



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 412 OF 2016

BETWEEN

DR. ROBERT K. AYISI.....PETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT

AND

NAIROBI CITY COUNTY GOVERNMENT.....INTERESTED PARTY

JUDGEMENT

Parties

1. At all material times the petitioner herein, **Dr. Robert K. Ayisi**, was the acting County Secretary and Head of Public Service of the interested party.
2. The Respondent, **The Kenya Revenue Authority**, is a statutory body established under the **Kenya Revenue Authority Act** (Cap. 469 of the Laws of Kenya) as the sole agent of the Government for the collection and receipt of all government revenue under section 5 of the said Act.
3. The interested party, **Nairobi City County Government**, is a county Government established under Article 176 of the Constitution of Kenya.

The Petition

4. According to the Petitioner in a letter dated 14th March, 2016 by the Respondent to the Petitioner, the Respondent sought for details of transaction between the interested party and **Prof. Tom Odhiambo Ojienda** in respect of the period 2009-2016, which information included details of Fee Note Numbers, Dates, Gross Amount, VAT and nature of the payment. It was pleaded that the said information was sought by the Respondent allegedly pursuant to the provisions of section 56 of the **Income Tax Act** and section 48 of the **VAT Act, 2013**.
5. According to the Petitioner, in response thereto, he wrote a letter dated 24th March, 2016 to the Respondent explaining that the Ethics and Anti-Corruption Commission had requested for documents relating to supplies of goods and services to the interested party and that the same had been forwarded to the Commission on 26th and 27th January 2015 and that so far they had not been returned to the interested party. Consequently, the documents sought by the Respondent were not available at the County.
6. However, vide a further letter dated 1st April, 2016, the Respondent requested from the Petitioner for a payment schedule of the interested party to **Prof. Tom Odhiambo Ojienda** which notice to produce was expressed to have been brought under section 59(1) of the **Tax Procedures Act, 2015**. To this, the Petitioner responded and forwarded the requested schedule vide a letter dated 28th April, 2016 to the Respondent. In yet another letter date 29th April, 2016, the Respondent acknowledged having received the payment schedule but complained that the fee notes had not been enclosed whereas the Petitioner had already explained that all the payment vouchers had been taken by the Ethics and Anti-Corruption Commission. The Respondent in addition sought the production of details of bank accounts that are operated by the interested party and drew attention of the Petitioner to the provisions of sections 99 and 100 of the **Tax Procedures Act**. It was however pleaded that by a letter dated 30th May, 2016, the Petitioner forwarded the bank details of the interested party to the Respondent as sought in the letter dated 29th April, 2016.
7. It was however pleaded that in yet another letter dated 26th September, 2016, the Respondent requested for documents to support payment

schedules provided in a letter dated 28th April, 2016 by the petitioner to the respondent which documents included terms of reference/contract/instructions, invoices/fee notes and payment documents, withholding tax certificates and withholding VAT Certificates, Court awards or any other money paid to third parties through the ex parte applicant's firm on behalf of the County Government and any other document relevant to the tax investigation.

8. The Petitioner was also requested to provide witness statements regarding payments made to **Prof Tom Ojienda** and was once again threatened with sanctions under sections 99 and 100 of the **Tax Procedures Act**.

9. It was pleaded that on 4th October, 2016 at about 4.00 pm, two officers from the Respondent's Department of Criminal Investigations unexpectedly stormed into the office of the Petitioner and demanded that they wanted to engage him regarding the production of certain documents that the Respondent had requested earlier on. It was averred that the said officers introduced themselves as Criminal Investigations Department Officers seconded to the Respondent led by a Chief Inspector of Police by the name Mohamed who informed the Petitioner that they had firm instructions from their boss (**Mr J. Githii Mburu**) to have the Petitioner arrested and be taken to the Respondent's offices at Times Towers Building for failure to produce documents sought from him.

10. It was averred that despite the fact that the Petitioner begged the said officers to allow him to re-check and confirm with the relevant department heads of the interested party if the said documents had been returned by the Ethics and Anti-Corruption Commission, the said officers flatly refused and informed the Petitioner that he was a suspect and insisted that the Petitioner accompanies them. It was further averred that the Petitioner's pleas that the said officers should await the arrival of his advocates was further declined. Accordingly, the Petitioner gave in and at about 5.00pm he left his office sandwiched by the two officers.

11. According to the Petitioner, he requested the said officers to take him to the Respondent's offices in his car considering his status since he was cooperating with them but they declined. Instead the Petitioner was frog-marched and or harassed through the streets like a common criminal to the dismay of onlookers and was according to the Petitioner treated in a very embarrassing and inhuman manner.

12. It was pleaded that on arrival on the 26th floor of the Times Towers Building which houses the Respondent, the Petitioner was shown an already prepared charge sheet. However upon the arrival of his advocate and following a prolonged engagement between his said advocate and **Mr J. Githii Mburu** of the Respondent, the Petitioner was released at about 7.30 pm on condition that he furnishes the sought information within ten days from 4th October, 2016.

13. It was the Petitioner's case that he was thus wrongly imprisoned for about three hours, which imprisonment mounted to inhuman treatment in blatant violation of Article 29 of the Constitution.

14. It was disclosed that in the meantime **Prof Tom Odhiambo** had, while this was happening, obtained order in JR Application No. 471 of 2016 staying any proceedings/actions against him in respect of tax assessment by the Respondent. However in a letter dated 5th October, 2016 addressed to the Petitioner, the Respondent once again reiterated that the Petitioner supplies the sought documents by 11th October, 2016 as agreed and to record a witness statement regarding payments made to the said **Prof Tom Odhiambo Ojienda** by the interested party and the same threats as earlier on were issued.

15. It was however the Petitioner's case that the same information could be obtained from the said **Prof Tom Odhiambo Ojienda** but for some reasons the Respondent never sought for this information from the said advocate himself.

16. Based on Articles 25(a), 28, 29, 31(c), 47(1) & (2), 49(1)(d) and 49(1)(d) of the Constitution, the Petitioner contended that his freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom to liberty, arbitrarily and without cause and be subjected to both physical and psychological torture; right to privacy, which includes the right not to have information relating his private affairs unnecessarily required and/or revealed; the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and the right not to be compelled to make any confession or admission that could be used in evidence against him.

17. It was the Petitioner's case that since Article 31(b) of the Constitution protects the right of every person to privacy which includes the right not to have their possessions seized, to the extent that sections 44(1) & (2) and 60(1)-(3) of the **Tax Procedures Act, 2015** empower the respondent to unilaterally and arbitrarily exercise the power search, seizure and forfeiture of goods, the same are unconstitutional.

18. The Petitioner further took issue with section 56(1) which provides that in any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect as being contrary to section 107 of the **Evidence Act** and contrary to Article 50(2)(a) of the Constitution which provides for fair trial and the right to be presumed innocent until the contrary is proved. It was contended that whereas the general law of application and the Constitution put the onus of proof on the allegor, section 56(1) of the **Tax Procedures Act, 2015** shifts this onus to the tax payer hence the same is not only oppressive and unreasonable but also inconsistent with the general law of application and the Constitution.

19. According to the Petitioner, section 58 of the **Tax Procedures Act, 2015**, in so far as it provides for the power to inspect goods, records etc. is contrary to Article 31(a) of the Constitution which provides that *every person has the right to privacy, which includes the right to have their person, home, or property searched.*

20. It was further contended that sections 59 and 60(10) of the **Tax Procedures Act, 2015** which provide for production of records are also contrary to section 137 of the **Evidence Act** which deals with privileged information between advocate and client as well as Article 31(c) & (d) of the Constitution which protects the right to privacy including the right not to have information relating to their family or private affairs unnecessarily required or revealed or the privacy of their communication infringed. In this case it was contended that whereas sections 59 and 60 of the of the **Tax Procedures Act, 2015** allow the Respondent to demand private and privileged communications between parties, they are not only inconsistent with the general law and application of privileged information but are also unconstitutional as they offed the said Article.

21. It was therefore contended that the offences created in section 99 of the *Tax Procedures Act, 2015* must similarly be unconstitutional.
22. On behalf of the Petitioner, it was submitted based on the principle of the purposive approach to the interpretation of the Constitution as well as the history attending the promulgation of the Constitution of Kenya, 2010 and in particular the case of **Koigi Wamwere vs. Attorney General [2012] eKLR** that the Petitioner was held by the Respondent for two hours, threatening to criminally charge him and causing him untold physical and psychological torture for failure to produce some specified documents which he had already explained had been demanded by the EACC.
23. It was submitted that the Respondent inflicted severe mental suffering on the Petitioner by falsely imprisoning him and threatening him with all manner of untold consequences should he fail to produce the documents. It was therefore submitted that the Petitioner was deprived of his freedom to liberty, arbitrarily and without just cause subjected both to physical and psychological torture and treated in a cruel, inhuman and degrading manner in violation of Article 29 and 25(a) of the Constitution.
24. It was the Petitioner's case that his right to privacy as guaranteed by Article 31 of the Constitution was violated and reliance was placed on **Samura Engineering Limited & 10 Others vs. Kenya Revenue Authority [2012] eKLR**.
25. It was submitted that since Article 10 of the Constitution provides that the national values and principles of governance in that Article bind all State organs, State officers, public officers and all persons, it is expected that even enforcement of tax laws is to be done in a manner reflective of the conduct of a democratic state. In this respect the Petitioner relied on Article 24 of the Constitution of Kenya that demarcates the way in which a fundamental right.
26. It was submitted that the Respondent's demand for information violated Article 31 of the Constitution which protects not only the Petitioner and the interested party but also **Prof. Tom Odhiambo Ojienda Advocate**. Based on Article 47 of the Constitution, it was submitted that even the criminal justice system is not immune to what is prescribed thereat. According to the Petitioner, pursuant to section 2 of the *Fair Administrative Action Act*, since an arrest affects the freedom of movement, amongst other rights, of a suspect, it is therefore an administrative act, regulated by the *Fair Administrative Action Act*. In this case it was submitted that at the point of arrest, contrary to section 4(3)(e) of the said Act, the Petitioner was not informed of the right to legal representation in the impugned proceedings. In this case the Petitioner relied on **Onyango Oloo vs. Attorney General [1986-1989] EA 456** and **Keroche Breweries Limited & 6 Others vs. Attorney General & 10 Others [2016] KLR**.
27. He Petitioner faulted his arrest on the ground that despite his pleas that he be allowed to verify whether the information sought was available, the officers of the Respondent insisted on arresting him hence denying him the right to be heard on the difficulty of accessing the said documents. It was submitted that in effecting an arrest the officers are enjoined to look at the whole matter before arriving at the conclusion to do so. In this case however a decision had already been made to charge the applicant without being heard. Based on **Reg. vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531**, it was submitted that any enforcement measures the Respondent may take pursuant to the provisions of the *Tax Procedures Act, 2015* must be accompanied by minimum standards of fairness, both substantive and procedural.
28. It was submitted that Article 49(1)(d) of the Constitution guarantees an arrested person the right not to be compelled to make any confession or admission that could be used in evidence against him. In this respect the Petitioner relied on the decision of **Majanja, J in Richard Dickson Ogeno & 2 Others vs. Attorney General & 5 Others [2014] eKLR**. In this respect the Petitioner relied on sections 25 and 26 of the *Evidence Act* as to what constitutes a confession and its effect in the law of evidence.
29. On compensation the Petitioner relied on **Otieno Mak'onyango vs. Attorney General & Another [2012] eKLR** and urged the Court to award the Petitioner Kshs Ten Million Shillings as compensation for damages arising from breach of the four constitutional rights guaranteed under the bill of rights.
30. As regards the declaration of unconstitutionality of sections 44(1) and (2) and 60(1) and (3) of the *Tax Procedures Act, 2015*, reliance was placed on **Kennedy vs. Ireland [1987] IR 587 as cited in Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [2015] KLR** and submitted that the right to privacy is tied to the inherent right to dignity of a person and that indeed it is prerequisite right that must be accorded for one to be able to enjoy every other right or freedom deserving of any citizen of a democratic state. It was the Petitioner's submission that Article 31(b) of the Constitution is clear and unequivocal both in wording and spirit and the Court was urged not to depart from the same. Based on the said Article it was the Petitioner's position that sections 44(1) & (2) and 60(1)-(3) of the Tax Procedures Act, 2015 are thus unconstitutional whereas they permit the Respondent to unilaterally and arbitrarily seize tax payer's possessions. In this respect the Petitioner relied on **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR**.
31. The Petitioner took the view that the danger that section 44(1) and (2) and 60(1)-(3) of the *Tax Procedures Act* pose to the nation in so far as it allows the respondent to unilaterally and arbitrarily seize tax payer's possessions is to demean the dignity and spirit of the victims of such actions.
32. As regards section 56(1) of the *Tax Procedures Act*, the Petitioner reiterated the contents of the petition and relied on the holding in **Ndegwa vs. Republic [1985] KLR 534** as well as on an article by **Kieran Riley** titled, "*Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*", at page 303 and submitted that section 56(1) of the *Tax Procedures Act, 2015* be declared unconstitutional for shifting the burden of proof to tax payers in contravention of section 107 of the *Evidence Act* and Article 50(2) of the Constitution.
33. As regards section 58 of the *Tax Procedures Act, 2015*, it was submitted that by permitting the Respondent to unilaterally and arbitrarily search tax payers' properties, the same section was unconstitutional and reliance was placed on **Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others** (supra) and **Brooker vs. The Police [2007] NZSC 30** at para 252.

34. It was the Petitioner's case that sections 59 and 60(10) of the *Tax Procedures Act, 2015* purport to limit fundamental rights and yet fail to meet the requirements and threshold set under Article 24 of the Constitution of Kenya and relied on *A Company and Others vs. Commissioner for South African Revenue Services (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) (17 March, 2014)* and *Balabel and Another vs. Air India [1988] 2 All ER 246 (CA) [1988] Ch. 317.*

35. According to the Petitioner, unless the advocate-client privilege is jealously protected by this court, it will impede the great public interest in accessing justice, as provided by Article 48 of the Constitution, by seeking and getting legal advice from counsel in confidence. It was the Petitioner's case that fee notes are part of the necessary exchange of information whose object is giving of legal advice as and when appropriate. To the Petitioner, so critical is the need for advocate-client privilege that various jurisdictions regard it to subsist even after the death of the client as was expressed by the US Supreme Court case of *Swidler & Berlin vs. United States 524 US 399 (1998).*

36. It was the Petitioner's case that even if the Respondent were to access such private documents and proceed to charge the Petitioner and adduce before the court evidence of such manner, it would still fail the admissibility test as was held in *Myers vs. DPP [1965] AC 101 at 1024.*

37. It was therefore submitted that section 59 and 60(10) of the *Tax Procedures Act, 2015* are unconstitutional whereas they allow the Respondent to demand private and privileged communication between parties in contravention of the general law and application of privileged information under section 137 of the *Evidence Act* and Article 31(d) of the Constitution.

38. It was therefore submitted that section 99 of the *Tax Procedures Act, 2015* which creates offences arising from the said section is similarly unconstitutional.

39. The Petitioner therefore sought the following orders:

- i. A declaration that the Petitioner's constitutional right to human dignity and freedom and security of the person as guaranteed by Article 25(a), 28 and 29 of the Constitution have been violated by the Respondent, its agents, employees and/servants;**
- ii. A declaration that the Petitioner's constitutional right to privacy as guaranteed by Article 31 of the Constitution have been violated by the Respondents, its agents, employees and/or servants;**
- iii. A declaration that the Petitioner's constitutional rights to fair administrative action as guaranteed by Article 47(1) & (2) of the Constitution have been violated by the Respondent, its agents, employees and/or servants;**
- iv. A declaration that the Petitioner's constitutional rights of rights of arrested persons as guaranteed by Article 49(1)(d) of the Constitution have been violated by the Respondent, its agents, employees and/or servants;**
- v. A declaration that the Petitioner be compensated a total sum of ten million Kenya Shillings (KShs 10,000,000.00) or any other amount that the court deems sufficient and/or appropriate by the Respondent for violating the Petitioner's constitutional rights;**
- vi. A declaration that section 44(1) & (2) and 60(1)-(3) of the *Tax Procedures Act, 2015* are unconstitutional whereas they allow the Respondent to unilaterally and arbitrarily seize tax payer's possessions in contravention of Article 31(b) of the Constitution;**
- vii. A declaration that section 56(1) of the *Tax Procedures Act, 2015* are unconstitutional whereas it shift the burden of proof to tax payers in contravention of the general law application under section 107 of the *Evidence Act* and Article 50(2)(a) of the Constitution;**
- viii. A declaration that section 58 of the *Tax Procedures Act, 2015* is unconstitutional whereas it allows the Respondent to unilaterally and arbitrarily search tax payer's properties in contravention of Article 31(a) of the Constitution;**
- ix. A declaration that section 59 and 60(10) of the *Tax Procedures Act, 2015* are unconstitutional whereas they allow the Respondent to demand private and privileged communication between parties in contravention of the general law and application of privilege information under section 137 of the *Evidence Act* and Article 31(d) of the Constitution;**
- x. A declaration that section 99 of the *Tax Procedures Act, 2015* is unconstitutional whereas it creates offences under sections 59(1)(a), (b), (c), and 60(3)(d)(e)(f) and (6) of the *Tax Procedures Act, 2015* which sections are equally unconstitutional;**
- xi. A declaration that it is illegal, unlawful and unconstitutional for the Respondent to compel the petitioner to give private communication and/or information between the interested party and Prof Tom Ojienda advocate or any other advocate or person or body to which the interested party and such a person or body have a private contractual relationship in alleged exercise of powers conferred to the Respondent under sections 59, 99 and 100 of the *Tax Procedures Act, 2015* or at all;**
- xii. An order for full compensation for General and Aggravated damages;**
- xiii. Costs of this petition;**

xiv. And any other or further relief.

Respondent's Case

40. In response to the application, the Respondent set out its role and mandate and averred that the cause of this matter is that it had been investigating **Prof Tom Odhiambo Ojienda** from 1st March, 2016, after receiving intelligence information that there were allegations by the Senate that the Nairobi City County Government had procured legal services from the applicant's firm on 7th January, 2014 at the cost of Kshs 92.8 million in a case against the Nairobi Metropolitan PSV Sacco. Further, there were allegations that the said **Prof Tom Odhiambo Ojienda** sued the Nairobi City County Government in August, 2015 for non-payment of legal fees amounting to Kshs 724,197,078.00. The Respondent also averred that in the same intelligence there were claims that Kshs 280 million was wired into the said Prof Tom Odhiambo Ojienda's personal account for legal services to Mumias Sugar Company in the year 2005.

41. It was the Respondent's case that upon conducting investigations, it was revealed that the said **Prof Tom Odhiambo Ojienda** had under declared taxes in his self-assessment tax returns amounting to Kshs 378,682,40.00 . Accordingly, based on the said investigations and the contractual relationship between **Prof Tom Odhiambo Ojienda** and the interested party through its Chief Finance Officer seeking the details of the transactions between **Prof Tom Odhiambo Ojienda** and the interested party which information included details of Fee Note Numbers, Dates, Gross Amount, VAT and nature of the payment, pursuant to the provisions of section 56 of the **Income Tax Act** and section 48 of the **VAT Act, 2013**, now repealed. However as the said letter was never responded to the Respondent was prompted to write a reminder dated 1st April, 2016 citing the provisions of sections 99 and 100 of the **Tax Procedures Act, 2015**.

42. It was averred that subsequently, on 28th April, 2016, the Respondent received a letter signed by the Petitioner herein on behalf of the interested party in his capacity as the County Secretary, acknowledging receipt of the Respondent's letters dated 14th March, 2016 and 1st April, 2016 forwarding payment schedule to the firm of **Prof Tom Ojienda & Associates**, but providing no fee note. It was averred that on 29th April, 2016 the Respondent wrote another letter to the interested party through the Petitioner informing him that he had failed to avail copies of the fee note in respect of the aforesaid transactions and in the said letter the Respondent requested the Petitioner to provide it with details of the bank accounts operated by the interested party in a bid to trace the direct bank transfers to the firm of **Prof Tom Ojienda & Associates** from the interested party's accounts.

43. According to the Respondent, on 3rd June, 2016, it received a letter dated 30th May, 2016 signed by the Petitioner on behalf of the interested party forwarding copies of Bank accounts held by the interested party but once again without copies of fee notes from the said firm. It was deposed that on 26th September, 2016 the Respondent wrote a letter to the Petitioner referring to the letter dated 28th April, 2016 seeking terms of reference/contracts/instructions, invoices/fee notes and payment documents, withholding tax certificates and withholding VAT Certificates, Court awards or any other money paid to third parties through the ex parte applicant's firm on behalf of the County Government and any other document relevant to the tax investigation. The letter also required the Petitioner to record statements regarding payments amounting to Kshs 269,858,001/= made to **Prof Tom Odhiambo Ojienda** by the interested party. However the Respondent having failed to received either a response to this letter or the documents sought, it once again wrote letter to the Petitioner on 28th September, 2016 requesting for a meeting on 29th September, 2016 which letter was received at the Petitioner's office the same day and the Respondent secured an appointment with the Petitioner for 30th September, 2016 at 9.00 am for the purposes of following up on the documents requested for and for recording witness statement from the Petitioner.

44. It was however averred that though the Respondent's officers, **Weldon Ngeno, Dominic Keng'ara, Phebine Achieng** and **Rael Ivayo** arrived at the Petitioner's office on 30th September, 2016 at 9.00 am as had been agreed, they did not meet the Petitioner and upon inquiry, they were told that he was in a meeting and could not attend to them. The said officers were then to go back and await the next meeting date. Accordingly the said officers left after furnishing their contacts. It was however averred that the Respondent never heard from the Petitioner or his representatives and similarly no documents were received from him.

45. It was disclosed that the findings of tax investigations on **Prof Tom Odhiambo Ojienda** revealed that he had not remitted VAT to the Respondent from payments made to him by the interested party as required, yet these unremitted VAT payments form part of the revenue collected by the Respondent on behalf of the National Government, which is to benefit the public including the interested party.

46. It was averred that based on section 99 of the **Tax Procedures Act, 2015** which makes it an offence not to provide information or produce documents for examination as required by the Commissioner under section 59(1)(a) or (b) of the same Act coupled with the fact that this was a matter of public interest, the Respondent had reason to believe that the Petitioner's failure to provide the documents as required constituted an offence and ordered for his arrest with the intention of charging him under the aforesaid section. Accordingly, the Petitioner was arrested on 4th October, 2016 at 5.00 pm at his office and taken to the Respondent's offices at Times Tower to voluntarily record statement as an accused person in the above charge before being escorted to the police station. It was he Respondent's case that it informed the Petitioner of is right to choose and be represented by an advocate as provided by Article 50g) and therefore the Respondent had to wait for the Petitioner's lawyers before taking any statement from the Petitioner.

47. It was disclosed that the Petitioner's lawyers led by **Dr Khaminwa** arrived later that evening and after thorough deliberations between the parties, the Petitioner committed to provide the required documents within 10 days upon being released, a proposal which the Respondent considered and on that understanding he Petitioner was released and has thus not been charged with any criminal offence.

48. It was deposed that on 5th October, 2016, the Respondent wrote a letter to the Petitioner referring to the discussions held on 4th October, 2016 and the Petitioner's commitment of 26th September, 2016. It was the Respondent's case that at no point during the aforesaid discussions did the Petitioner mention that the documents were with the Ethics and Anti-Corruption Commission as alleged. However on 5th October, 2016, the Respondent received a Court order in JR Application No. 471 of 2016 staying any proceedings whether civil or criminal against **Prof Tom Odhiambo Ojienda** with respect to the amended assessment issued by the Respondent.

49. The Respondent maintained that it never received any communication from the interested party to the effect that the documents sought were with the Ethics and Anti-Corruption Commission. It was the Respondent's view that the documents requested for were public documents and not personal ones belonging to the Petitioner. Accordingly Article 31(d) was not applicable. The Respondent however explained that it did not seek the said documents from **Prof Tom Odhiambo Ojienda** Advocate as it is unconstitutional pursuant to Article 50(1) of the Constitution to compel a person to give self-incriminating evidence. While confirming that the Petitioner was indeed arrested by the CID officers seconded to the Respondent under section 7 of the **Tax Procedures Act**, it was averred that the Petitioner was informed of the reason for his arrest as provided in Article 49(i) of the Constitution and that he reason for the Petitioner's arrest was his failure to produce documents sought by the Commissioner which is an offence under section 99 of the **Tax Procedures Act**.

50. According to the Respondent, since the Petitioner was warned several times that action would be taken against him under sections 99 and 100 of the **Tax Procedures Act** but still failed to comply, the officers acted within the law and administrative action taken was lawful, reasonable and procedurally fair. The Respondent contended that under Article 27(1) of the Constitution every person is equal before the law notwithstanding the status of the Petitioner. It was the Respondent's case that he Petitioner was arrested and escorted to the Respondent's offices like any other citizen of Kenya and that he was never tortured or punished by the Respondent's officers during or after his arrest and that his rights under Article 25(a), 28 and 29 were not violated as alleged.

51. It was explained that the Petitioner was arrested on 4th October, 2016 while the stay in the judicial review application was issued on 5th October, 2016 hence the allegation that the arrest happened after the stay was issued was misplaced.

52. It was submitted on behalf of the Respondent that the **Tax Procedures Act** was constitutionally passed and that the Petitioner had every opportunity to lobby members of Parliament against passing the alleged offending provisions. It was therefore the Respondent's case that this petition was an attempt to frustrate the efforts of the Respondent in performing its mandate under the **Kenya Revenue Authority Act**, Cap 469. It was argued in a nutshell that the Petitioner had not proved the manner in which the challenged provisions of the said Act were unconstitutional.

53. The Court was therefore urged to dismiss the petition with costs.

Analysis and Determination

54. I have considered the issues raised in this Petition. The issues raised herein revolve around the constitutionality of some of the provisions of the **Tax Procedures Act, 2015**, (hereinafter referred to as "the Act").

55. It is however important to set out the general rule that applies to such investigations. That there is a presumption of constitutionality of statutes is not in doubt. This position was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which was a restatement of the law in the English case of **Pearlberg vs. Varty [1972] 1 WLR 534**. 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”

56. I agree, as found by the Court in **Ndyanabo**, that the principle of presumption of constitutionality is a sound principle. However, like any other legal presumption, it has exceptions and in our constitutional set up the example that immediately comes to mind is to be found in Article 24(3). With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of **Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR** in which it stated:

“We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.”

57. However, the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article. See **Coalition for Reforms & Democracy & 2 Others vs. Republic of Kenya & 10 Others Petition Nos 628, 630 of 2014 & 12 of 2015 (Consolidated)**.

58. The criteria in such circumstances was set in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127** where the Constitutional Court of Uganda set out the following principles:

(i) **The onus is on the petitioners to show a prima facie case of violation of their constitutional rights.**

(ii) **Thereafter the burden shifts to the respondent to justify that the limitations to the rights contained in the impugned statute is justified within the meaning of Article 43 of the Constitution. Both purposes and effect of an impugned legislation are relevant in the determination of its constitutionality.**

(iii) **The constitution is to be looked at as a whole. It has to be read as an integrated whole with no particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument.**

(iv) Where human rights provisions conflict with other provisions of the Constitution, human rights provisions take precedence and interpretation should favour enjoyment of the human rights and freedoms.

See also Institute of Social Accountability & Another vs. National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR.

59. It is important in determining this petition to appreciate the nature of the Constitution of Kenya, 2010. Our Constitution, it has been hailed as being a transformative Constitution since as opposed to a structural Constitution, it is a value-oriented one. Its interpretation and application must therefore not be a mechanical one but must be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and *inter alia* Article 10 of the Constitution. The distinction between the two was made by Ulrich Karpen in *The Constitution of the Federal Republic of Germany* thus:

“...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.”

60. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. This was the position adopted by the Supreme Court in The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012 where it was held that:

“A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”

61. As was appreciated by Ojwang, JSC, in Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010:

“A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a “social orientation”, and as its main theme, “rights, welfare, empowerment”, and the Constitution offers these values as the reference-point in governance functions.”

62. Similarly, the majority in The Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012 opined at para 54 that:

“Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions.”

63. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51) noted as follows:

“But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”

64. The foregoing position was aptly summarised by the South African Constitutional Court in Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC) in the following terms:

“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.’ The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”

65. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as “a transformative instrument is the key instrument to bring about a better and more just society”. See **Michaela Hailbronner** in *Traditions and Transformations: The Rise of German Constitutionalism*.

66. This was the position of the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where it expressed itself as follows:

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute *social change and reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy*. This is clear right from the preambular clause which premises the new Constitution on – “*RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.*” And the principle is fleshed out in Article 10 of the Constitution, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racist governance system. Karl Klare, in his article, “*Legal Culture and Transformative Constitutionalism*,” *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: “*At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.*” The scholar states the object of this South African choice: “*By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.*” The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s achievements in constitutional precedent. We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of the Constitution of 2010”.

67. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

“Free democratic order of the Basic Law...assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.”

68. This is my understanding of Article 20(2)(3) and (4) of the 2010 Constitution which provides as follows:

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

69. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57**, the Constitution is a living thing; it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452**:

“Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are “amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.”

70. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006**, it was held that:

“...the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being

a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

71. Nyamu, J (as he then was) in Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356 expressed himself as hereunder:

“The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future.”

72. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

“The national values and principles of governance include...”

73. By employing the use of the term “include” the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

74. The current Constitution of Kenya, 2010, is a product of a long struggle for democracy and liberty spanning decades by the people of Kenya. It is therefore partly a response to many years of misrule by a single party dictatorship. One must therefore start from the presumption that the provisions under the Chapter dealing with the Bill of Rights were meant *inter alia* to correct the historical deficiencies that placed the people at the mercy of the executive by usurping the people’s sovereignty and giving the executive unchecked power over all other institutions of governance. In this respect I defer to Ndegwa vs. Republic [1985] KLR 534 where it was held that:

“No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.”

75. This was appreciated by the Supreme Court in In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012, where it held that we ought to take into account the agonized history attending Kenya’s constitutional reform. Accordingly, in interpreting the Constitution it important that we do so while keeping in mind what Kenyans intended to achieve by retiring the former Constitution and substituting it with the current Constitution.

76. As was held in Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67, it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. Similarly, in Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR, a majority of the Court held that quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

77. In Institute of Social Accountability & Another vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR, the Court stated as follows:

[57] “[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.

...

[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.”

78. With regard to the purpose and effect of legislation, the Canadian Supreme Court in R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated the principle that:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

79. The Court in the Institute of Social Accountability & Another vs. National Assembly & 4 Others (supra) concluded as follows at paragraph 59 of its decision:

“Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution.”

80. In Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed In Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR, at paragraph 26 where the Supreme Court opined that:

“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

81. It is therefore my view that the Bill of Rights is partly steeped in historical context. This view has in fact acquired jurisprudential recognition by the Supreme Court which In the Matter of the Interim Independent Electoral Commission - Constitutional Application No. 2 of 2011 [2011] eKLR paragraph 86, stated:

“The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 20(4) and 259(1)). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10, in chapter 6 and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court”.

82. It is with that historical context in mind that I will endeavour to unravel the issues raised before me. This must necessarily be so due to the fact that under Article 259(a) and (c) of the Constitution this Court is expected to interpret the Constitution in a manner that promotes its values, purposes and principles and permits the development of the law. I therefore associate myself with the views expressed by **Mohamed A J** in the Namibian case of S. vs Acheson, 1991 (2) S.A. 805 (at p.813) to the effect that:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

83. In this case, borrowing from our past, it may well be that Kenyans wanted to break away from the past in which the executive and its apparatus could arbitrarily break into people’s premises at any time of the day or night and cart away people’s properties in violation of inalienable human rights and without recourse to the due process whatsoever. To therefore deliberately set out to strangle the constitutional right entrenched in the Bill of Rights would be inimical to the spirit of the Constitution.

84. One of the cardinal principles for constitutional interpretation was restated the Supreme Court in Advisory Opinion No. 2 of 2013 - The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR, in which the Honourable Chief Justice at paragraph 184 quoted the Ugandan Case of Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3) where it was held that:

“the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution.”

85. It is in this light that we must understand the genesis of the right to privacy.

86. Section 44(1) & (2) of the Act provides as hereunder:

(1) This section shall apply to—

(a) any goods in respect of which the Commissioner or authorized officer reasonably believes that the value added tax or excise duty payable in respect of the supply, removal, or import of the goods has not been or will not be paid; or

(b) goods for which excise duty has not been paid, unless the owner of the goods has made arrangements that have satisfied the Commissioner for the payment of the excise duty, which may include the giving of a security;

(c) excisable goods subject to excise control that have been moved, altered, or in any way interfered with, except with the permission of the Commissioner;

(d) excisable goods in respect of which, any person, in any matter relating to excise, makes or produces a declaration, certificate, application or other document, answer, statement or representation, that is false or incorrect in any particular; or

(e) excisable goods in respect of which a refund of excise duty has been unlawfully obtained.

(2) The Commissioner or an authorized officer may seize any goods to which this section applies.

87. Section 60(1)-(3) of the same Act on the other hand provides as hereunder:

(1) The Commissioner or an authorised officer shall, with a warrant, have full and free access to any building, place, property, documents, or data storage device for the purposes of administering a tax law.

(2) The Commissioner or an authorised officer may secure the building, place, property, documents, or data storage device to which access is sought under subsection (1) before obtaining a warrant.

(3) In the exercise of the power under subsection (1), the Commissioner or authorised officer may—

(a) make an extract or copy of any documents or information stored on a data storage device to which access is obtained under subsection (1);

(b) seize any documents that, in the opinion of the Commissioner or authorised officer, may be material in determining the tax liability of a taxpayer and retain such documents for the period specified in subsection (9);

(c) seize and retain a data storage device when a physical copy or electronic copy of information stored on the device has not been provided for in the period specified in subsection (9);

(d) require the owner or lawful occupier (including an employee) of a building or place to which access is obtained under subsection (1) to answer questions relating to any document found in the building or place, whether on a data storage device or otherwise, or to any entry in the document, and to render such explanation and give any information that the Commissioner or authorised officer may require in relation to a tax law;

(e) require the owner or lawful occupier (including an employee) of a building or place to which access is obtained under subsection (1) to provide access to decryption information necessary to decrypt data to which access is sought under this section;

(f) at the risk and expense of the occupier of the premises to which access is obtained under subsection (1), open and examine any package found in the premises; or

(g) take and retain without payment such reasonable samples of any goods as the Commissioner or authorised officer may think necessary for the exercise of functions under a tax law.

88. According to the Petitioner, these provisions are inconsistent with and violate Article 31(b) of the Constitution which provides as follows:

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

(a) ...

(b) their possessions seized;

89. There is no doubt that the provisions of 44(1) & 2 and 60(1)-(3) restrict the provisions of Article 31(b) of the Constitution. In that event the said provisions of the Act are required to comply with Article 24 of the Constitution which provides as follows:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

90. With regard to the said provision, Mumbi Ngugi, J in Geoffrey Andare vs. Attorney General & 2 Others [2016] eKLR expressed herself as hereunder:

“89. In other jurisdictions part of, the criteria set out in Article 24 has been applied in cases where the question of the constitutionality of statutes was at issue, and is of assistance to this court even were article 24 not applicable. In the Canadian case of *R v. Oakes* (supra), the Court was considering the question whether section 8 of the Narcotic Control Act, which had been found to be unconstitutional for violating section 11 of the Canadian Charter of Rights and Freedoms, was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. In reaching the conclusion that it was not, the Court enunciated the criteria to be followed in answering the question as follows:

“69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom”: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.”

91. In this case the Respondent has not even attempted to show that the requirements of Article 24 aforesaid were satisfied in the enactment of the said sections. The Respondent was required to satisfy this Court that the said provisions which are post 2010 Constitution specifically expresses the intention to limit the Article 31(b) right or fundamental freedom. Accordingly, there same do not indicate the nature and extent of the limitation. According to Article 24 of the Constitution such provisions are invalid and cannot have the effect of limiting the rights conferred by Article 31(b) of the Constitution.

92. The Petitioner further took issue with section 56(1) of the Act which deals with objections and appeals and provides that:

In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.

93. The said provision was however objected to as being contrary to section 107 of the *Evidence Act* and contrary to Article 50(2)(a) of the Constitution which provides for fair trial and the right to be presumed innocent until the contrary is proved. It was contended that whereas the general law of application and the Constitution put the onus of proof on the allegor, section 56(1) of the *Tax Procedures Act, 2015* shifts this onus to the tax payer hence the same is not only oppressive and unreasonable but also inconsistent with the general law of application and the Constitution.

94. As this Court has held time and again a taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. In Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, it was held that

in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

95. Section 107 of the *Evidence Act* provides as hereunder:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

96. This however the general rule and like any other general rule, it may be subject to exceptions. Accordingly, section 109 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

97. It is therefore clear that it is not objectionable for a particular legislation to provide that the proof of a particular fact lies on a particular person. It follows that section 109 of the *Evidence Act* cannot be the basis for nullifying section 56(1) of the *Tax Procedures Act*.

98. It is however contended that the section is violative of Article 50(2)(a) of the Constitution which provides that:

Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

99. It is important to note that the provisions of section 56(1) of the *Tax Procedures Act* come into effect after a tax payer has been assessed. Accordingly, it is my view that it cannot be argued that a tax payer who objects to such an assessment or appeals against the decision is to be treated in the same manner as an innocent person pursuant to Article 50(2)(a) since the objection or an appeal is directed at a decision already made which, unless set aside, is capable of being executed.

100. According to the Petitioner, section 58 of the *Tax Procedures Act, 2015*, in so far as it provides for the power to inspect goods, records etc. is contrary to Article 31(a) of the Constitution. The said section 58 provides as hereunder:

(1) Notwithstanding anything to the contrary in any written law, an authorised officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer, or of a body corporate or of any other person, and may make extracts from or copies of those records.

(2) An officer acting under subsection (1) may require the owner or employee, or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry.

101. There is no doubt that section 58 of the *Tax Procedures Act, 2015*, is a restriction on the right to privacy in Article 31(a) of the Constitution which provides that *every person has the right to privacy, which includes the right to have their person, home, or property searched*. I associate myself with the opinion in *Samura Engineering Limited & 10 Others vs. Kenya Revenue Authority [2012] eKLR* where it was held that:

“The right to privacy enshrined in our Constitution includes the right to not to have one’s person or home searched, one’s property searched or possessions seized. Since searches infringe the right to privacy, they must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state.”

102. I also agree with the position in *Kennedy vs. Ireland [1987] IR 587* as cited in *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [2015] KLR* where it was held that:

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

103. In this respect the Petitioner relied on *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR* where it was held that:

“285 The right to privacy is guaranteed under Article 31 of the Constitution which provides as follows:

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

(a) Their person, house or property searched.

(b) Their possessions seized

(c) Information relating to their family or private affairs unnecessarily required or revealed; or

(d) The privacy of their communications infringed.

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

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

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

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

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

289. The New Zealand Supreme Court in *Brooker vs the Police (2007) NZSC 30* at para. 252 stated as follows:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

290. Applying the normative content of the right to privacy as stated above and what that right seeks to protect, we are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of *Kennedy vs Ireland (1987) I.R 587* it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view:

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

104. As regards the declaration of unconstitutionality of sections 44(1) and (2) and 60(1) and (3) of the *Tax Procedures Act, 2015*, reliance was placed on *Kennedy vs. Ireland [1987] IR 587* as cited in *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [2015] KLR* where it was held that:

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

105. I agree that the right to privacy is tied to the inherent right to dignity of a person and that indeed it is prerequisite right that must be accorded for one to be able to enjoy every other right or freedom deserving of any citizen of a democratic state. In *Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic of Kenya & 10 Others [2015] eKLR* it was held that:

“285 The right to privacy is guaranteed under Article 31 of the Constitution which provides as follows:

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

(a) *Their person, house or property searched.*

(b) *Their possessions seized*

(c) *Information relating to their family or private affairs unnecessarily required or revealed; or*

(d) *The privacy of their communications infringed.*

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

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

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

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

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

289. The New Zealand Supreme Court in *Brooker vs the Police (2007) NZSC 30* at para. 252 stated as follows:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

290. Applying the normative content of the right to privacy as stated above and what that right seeks to protect, we are clear in our mind that surveillance in terms of intercepting communication impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. In the Irish Supreme Court case of *Kennedy vs Ireland (1987) I.R 587* it was held that the phone-tapping of the two journalists in question violated their right to privacy. Hamilton J made it clear that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view:

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

106. *Brooker vs. The Police [2007] NZSC 30* at para 252 holds that:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

107. In the absence of compliance with Article 24 of the Constitution, the said provisions must similarly be invalidated.

108. It was further contended that sections 59 and 60(10) of the *Tax Procedures Act, 2015* which provide for production of records are also contrary to section 137 of the *Evidence Act* which deals with privileged information between advocate and client as well as Article 31(c) & (d) of the Constitution which protects the right to privacy including the right not to have information relating to their family or private affairs unnecessarily required or revealed or the privacy of their communication infringed. In this case it was contended that whereas sections 59 and 60 of the of the *Tax Procedures Act, 2015* allow the Respondent to demand private and privileged communications between parties, they are not only inconsistent with the general law and application of privileged information but are also unconstitutional as they offed the said Article.

109. With due respect, save for section 59(4) the said sections do not purport to take away the privilege between an advocate and his client. The provisions are general provisions which apply to all persons but are subject to other legal provisions Whereas the said provisions may on occasion fall foul of the privilege between advocate and client, such cases must be treated on their own facts and cannot be the basis for declaring sections 59 and 60 of the of the *Tax Procedures Act, 2015* as unconstitutional based on the said privilege. Accordingly, it is only section 59(4) that falls foul of the privilege rule. I therefore associate myself with the position adopted by **Taylor, L** in *Balabel and Another vs. Air India [1988] 2 All ER 246 (CA) [1988] Ch. 317* that:

“...the purpose and scope of privilege is...to enable legal advice to be sought and given in confidence.

110. Therefore the privilege must be seen in light of the broader right to access justice through the seeking of legal advice without hindrance or deterrence.

111. Whereas I have found that section 60(1) – (3) are constitutional for different reasons, section 59 save for subsection (4) has an inbuilt mechanism for testing the legality of the actions taken thereunder.

112. Based on the impugned sections, the Petitioner urged the Court to strike down sections 99 and 100 of the Act as well. The said sections provide as hereunder:

99. (1) A person commits an offence when that person—

(a) fails to provide information or produce any document for examination as required by the Commissioner under section 59(1)(a) or (b);

(b) fails to appear before the Commissioner as required under section 59(1)(c); or

(c) fails to answer any question put to the person by the Commissioner or authorised officer in accordance with section 59(1)(c).

(2) A person commits an offence when the person, without reasonable excuse, fails to provide reasonable facilities and assistance as required by section 60(3)(d), (e), and (f), and (6).

100. A person commits an offence if the person hinders or obstructs the Commissioner or an authorised officer in the performance of the Commissioner's or authorised officer's duties under a tax law.

113. In light of my findings above there is nothing wrong with sections 99 and 100 of the Act.

114. It was submitted that the Respondent inflicted severe mental suffering on the Petitioner by falsely imprisoning him and threatening him with all manner of untold consequences should he fail to produce the documents. It was therefore submitted that the Petitioner was deprived of his freedom to liberty, arbitrarily and without just cause subjected both to physical and psychological torture and treated in a cruel, inhuman and degrading manner in violation of Article 29 and 25(a) of the Constitution. I respectfully do not find any evidence of physical and psychological torture or even cruel and inhuman treatment of the Petitioner at the hands of the Respondent's agents. The mere fact that a person is arrested, whether wrongly or rightly does not necessarily amount to torture or even cruel and inhuman treatment. However all persons whether under arrest or otherwise must be treated with dignity.

115. I am alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. See *Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516*. Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated.

116. Under Article 10(2)(b) of the Constitution, human dignity is one of the values and principles of governance and under Article 10(1) thereof this Court is bound by *inter alia* the said principle when applying or interpreting the Act herein or implementing policy decisions of the Respondents.

117. Further Article 19 of the Constitution provides:

(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

118. Where a law does not give effect to a right or fundamental freedom, Article 20(3)(a) mandates and enjoins this Court to develop such a law to that extent and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Dealing with this obligation the South African Constitutional Court in *Masiya vs. Director of Public Prosecutions Pretoria (The State) & Another [2007] ZAC* expressed itself as follows:

“The constitutional role of the courts in the development of the common law must be distinguished from their other role in considering whether legislative provisions are consistent with the Constitution. The latter role is one of checks and balances on the power provided for in our Constitution, whereby courts are empowered to ensure that legislative provisions are constitutionally compliant. The development of the common law on the other hand is a power that has always vested in our courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed,

but the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.....The question of development of the common law was comprehensively discussed by Ackermann and Goldstone JJ in *Carmichele* in which the duty of courts that is derived from sections 7, 8(1), 39(2) and 173 of the Constitution was stressed. The Court sounded a reminder to judges when developing the common law to "be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary." The Court repeated with approval the remarks of Iacobucci J in *R v Salituro*,—

'Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'

The Court however said that "courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . whether or not the parties in any particular case request the Court to develop the common law under s 39(2)." Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation."

119. In interpreting the Bill of Rights Article 19(4) obliges the Court to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. Article 28 on the other hand recognises that every person has inherent dignity and the right to have that dignity respected and protected. Human dignity is therefore an integral ingredient of the Bill of Rights and the Bill of Rights is expressed under Article 19 to be an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. As expressed by Albie Sachs in *The Strange Alchemy of Life and Law* (OUP) at page 213:

"Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the "haves" can continue to have, but to help create conditions in which the basis dignity of the "have nots" can be secured. The key question then, is not whether the unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically contested terrain. It is precisely where political leaders may have difficulty withstanding constitutionally undue populist pressure, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable to the electorate. It is at these moments that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice as constitutionally envisaged is done to all, without fear, favour or prejudice."

120. It is therefore my view that any law, policy or executive action must as of necessity have as its core objective the upholding of human dignity, a test to which any law and policy must be subjected. As was aptly put by this Court in **Federation of Kenya Women Lawyers (Fida-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] EKLK (HCK)**:

"One of the greatest challenges which has occurred as a result of the new Constitution is the remarkable and dramatic increased expectation people have in the institution of Government. People now expect their Government to not just maintain order but to achieve progress and development. People expect the Government to solve the problems of poverty, inequality, discrimination, unemployment, housing, education and health etc. This vast increase of expectation has given rise to huge anxiety and positive beliefs. The new situation has rekindled public awareness and interest in the role of the courts through which one seeks individual and collective justice and the sustenance of a democratic culture.....The new winds of change brought fundamental and dramatic Constitutional changes and awareness among citizens of this country. There is much euphoria and hope but the question that remains is whether the new Constitution as a popular and desirable document is a durable document that can help citizens achieve their aspirations. Whilst recognizing that even the most progressive Constitution cannot alone solve all the ills of society, the constitution that aspires to be legitimate, progressive, authoritative and to be accepted as a fundamental law must also address, inter alia, the fundamental rights of the people and ensure elimination of all forms of discrimination especially against women and disabled persons. As was stated by Madan, CJ in the case of *Githunguri vs. Republic KLR [1986] 1* these proceedings have put our Constitution on the anvil. It is the subject of considerable anxiety, notoriety and public attention. To quote the words of Madan, CJ; "We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the constitution if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice thereby also destroying the society."

121. In my view, the Court must uphold the dignity of all persons whether suspected of having committed offences or not. Therefore in effecting arrest of suspects, their dignity must be maintained at all times and unless there is threat of violence or imminent escape from lawful custody, there is no reason why law enforcement agencies and officers should treat suspects as if they are criminals.

122. It is in this light that I understand the article by **Kieran Riley** titled, *“Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine”*, at page 303 where it is stated that:

“Individual criminal defendants need to be protected against the “occasional excesses of the popular will.” It is the duty of the judiciary to protect them and to uphold our constitutional system of checks and balances that is “precisely designed to inhibit swift and complete accomplishment of that popular will. “The legislature, in theory acts to please the people. When crime rates rise, the people want to see that the legislature is doing something to protect them. This relationship can lead to broad criminalisation and punishment schemes that are “tough on crime” at the expense of the rights of the individuals who are convicted of crimes. The Constitution entrust the judiciary to protect individual defendants from unjust application of the rule of the majority. Therefore, the judiciary is the branch that should make the final sentencing determination for each individual.”

123. In this case, the Petitioner averred that he was frogmarched along the City Streets despite his pleas that he was ready to drive to the Respondent’s offices. Despite the fact that the Respondent denied this there was no affidavit sworn by any of the officers who effected the Petitioner’s arrest that he was humiliated. Accordingly, the only credible evidence with respect to the manner in which the Petitioner was treated emanated from the Petitioner. Accordingly, I find that the Petitioner’s right to be treated with dignity pursuant to Article 28 of the Constitution was violated. This is not to say that the Petitioner ought to have been treated differently owing to his status but to emphasise that all persons no matter their status must be treated with dignity.

124. I am however not satisfied that the Petitioner’s termination of employment was as a result of the manner in which he was treated by the Respondent. Suffice t to say that the pleadings were never amended to place that issue on record.

125. With respect to compensation, **Rawal, J** (as she then was) in **Otieno Mak’onyango vs. Attorney General & Another [2012] eKLR** expressed herself as hereunder:

195. This case has posed its unique circumstances, but whatever, the circumstances of the case, howsoever controversial or difficult they could be, I shall have to be fair and reasonable in awarding damages.

196. I may reiterate words expressed by Lord Nicholls of Birkenhead in *Rees –vs- Darlington Memorial Hospital NHS Trust (2003 UKHL 52)*

‘In this this Appeal, as in the recent case of Mcfarlane –vs- Tayside Health Board [2000] 2 ac 59, your Lordship’s House had to make a decision concerning development of the law in a field which is highly controversial and therefore, exceedingly difficult.....Judges of course do not have, and do not claim to have, any special insight into what contemporary society regards as fair and reasonable, although their legal expertise enables them to promote a desirable degree of consistency from one case or type of case to the next, and to avoid other pitfalls. But, however, controversial and difficult the subject matter, Judges are required to decide the cases brought before the Court. Where necessary, therefore, they must form a view on what are the requirements of fairness and reasonableness in a novel type of case’

197. I shall further observe that the plaintiff had also claimed damages in tort. However, those claims are not successful as per my findings. What remains are the actions by and from the State officers which, to say the least, were unconstitutional, contrary to fair process of Criminal Law administration and oppressive. He has lost almost five years of life without family or friends. He was punished to suffer solitude and stress without due process of law. It is almost impossible to describe or even to visualize how he would have passed those years without human dignity. Those years cannot be just wished away from his life.

198. It could be even difficult to make heads of damages as the events emanate from his arrest in the aftermath of another tragic blot on the face of our Nation. I shall thus award the lumpsum for all the breaches of his fundamental rights specified hereinbefore. In my considered belief, that method shall be the fairest to adopt in this matter.

199. Considering all the circumstances shown from all sides, I am of an opinion that a sum of *Kshs. 20,000,000/- (Kshs. Twenty Million)* is the fair and reasonable award to the plaintiff for violation of his fundamental rights as enumerated hereinbefore.”

126. While the principles are relevant, the said case cannot be said to be on all fours with the present one where the Petitioner has not called any evidence to show that any person found his arrest embarrassing. He however must have felt humiliated and for that he deserves an award of damages.

Summary of Findings

127. I have dealt in the preceding sections with the issues which were raised before me in this petition. What remains is to summarise my findings in this judgment and my disposition of the petition. Consequently I find that:

- 1) Sections 44(1) and (2), 60(1) and (3) and 59(4) of the ***Tax Procedures Act, 2015*** are not in compliance with the Constitution.
- 2) The Petitioner’s right to be treated with dignity pursuant to Article 28 of the Constitution was violated.

Disposition and Remedies

128. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

1) I declare that sections 44(1) and (2), 60(1) and (3) and 59(4) of the *Tax Procedures Act, 2015* are unconstitutional and are invalid and are accordingly null and void.

2) The Petitioner is entitled to damages for violation of his right to dignity and I assess the same in the sum of Kshs 2,000,000.00.

3) I also award the costs of this Petition to the Petitioner to be borne by the Respondent.

4) The Deputy Registrar of this Court is directed to serve a copy of this judgement on the office of the Attorney General for the necessary action.

129. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 16th day of May, 2018

J M MATIVO

JUDGE

In the presence of: