

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E 135 OF 2021

**IN THE MATTER OF CHAPTER FOUR, THE BILL OF RIGHTS, ARTICLES
19,20,21,22,23,27(1),28,29,31,39,40,45(3),47 AND ARTICLES 159(2) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19,20,21,22,23,27(1),28,29(a),29(d),31,39(1),40(1)
(a),40(2)(a),45(3),47 AND ARTICLES 159(2) OF THE CONSTITUTION OF KENYA
2010**

BETWEEN

ISAIAH WAWERU NGUMI.....PETITIONER

-VERSUS-

DAVID KAHURA NDEGWA.....1ST RESPONDENT

**THE HON. ATTORNEY GENERAL.....2ND
RESPONDENT**

JUDGMENT

1. The Petition dated 15th April, 2021 was filed against the Respondents for the alleged malicious and unlawful arrest, detention and prosecution of the Petitioner. Accordingly, the Petitioner seeks the following reliefs against the Respondents:

- a. *A declaration that the Respondents violated the Petitioner's rights as guaranteed under Articles 28,29,31,39(1),40(1),40(2) (a) and 47(1) of the Constitution of Kenya 2010.*
- b. *A declaration that the Petitioner's conjugal rights as a very married man were violated by the Respondents as a result of him being incarcerated at the Kikuyu police station for a whole week.*
- c. *A declaration that the Petitioner's reputation was damaged by the acts of the Respondents stated herein-above.*
- d. *Orders that Occurrence book number 32/21/10/2019 at Kikuyu police station be expunged.*
- e. *Orders that forms containing the finger prints taken from the Petitioner be expunged from the government records forthwith*
- f. *An order restraining the 1st Respondent from harassing, intimidating, threatening and assaulting the Petitioner in any way.*
- g. *Award the Petitioner damages against the Respondents for the aforesaid violations.*
- h. *Costs of the Petition.*
- i. *Issue any other Order that it may deem just and fit.*

THE PETITIONER'S CASE

2. The Petitioner in his Petition and affidavit sworn on 15th April 2021 avers that in 2010 the 1st Respondent successfully brokered a sale of L.R. No. SIGONA/1431 to the Petitioner's elder brother, for which the 1st Respondent earned a commission of Kshs.200,000/=. He further asserts that in 2019 he

lawfully engaged in the sale of L.R. No. SIGONA/1411 after the 1st Respondent approached him seeking land on behalf of his sister, Mary Wanjiku Ndegwa who resides in the United States of America. He contends that Mary Wanjiku Ndegwa and her husband, Sammy Njihia Wamae, executed a sale agreement with him on 7th February 2019 for a consideration of Kshs.3,800,000/=.

3. The Petitioner states that the 1st Respondent acted as an intermediary and was to be paid a commission totaling Kshs.400,000 if the transaction was successful. He avers that the purchasers paid the purchase price in instalments until 27th September 2019, after which payments ceased.
4. He further alleges that on 18th November 2019, while outside a photo studio in Sigona, he was accosted by two men and a woman, handcuffed, and bundled into a vehicle, and that the 1st Respondent joined in the scuffle. He states that the woman later identified herself as a DCI officer.
5. The Petitioner asserts that he was interrogated on allegations of receiving money for non-existent land and detained at Kikuyu Police Station under degrading conditions, including sleeping on a cold floor and being denied adequate food and conjugal rights.
6. He avers that he was arraigned the following day when Corporal Lucy Mbithe sought custodial orders, resulting in a further three days' remand. During this period, he was fingerprinted and shown a copy of the green card, which he says confirmed the land's existence. He further contends that DCI officers later acknowledged he bore no fault and suggested that the 1st Respondent should pay the outstanding Kshs.900,000/= as per the agreement.

7. It is the Petitioner's contention that on 22nd November 2019 the 1st Respondent expressed an intention to withdraw the complaint, to which the ODPP, through Corporal Lucy Mbithe and the prosecutor, did not object, and he was released upon pleading not guilty. He states that after his release he instructed advocates to demand accountability from both Respondents.
8. He avers that on 27th February 2020 the 1st Respondent assaulted and threatened him at his residence, which he reported to Kikuyu Police Station and issued the police officers with CCTV footage, but no action was taken.
9. It is the Petitioner's case accordingly that the Respondents' actions were unjustified and damaged his reputation. On this premise it was argued that the prosecution instigated against him was malicious. The Petitioner accordingly takes the view that the Respondents' actions of subjecting him to sleep on cold concrete floor of kikuyu police station, being denied freedom of movement, denial of conjugal rights and his dignity and reputation damaged violated his constitutional rights under Articles 28,29, 31, 39 (1), 40 (1), 40 (2) (a) ad 47 (1) of the Constitution.
10. In rejoinder to the 1st Respondent's answer to the petition dated 30th June 2021, the Petitioner reiterates, as pleaded at paragraph 4 of the Petition dated 15th April 2021, that the 1st Respondent's brother, Mr. Isaac Mwaura Ndegwa, purchased L.R. SIGONA/1431 from the Petitioner and has remained its registered owner to date. It is averred that L.R. SIGONA/1431 resulted from the subdivision of L.R. SIGONA/1427, and that the 1st Respondent, acting on behalf of his brother, entered into the sale agreement and utilized the mutation for L.R. SIGONA/1427 to identify L.R. SIGONA/1431.

11. The Petitioner further asserts that after the title to L.R. SIGONA/1431 was obtained, the 1st Respondent oversaw the construction of commercial residential flats thereon, which construction encroached upon the Petitioner's adjacent parcel then known as L.R. SIGONA/1350. It is deposed that L.R. SIGONA/1411 is a subdivision of L.R. SIGONA/1350. The two parcels, L.R. SIGONA/1431 and L.R. SIGONA/1411 are said to be in close proximity, being approximately less than 100 metres apart in a straight line and not more than 150 metres via the access road.
12. On that basis, the Petitioner contends that the 1st Respondent is well acquainted with the Petitioner's parcels and is therefore untruthful in alleging that the Petitioner fraudulently misrepresented the location of L.R. SIGONA/1411 as that of L.R. SIGONA/1427. The Petitioner accordingly prays that the 1st Respondent's answer to the Petition be dismissed with costs.

THE 1ST RESPONDENT'S CASE

13. In response, the 1st Respondent filed an answer to the petition dated 30th June, 2021 in which he denies the petition *in toto*. He avers that on or before 7th February 2019 the purchasers, through him, agreed to purchase L.R Number Sigona/1411 from the Petitioner and were shown a vacant parcel represented as such. A sale agreement for L.R Number Sigona/1411 was executed on 7th February 2019 at a consideration of KShs.3,800,000/= whereupon KShs.2,883,000/= was paid as a refundable deposit, the balance being contingent upon transfer consent.

14. He further averred that although the Petitioner procured Land Control Board consent and executed transfer forms, he declined to furnish the original title and certified copies of his National ID and KRA PIN to complete the transaction.
15. It is the 1st Respondent's case that upon further inquiry, the purchasers through the 1st Respondent discovered that the land shown was in fact L.R Number Sigona/1427, registered in the name of the Petitioner's deceased father, Phillip Ngumi Rukungu. They also learnt that L.R Number Sigona/1427 had been fraudulently sold to Stephen Karanja and Mercy Gathoni Thuitai, while L.R Number Sigona/1411 had long before been sold to one Thomas Githinji, who had commenced permanent construction. The 1st Respondent attributes the Petitioner's refusal to produce completion documents to the deception regarding the availability of L.R Number Sigona/1411. On this basis, the Petitioner was charged with obtaining money by false pretences.
16. The 1st Respondent further averred that he withdrew the criminal complaint because the Petitioner persuaded both him and the investigating officer that he would purge the offence by identifying an alternative parcel or refunding the purchase price. After withdrawal, the Petitioner failed, refused, and/or neglected to either show the alternative land or make the refund. The 1st Respondent therefore returned to the police to report the default and sought the Petitioner's re-arrest and re-arraignment. He was advised by the investigating officer that the law barred a re-arrest and re-arraignment on charges similar to those withdrawn.

17. It is also stated that the 1st Respondent did not assault the Petitioner and contends that, had any assault occurred, he would have been arrested and charged. Additionally, the 1st Respondent particularizes the alleged criminal fraud as: misrepresenting the location and availability of the property; receiving KShs.2,883,000/= on the false pretext of selling L.R Number Sigona/1411 while knowing it belonged to the estate of his deceased father and had been previously sold; misrepresenting L.R Number Sigona/1427 as L.R Number Sigona/1411 notwithstanding its prior sale; failing to provide the title and identification documents necessary for completion; and failing to refund the said deposit.

18. On that basis, the 1st Respondent urged this court to dismiss the Petition with costs to the Respondents.

THE 2ND RESPONDENT'S CASE

19. The 2nd Respondent in response to the Petition, filed two grounds of opposition dated 26th April, 2021 and 22nd November, 2024 on the premise that:

- i. There is no cause of action against the 2nd Respondent as the matter relates to the conduct of the office of the Director of Public Prosecution and the Director off Criminal Investigations.
- ii. The 2nd Respondent is the principal legal adviser to the government and is under no obligation to advise the 1st Respondent herein.

- iii. The instant Petition does not disclose any violation of the Petitioner's constitutional rights and fundamental freedoms by the 2nd Respondent as has been alleged by the Petitioner.
- iv. The Petitioner has failed to discharge both legal and evidentiary burden of proof as required by law.
- v. The Petition has failed to meet the threshold for a constitutional petition as established by the court in the case of **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272**.
- vi. The cause of action raised by the Petitioner in the instant Petition does not constitute to a constitutional question as established in the case of **CNM V WMG (2018) eKLR**.
- vii. The Petitioner ought to have instituted a private civil action against the 1st Respondent in furtherance of obtaining the reliefs sought instead of moving this Honourable Court by filing the instant Petition.
- viii. The Petition is fatally devoid of its substratum as it lacks a nexus between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of such contravention or infringement by the 2nd Respondent.
- ix. The Petition lacks merit and is an abuse of the court process which should be dismissed with costs to the 2nd Respondent.

20. The parties agreed to canvass the Petition by way of written submissions.

PETITIONER'S SUBMISSIONS

21. The Petitioner filed his written submissions dated 15th February, 2023, to which he framed three issues for determination; whether the Petitioner's constitutional rights were violated by the malicious arrest, detention, charging and confinement by the Respondents; whether the Petitioner suffered as a result of the violations of his constitutional rights and whether he is entitled to the reliefs sought, however he generalized the issues in his arguments.
22. In his submissions, he submits that the 1st Respondent gave a false report to the Directorate of Criminal Investigation (DCI) Officers at Kikuyu police station alleging that the Petitioner had obtained money by false pretense. It is argued that this resulted to the DCI officers maliciously arresting the Petitioner, detaining him at Kikuyu police station for five (5) days from 18th to 22nd November, 2020 after which he was charged at Kikuyu Magistrate's Court on fabricated charges.
23. According to the Petitioner, there was no justification for his arrest, detention, charging and confinement by the Respondents, which he argues, are actions that violated his constitutional rights which includes freedom of movement, liberty and dignity.
24. On whether he is entitled to damages, it was submitted that since the Respondents have failed to controvert the facts stated in the Petition, they ought to pay him damages for the violations of his constitutional rights.
25. The Petitioner submitted that he is entitled to an award of Kshs.10,000,000 for being detained for five days in Kikuyu police station and relied on the decision in *HCCHR Petition No. 156 of 2011 at Nairobi; Sonia Kwamboka Rasugu v*

Sandalwood Hotel & Resort Limited & Another where the court awarded the Petitioner Kshs.1,000,000/= for being unlawfully detained for four days in Paradise Beach Hotel South Coast, and argued that the conditions in the police cells are ten times harsher than those Rasugu endured in a five star beach hotel.

26. Consequently, he urged this Honourable Court to find the Respondents liable for violating his constitutional rights and grant the reliefs sought in the Petition.

1ST RESPONDENT'S SUBMISSIONS

a) Institution of the Prosecution

27. In his written submissions, the 1st Respondent identified four issues for determination: Was the prosecution instituted by the 1st Respondent, or by someone for whose acts he is responsible? Was the prosecution instituted without reasonable and probable cause? Was the Petitioner acquitted or was the prosecution against the Petitioner dismissal? Was the Prosecution actuated by malice?

28. The 1st Respondent relied on the case of ***Tobias Moinde Kengere v Postal Corporation of Kenya & 2 Others [2019] eKLR*** which cited with approval the decision of Cotran J, in ***Murunga vs Attorney General [1979] KLR 138***, that laid down the principles governing malicious prosecution, which are:

- a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible.

- b) The Plaintiff must show that the prosecution terminated in his favour.
- c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause.
- d) He must also show that the prosecution was actuated by malice.

29. On the first limb, it was submitted that 1st Respondent neither arrested, detained, charged nor confined the Petitioner; those steps were taken by the Police and the Prosecutor who act independently. It is further contended that the 1st Respondent could not compel a re-arrest after the Petitioner induced withdrawal on a promise of restitution.

30. On the second limb, the 1st Respondent relied on the decision in ***Kagame & Others v AG & Another [1969] EA 643*** which cited with approval the decisions in ***Hicks v Faulkner [1878] 8 QBD 167 at 171***, ***Herniman v Smith [1938] AC 305*** and ***Glinski v Mclver [1962] AC 726***, and argued that reasonable and probable cause turns on an honest belief on reasonable grounds at the time of institution. Further, he argued that the evidence presented, including the transaction culminating in alleged obtaining money by false pretences, is said to have furnished adequate grounds for police investigation and charge.

31. On the third element, the authorities (**Murunga; Mbowa**) are cited for the proposition that the proceedings must terminate in the claimant's favour. It is asserted that there was neither an acquittal nor a dismissal on the merits, rather, the Petitioner obtained a withdrawal of charges after he told the 1st Respondent that he would provide an alternative parcel of land or refund which were not honoured. Reliance was placed on the decision in **Robert**

Okeri Ombeka v Central Bank of Kenya, Civil Appeal No. 105 of 2007 [2015] eKLR to emphasize that an acquittal, even if present, would not by itself prove absence of probable cause.

32. Turning to malice, the 1st Respondent placed reliance on Clerk & Lindsell on Torts, 18th Edition at page 823 and the decision in ***Dr Lucas Ndungu Munyua v Royal Media Services Limited & Another Civil Case 52 of 2008 [2014] eKLR*** which emphasized that prosecution is not prima facie tortious; it is the dishonest or unreasonable use of process that attracts liability. Thus, it is argued that the arrest, detention and prosecution of the Petitioner was devoid of any improper and wrongful motive and without an intent to use the legal process in question for some other than its legally appointed and appropriate purpose.
33. Further, it was submitted that there was a reasonable and probable cause to support the prosecution of the Petitioner for the offence of obtaining money by false pretense and the court was urged to dismiss the Petition with costs.

2ND RESPONDENT'S SUBMISSIONS

34. The 2nd Respondent in its written submissions dated 27th October, 2025 distil three issues for the Court's consideration: whether the arrest, detention and prosecution disclosed a violation of constitutional rights; whether the Petition raises a constitutional question or is an abuse of the court process; and whether the Petition discloses a cause of action against the 2nd Respondent.

35. On the first issue, it is submitted that a constitutional petition must, with reasonable precision, plead the specific provisions allegedly violated, the manner of violation, and the material facts grounding the complaint and relied on the decision in ***Mumo Matemu v Trusted Society of Human Rights Alliance & others [2013] eKLR***, on the centrality of precise pleadings. Further reliance was placed on the decision in ***Susan Wangari Mburu & 5 others v Eldoret Water & Sanitation Company Limited & another [2021] KEELC 1429 (KLR)***, echoing the decision in ***Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others [2018] eKLR*** on the higher degree of precision in constitutional litigation.
36. The 2nd Respondent also relied on the decisions in ***Rono v Insurance Regulatory Authority & 4 others (Constitutional Petition E008 of 2023) [2024] KEHC 11373 (KLR)*** and ***Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR*** which emphasized that it is not enough to cite constitutional provisions without particulars of infringement. On that footing, it is argued that the Petition is vague and does not meet the constitutional threshold as the Petitioner has failed to demonstrate any violation of his constitutional rights and the harm occasioned to him as a result of the purported violation.
37. Further, it was submitted that the Petitioner's arrest was precipitated by a complaint lodged by the 1st Respondent, investigations conducted by the DCI, and arraignment before a competent court, with custodial orders sought and granted within constitutional timelines under Articles 49(1)(f) and 50. It is argued that once the Petitioner was remanded pursuant to lawful orders,

detention ceased to be unlawful, a position supported in ***Mango v Director of Public Prosecutions & 3 others (Criminal Petition E009 of 2024) [2025] KEHC 3689 (KLR)***.

MALICIOUS PROSECUTION: ELEMENTS AND APPLICATION

38. On malicious prosecution, the 2nd Respondent relied on the decision in ***John Ndeto Kyalo v Kenya Tea Development Authority & another [2005] KEHC 1489 (KLR)*** to outline the four conjunctive elements of malicious prosecution. Further reliance was placed in ***Mosigani v Khisa & another (Civil Appeal 001 of 2020 [2025] KEHC 1677 (KLR)*** to emphasize that all four elements must unite.
39. It was further submitted that while withdrawal under section 204 of the Criminal Procedure Code shows termination, the remaining elements, it is argued that are unproven because the case arose from a bona fide land complaint investigated by the DCI that led to the Petitioner's arraignment. Moreover, it was argued that the ODPP's withdrawal of the charges is a lawful exercise under Article 157(6)(c) of the Constitution and section 204 of the Criminal Procedure Code that gives the ODPP discretion to discontinue proceedings at any stage before judgment, an exercise which is constitutionally protected and cannot be impugned until one proves an abuse of power or violation of rights. Reliance was placed in ***Communications Commission of Kenya v Office of the Director of Public Prosecution & another [2018] eKLR***, ***James Kahindi Simba v Director of Public Prosecution & 2 others [2020] KEHC 5684 (KLR)*** to buttress its arguments.

40. It was also submitted that the alleged denial of conjugal rights and inhumane treatment are unsupported by evidence and are legally untenable since the Petitioner failed to prove to the required standard, that his arrest, detention, or

WHETHER THE PETITION RAISES A CONSTITUTIONAL QUESTION OR IS AN ABUSE OF PROCESS

41. On whether the Petition raises a constitutional question or is an abuse of the court process, it was submitted that the dispute is a private grievance from a land transaction and a related complaint, not a constitutional controversy warranting this Court's intervention. Reliance was placed in **CNM v WMG [2018] KEHC 8434 (KLR)** for the proposition that a constitutional issue compels interpretation, application, or enforcement of constitutional rights or values, which is not the case here.

42. Further, it was argued that the Petition neither challenges any statute nor alleges systemic abuse, and it fails the precision requirement in constitutional pleadings as established in **Anarita Karimi Njeru v Republic [1979] (KLR) 1272** and reaffirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR**. Additionally, it was argued that reliefs sought such as expungement of OB entries and deletion of fingerprints are portrayed as legally unsustainable within constitutional remedial architecture. On that basis, the Petition is said to be dressed in constitutional language but essentially an abuse of process.

43. On whether the Petition discloses a cause of action against the 2nd Respondent, it is contended that no actionable nexus is pleaded against the

2nd Respondent, the Attorney General, whose role under Article 156 (4) of the Constitution is principally advisory and representational to the Government and does not have control over the ODPP which is an independent office under Article 157 of the constitution and neither does it have control over the DCI. On that basis, it is argued that no directive, authorization, or participation by the Attorney General is alleged by the Petitioner and neither has he demonstrated that the 2nd Respondent directed, authorized or participated in his arrest or prosecution. This Honourable Court was thus urged to dismiss the Petition with costs.

ANALYSIS AND DETERMINATION

44. Having carefully considered the pleadings, responses, submissions and relevant cases relied upon by the parties, I find the issues for determination to be:

- i. *Whether the Petition raises any constitutional issues.*
- ii. *Whether the Petitioner has established the tort of malicious prosecution.*

Whether the Petition raises any constitutional issues.

45. It is the duty of this court to satisfy itself in a matter that it is possessed of jurisdiction otherwise it may end up acting in vain. The jurisdiction of this court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must therefore, decline any invitation by a Petitioner to deal

with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.

46. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others*** had the following to say on Constitutional Petitions: -

“Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of the Contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

47. The issue before Court is whether the Petitioner’s constitutional rights under Articles 28, 29, 31, 39(1), 40(1), 40 (2)(a) and 47(1) were violated by the Respondents.

48. The gravamen of this petition is that the Petitioner’s arrest, detention and prosecution by the respondents was unjustified and thus violated the Petitioner’s constitutional rights. Those facts can be grounded as private law claims, but they must be pleaded with particularity as constitutional wrongs.

The Petition lists several Constitutional Articles yet offers scant particulars on how each was infringed beyond broad assertions of malicious conduct.

49. It was the Respondents' submission that the instant petition is an abuse of the court process as it was a claim for malicious prosecution cloaked under the guise of a constitutional petition whereas the law sets down the procedure for seeking redress for compensation for the torts of false imprisonment, unlawful arrest and malicious prosecution. In other words, the Respondents contend that this court lacks jurisdiction to entertain the instant petition.

50. The mandate of the DCI officers is well provided for in the Constitution. The National Police Service is established under article 243 of the Constitution. The National Police Service Act, 2011 which operationalizes the above article provides in section 24(e) that one of the functions of the police is the investigation of crimes. In ***Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others (2019) eKLR***, the court in discussing the role of the police in investigation of crimes held:

"...The powers of the police to investigate a crime cannot be challenged because the police is there principally to combat crime. It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power...Odunga J in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, said with regard to the power of the police to investigate:

"...42.It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they

have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene...”

51. On the other hand, the DPP derives his powers from article 157 of the Constitution and his mandate spelt out in the following sub-articles:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(6) The Director of Public Prosecution shall exercise State powers of prosecution and may—

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

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

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

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

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

52. The Office of the Director of Public Prosecutions Act, 2013 under section 6 on the manner of carrying out the function provides as follows:

a. not require the consent of any person or authority for the commencement of criminal proceedings;

- b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and
- c. be subject only to the Constitution and the law.

53. The court in ***Denis Joseph Shijenje & another v Kenya Revenue Authority & 2 others (2021) eKLR*** while discussing the mandate of the ODPP noted as follows:

“37. I find that the office of the Director of Public Prosecution being an independent institution established under the Constitution, the court can only interfere with or interrogate its actions where there is contravention of the Constitution. In the case of Paul Ng’ang’a Nyaga v Attorney General & 3 others (2013) eKLR, it was held that “this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution.”

54. Further in ***Francis Anyango Juma vs The Director of Public Prosecutions and another (2012) eKLR*** the court observed that:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a

party's rights under the Constitution, or violation of the Constitution itself."

55. In like manner, in ***Kenya Commercial Bank Ltd & 2 others v Commissioner Of Police And the Director of Criminal investigations Department & another interested party benjoh Amalgamated Ltd [2012] eKLR*** the court held that:

"25. The Office of the Director of Public Prosecutions and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided for by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and, in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution."

56. It follows therefore that for this petition to succeed, the Petitioner must demonstrate that the DCI officers and the ODPP were in breach of their mandate in arresting, incarcerating, and prosecuting him.

57. However, a fundamental question that must be asked is whether this dispute as presented is in reality a constitutional dispute. The facts as pleaded in my view present a dispute that is allegedly based on unlawful arrest, confinement and malicious prosecution. Though these allegations can be framed as constitutional violations, they may very well support a tortious claim of false imprisonment and malicious prosecution but the petitioner appears to have deliberately avoided taking that route.

58. If therefore the claims before this Court can be adequately litigated in tort, was it proper for the Petitioners to fashion the matter as a constitutional dispute?

59. Courts have constantly weeded out disputes that are disguised as constitutional disputes when in reality they are not. In **Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited (2013) eKLR** Lenaola J (as he then was) stated:

“...Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of Haco Industries where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in AG V Dutambala Criminal Appeal No. 37 of 1991 (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions...”

60. Further in **John Harun Mwau v Peter Gastrow & 3 others (2014) eKLR** the Court held:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights... it is established practice where a matter can be deposed without recourse of the Constitution, Constitution should not be invoked at all...”

61. In the case of **Grace Jepkemoi Kiplagat vs Zakayo Cheruiyot (2021) eKLR** Mutungi J held thus: -

“... there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing matters that are essentially civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”

62. The Court of Appeal in dismissing a similar matter in the case of **James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution (2019) eKLR** stated as follows:

“...As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal timeframe...”

63. It is cardinal principle that where there exists an alternative remedy under statutory law or otherwise, then such a remedy should be pursued instead of a constitutional petition. For instance, in **Patrick Mbau Karanja v Kenyatta University [2012] eKLR** Lenaola J (as he then was) held:

“I should only say this as I conclude; in Francis Waithaka vs Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the constitutional imperative mandate of this court should not be invoked where other remedies lie.”

64. Chacha J. was of a similar view and which I entirely agree with in the case of **Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR** where he stated thus:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in a manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the

appropriate forum in the manner allowed by the applicable law and procedure.”

65. For malicious prosecution which the Petitioner heavily complains about, all what the Petitioner would have been required to prove is the presence of four elements, namely the Respondent instituted the prosecution against the Petitioner, the prosecution ended in his favour, the prosecution was instituted without reasonable and probable cause and that the prosecution was actuated by malice. The court in ***Bethwel Omondi Okal v Attorney General & another [2018] eKLR*** reiterated these principles as follows:

*“... For one to succeed, he/she must prove four elements. First that the criminal proceedings were instituted by the defendant who was instrumental in setting the law in motion against the plaintiff, second, that the defendant acted without reasonable or probable cause. Otherwise there must exist facts which show that the defendant genuinely believed that the criminal proceedings were justified; third, that the defendant must have acted maliciously. That the defendant in instituting the criminal proceedings acted with improper or wrongful motive. and fourth, the criminal proceedings must have terminated in the plaintiff's favour having been acquitted of the charge laid against him. (See *Egbema v West Nile District Administration [1972] EA 60*)...”*

66. From the above, on instituting the proceedings, the record shows the 1st Respondent made a complaint to police. Lodging a complaint does not mean that a prosecution will necessarily ensue; police investigators and the ODPP

independently evaluate and decide whether to recommend a charge or to charge respectively.

67. On termination, the criminal case did not culminate in a merits-based acquittal as the available record points to discontinuance. Favourable termination may be satisfied by certain forms of withdrawal, but its presence does not by itself demonstrate want of reasonable cause or malice.
68. On reasonable and probable cause, the inquiry is time-bound and dual: an honest belief on reasonable grounds judged objectively and subjectively. Where a complaint discloses an arguable offence and investigators act upon it, courts are slow to find want of cause unless the materials were plainly inadequate or fabricated.
69. On malice, the Petitioner must show improper purpose or spite beyond mere error. No evidentiary thread demonstrates that the 1st Respondent or the investigative agencies acted for a collateral purpose. Independent prosecutorial decision-making under Article 157 of the Constitution weighs against an inference of malice in the absence of cogent proof.
70. In the instant petition, this Court considers the allegations raised heavily lie in the tort of malicious prosecution and other ordinary civil claims. The Petitioner's cause of action could have been better and more adequately addressed in civil proceedings under that tort as opposed to a constitutional petition. From a perusal of this Petition, the Petitioner has not articulated allegations that shift the dispute from the realm of ordinary tort into the constitutional arena.

71. Moreover, the Petitioner has not adduced evidence to show how the DCI officers and the DPP acted ultra vires of their duty or violated the Constitution in exercise of their official duties, so as to create a distinct limb separate from malicious prosecution allegations. Consequently, I find that this matter should have been brought as under tort as opposed to within a constitutional litigation.
72. The mandate and jurisdiction of the High Court as a Constitutional Court is distinct from the High Court sitting as a Civil Court. However, when the High Court sitting as a civil Court determines that a prosecution was malicious, then it has jurisdiction to address concerns of violations of constitutional human rights and fundamental freedoms in that very matter.
73. The above discussion, therefore, renders the Petition herein as premature. The Petitioner must, in the first instance, succeed in proving that his prosecution was malicious before the alleged infraction of his rights and fundamental freedoms can be dealt with.
74. Guided by the above principles, this Court is satisfied that the grievances raised in this Petition are ordinary civil disputes that the Petitioner is masking as constitutional grievances. Applying the doctrine of constitutional avoidance, this Court finds that it cannot consider the same as a constitutional petition. Accordingly, the petition is found to be devoid of merit. The orders sought in the Petition being declarations as well as damages are declined and dismissed.
75. The Petition herein is found to be without merit and is dismissed in its entirety, with each party to bear their own costs.

Orders accordingly. File closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER
2025.**

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Petitioner in person - Mr. Isaiah Waweru Ngumi

Counsel for the 1st Respondent – Ms. Omondi

Counsel for the 2nd Respondent – Mr. Weche hb Mr. Marwa

Court Assistant –Ms. Lwambia