

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E348 OF 2023**

**BETWEEN**

**CORNELIUS MULI MBUVI.....**  
**.....PETITIONER**

**VERSUS**

**DIRECTORATE OF CRIMINAL**  
**INVESTIGATION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup>**  
**RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC**  
**PROSECUTIONS.....INTERESTED PARTY**

**J U D G M E N T**

**Introduction**

1. The Petition dated 21<sup>st</sup> September 2023 is supported by the Petitioner's affidavit in support of even date. The Petitioner challenges the 1<sup>st</sup> Respondent's continued detention of his motor vehicle **Registration Number KAU 964Z** on grounds that it is illegal, unreasonable and without any justifiable cause.
2. The Petitioner thus seeks the following reliefs:

- a) **A declaration that the 1<sup>st</sup> Respondent's action of detaining the Petitioner's motor-vehicle registration No. KAU 964Z is unconstitutional therefore unlawful and illegal.**
- b) **The 1<sup>st</sup> Respondent whether by its agents, servants and/or others be ordered to release to the Petitioner motor-vehicle registration No. KAU 964Z forthwith from wherever it is detained and unconditionally.**
- c) **Aggravated and/or exemplary damages for the unlawful actions of the 1<sup>st</sup> Respondent.**
- d) **Costs.**

#### **Petitioner's Case**

3. The Petitioner states that he is the *bonafide* registered owner of motor vehicle Registration No. KAU 946Z having purchased the said vehicle from one Charles Waithaka Mwangi (deceased) vide a Sale Agreement dated 15<sup>th</sup> August 2017.
4. The Petitioner depones that on 24<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent armed officers, around 10 in number, raided his home in the wee hours of the night and impounded the said vehicle. He states that this was done in the presence of his wife and children who were traumatized by the ordeal. He avers that the officers detained the vehicle at the 1<sup>st</sup> Respondent's headquarters at Kiambu Road.

5. He avers that upon inquiry on the same day; he was informed that the vehicle would be forensically examined using tape lifting and chemical test to verify whether it was a motor-vehicle in transit or not and thus ascertain if it was unlawfully in the country.
6. At that point in time, the Petitioner was informed that the vehicle was not supposed to be in the country and thus his ownership and possession of the same was unlawful. He as such was directed to submit the *sale agreement, the log book, his national identity card and those of the witnesses and Charles Mwangi Waithaka*. Additionally, he was interrogated by the 1<sup>st</sup> Respondent's officers and his statement recorded.
7. However, following completion of the forensic examination, a report dated 25<sup>th</sup> August 2021 by the 1<sup>st</sup> Respondent came out. The Petitioner alleges that the Report confirmed that the Chassis and engine numbers were genuine including his ownership of the motor vehicle in question.
8. The Petitioner is aggrieved that despite the forensic report confirming that the vehicle is legally in the Country, the 1<sup>st</sup> Respondent has continued to detain the vehicle without giving any justification or reasons and despite the Petitioner's persistent follow ups. In fact, he alleges that at one point as he was making a follow up, he was threatened by the 1<sup>st</sup> Respondent's officer one, **Pius Gitari** with a gun

and warned that he risked death if he continued to persist in his inquiry.

9. On this premise, the Petitioner argues that the 1<sup>st</sup> Respondent has violated his right to property under Article 40(1) of the Constitution. In like manner, he argues that the 1<sup>st</sup> Respondent acted in a discriminatory manner in the application of the law towards him in violation of Article 27 of the Constitution. Equally, he argues that his right to a fair administrative action under Article 47 of the Constitution was violated by the 1<sup>st</sup> Respondent.
10. The Petitioner argues that as a result of the 1<sup>st</sup> Respondent's actions, he has suffered loss of use of his motor vehicle since 24<sup>th</sup> August 2021, suffered mental agony, anguish and psychological distress. He adds that the vehicle has continued to waste away in the 1<sup>st</sup> Respondent's hands thus subjecting him to great financial loss.
11. Furthermore, the Petitioner contends that although he is not charged with any offence, he is apprehensive that the 1<sup>st</sup> Respondent may institute sham charges against him and recommend his prosecution to the Interested Party. It is on these grounds that he seeks this Court's intervention.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's Case**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' filed their reply via the Grounds of Opposition dated 10<sup>th</sup> July 2024 on the basis that:
  - i. *The Petition is, misconceived, unwarranted, devoid of merit and therefore an abuse of the process of this Court.*

- ii. *In exercise of its constitutional powers and functions, the 1<sup>st</sup> Respondent is bound by the national values and principles of governance as provided for under Article 10 and 157(11) where public interest, interests of the administration of justice and the need to prevent and avoid abuse of legal process must be observed.*
- iii. *No evidence has been adduced before the Court to show that the Petitioners have suffered prejudice, damages or violation of their rights and freedoms under the constitution as a result of the ongoing prosecution thus rendering their continued prosecution an outright abuse of constitutional rights and powers.*
- iv. *The Petitioner has not demonstrated that the seizure and retention of his vehicle were not justified or that the police have acted outside their legal authority.*
- v. *The right to property does not “extend to any property that has been found to have been unlawfully acquired.” As stipulated under Article 40(6) of the Constitution.*
- vi. *Pursuant to Article 243(4) of the Constitution, the National Police Service Act No. 11A of 2011, under Section 24 of the said Act, the functions of the National Police Service are set out and include investigations, detection and prevention of crimes among many others.*
- vii. *Section 26 of the Criminal Procedure Code provides that; “a police officer, or other person authorized in writing in that behalf by Inspector-General of the National Police Service, may stop, search and detain any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or any aircraft, vessel or vehicle which*

*there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.*

- viii. The Petitioner has not provided any credible evidence to demonstrate how he has suffered damages as a result of the alleged actions or inactions of the authorities.*
- ix. The Petitioner's assertion that his right to property has been infringed is unfounded, as the right to property is subject to limitations for the sake of public interest, compliance with the law, and the administration of justice.*
- x. The Petition and application and the orders sought therein are unwarranted and untenable in the present circumstances and subsequently, the Petition ought to be dismissed with costs to the Respondents.*

### **Interested Party's Case**

- 13. In response to the Petition, the Interested Party filed Grounds of Opposition dated 20<sup>th</sup> May 2024 on the basis that:
  - i. The instant Application together with the Petition filed herein is not only misconceived and bad in law but also incompetent as the same does not in any way disclose how the Interested Party herein has violated his fundamental rights and freedoms.*

- ii. *The instant Constitutional Petition and application fails to set out with reasonable degree of precision that of which the Petitioner complains, provisions said to have been infringed or violated and the manner in which they are alleged to have been infringed or violated as was enunciated in the celebrated case of **Anarita Karimi -Versus-Republic (No.1) (1979 1 KLR 154** and **Mumo Matemu -Versus-Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013)**, simply put, the petition filed herein fails the specificity test.*
- iii. *The Petitioner seemed to have misapprehended the constitutional mandate of the Interested Party herein as articulated under Article 157 of the Constitution and the Office of the Director of Public Prosecutions (ODPP) Act, 2013 whose mandate does not include investigation of complaints or cases at all.*
- iv. *The instant Petition is a well-orchestrated move by the Petitioner to scuttle and derail the investigations initiated and being done by the 1<sup>st</sup> Respondent herein hence allowing the Petition shall amount to curtailing and interfering with the said respondent's constitutional and statutory mandate to investigate complaints and cases.*
- v. *The Petition filed herein amounts to an abuse of the Court process as the investigations had not been completed and file forwarded to the DPP for the decision to charge or not to charge to be made.*

### **Petitioner's Submissions**

14. On 20<sup>th</sup> November 2024, the Petitioner through Munyalo Muli and Company Advocates filed submissions.

15. To commence with, Counsel submitted that the Petitioner's case remains uncontroverted as neither the Respondents nor Interested Party filed any Replying Affidavit in this matter to explain why the Petitioner's vehicle is still being withheld. Relying on the averments in the Petitioner's affidavit, Counsel maintained that there was no reasonable cause for the 1<sup>st</sup> Respondent to continue holding the Petitioner's vehicle despite its own Report in the matter. Counsel submitted thus that the Petitioner's vehicle ought to be released and further, damages be awarded including aggravated damages.
16. On loss of user of the vehicle, Counsel submitted that Ksh.600,000/- being the equivalent sum that the car was purchased, be awarded to the Petitioner as its value had greatly depreciated as a result of the 1<sup>st</sup> Respondent's actions. Moreover, Counsel submitted that owing to the illegal seizure of the vehicle, Ksh.3,000,000/- was sufficient to remedy violation of the Petitioner's right to property. Furthermore, on the torture and harassment meted out on the Petitioner during seizure of the vehicle, Counsel submitted that an award of Ksh.5,000,000/- would be appropriate. In sum, Counsel urged the Court to award a total amount of Ksh.8,600,000/- as compensation.
17. To buttress the Petitioner's case, Counsel relied in **Paris Mutwiri John -Vs-Base Commander Maua Traffic Base & Anor (2021) eKLR** where it was held that:

*“The 5<sup>th</sup> Respondent having failed to respond to the allegations of illegality on their part, leaves the Petitioner's contention unchallenged. Hence the petitioner's right to own property and the right to fair administrative action was violated. Being in possession of the motor vehicle and having a log book that indicated he was the owner, the police officers who impounded the motor vehicle acted in violation of his rights as they ought to have carried out investigations to find out the true position of the matter before impounding the motor vehicle. In the circumstances of this case, despite the fact that the police may have had another document showing that the motor vehicle was registered in another person's name, they were not justified in simply taking the motor vehicle away from the Petitioner. They were required to follow due process. The Petitioner was never charged with any offence hence, it cannot be said that he had committed some crime in possessing the motor vehicle.”*

18. Further reliance was placed on **Jamlik Muchangi Miano v Attorney General (2017) eKLR.**
19. In view of the foregoing, Counsel submitted that the 1<sup>st</sup> Respondent's actions as well violated the Petitioner's right to a fair administrative action. Furthermore, Counsel submitted that the police as directed in the cited case are required to first investigate a claim before impounding a vehicle.

### **Respondents Submissions**

20. Principal State Counsel, Eve Mbeda for these Respondents filed submissions dated 10<sup>th</sup> July 2024 and highlighted the issues as follows: *whether the Petitioner is entitled to the*

*reliefs sought against Respondents and whether there is an infringement on the Petitioner's rights and freedoms under Fair Administrative Action under Article 47(1) of the Constitution.*

21. On the first issue, Counsel submitted that the right to property under Article 40 of the Constitution is not absolute as is made manifest in Article 40(3) of the Constitution. That is, this protection does not extend to any property that has been found to have been unlawfully acquired.
22. In this matter, Counsel submitted that the 1<sup>st</sup> Respondent is obligated under Article 243(4) of the Constitution and National Police Service Act under Section 24 to carry out investigations including detection and prevention of crimes. Furthermore, Section 26 of the Criminal Procedure Code provides that a police officer can stop, search and detain any vessel which there is reason to suspect that anything stolen or unlawfully obtained may be found. This is as well echoed under Section 60 of the National Police Service Act.
23. For these reasons, Counsel submitted that seizure of property to facilitate investigations is a lawful act and thus the Petitioner's claim to violation of the right to property and right to a fair administrative action lacks merit. Equally, it was argued that the Petitioner had failed to discharge his burden of proof against the 1<sup>st</sup> Respondent as required under Section 107 of the Evidence Act.

24. Reliance was placed in **Rheir Shipping Co. SA v Edmunds [1955] IWL 948 at 955** where it was held that:

*“No judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”*

25. More reliance was placed in **Hellen Wangari Wangechi v Carumera Muthini Gathua (2005) eKLR.**

### **Interested Party’s Submissions**

26. Senior Principal Prosecution Counsel, Kerongo Maatwa filed submissions dated 29<sup>th</sup> April 2025 and set out the single issue for discussion as: *whether there is a competent Petition against the Interested Party that meets the threshold set out in **Anarita Karimi** (supra) and **Mumo Matemu** (supra).*
27. Counsel reiterating the Petitioner’s case submitted that the matters complained herein are within the province of the police as provided under Section 24 as read with Section 35 of the National Police Service Act. For this reason, Counsel submitted that the Interested Party cannot be called upon to answer matters that are constitutionally and statutorily within the 1<sup>st</sup> Respondent’s mandate. Counsel emphasized that the Interested Party’s mandate under Article 157 of the Constitution is solely limited to carry out prosecution upon the police investigating a matter.

28. On this premise, Counsel submitted that the Petition does not raise any cause of action against the Interested Party. Likewise, Counsel submitted that the Petition herein has failed to disclose and indicate with a reasonable degree of precision that which the Petitioner complains of and the provisions said to have been violated by the Interested Party.

### **Analysis and Determination**

29. It is my considered opinion that the issues that arise for determination are as follows:

- i. Whether the Petition raises a cause of action against the Interested Party.***
- ii. Whether the Petitioner's constitutional rights under Article 27, 40 and 47 of the Constitution were violated by the 1<sup>st</sup> Respondent.***
- iii. Whether the Petitioner is entitled to the relief sought.***

### ***Whether the Petition raises a cause of action against the Interested Party.***

30. The Interested Party in this matter is the Director of Public Prosecutions.

31. Mr. Maatwa who appeared for the DPP argued that the allegations in this Petition do not in any way touch on the mandate of the DPP as there in relation to the conduct of the Police under Section 24 as read with Section 35 of the

National Police Service Act. As such, there was, in the light of the facts, nothing for the Interested Party to respond from both its constitutional and statutory hence there was no cause of action against the 1<sup>st</sup> interested party.

32. A cause of action exists when facts coupled with the legal principles justify the existence of a legal claim. It has thus been loosely described as consisting of facts, which when assessed under the relevant legal principles (could be under the statute, precedent or common law) establish a legally cognizable claim capable of attracting a legal remedy against the adversative party.
33. The Court in **Isaiah Ondiba Bitange v & 3 others v Institute of Engineers of Kenya another [2017] KEHC 7565 (KLR)** discussed cause of action as follows:

***“A cause of action was defined by Obi Okoye — Essays on Civil Proceedings,[1] thus — “By a cause of action is meant any facts or series of facts which are complete in themselves to found a claim or relief.”[2] In the case of Drummond Jackson v. British Medical Associations & Ors.,[3] Lord Pearson stated as follows:-***

***“..... the expression “reasonable cause of action”[4] ....No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out.”***

***The Supreme Court of Nigeria in the case of Oshoboja v. Amuda & Ors;[5] held that a***

***reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions.***

34. In the same way, the Court in **Njunge v Ministry of Interior & Coordination of National Government & 3 others [2024] KEHC 4676 (KLR)** citing a number of authorities with approval noted as follows:

***“That the application discloses no reasonable cause of action or defence in law. In DT Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR, the Court of Appeal defined reasonable cause of action to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...” The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. Up to this point the plaintiff has failed to disclose a reasonable cause of action which would enable him to seek a legal remedy against the 3rd Defendant. It is on this basis that we humbly invite the court to strike out the Plaintiff’s application...”***

35. Under the Office of the Director of the Public Prosecution Act, Cap 6B; in particular;

**Section 5; on Powers and functions of the Director**

- (1) Pursuant to Article 157 of the Constitution the Director shall—

- (a) **have power to direct the Inspector-General to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction;**
- (b) 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 Article 157(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;
- (c) formulate and keep under review public prosecution policy;
- (d) perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by the Constitution and this Act.
- (2) The Director shall exercise State powers of prosecution and may—
- (a) notwithstanding the provisions of any other law in force for the time being, perform all that is necessary to be done for the purpose of performing the functions of the Director; and

**(b) direct that investigations be conducted by an investigative agency named in the direction.**

36. Under Article 157 (4) of the Constitution states that-
- ‘The Director of Public Prosecution shall have the 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’*
37. Article 157 (6) states the Director of Public Prosecution shall exercise State powers of prosecution.
38. It is manifest, in view of the foregoing legal provisions that define the mandate of the Director of Public Prosecution that, his role as a Director of Public Prosecution does not extend to carrying any investigation and where he finds it necessary that investigation be conducted, under the law and the Constitution, the ODPP can only require the same be undertaken by the Inspector General or by any relevant investigative agency (ODPP ACT) but cannot by itself assume that particular mandate. In essence, the DPP can only act on the information submitted from an investigative agency and not perform the investigatory mandate as this does not fall within his jurisdictional domain.
39. In this matter, the present investigation, which is still ongoing is not even traceable to any investigative direction issued by the ODPP/Interested Party. It is a separate and independent action initiated by the 1<sup>st</sup> Respondent- National Police Service. The matter has not even been presented to

the DPP to decide whether to charge or not. I thus find there is absolutely no basis for a complaint against the DPP in the circumstances as there is nothing in the Petition to impute any wrongdoing or fault for which a remedy can be obtained against the DPP. Liability against the DPP does not lie for pure independent conduct of the police that has nothing to do with the DPP. I thus find that there is no reasonable cause of action that can objectively be established against the DPP given the facts put forth by the Petitioner hence the complaint against the DPP is unfounded.

***Whether the Petitioner's constitutional rights under Article 27, 40 and 47 of the Constitution were violated by the 1<sup>st</sup> Respondent.***

40. The 1<sup>st</sup> Respondent has both a Constitutional and statutory mandate to investigate crime.
41. The 1<sup>st</sup> Respondent is a Department of the National Police Service which under Article 239 (1) (c) of the Constitution is included as a national security organ and is specifically established under Article 243 of the Constitution. The National Police Service Act, 2011, which was enacted to give effect to this Article of the Constitution as envisaged under Article 243 (4) sets out the National Police Service's mandate of which Section 24 (e) is *the investigation of crimes*. Further Section 35 of the Act, authorizes the 1<sup>st</sup> Respondent, a Directorate of the National Police Service under the said Act to perform the following key functions among others:

***Functions of the Directorate***

*The Directorate shall—*

- (a) *collect and provide criminal intelligence;*
- (b) ***undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, economic crimes, piracy, organized crime, and cyber crime among others;***
- (c) *maintain law and order;*
- (d) *detect and prevent crime*
- (e) *apprehend offenders;*
- (f) *maintain criminal records;*
- (g) ***conduct forensic analysis;***
- (h) *execute the directions given to the Inspector-General by the Director of Public Prosecutions pursuant to Article 157(4) of the Constitution;*
- (i) *coordinate country Interpol Affairs;*
- (j) *investigate any matter that may be referred to it by the Independent Police Oversight Authority; and*
- (k) *perform any other function conferred on it by any other written law.*

42. It follows therefore that unless it can be demonstrated that the Respondents acted in abuse of their authority outside the scope of what the law authorizes them to do unless it can be proving an investigation based on malice then, the Court may not interfere with that mandate. The burden of proof is on the person alleging to demonstrate there is abuse of authority, malice or illegality.

43. In **Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] KEHC 7138 (KLR)** the Court held as follows:

***“46. ...The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking.”***

44. Nevertheless, in carrying investigations, the Respondents must act honestly and objectively to carry out a genuine criminal investigation that is not actuated with malice or that which clearly demonstrates outright abuse of their investigative powers. The Court of Appeal in **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] KECA 182 (KLR)** underscoring this point stated as follows:

***“...an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (...) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.”***

45. In Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] KEHC 12121 (KLR) the Court observed thus:

***“... It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.***

- 51. 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.”***

46. The question thus becomes, has the Petitioner demonstrated by way of cogent and credible evidence that the investigation by the 1<sup>st</sup> Respondent to confiscate

and eventually detain motor vehicle KAU 964Z was actuated by malice, bad faith or unreasonableness?

47. Although the Petitioner stated that the vehicle was lawfully acquired by him through purchase and recording statements and even provided ownership documents to support the fact that he had acquired the vehicle lawfully, the 1<sup>st</sup> Respondent did not counter this information with any contrary facts or provide the basis for the initiation of the investigation in the 1<sup>st</sup> instance or even provide any basis for the continued investigation. Moreover, the Petitioner annexed a copy of the forensic report (annexure 'CMM7') dated 25/8/2021. This the forensic report is titled- NATIONAL POLICE SERVICE- DIRECTORATE OF CRIMINAL INVESTIGATIONS. This is the 1<sup>st</sup> Respondent's document whose authenticity it did not dispute as no replying affidavit controverting the report was filed. The 1<sup>st</sup> Respondent only relied on Grounds of Opposition that could not answer to specific factual assertions by the petitioner. In that report which shows the M/VEHICLE KAU 964Z TOYOTA PRADO was examined, by the Examining Officer- D. Kemboi, the report concludes as follows:

***“THE CHASIS/FRAME AND ENGINE NUMBERS WERE EXAMINED AND FOUND GENUINE”***

48. With the findings of this Report right in the hands of the 1<sup>st</sup> Respondent, what else would justify the continued withholding of the Petitioner's motor vehicle? The 1<sup>st</sup>

Respondent did not bother to even explain before this Court the reason behind the continued detention despite its own forensic report establishing the absence any reasonable basis of suspicion of theft or unlawful origin. In the circumstances, given the clear absence of basis of the continued detention and the glaring exculpatory evidence- the Court can only read arbitrariness, impunity and malice in the 1<sup>st</sup> Respondent's Officer's conduct. The conduct detaining the motor vehicle such a prolonged duration in the light of these facts constitutes abuse of the investigative mandate which I find unlawful and thus unconstitutional for violating the Petitioner's right to enjoyment of property without a just cause.

49. This case is in *pari materia* with the Court decision in **Republic v Inspector General of Police Exparte Kennedy Ngeru Irungu [2016] KEHC 2895 (KLR)** where the Court observed thus:

***“39. In the instant case, it is clear in the absence of any affidavit justifying impounding of the subject motor vehicle KAT 165M, I find that the actions by the police at Kiamumbi police station are not only illegal, irregular and irrational and without any fairness or at all. It was arbitrary and without justification.***

***40. Albeit the respondent's legal counsel the Attorney General in his statements on grounds of opposition and submissions claims that the police action was authorized in order to investigate to establish the truth of the matter regarding the matter***

***with regard to the subject motor vehicle, there is no evidence by way of affidavit to show that the police were investigating the loss of the subject motor vehicle or at all from the time of the impoundment to the time of writing and delivery of this judgment.***

***41. The respondent's mere statements do not amount to evidence or justification to act the way they did...***

***42. ... There is every evidence on record that the police were provided with documents of ownership of the subject motor vehicle and they have not bothered to investigate whether those documents are genuine or not yet they have continued for over one year, to detain the subject motor vehicle which as correctly submitted by the exparte applicant, must be wasting away as there is no guarantee that it is detained in an environment which is safe and or free from destruction due to prolonged immobility or even vandalisms.***

***43... Todate, which is nearly one year, no such intention to charge the exparte applicant with any offence related to the suit motor vehicle has been demonstrated..."***

50. In the instant case, the Respondent have not even bothered to explain the prolonged delay in concluding the investigation, if any, since 24/8/21, five years ago.

51. Article 40 (2) (a) of the Constitution protects one's right to property so that one is not to be deprived of property arbitrarily by the State or by any person. The Respondents violated the State power of investigation to deprive the Petitioner the enjoyment of his motor vehicle without valid,

sufficient or justifiable reasons by initiating a groundless investigation whose motive manifestly appears to have to have been to take away the petitioner's vehicle and detain it for without any legal basis whatsoever. I find that the 1<sup>st</sup> Respondent in the circumstances of this case violated the Petitioner's right to property under Article 40 (2) (a) of the Constitution.

***Whether the Petitioner is entitled to the reliefs sought.***

52. Article 23 (3) of the Constitution specifies the reliefs that this Honourable Court may grant in Constitutional Petitions. The Court however is given the liberty to consider an appropriate relief. The phrase ***“in any proceedings brought under Article 22, may grant appropriate relief, including”*** shows that the list is not exhaustive.
53. In the South African case of **Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17**; the Court explained:

*“[45] The determination of appropriate relief...calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the*

*infringement will provide guidance as to the appropriate relief in the particular case...”*

54. The Supreme Court in **Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others (SC) Petition No.13 (E015) of 2022** guided as follows:

***“.... [92] This Court in the case of Gitobu Imanyara & 2 Others v. Attorney General, SC Petition No. 15 of 2017, described Article 23 as “the launching pad of any analysis on remedies for Constitutional violations”. This statement has repeatedly been made in other decisions like Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”***

55. The Superior Court proceeded to note as follows:

*“[94] To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under*

public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

[95] In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

56. Contrary to the principles under the law of torts where assessment of damages is underpinned on principle of restoring the victim to the position he would have been prior to the injury or loss occurring the primary focus of the constitutional reliefs, including compensation is not to punish the violator but to vindicate the constitutional harm to protect constitutional order.
57. The approach taken by the Petitioners of seeking exemplary damages is not vindicatory, rather, it leans more towards a punitive path synonymous with assessment of damages in tortious claims other denunciation of the Respondent's conduct in a constitutional order.
58. In deciding what would be the extent of compensation, this Court would focus on assessing what is appropriate and just in the circumstances of the case and no more. The Court of Appeal decision in **Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others [2021] KECA 328 (KLR)** aptly captures the vindicatory approach that characterizes assessment of compensatory awards in constitutional reliefs. It explained:

*“15.The relevant principles applicable to award of damages for constitutional violations under the Constitution were also explained by the Privy Council in the case of Siewchand Ramanoop vs The AG of T&T, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:*

*“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.*

*An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.”*

16. *The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”*

59. Having regard to the above principles, this Honourable Court grants reliefs as follows:

**1) A declaration is hereby issued that the 1<sup>st</sup> Respondent's action of detaining the**

**Petitioner's motor-vehicle registration No. KAU 964Z violates Article 40 (2) (a) thus unlawful, illegal and unconstitutional.**

- 2) The 1<sup>st</sup> Respondent whether by its agents, servants and/or others is hereby ordered to release to the Petitioner motor-vehicle registration No. KAU 964Z Toyota Prado forthwith from wherever it is detained and unconditionally.**
- 3) The 1<sup>st</sup> Respondent shall pay the Petitioner compensation for the prolonged detention of the motor vehicle for almost five years since 24/8/2021 to date a sum of Kenya Shillings two million (Kshs. 2,000,000/-)**
- 4) Costs of this Petition.**

**Dated, Signed and Delivered virtually at Nairobi this 5<sup>th</sup> day of March, 2026.**

.....  
**L N MUGAMBI  
JUDGE**