REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION NO. E013 OF 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

FREEDOMS PURSUANT TO ARTICLES 10, 19, 20, 21, 22, 23, 27, 28, 38, 47, 49, 50, 157(11), AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 4, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) AND PRACTICE & PROCEDURE RULES

BETWEEN

ROSE ESTHER MUTHONI WAUMIYA…….

PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION…..1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ……. 2ND RESPONDENT

ATTORNEY GENERAL ……3RD RESPONDENT

AND

JOSEPH KIMEMIA THUITA …….

INTERESTED PARTY

JUDGMENT

1. The petitioner is said to be a female adult of sound mind and an accused in Nyeri MCAC E001 of 2025, Republic v Rose Esther Muthoni Waumiya & 3 Others. She is an advocate of the High Court and an active political leader. She stated that she is a whistleblower, who voluntarily came forward to expose corruption in the Nyandarua County tender scandal, guided by her strong belief in transparency, accountability, and the constitutional values underpinning devolution. She supports the devolved system of government and abhors irregular procurement. She is said to have approached the Ethics and Anti-Corruption Commission, the first respondent

and provided information on corruption and did so in good faith and was acting in public interest.

2. She was invited as a whistle-blower on 12.04.2021 by the Respondents to assist with investigations. She voluntarily recorded statements, surrendered WhatsApp and email communications, and fully cooperated with investigators. She was expressly assured by officers of the 2nd Respondent, including Mr. Peter Gachoki and Ms. Miriam Musyimi, that her role would remain that of a state witness.
3. She further posited that on 14.12.2021 and 15.12.2021 she saw the same officers of the 2nd Respondent. She dutifully honoured the invitation, fully cooperated, and provided further statements as well as additional documentary and electronic evidence to aid investigations. She stated that at all times, she acted in the *bona fide* belief and with the legitimate expectation that she was a state witness and would not be reclassified as a suspect, having been consistently assured so by the 2nd Respondent's officers. She was invited over time and furnished more documents which she volunteered.
4. To her utter shock, dismay and consternation, on 25.08.2025 she was arrested, issued with cash bail, and informed that she would be arraigned before the Nyeri Chief Magistrate's Court, Anti-Corruption Division, in Nyeri MCAC E001 of 2025: Republic v Joseph Kimemia Thuita & 3 Others, on 8th September 2025. The intended charges were based solely on

the very evidence she voluntarily provided as a cooperating witness.

5. She relied on various constitutional provisions for her protections, that is, 2(1), 3(1), 10, 19(2) and (3), 20(1), 21, 22, 23, 24, 28, 38, 47, 50, 157(11) and 165 (3)(b) and (d) (i) of the Constitution of Kenya.
6. She maintained that her constitutional rights were breached, she laid 14 point violations of the constitution. The first aspect was breach of process. Reliance was placed, a priori, on the *locus classicus* decision of **Stanley Munga Githunguri v Republic [1986] KEHC 44 (KLR),** where the High Court [C.B.Madan, CJ, D.K.S. Aganyanya and J.E. Gicheru, JJ] posited as follows:

> If we thought, which we do not, that the applicant by being prosecuted is not being deprived of the protection of any of the fundamental rights given by section 77(1) of the Constitution, we are firmly of the opinion that in that event we ought to invoke our inherent powers to prevent this prosecution in the public interest because otherwise it would similarly be an abuse of the process of the Court, oppressive and vexatious. It follows that we are of the opinion that the application must succeed in either event.

7. She maintained that her dignity under Article 28 was violated as she voluntarily assisted in investigations, in the light of assurances by officers. She lost dignity by being arrested in

front of her children. She was of the view that her rights under article 28 were violated.

8. The petitioner maintained that she is aspiring for political office and the trial is bound to be highly publicised and tarnishing her reputation irreparably together with her political right under article 38 of the constitution. She sought refuge in the case of **Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR**).

9. It was her position that the decision to arrest and prosecute her, without affording her any explanation or opportunity to be heard, amounted to arbitrary administrative action. This violated her right under Article 47 of the Constitution to administrative action that is lawful, reasonable, and procedurally fair. The abrupt volte-face by the Respondents, after having treated her as a witness for years, was irrational, opaque, and actuated by malice.

10. She continued that the charges are built on the very evidence the Petitioner voluntarily provided to the 2nd Respondent during investigations, in the *bona fide* belief that she was assisting as a state witness. That to later weaponize her own statements against her contravenes the guarantee under Article 50(2)(1), which protects an accused person from being compelled to give self-incriminating evidence. Reliance was placed on the decision of **Stanley Munga Githunguri v Republic [supra].** It was averred that in the said case, the

court condemned a prosecution founded on a betrayal of official assurances, holding that it would be unjust, oppressive, and contrary to due process for the State to induce cooperation and subsequently turn against the co-operator. Similarly, in the present case, the Petitioner was induced to cooperate on the strength of assurances of protection, only to be betrayed by the very authorities that gave those assurances.

11. They also raised violation of her right to legitimate expectation, unfair inducement and breach of trust. It was her case that by recording statements and providing digital communications, the Petitioner acted under assurances by Ethics and Anti-Corruption Commission officers that she would remain a state witness. Such assurances created a legitimate expectation that she would not be prosecuted. To then reverse this position and deploy her own evidence against her is not only a breach of trust but also an unfair inducement which taints the fairness of the trial from the outset.

12. They posited that in the Supreme Court case of *Wafula v DPP & EACC (Petition E045 of 2024) [2024] KESC 4,* the court emphasized that while witnesses can lawfully be converted into accused persons in certain circumstances, this must only occur where there is credible new evidence pointing to their culpability, and not by recycling testimony they gave as cooperating witnesses. Otherwise, the prosecution is tainted by unfairness and violates the right to a fair trial.

13. She posited that she is entitled to protection from oppressive prosecution as held in the case of **Republic v Attorney General ex-parte Kipng'eno Arap Ngeny** [2001] KLR 612. She posited that prosecuting her on the basis of her own whistleblowing is oppressive and undermines the integrity of the justice system. She relied on comparative whistle blower protection in the case of **Spencer Sankale Olochike v Maasai Mara University; Transparency International Kenya & 2 Others** [2024] KEELRC 1741. It was her position that it is grossly unjust to prosecute a whistle-blower.
14. She stated that she cannot get a fair trial based on the evidence she supplied hence the assurances incurably tainted the prosecution. The prosecution is thus based on compelled or induced testimony. She drew the court's attention to the case of **Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others [2018] KECA 47 (KLR)**. She decried prosecutorial discretion that undermines the course of justice. It was maintained that there was abuse of prosecutorial discretion under Article 157(11) of the constitution. It was her case that the second respondent, Director of Public Prosecutions abused discretion by disregarding public interest in protecting and promoting whistle blowers.
15. She continued that the decision penalised citizen cooperation and acted oppressively, in bad faith and

maliciously. It was her case that in the case of **Wafula v Director of Public Prosecutions; Ethics and Anti-Corruption Commission & 2 others (Interested Parties) [2025] KESC 46 (KLR)**, the Supreme Court [MK Koome, CJ & P, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ] held that the prosecutorial discretion is reviewable.

16. She averred that the charges will deter whistleblowers from cooperating and thus cause collateral harm to the rule of law. This scenario, if left unchecked, she posited, will lead to a lack of public cooperation, contrary to the national values of integrity, transparency, and accountability enshrined in Article 10 of the Constitution. The court was said to be vested with the jurisdiction to determine the matter by dint of articles 22, 23, 165(3)(b), and 258 of the Constitution.

17. The petition was supported by her affidavit, sworn on 4th September 2024 in Nairobi. Together with annexures, including email correspondences, cash bail, and case registration details.

18. The petitioner sought the following order:

    a) A declaration that the intended arrest, arraignment, and prosecution of the Petitioner in Nyeri MCAC E001 of 2025: Republic v Joseph Kimemia Thuita & 3 Others is unconstitutional, unlawful, and in violation of her fundamental rights and freedoms guaranteed under Articles 27, 28, 38, 47, 50 and 157(11) of the Constitution.

b) A declaration that the evidence, statements, and communications voluntarily provided by the Petitioner to the 2nd Respondent during investigations in her capacity as a cooperating whistle blower and State witness are inadmissible in any criminal proceedings against her.

c) A declaration that the purported transposition of the Petitioner from a State witness to an accused person is inimical to her constitutional rights as enshrined under Articles 10, 27, 28 and 50 of the Constitution of Kenya 2010.

d) An order of prohibition restraining the Respondents, whether by themselves, agents or officers, from charging, prosecuting, or arraigning the Petitioner in respect of the Nyandarua County tender investigations.

e) An order of certiorari to remove into this court and quash any decision of the Respondents purporting to approve or institute criminal charges against the Petitioner arising from the Nyandarua County tender investigations.

f) An order of mandamus directing the Respondents to recognize and uphold the Petitioner's role as a cooperating witness and whistleblower, and to take all necessary steps to protect her from reprisals or adverse actions arising from her cooperation.

g) A permanent injunction restraining the Respondents from instituting or continuing any criminal proceedings against the Petitioner arising out of the Nyandarua County tender investigations.

h) A declaration that the Respondents' conduct in seeking to prosecute the Petitioner amounts to abuse of legal process, violates the principle of legitimate expectation, and undermines both the fair administration of justice and the Petitioner's right to a fair trial under Article 50.

i) Such other or further orders as this Honourable court may deem just, expedient and appropriate in the circumstances, including such orders as are necessary to safeguard the Petitioner's constitutional rights and to uphold the integrity of the administration of justice.

j) Costs of the Petition to be borne by the Respondents.

19. The second respondent filed an affidavit in the hand of Jennieffer Kaniu, a learned principal prosecution counsel. It was her position that the petitioner sought to nullify the criminal proceedings in Nyeri MCAC E001 of 2025: Republic v Joseph Kimemia Thuita & 3 Others, on the grounds of a violation of the constitutional right to self-incrimination.

20. It was her position that the Director of Public Prosecution is mandated under Article 157 of the Constitution to institute criminal proceedings against the state. The charge sheet is a

result of the mandate of the exercise of powers of the Ethics and Anti-Corruption Commission, which has a mandate to investigate the conduct of any person for conduct that constitutes corruption or economic crime. Under chapter 6 of the Constitution, Anti-Corruption and Economic Crimes Act, Ethics and Anti-Corruption Commission Act, and Leadership and Integrity Act.

21. The office of the Director of Public Prosecution is empowered to authorise any investigation in an effort to protect public property and revenue under the Anti-Corruption and Economic Crimes Act. A crime was disclosed under the said Acts in connection with the tender and payment for tender NYA/CGN/PT/ITC/01/2017-2018 for the provision of branding services for the County Government of Nyandarua.

22. She posited that investigations implicated the petitioner, the interested party, and others. They are said to have identified the tender prior to advertisement. The Ethics and Anti-Corruption Commission communicated to the Office of the Director of Public Prosecution, who made recommendations under section 35 of the Anti-Corruption and Economic Crimes Act, 2003 and the Ethics and Anti-Corruption Commission Act, 2011, through a report dated 7.3.2025, recommending the charging of various persons. Office of the Director of Public Prosecution found criminal culpability of four suspects and preferred charges. The filing of Nyeri MCAC E001 of 2025 - Republic v Rose Esther Muthoni Waumiya & 3 Others was

thereby filed, and orders sought in this court by the petitioner before she took a plea.

23. The learned principal prosecution counsel maintained that they have the power to prefer charges without direction from any other authority or control of anyone. It was her position that they relied on the Director of Public Prosecutions' decision to charge guidelines, 2019. They did not rely solely on the petitioner's evidence; they also reviewed other evidence, including witness statements, documents, registers, letters, bank statements, and procurement documents.

24. It was the first respondent’s case that the statements recorded by the investigators were not confessions, hence article 50(2)(l) of the Constitution was not breached. The office of the Director of Public Prosecutions was not aware of any arrangement made with the investigators of the Ethics and Anti-Corruption Commission. The director of Public Prosecutions maintained that the petitioner will get a fair trial under Article 162(4) of the Constitution. In any case, the parties will appear before a competent magistrate with an opportunity to participate.

25. They posited that the petitioner is represented by counsel, has the opportunity to rebut the evidence given, and protections under Article 24 of the Constitution will be protected. They beseeched the court to dismiss the petition as it delays the matter at hand.

26. The petition was described as vexatious, frivolous, and an abuse of the court process.

27. The petitioner filed humongous submissions dated 21.1.2026, posting that she was redesignated from a witness to an accused in a matter where they were relying on documents, electronic data, and communication exclusively, procured from her on express assurance that she was to be a witness. She decried the sudden shift from witness to accused, which ran counter to her legitimate expectations. This was said to be a breach of Articles 27.28, 47, 50, and 157(11) of the Constitution. To them, this made the decision irrational, arbitrary, unfair, and unconstitutional.

28. They submitted that the intended prosecution is bad in law, not anchored in evidence, in violation of fundamental rights, and was in a manner that constitutes an abuse of the criminal justice system. The same was said to be made in bad faith, procedurally and constitutionally flawed, brought with an improper motive, and will inflict irreparable prejudice on the petitioner. They therefore invoked this court’s power to protect the integrity of the administration of justice. The petitioner thereafter submitted that there are four issues for determination, which I set herein verbatim:

    a) Whether the respondents' conduct amounts to the abuse of the process, warranting the constitutional intervention.

b) Whether the intended prosecution violated the petitioner's rights under articles 27, 28, 38, 47, and 50 of the Constitution.

c) Whether the court has jurisdiction to intervene pre-emptively to stop the unlawful prosecution.

d) Whether the petitioner is entitled to the reliefs sought.

29. She submitted that she was a whistle blower and was given assurances by two officers of the Ethics and Anti-Corruption Commission. On that basis, she cooperated until 25.08.2025, when she was informed of changed circumstances and that roles had reversed. It was her case that cooperation would not have ensued without assurance from the two officers. The court was called upon to protect the petition from abuse of the court system. The court was called upon to front on prosecutions that compromise the integrity of the justice system. reliance was placed on the English case of **Regina V. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42**, where, Lord Griffiths, Lord Bridge of Harwich, Lord Oliver of Aylmerton, Lord Lowry and Lord Slynn of Hadley; per Lord Griffiths, held as follows:

> As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In Reg. v. Derby Crown Court, Ex parte Brooks (1984) 80 Cr.App.R. 164, 168-169, Sir Roger Ormrod said:

"The power to stop a prosecution arises only when it is an abuse of a process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution."

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In Chu Piu-wing v. Attorney-General [1984] H.K.L.R. 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence, McMullin V.-P said at pp. 417-418:

"There is a clear public interest to be observed in holding officials of the state to promises made by

them in full understanding of what is entailed by the bargain."

30. The submission that the law abhors the selective application of the law. They posit that she is the only one charged for those who cooperated. Reliance was placed on **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR)(DK MARAGA, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & N NDUNGU, SCJJ).** The decision did not address the questions indicated as decided.

31. The petitioner submitted rather strangely that the respondent had not justified in charging her among the plethora of others who cooperated, lamenting that she was arrested in the presence of her young children. It was her submissions that the venous rights under articles 27, 28, 38, 47, and 50 were violated. The respondents breached their duty to ensure that the action was procedurally fair, lawful, and reasonable. Reliance was placed on the case of **Judicial Service Commission v Mutava & another [2015] KECA 741 (KLR)**, where the Supreme Court posited as follows:

> [23] Article 47(1) does not exclude the application of common law particularly the common law right to fair hearing. As I have endeavoured to show above,

natural justice comprises the doctrine of or is synonymous with "acting fairly". The term "procedurally fair" used in article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action. In construing the contents and scope of fair administrative action, the justice of the common law will greatly influence the future development of the administrative law under the Constitution. Article 47(1) marks an important and transformative development of administrative justice, for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10, such as the rule of law, human dignity, social justice, and good governance.

32. Further, reliance was placed on the case of **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others** [2014] KESC 53 (KLR). She further submitted that Article 50(2)(l) of the Constitution was breached. Further reliance was placed on the case of *AOO & 6 others v Attorney General & another [2017] KEHC 6022 (KLR).* The two decisions deal with different questions altogether.

33. It was her submissions that the Director of Public Prosecution is under a duty to act in the public interest, in a manner that prevents abuse of judicial process and the interest of administration of justice. She relied on the case of **Director of Public Prosecutions v Martin Maina & 4 Others** [2017] KECA 93 (KLR) (Musinga, Gatembu & Murgor, JJ.A). The matters covered therein are different. Further reliance was placed on the case of **Stanley Munga Githunguri v Republic [1986] KEHC 44 (KLR),** where a bench of the High Court [C.B. Madan CJ, D.K.S. Aganyanya and J.E. Gicheru] held as follows:

> Even if none of the pre-requisites exists as required by section 77(1) it would still be open to this Court to say under its inherent powers, and also by virtue of the provisions of the Judicature Act (Cap 8), that it would not be in the public interest, sometimes also referred to as public policy, to allow the prosecution launched against the applicant to continue, and issue Order of Prohibition to stop it. It is as much in the public interest that breaches of the law should be punished, as it is to ensure that in the process of doing so the people are not bashed about so that they lose respect for the law. If the law falls into disrepute, it will have a shattering effect upon society's sense of security, personal freedom, and property. The Court is the final arbiter of how the public interest is to be preserved.

34. Reliance was placed on the case of **Matemu v Trusted Society of Human Rights Alliance & 5 others** (Civil Application 29 of 2014) [2014] KESC 6 (KLR) (9 December 2014) (Ruling), [WM Mutunga, CJ & P, KH Rawal, DCJ & VP, PK Tunoi, MK Ibrahim, JB Ojwang & N Ndungu, SCJJ]. The point raised in respect of this decision is equally unclear.

35. In Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR). The court of appeal [Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)], the Judges posited as follows in that matter:

> There is, in addition, more to this analysis. It was the High Court's holding that the failure of the appointing authorities to give due attention to all information that was available on the integrity or suitability of the appellant constituted a ground to invalidate his appointment. In its view, the unresolved questions touching on the appellant implied that there had been no proper inquiry. While the argument is logical, the irresolution of the said questions cannot in itself amount to procedural impropriety on the part of the Executive or the Legislature. We note that the superior court below itself noted the inconclusive nature of the evidence and suggested in its decision, without explication, that such unresolved questions remained to be determined only by "appropriate legal proceedings tailored for that purpose." By logical inference, a

holding that the omission to resolve the questions constituted procedural impropriety is in our humble view inconsistent with its own statements. We are persuaded here by the determination of the Constitutional Court of South Africa in Democratic Alliance (supra) that a meeting of evidentiary threshold is key to a determination of procedural impropriety. That evidentiary threshold is high, given the principle of separation of powers, and in our view, it has not been met in this case.

75. In sum, this Court agrees with the High Court's dicta that procedural propriety cannot be based on mechanical compliance with procedural hoops. In our view, however, the applicable general principle is that there must be a showing that there were substantive defects in that procedure, or significant omissions as to render it unconstitutional. Absent such showing, or arbitrariness or absence of debate altogether, a judicial determination on the quality of the debate or its outcome is to overstep the demarcated boundaries of our constitutional enterprise. In our view, to conclude, as the High Court did, that there was no substantive debate is to cross the boundary.

76. It is also our considered view, moreover, that the applicable principle is that the process must be examined cumulatively as a whole, without cherry picking an episode which may tend to color the process without impugning its substance. Such an approach would be a wild search for error. That is not the purpose of judicial review. On this principle alone, there is no material before us to sustain the High Court's conclusion that the procedural aspects

> of the appointment of the appellant by the Executive and Legislature did not pass the constitutional standard. There has been no material either to sustain the claim touching on procedural propriety to the effect that the appellant had failed to meet any of the conditions and qualifications set out in section 5 of the Ethics and Anti-Corruption Commission Act.

36. They posited that the action of the respondents is contrary to the constitution by:

a) Violating legitimate expectation
b) Weaponizes cooperation
c) Discourages future whistle blowers
d) Violates discretion under Article157(11) of the Constitution
e) Breaches Article 10 of the Constitution

37. It was their submissions that the constitution is forward looking. Reliance was placed on the case of **Meixner & another v Attorney General [2005] KECA 292 (KLR)** where the Court of Appeal (**RSC OMOLO, PK TUNOI & EM GITHINJI, JJA)** posited as follows:

> As the learned Judge correctly stated, judicial review is concerned with the decision-making process and not with the merits of the decision itself. Judicial review concerns the legality of decisions by bodies or persons that are subject to judicial review. A decision can be upset through certiorari on a matter of law if on the face of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.

> 12. Having regard to the law, we agree with the finding of the learned Judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.
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> 13. The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the Judicial Review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.

38. The Respondents did not file submissions.

Analysis

39. Only two issues are up for consideration:
    a) The factual matrix forming the current petition and the effect thereon.

b) The reliefs to be granted.

40. Essentially, therefore, the court has to determine on the basis of the affidavits on record, the factual base of the imbroglio facing the parties. Secondly, to find out whether any of the facts found create a legal obligation or amount to a breach of a constitutional imperative necessitating intervention by the High Court. The court will therefore set out the language addressed in the petition and its legal effect and meaning. The same will be juxtaposed with the constitutional tenets of interpretation. Finally, the court will determine the intersection of the evidence and the constitutional imperatives. This will then give rise to the relief that is due to either party.

41. Articles 19, 20, 21, 22, 23, 27, 28, 38, 47, 49 and 50 provide certain rights and procedural safeguards for the rights. On the other hand article 10 sets forth imperatives for integrity.

42. Article 10 provides for the national values and principles of governance. These bind all state organs, state officers, public officers and all persons whenever any of them-

(a) Applies or interprets this Constitution;

(b) Enacts, applies or interprets any law; or

(c) Makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, nondiscrimination and protection of the marginalised;
(c) Good governance, integrity, transparency and accountability; and
(d) Sustainable development.

43. On the other hand, Articles 19, 20, 21, 22, 23, provide for the enforcement of human rights. They address the applicability and limitations of rights under the Bill of Rights. They posit that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights. In the case of **Lewa v Mwagandi [2015] KECA 532 (KLR),** W Ouko, MS Asike-Makhandia & K M'Inoti, JJA; Per, K. M'Inoti, JA posited as follows:

> Applying the Constitutional principles of interpretation that insists on consideration of the whole Constitution (the principle of harmonization), as opposed to a narrow interpretation, one that promotes the purposes, values and principles of the Constitution, advances the rule of law, human rights and fundamental freedoms, I am of the firm view that, if it was the intention of the people of Kenya to

> say enough is enough with this law, nothing would have been easier than to say so loud and clear, leaving no room for conjecture. That perhaps explains why right to property is not listed among the rights that may not be limited. A right or fundamental freedom may be limited by legislation if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation.

44. The next question is what constitutes public interest. Is public interest abstract, or is it the interest of the loudest in society? Public interest dictates that interpretation be oriented toward the common good rather than the enforcement of narrow sectarian or selfish interests. Even where liberty is being protected, it is protected not for its own sake but as part of the wider public interest. In the case of **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR),** the Court of Appeal [**MS ASIKE-MAKHANDIA, W OUKO, PO KIAGE, K M'INOTI & AK MURGOR, JJA]** addressed what constitutes public interest as follows:

> 99. Finally, in Center for Rights Education and Awareness & Another v. John Harun Mwau & 6 Others[2012] eKLR, Githinji, JA, with whom we respectfully agree, outlined other important principles of interpretation of the Constitution and stated that;

"There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise."

100.Ultimately, we are clear in our minds that, owing to the prescriptive requirements of Article 259, and the various pronouncements by the courts that we have adverted to, we are compelled to adopt a purposive approach when interpreting the Constitution, having regard to the intent and purpose, the historical socio-political context, the values, aspirations and the spirit of the Constitution. We do not agree with the appellant or the Attorney-General that in this

appeal, interpretation should be formalistic or restricted to the legal text alone and the literal meaning of the provisions, and neither do we subscribe to the proposition that a purposive or normative interpretation is strictly limited to the Bill of Rights only. The criticism directed at the High Court in this regard is not justified.

45. In addressing the question of public interest, the court in **Kamau v Attorney General & 2 others; Equality Now & 9 others** (Interested Parties); Katiba Institute & another (Amicus Curiae) [2021] KEHC 450 (KLR),[LA Achode, K Kimondo & MW Muigai, JJ] posited as doth;

> **In MEC for Education: Kwazulu-Natal and others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) the South African Constitutional Court opined thus: Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of "human dignity, equality and freedom". These values are not mutually exclusive but enhance and reinforce each other…A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues." …that we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.**

> **166.In United Millers Limited & another v John Mangoro Njogu Nyeri, High Court, Civil Appeal 118 of 2011; [2016] eKLR, Mativo, J stated thus:A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.**

46. The question then is whether the assurances were ever given and the effect thereof. The material placed before me contained no assurances that there would be no prosecution. Secondly, the authority to make that decision was the Office of the Director of Public Prosecutions. There is no allegation that the office of the Director of Public Prosecutions gave any assurance. Therefore, even where such assurances were given, they are not from the one and only body that initiates and makes a decision to charge on the basis of an evidential test of means, the test used to ensure that there is sufficient evidence to provide a realistic prospect of conviction against a suspect on each charge. Further, it is the same office that decides on the public interest, meaning the test applied by prosecutors to determine whether charging a suspect is in the interest of the wider administration of justice.

47. The second limb is whether, as alleged, the petitioner was converted from a witness to an accused person. The evidence on record does not show this. All the accused persons were charged at the same time. The petitioner was informed on 25.8.2025 of the decision to charge. Therefore, there is no instance when the petitioner was an accused person. The court shall revert to this.

48. Lastly, was there a legitimate expectation? In the case of **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR)**, the Supreme Court [**WM Mutunga, CJ & P, KH Rawal, DCJ & VP, PK Tunoi, MK Ibrahim, JB OJWANG, SC Wanjala & N Ndungu, SCJJ']** dealt with legitimate expectation as follows:

> "Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, In re Westminster City Council, [1986] A.C. 668 at 692(Lord Bridge):… the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".
>
> [264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body

retaining a long-standing practice, or keeping a promise.

[265]Aninstance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that iswithin its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation,has to show that it has locus standi to make a claim on the basis of legitimate expectation.

[266]Wade and Forsyth in their work, Administrative Law, 10th ed (pages 446-448), discuss the relevant legal principles onlegitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation. Citing the House of Lord's decision in R. v. DPP ex p. Kebilene [1999] 3 WLR 972(HL), the learned authors observe thata statement made by a Minister cannot found an expectation that an independent officer will act in a particular way. They cited the case,R. v. Secretary of State for Education and Employment, ex p. Begbie [2000] 1 WLR 1115 (CA),where the Court of Appeal held that an election promise made by a Shadow Minister did not bind the responsible Minister after a change of government. The authors cite the House of Lord's decision in R. v. DPP ex p. Kebilene,for the principle that clear statutory words override any expectation howsoever founded.

[267]The principle is well reflected in judicial practice in Kenya. A relevant excerpt from Republic v Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc.

case No. 356 of 2013; [2014] eKLR, Thus reads [paragraph 33]:

> …the legal position is that legitimate expectation cannot override the law. This was the position in Republic vs. Kenya Revenue Authority, ex parte Aberdare Freight Services Limited [2004] 2 eKLR 530, where it was held:'…a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties.
>
> Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims… Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case, a judge should achieve justice, weigh the relative 'strength of expectation'…"
>
> [268]An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, South African Veterinary Council v. Szymanski 2003(4) S.A. 42 (SCA) at [paragraph 28]: the Court held as follows:
>
> The law does not protect every expectation but only those which are 'legitimate'. The requirements for the legitimacy of the expectation include the following:

i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting, ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

ii. The expectation must be reasonable: Administrator, Transvaal v. Traub (supra [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

iii. The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350h – j

iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: Hauptfleisch

v. Caledon Divisional Council 1963 (4) SA 53 (C) at 59E - G.”This was also referred to with approval in Walele v. City of Cape Townand

Others; 2008 (6) S.A 129 (C.C.) paragraph 41.

49. The court in the above case, distilled the principles for legitimate expectation as follows:

> The emerging principles may be succinctly set out as follows:
>
> a) There must be an express, clear, and unambiguous promise given by a public authority;
> b) The expectation itself must be reasonable;
> c) The representation must be one which it was competent and lawful for the decision-maker to make; and
> d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.

50. Reading these principles against the facts, it comes out succinctly that there was no legitimate expectation that they would not be charged. How two Ethics and Anti-Corruption Commission officers investigating a crime can assure an advocate of the High Court that she was not to be charged is beyond fathoming. They do not hold a decision-making authority at the Office of the Director of Public Prosecution, let alone the Ethics and Anti-Corruption Commission. The so-called persons who allegedly gave assurance had no authority to do so. It is unnecessary to go into whether they indeed gave her the assurance.

51. Secondly, there is no material placed before the court that the expectation was itself reasonable. In the case of **Transparency International - Kenya v Omondi [2023] KECA 174 (KLR)**, the Court of Appeal [F Sichale, LA Achode & PM Gachoka, JJA] addressed the question of the reasonableness of expectation as follows:

> **De Smith, Woolf & Jowell, in "Judicial Review of Administrative Action cited in Republic v Kenya Revenue Authority Ex Parte M- Kopa Kenya Limited thus:**
> **A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.**

52. In the case of **Kenya Revenue Authority v Export Trading Company Limited [2022]** KESC 31 (KLR), the Supreme Court [Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) held as follows:

> In Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others, SC Petitions No. 14, 14A, 14B and 14C of 2014; [2014] eKLR "CCK Case" where Rawal, SCJ discussed the

right to fair administrative action as provided for under Article 47 of the Constitution by finding:

“[404] The concept of legitimate expectation has been admirably captured in the main Judgment (paragraphs 256-291), and my intention is to capture its essence while considering its implications within our constitutional purpose, and the concept of its remedies through the administrative process stipulated under Article 47 of the Constitution. A State under the rule of law is obliged to balance administrative action and the claims of legitimate expectation as has been claimed by the 1st, 2nd and 3rd respondents in this case. Article 47 in the circumstances is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful, reasonable and procedurally fair public policies. The doctrine of legitimate expectation requires the entrenchment of a duty to act fairly. A breach of Article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party’s legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at un-procedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.”

53. The Supreme Court continued in **Kenya Revenue Authority v Export Trading Company Limited [supra]** as follows at paragraph 47:

> This Court in Martin Wanderi & 106 others v. Engineers Registration Board & 10 others, SC Petition No. 19 of 2015; [2018] eKLR found that the question of legality or the lawfulness of an act lies at the core of Article 47(1) by finding:
> "[126] In examining Article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of Article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of the Constitution. The question of legality or the lawfulness of an act lies at the core Article 47(1)."

54. What comes from the above, the assurance must be from an authority with lawful power to give the assurance, and at the same time, the said expectation must be reasonable. In this case, the decision to charge is made by the Director of Public Prosecution under article 157. He does not act on the direction of any person. Therefore, for EACC to bind him not

to charge is to fetter discretion given only to the said office. Article 157 (6) to 11 of the Constitution provides as follows:

> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-
>
> (a) Institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed;
>
> (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> (c) subject to 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).
>
> (7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.
>
> (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
>
> (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers

acting in accordance with general or special instructions.

(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.

(12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

55. Thirdly, there is no evidence of the decisions themselves. What is in the imagination of the parties must remain there. For a legitimate expectation to be legitimate, the representation must be one that it was competent and lawful for the decision-maker to make. The alleged investigators were employees and workers of the Ethics and Anti-Corruption Commission.

56. The Ethics and Anti-Corruption Commission is a body established under section 3(1) of the Ethics and Anti-

Corruption Commission Act. Its functions in relation to criminal cases are set out in section 11(1) of the said Act as follows:

> *Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.*

57. Therefore, with the mandate to investigate, the only legitimate question they may deal with at the highest authority is not to investigate. They have no authority to promise not to charge. This is because the same is not within their remit. The Ethics and Anti-Corruption Commission has no power to advise on forbearance from charging. Effectively, there was no legitimate expectation that the petitioner was not to be charged on the face of any assurance from the Ethics and Anti-Corruption Commission. That assurance can only legitimately come from the Director of Public Prosecutions. There is no assurance given by the said office.

58. This therefore brings the court to the last limb. There cannot be a legitimate expectation in the face of clear provisions of the law or the Constitution. An assurance given

contrary to the powers expressly vested in the Director of Public Prosecutions is illegitimate.

59. The last issue, which I postponed earlier, was the power to convert a witness into an accused and whether such a conversion occurred. This is easily addressed by the nomenclature in Articles 49 and 50 of the Constitution. A person of interest metamorphoses into a suspect, an arrested person, and an accused person.

60. Article 49 provides for the rights of arrested persons as follows:

> (1) An arrested person has the right-
> (a) to be informed promptly, in a language that the person understands, of
> (i) the reason for the arrest;
> (ii) the right to remain silent; and
> (iii) the consequences of not remaining silent;
> (b) to remain silent;
> (c) to communicate with an advocate, and other persons whose assistance is necessary;
> (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
> (e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than
(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

61. *Ipso facto*, an arrested person is not an accused person. He needs to be informed of the charges he is facing and not compelled to confess or admit. This protection is extended by statute under section 25A of the Evidence Act as follows:

> 1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

> (2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

62. Consequently, whatever the investigating officer was told cannot be a confession. Any question of illegally obtained evidence is within the province of the court hearing the case.

63. Article 50 of the Constitution addresses a distinct category of persons, those charged with a criminal offence. These are known as accused persons. Article 50(2), provides as follows:

> (2) Every accused person has the right to a fair trial, which includes the right—
> (a) to be presumed innocent until the contrary is proved;
> (b) to be informed of the charge, with sufficient detail to answer it;
> (c) to have adequate time and facilities to prepare a defence;
> (d) to a public trial before a court established under this Constitution;
> (e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(i) to remain silent, and not to testify during the proceedings;
(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
(k) to adduce and challenge evidence;
(l) to refuse to give self-incriminating evidence;
(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
(n) not to be convicted for an act or omission that at the time it was committed or omitted was not-
(i) an offence in Kenya; or
(ii) a crime under international law;
(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

64. The Petitioner was, at no point, a witness in the matter in the court below. There is no evidence on record to demonstrate that she was ever designated or assured of being treated as a whistle-blower, nor that her status was altered from that of a witness to an accused person. In the absence of such evidence, the question whether the Respondents assured her to remain a witness to accused does not arise for determination. Courts do not adjudicate upon hypothetical or abstract questions that have not crystallized into live issues between the parties. In the case of **Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 44**5 (KLR), the court held that:

> The US Supreme Court has also placed particular emphasis on the fact of its being the final Court of appeal; it is the Court which would normally be the last to hear a case, after the facts have been fully aired in lower Courts. In the response to President Washington in 1793, that Court referred to “being judges of a court of last resort”, the Court to which any actual dispute might finally be brought. It is

> clear that the Courts refuse to advise on abstract legal questions; they give their views only in the course of deciding actual cases or controversies. Hence 'case or controversy', as a requirement, is fundamental in American jurisprudence. In the case of Aetna Life Ins. Co. Vs. Haworth, 300 U.S. 227, the Court has defined justiciable controversy as being distinct from –"a difference or dispute of a hypothetical or abstract character; from one that is academic or moot – one that is definite and concrete, touching the legal relations of parties having adverse legal interests,....a real and substantial controversy admitting specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

65. The question, therefore, is hypothetical and not before the court. The net effect is that the petition lacks merit and is accordingly dismissed. Being a criminal petition, the question of costs does not arise. There shall thus be no order as to costs.

Determination

66. In the circumstances, I make the following orders: -

a) The petition dated 4.09.2025 is accordingly dismissed.

b) There is no order as to costs.

c) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **19th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Petitioner

Ms. Omari for the Respondent

No Appearance for the 1st and 3rd Respondents

Court Assistant – Michael