeless for which no life can be breathed into it can be dismissed.

42. The purpose of pleadings is to notify the opposite party of the issue in controversy. In this petition the issue at hand was the arbitrary arrest and unlawful incarceration of the petitioner in police custody. This was brought to the attention of the respondents in the petition. The respondents responded to the petition and denied the allegations. The petitioner did prove in court that he was unlawfully incarcerated in custody for no just cause. The respondents failed to show that there was reasonable cause for the arrest of the petitioner.

43. Article 29 of the Constitution provides that:-

> ***"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."***
>
> ***(b)***

44. The petitioner has established that his arrest was arbitrary and for no just cause. His right to freedom of the person was thereby infringed. I do hold that there was a contravention of the petitioner's right to freedom and security of the person under article 29 (a) of the Constitution of Kenya, 2010. His arrest was unlawful and unjustified.

45. I have hereto above held that there was no evidence that there was imminent prosecution of the petitioner as there was no decision made by the DPP to charge him with any offence. The matter against the petitioner was at investigation stage. There cannot have been a breach of the petitioner's fundamental right when there was yet a decision made to charge him with the offence.

46. In the notice of motion dated 20/5/19, the petitioner states that he has been a licenced firearm holder since the year 2012. That on 16/3/2019 officers from the office of the DCI accosted him and repossessed his firearm. That no reason was given for the repossession of the firearm. The petitioner did attach to the application his firearms licence and an inventory form dated 16/3/2019 showing that his firearm Bereta Pistol S/No. A0221822, firearm certificate book No. 0092226 and one magazine loaded with 14x9mm ammunition were seized by one IP Philip Sang from the office of DCI-SCPU.

47. Cpl. Ogutu denied that he seized the petitioner's firearm. The 2nd respondent did not file a statement from IP Philip Sang to deny that he seized the firearm from the petitioner. The inventory form shows that IP Sang is from the Office of the DCI. There is then no doubt that it is officers from the 2nd respondent who seized the respondent's firearm. The question is whether the seizure and retention was lawful and justified.

48. Sections 10 and 11 of the Firearms Act provides as follows:

> ***"(1) Any police officer, customs officer or licensing officer may demand from any person whom he believes to be in possession of a firearm or ammunition the production of any firearm certificate or of any permit granted under subsection (12) or subsection (13) of section 7 at or before such time, at such place and to such police officer, customs officer or licensing officer as he may specify.***
>
> ***(2) Such demand under this section may be made orally or in writing.***
>
> ***(3) If any person upon whom a demand is so made fails to produce any certificate or permit granted to him, or to allow the officer to read the same, or to show that he is entitled by virtue of this Act to have the firearm or ammunition in his possession without holding a firearm certificate or permit, the officer may seize and detain the firearm or ammunition, and may require that person to declare to him immediately his name and address.***
>
> ***(4) If any person upon whom a demand is so made fails, without reasonable cause, to produce any certificate or permit granted to him, or to allow the officer to read the same, or refuses so to declare his name and address, or fails to give his true name and address, he shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings.***
>
> ***[Act No. 4 of 1960, s. 6, Act No. 2 of 2002, Sch.]***
>
> ***11. Production of and accounting for firearms and ammunitions***
>
> ***(1) Any police officer, customs officer or licensing officer may demand from any person who holds a firearm certificate or a permit under subsection (12) or subsection (13) of section 7 the production of any firearm or ammunition to which it relates at or before such time, at such place and to such police officer, customs officer or licensing officer as he may specify.***
>
> ***(2) Any such officer may demand from any person who has within the last preceding five years held a firearm certificate or permit the production of any firearm or ammunition to which it relates, or an account of its whereabouts, at or before such time, at such place and to such police officer, customs officer or licensing officer as he may reasonably specify.***
>
> ***(3) A demand under this section may be made orally or in writing.***
>
> ***(4) If any person fails without reasonable cause to comply with a demand under this section, he shall be guilty of an offence and***

liable to a fine not exceeding ten thousand shillings.

[Act No. 4 of 1960, s. 6, Act No. 2 of 2002, Sch.]

49. Section 37 (1) of the Firearms Act provides that:

> ***"(1) A court, if satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been, is being or is about to be committed, may grant a search warrant authorizing a police officer or other person therein named —***
>
> ***(a) to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein; and***
>
> ***(b) to seize and detain any firearm or ammunition which he may find on the premises or place, or on any such person, in respect of which or in connection with which he has reasonable ground for suspecting that an offence under this Act has been, is being or is about to be committed; and***
>
> ***(c) if the premises are those of a registered firearms dealer, to examine any books relating to the business.***

50. There is no evidence that either of the persons mentioned in Sections 10 and 11 of the Firearms Act ever demanded for the applicant's firearm and firearm certificate or that after such demand, the applicant failed to produce them. There is no evidence that there was reasonable ground for suspecting that an offence under the Firearms Act had been, was being or was about to be committed by the applicant. The respondents have not given any reason why the applicant's firearm and firearm license were confiscated. Cpl. Ogutu, the investigating officer has already stated that the said firearm was not the subject of his investigations. To this end, I find that the seizure of the applicant's firearm and firearm license was unlawful and unjustified.

51. Article 47 (1) of the Constitution provides that:-

> ***"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

52. The petitioner was in lawful possession of the firearm. He had a firearms certificate for it. He was not given any reason for the seizure of the firearm, firearm certificate and ammunition. I do hold that the seizure was unreasonable, unlawful and abuse of power.

53. Consequently and for the above stated reasons the petition partially succeeds and I make the following orders:-

> **(a) A declaration be and is hereby issued that the respondents breached the petitioner's fundamental right to freedom from arbitrary arrest without just cause.**
>
> **(b) A declaration be and is hereby issued that the 2nd respondent's action of confiscating the petitioner's firearm, firearm certificate and ammunition was unreasonable, unlawful and abuse of power.**
>
> **(c) An order is hereby issued directing the respondents to return to the petitioner the petitioner's firearm Bereta Pistol S/No. A022118222, firearm certificate book No. 0092226 and one magazine loaded with 14 x 9mm ammunition.**

Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 17th day of October, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for Respondents

Mr. Namatsi for Petitioner

Petitioner - absent

Court Assistant - George

14 days right of appeal.