

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. E338 OF 2025

**IN THE MATTER OF: ARTICLES 22(1), 23(1), 159 (2) (a, e), 165(3)(b, d), (6) & (7) &
258 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 3, 10(1)(2),
19, 20, 21(1), 25 (C), 27(1)(2), 29, 47(1), 50, 79, 157 & 249
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTIONS OF THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS GUIDELINES ON THE
DECISION TO CHARGE, 2019**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION 4(2) OF THE ANTI-
CORRUPTION AND ECONOMIC CRIMES ACT**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT CASE ANTI-CORRUPTION
CRIMINAL CASE NO. E024 OF 2025 R V GEORGE NATEMBEYA AND EMMANUEL
WAFULA MASUNGO**

BETWEEN

GEORGE NATEMBEYA..... PETITIONER

VERSUS

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

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

ETHICS AND ANTI-CORRUPTION COMMISSION..... 3RD RESPONDENT

CHIEF MAGISTRATE’S COURT,

ANTI-CORRUPTION COURT, NAIROBI..... 4TH RESPONDENT

THE ATTORNEY GENERAL..... 5TH RESPONDENT

JUDGMENT

Introduction

1. Before this Honourable Court is the Petition dated 5th June 2025, lodged by the Petitioner, George Natembeya, wherein he challenges the constitutionality, propriety, and legality of his arrest, the ensuing investigations, and his subsequent arraignment and prosecution in Milimani Anti-Corruption Case No. E024 of 2025, Republic v George Natembeya & Emmanuel Wafula Masungu.
2. The Petitioner, George Natembeya, is the duly elected Governor of Trans Nzoia County, having assumed office following his election in the August 2022 General Elections. Prior to his entry into elective politics, the Petitioner rendered distinguished service within the public administration, ascending through the ranks to the office of Regional Commissioner.
3. The gravamen of the Petition is that the impugned actions of the Respondents namely, the procurement and execution of search warrants, the arrest and detention of the Petitioner, the decision to prefer criminal charges against him, and the manner in which the impugned evidence was obtained were procedurally irregular, unlawful, and actuated by mala fides. The Petitioner contends that the said actions were undertaken in contravention of

his fundamental rights and freedoms as guaranteed under Articles 27, 28, 31, 47, 49 and 50 of the Constitution. He further avers that the charges preferred against him, allegedly arising in part from Mpesa transactions and purported conflict-of-interest payments, are bereft of factual and legal foundation and are irredeemably tainted by evidence said to have been procured in violation of the law.

4. The Petition is strenuously opposed. The 1st Respondent maintains that the decision to charge the Petitioner was lawfully undertaken pursuant to Article 157 of the Constitution and in strict adherence to the applicable prosecutorial guidelines, following an independent, objective, and professional review of the investigation file. The 2nd Respondent asserts the legality and propriety of the financial transactions that form the substratum of the criminal proceedings. The 3rd Respondent avers that the investigations and collection of evidence were conducted strictly within the confines of its constitutional and statutory mandate. The 4th and 5th Respondents similarly contend that the Petition discloses no constitutional infraction and does not meet the established threshold warranting this Court's intervention in ongoing criminal proceedings.
5. The central issue falling for determination is whether the impugned investigation and prosecution are so constitutionally infirm, procedurally defective, or demonstrably actuated by bad faith as to warrant the grant of the declaratory and prerogative reliefs sought, including orders of certiorari to quash the charge sheet and prohibition to halt the pending criminal trial.

6. The matter first came before this Court on 5th June 2025 in Chambers for directions in respect of the Petitioner's Notice of Motion application dated 5th June 2025. Upon a preliminary consideration of the application and the material placed before it, the Court was persuaded that the threshold for the grant of interim relief had been met and accordingly issued conservatory orders staying the criminal proceedings in **Nairobi Milimani Chief Magistrate's Anti-Corruption Case No. E024 of 2025, Republic v George Natembeya & Another**, pending the inter partes hearing and determination of the said application.
7. The Petitioner further contends that his intended prosecution is not a bona fide exercise of constitutional authority but rather a politically orchestrated vendetta what he characterises as "lawfare" designed to penalise him for his outspoken criticism of the national government. He alleges a litany of constitutional violations arising from his arrest on 19th May 2025, the execution of search warrants at multiple residences, the alleged denial of access to legal counsel, the conditions of his detention, and the ultimate decision to charge him with offences relating to corruption and conflict of interest. He invites this Court to invoke its supervisory jurisdiction under Article 165 of the Constitution to scrutinise the decision-making processes of the 1st and 3rd Respondents and to grant appropriate relief, including declarations and orders of certiorari and prohibition, to quash the charges and arrest the prosecution.
8. In a consolidated response, the Respondents urge that the Petition is devoid of merit. They maintain that the 1st Respondent, the Director of Public

Prosecutions, and the 3rd Respondent, the Ethics and Anti-Corruption Commission, acted strictly within their respective constitutional and statutory mandates. It is their position that the decision to charge the Petitioner was predicated upon prima facie evidence disclosing offences known to law; that the investigations and prosecution are lawful and procedurally sound; and that the Petition constitutes an impermissible attempt by a sitting Governor to shield himself from legitimate criminal process. The Respondents further submit that the factual controversies raised by the Petitioner are matters properly reserved for determination by the trial court, and that this Court ought not to usurp the jurisdiction of the subordinate court seized of the criminal proceedings.

The Petitioner's case

9. The Petitioner assails the legality of the measures undertaken against him by the Respondents, contending that his arrest, detention, investigation, and subsequent arraignment were vitiated by procedural impropriety and amount to a manifest abuse of statutory and constitutional authority.

10. He first impugns the search warrants issued on 16th May 2025 by the Chief Magistrate's Court in Milimani Magistrates' Court Miscellaneous Criminal Application No. E716 of 2025. It is his case that the warrants were procured and executed in excess of jurisdiction and in contravention of the governing statutory framework. In particular, he asserts that the 3rd Respondent failed to comply with section 29 of the Anti-Corruption and Economic Crimes Act, 2003, which he interprets as requiring the prior issuance of a notice to

produce documents before recourse to coercive search measures. He further contends that the warrants offended section 110 of the Criminal Procedure Code, Cap. 75, and were consequently procedurally defective and constitutionally infirm.

11. The Petitioner deposes that on 19th May 2025 officers drawn from the 2nd and 3rd Respondents simultaneously conducted searches at his residences in Kileleshwa (Tabere Heights), Rongai, Milimani (Kitale), and Kibomet, as well as at the Governor's office in Trans Nzoia County. He states that he was arrested at his Kileleshwa residence at approximately 8.02 a.m. without being informed of the reasons for his arrest, and that the searches were executed in his absence with what he characterises as excessive force, including the breaching of walls and safes.
12. Following his arrest, the Petitioner avers that he was detained at the premises of the 3rd Respondent for the better part of the day and that a cautionary statement was administered at about 10.00 p.m. He alleges that during this period he was denied access to his advocates, Mr. Simiyu Murambi and Mr. Zack Alakonya, and was thereby held incommunicado. He further claims that he was subjected to intimidation and pressure to admit to the embezzlement of public funds, allegations he unequivocally denies. Access to counsel, he states, was only granted on the morning of 20th May 2025. He also faults the refusal to admit him to police bond prior to arraignment, contending that the denial infringed his rights under Articles 49 and 50 of the Constitution as well as the Bail and Bond Policy Guidelines, 2015.

13. It is common ground that on 20th May 2025 the Petitioner was arraigned before the **Chief Magistrate's Court in Anti-Corruption Case No. E024 of 2025** and charged with three counts:
- a. **Count I:** Conflict of Interest contrary to section 42(3) as read with section 48 of the ACECA, alleging that between 1st January 2023 and 30th April 2025, as an agent of the County Government of Trans Nzoia, he knowingly acquired an indirect private interest of Kshs. 1,127,900 from Mercy Chelangat, a director of Lyma Agro Science Limited and proprietor of Maira Stores, entities that traded with the county.
 - b. **Count II:** Conflict of Interest contrary to section 42(3) as read with section 48 of the ACECA, alleging the acquisition of an indirect pecuniary interest of Kshs. 2,124,668 from Emmanuel Wafula Masungu, a beneficial owner of Easterly Winds Limited, which traded with the county.
 - c. **Count III:** Unlawful acquisition of public property contrary to section 45(1)(a) as read with section 48 of the ACECA, alleging the unlawful acquisition of Kshs. 3,252,568, being part of payments made by the county to Lyma Agro Science Limited, Maira Stores, and Easterly Winds Limited.
14. The charges allege that, between 1st January 2023 and 30th April 2025, he acquired indirect pecuniary interests from persons and entities trading with the County Government of Trans Nzoia, and unlawfully obtained public funds arising from such transactions.

15. The Petitioner maintains that prior to his arraignment he was neither informed of the nature of the allegations nor furnished with the evidentiary basis informing the decision to charge. He challenges that decision on the ground that it was not undertaken in accordance with section 23 of the Office of the Director of Public Prosecutions Act and the Guidelines on the Decision to Charge, 2019. He contends that the process was hurried and perfunctory, that the mandatory Decision to Charge Form (ODPP 1A) was not availed, and that the charges were preferred by a person lacking constitutional authority. The expedition with which he was investigated, arrested, and charged within less than forty-eight hours is, in his view, indicative of extraneous influence and lack of prosecutorial independence.
16. The Petitioner further asserts that the prosecution is politically instigated and actuated by ulterior motive. He traces the alleged animus to his public criticism of the national government on matters of public interest, including abductions, the suppression of protests, the leasing of Nzoia Sugar Company land, ethnic imbalance in public appointments, and the university funding model. He avers that the criminal proceedings are intended to embarrass, denigrate, and politically undermine him in his capacity as Governor, and he annexes media publications to demonstrate the public positions he has taken.
17. He also takes issue with public statements attributed to the 2nd and 3rd Respondents which, he contends, prematurely implicated him in irregular procurement and embezzlement. Of particular concern, in his submission, is the alleged procurement of key evidentiary material including reports from

the Business Registration Service and M-Pesa statements after the charges had already been instituted. He argues that the decision to prosecute was therefore made in the absence of a complete investigative record.

18. A central plank of his challenge relates to the acquisition of his M-Pesa transaction records. He contends that the 3rd Respondent accessed his mobile money statements, and those of his co-accused, without a prior court order, thereby infringing his right to privacy under Article 31 of the Constitution. He points to material indicating that formal orders to obtain the statements from Safaricom Limited were issued on 27th May 2025, several days after he had been charged. In his submission, such ex post facto evidence-gathering renders the prosecution irredeemably tainted and attracts the exclusionary rule under Article 50(4) of the Constitution.
19. On the substantive merits of the charges, the Petitioner asserts that the impugned contracts were awarded before he assumed office in 2022 and that he played no role in their procurement. As regards the alleged conflict-of-interest payments, he maintains that the sums received were lawful per diem and subsistence allowances arising from his official duties, including intergovernmental engagements and meetings of the Council of Governors. He annexes work tickets, imprest documents, and surrender forms to demonstrate that he was entitled to Kshs. 4,477,078, of which Kshs. 2,904,400 had been paid, leaving a balance of Kshs. 1,572,678. He contends that the criminalisation of such payments is unfounded in fact and law.

20. The Petitioner additionally challenges the territorial jurisdiction of the Anti-Corruption Court in Nairobi, asserting that the alleged offences were committed in Kitale, Trans Nzoia County. He also contests the bail terms imposed upon arraignment, particularly the condition barring him from accessing his office for sixty days, which he characterises as onerous and disruptive of his constitutional mandate as Governor.
21. In sum, the Petitioner's case is that the cumulative effect of the impugned actions namely, the issuance and execution of search warrants, the circumstances of his arrest and detention, the alleged denial of access to counsel, the decision to charge, and the manner in which evidence was procured—demonstrates a pattern of illegality, procedural impropriety, mala fides, and abuse of constitutional and statutory power.
22. On that basis, the Petitioner seeks the following reliefs from this court:
- (a) A declaration be and is hereby issued to the effect that the investigations of the Petitioner by the 2nd Respondent and the 1st Respondent's institution of criminal proceedings against the Petitioner as contained in MILIMANI .ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO violates his constitutional rights, is an abuse of police and prosecutorial powers and a violation of the due process and also of the court process and therefore unlawful, null and void ab initio.***

- (b) A declaration be and is hereby issued to the effect that the institution of criminal proceedings in MILIMANI ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO violates the accused's constitutional rights, is an abuse of police and prosecutorial powers and a violation of the due process and also of the court process and therefore unlawful, null and void ab initio.*
- (c) A declaration that the Search Warrant issued on 16th May 2025 by the 4111 Respondent in Milimani Magistrates Court E716 of 2025, Republic Versus George Natembeya is null and void.*
- (d) A declaration that the searches conducted by the 2nd and the 3rd Respondents at the Kitale, and Rongai Residences of the Petitioner in the absence of the Petitioner amounted to a violation of the constitutional rights of the Petitioner, and that they were unlawful and void.*
- (e) A declaration that all the evidence collected on the strength of the illegally obtained evidence is inadmissible as against the Petitioner in any ensuing criminal trial.*
- (f) A declaration that the absence of a legitimate and procedural approval of charges by the Director of Public Prosecution renders the entire proceedings in MILIMANI ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO, unlawful, unconstitutional, null and void.*

- (g) A declaration that the conduct of the 3rd Respondent's officers namely Mr. Simon Chepka and Mr. Stephen Wanyama by denying the Petitioner timely legal representation of the Petitioner's choice was unlawful and unconstitutional.
- (h) A declaration that the anti-corruption court does not have jurisdiction to try the Petitioner in MILIMANI ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO
- (i) An order of certiorari be and is hereby issued to quash the charges sheet dated 20th May, 2025 and any further amendments and or substitution in MILIMANI ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO.
- (j) An order of prohibition be and is hereby issued against the Respondents prohibiting them from proceeding with the prosecution of the Petitioner in MILIMANI ANTI-CORRUPTION CASE NO. E024 OF 2025 REPUBLIC VERSUS GEORGE NATEMBEYA AND EMMANUEL WAFULA MASUNGO on account of the same facts.
- (k) An order prohibition on be and is hereby issued against the Inspector General of Police, Director of Criminal Investigations and the Director of Public Prosecution from investigation, recommending the prosecution or commencing any prosecution of the Petitioner on account of facts disclosed in MILIMANI ANTI-CORRUPTION CASE

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EMMANUEL WAFULA MASUNGO**

(l) General and exemplary Damages for the constitutional violations.

(m) Costs of the Petition be borne by the Respondents.

The 1st Respondent's case

23. The 1st Respondent opposed the Petition in its entirety through the replying affidavit sworn on 19th June 2025 by Ms. Njoki Kihara, a Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP).
24. It is deponed that the decision to charge the Petitioner, George Natembeya, was arrived at following a comprehensive and independent review of the inquiry file and recommendations forwarded by the 3rd Respondent, the Ethics and Anti-Corruption Commission (EACC), pursuant to Section 35 of the Anti-Corruption and Economic Crimes Act, 2003. Upon an objective appraisal of the evidentiary material, the ODPP formed the view that there existed sufficient evidence to sustain criminal charges against the Petitioner. Consequently, he was charged with three counts: conflict of interest contrary to Sections 42(3) and 48 of the Anti-Corruption and Economic Crimes Act, in respect of alleged indirect pecuniary benefits derived from Lyma Agro Science Limited, Maira Store, and Easterly Winds Limited; and unlawful acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of the Act, the total sum in question being Kshs 3,252,568.

25. The 1st Respondent maintains that the decision to prosecute was undertaken independently, in good faith, and in strict fidelity to the Constitution particularly Article 157 and the provisions of the Office of the Director of Public Prosecutions Act. It is averred that the Petitioner was lawfully arrested on 19th May 2025 and arraigned the following day, 20th May 2025, before the Anti-Corruption Court, where he entered a plea of not guilty. Bail was initially opposed on grounds that the Petitioner had allegedly interfered with ongoing investigations by the EACC and that there had been destruction of public property at his residence. Notwithstanding that opposition, the trial court admitted him to bail subject to specified conditions, including restricted access to his office.
26. With respect to disclosure, the 1st Respondent deposes that pre-trial directions and disclosure of evidentiary material were scheduled for 16th June 2025. However, the process was interrupted by the issuance of conservatory orders by this Court, thereby rendering the pre-trial exercise incomplete. It is contended that the Petitioner's allegations of non-disclosure are premature and misconceived, as the procedural mechanisms governing pre-trial disclosure before the Anti-Corruption Court had not been exhausted. In the 1st Respondent's view, the Petition is calculated to obstruct the due administration of justice, given that the charges are grounded upon evidence allegedly demonstrating that the Petitioner received payments from entities that engaged in business transactions with the County Government of Trans-Nzoia.

27. The 1st Respondent further avers that the Petitioner has failed to demonstrate any violation of constitutional or statutory provisions in the manner in which the ODPP exercised its prosecutorial mandate. It is contended that the Petition constitutes an impermissible invitation to this Court to interfere with the prosecutorial discretion vested in the ODPP under Article 157 of the Constitution and with the judicial process in Milimani Anti-Corruption Case No. E024 of 2025.
28. The 1st Respondent asserts that the grant of the reliefs sought would prejudice the public interest in the prosecution of corruption-related offences and undermine the fair and orderly determination of the pending criminal proceedings. The Court is therefore urged to dismiss the Petition and permit the criminal trial to proceed to its logical conclusion.

The 2nd Respondent's case

29. The 2nd Respondent, the County Government of Trans-Nzoia, through its Grounds of Opposition dated 18th June 2025, opposed the Petition and aligned itself with the position taken by the prosecution.
30. The 2nd Respondent contends that all payments made to the Petitioner in his capacity as Governor including per diem allowances for official travel and attendant expenses were lawful, duly authorized, and effected in strict compliance with the applicable public financial management framework. It is emphasized that the Petitioner was entitled to per diem for official travel undertaken in the discharge of his gubernatorial mandate, including engagements under the auspices of the Council of Governors, the

Intergovernmental Budget and Economic Council (IBEC), and appearances before various Senate Committees.

31. The 2nd Respondent clarifies that the impugned payments were made for legitimate official purposes and in accordance with established administrative procedures. It is averred that, of the total per diem claim of Kshs 4,477,078, the Petitioner received Kshs 2,904,400, leaving an outstanding balance of Kshs 1,572,678. The Respondent further explains that the Petitioner's mode of travel by air while his aides and driver utilized road transport, was consistent with prevailing government practice and administrative norms.
32. It is further deponed that the payments in question were duly processed, approved, and disbursed by the County Chief Officer for Finance in compliance with Sections 103 and 104 of the Public Finance Management Act. The 2nd Respondent therefore maintains that there was no conflict of interest, unlawful acquisition of public property, or any impropriety whatsoever in the disbursement of the per diem allowances.
33. The 2nd Respondent asserts that the Petitioner's claims are misconceived and unsupported by evidence, and that the characterization of the per diem payments as criminal conduct amounts to a distortion of legitimate public service functions. The Court is accordingly urged to dismiss the Petition in its entirety, uphold the integrity of lawful public financial management processes, and permit the criminal proceedings instituted by the 1st Respondent to proceed unimpeded.

The 3rd Respondent's case

34. The 3rd Respondent, the Ethics and Anti-Corruption Commission (EACC), opposes the Petition through the Replying Affidavit sworn on 24th June 2025 and the Further Replying Affidavit sworn on 1st September 2025 by Robert Ronoh, an investigator attached to the Commission, together with its written submissions.
35. The 3rd Respondent anchors its actions upon its constitutional and statutory mandate under Article 79 of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 (ACECA), and the Ethics and Anti-Corruption Commission Act, 2011. It avers that this mandate encompasses the investigation of corruption and economic crimes, the protection and recovery of public property, and the making of appropriate recommendations to the Director of Public Prosecutions for prosecutorial action.
36. It is deposed that on 26th July 2023 the Commission received allegations that the Petitioner, in his capacity as Governor of Trans Nzoia County, had engaged in conflict of interest by receiving funds from entities trading with the County Government, and that such payments were allegedly channelled through the then Chief Officer for Finance, Emmanuel Wafula Masungu.
37. According to the 3rd Respondent, investigations disclosed prima facie evidence linking the Petitioner, the said Chief Officer, and several companies that had contractual engagements with the County Government of Trans Nzoia. The entities identified include Lyma Agro Science Limited, Maira Stores, Obtuse Holdings Ltd, and Easterly Winds Limited, all of which are said

to have supplied goods or services to the County between 2023 and 2025 and to have received substantial public funds.

38. The Commission avers that Business Registration Service reports established that Emmanuel Wafula Masungu was a director and shareholder in Obtuse Holdings Limited and Easterly Winds Limited. It is further deposed that M-Pesa statements attributed to him reflect receipt of Kshs. 1,571,400 between 21st October 2023 and 26th February 2025 from Mercy Chelangat, a director of Lyma Agro Science Limited and proprietor of Maira Stores.
39. The 3rd Respondent further asserts that the Petitioner's own M-Pesa statements reveal that, between 9th March 2024 and 24th January 2025, he received a cumulative sum of Kshs. 3,212,068 from Emmanuel Wafula Masungu. In its view, these transactions demonstrate the acquisition of indirect pecuniary interests arising from entities trading with the County Government, thereby disclosing offences of conflict of interest and unlawful acquisition of public property contrary to sections 42(3), 45(1)(a), and 48 of ACECA. On that basis, it recommended to the Director of Public Prosecutions that charges be preferred.
40. In answer to the procedural objections raised by the Petitioner, the 3rd Respondent maintains that all searches were conducted pursuant to valid court-issued warrants obtained under sections 23 and 29 of ACECA, sections 118, 118A and 119 of the Criminal Procedure Code, and sections 24(e) and (g) of the National Police Service Act. It disputes the contention that the issuance of a notice to produce documents was a mandatory precondition to

the grant of search warrants, placing reliance on the decision of ***the Supreme Court in Ethics and Anti-Corruption Commission & Another v Tom Ojienda SC t/a Prof. Tom Ojienda & Associates Advocates & 2 Others*** for the proposition that prior notice is not required where the Commission is undertaking investigative or intelligence-gathering operations.

41. The 3rd Respondent further contends that inventories of seized items were duly prepared and acknowledged, and that any challenge to the validity of the warrants ought properly to have been mounted before the issuing court through established appellate or review mechanisms. In that regard, it invokes the doctrine of constitutional avoidance as articulated in ***Okiya Omtatah Okioti & 2 others v Attorney General & 4 others***.
42. With respect to the acquisition of M-Pesa statements, the Commission deposes that the records were lawfully obtained pursuant to court orders issued in **Miscellaneous Criminal Applications Nos. E775 and E782 of 2025**. It further relies upon the decision of the Supreme Court in ***Khalid & 16 Others v Attorney General & 2 Others*** to assert that disclosure in criminal proceedings is a continuing obligation, capable of supplementation as additional evidence emerges, provided that the accused has not been called upon to present his defence.
43. The 3rd Respondent therefore maintains that the Petition discloses no prima facie violation of constitutional rights, but rather raises contested evidentiary and factual matters that properly fall within the province of the trial court. It cautions that the grant of conservatory or prerogative relief would unduly

fetter its constitutionally ordained investigative mandate and impede the prosecutorial function of the Director of Public Prosecutions.

44. Accordingly, the 3rd Respondent urges this Court to find that the investigations and recommendation for prosecution were undertaken lawfully, in good faith, and in the public interest, and to dismiss the Petition so that the criminal proceedings in **Milimani Anti-Corruption Case No. E024 of 2025** may proceed to their logical conclusion.

4th and 5th Respondent's case

45. The 4th and 5th Respondents opposed the Petition on grounds that it discloses no justiciable constitutional controversy warranting this Court's intervention and ought, in their view, to be dismissed with costs.
46. They contend that the National Police Service is vested with a clear statutory mandate under the National Police Service Act to receive and investigate complaints relating to the commission of offences, including economic crimes, corruption, money laundering, and organized criminal activity. It is their position that the investigative steps undertaken in respect of the Petitioner were lawful, proportionate, and executed in furtherance of that mandate, and under the general superintendence of the Director of Public Prosecutions. Reliance is placed on established jurisprudence to the effect that courts ought not to interfere with bona fide investigations merely because the allegations under inquiry may ultimately prove to be unsubstantiated.

47. The 4th and 5th Respondents further submit that the Petitioner has failed to demonstrate that the pending criminal proceedings before the Anti-Corruption Court are unfair, unfounded, or actuated by malice or ulterior motive. They argue that the criminal justice system provides adequate procedural safeguards through which the Petitioner may challenge the evidence against him and vindicate his innocence. In their submission, constitutional intervention at this interlocutory stage would amount to an unwarranted truncation of the trial process, contrary to the well-settled principle that an accused person ought, in the ordinary course, to face his accusers and exhaust the remedies available within the trial court.
48. Additionally, the 4th and 5th Respondents characterize the Petition as frivolous, vexatious, and an abuse of the court process. They maintain that judicial review or constitutional relief is only merited where impugned actions are manifestly unlawful, oppressive, or undertaken in bad faith. In the present case, they contend that all measures taken including the execution of investigative powers and any use of reasonable and proportionate force permitted under the National Police Service Act were lawful, undertaken in good faith, and consistent with established legal standards.
49. They further aver that the Petitioner has neither demonstrated any specific violation of his constitutional rights nor established any actionable misconduct attributable to them. In the premises, they urge the Court to find that the Petition is devoid of merit and to dismiss it in its entirety with costs.
50. The petition was canvassed by way of written submissions.

The parties Submissions

The Petitioner's submissions

51. The Petitioner submits that the Respondents have violated his constitutional rights under Articles 22, 23, 28, 49, and 50 of the Constitution. Between 26th July 2023 and 19th May 2025, the 3rd Respondent conducted investigations culminating in his arrest and arraignment without summoning him, notifying him of the nature of the complaint, or providing timely access to legal counsel, contrary to Article 49(1)(a), (c), and (d). His overnight detention without police bond and the seizure of personal documents including academic certificates and wealth declaration forms amounted to unlawful deprivation of liberty and dignity.
52. The Petitioner further submits that the 3rd Respondent acted beyond its constitutional mandate. Despite having the time, authority, and resources to summon him, no such notice was issued. The arrest and treatment were disproportionate and inhumane, particularly given his status as a sitting Governor and long-serving public official. The publication of a press statement alleging a loss of Kshs 1.4 billion, while the charge sheet cited substantially lower amounts, reflects misrepresentation and lack of due diligence, offending the principle in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, that decisions so unreasonable that no reasonable authority would make them are unlawful.

53. With respect to the 1st Respondent, the Director of Public Prosecutions, the Petitioner submits that prosecutorial discretion under Article 157 was exercised irregularly and mala fide. The ODPP Guidelines on the Decision to Charge (2019) require independent assessment of evidence, realistic prospects of conviction, and the completion of Form ODPP 1A. The Respondents have failed to produce Form ODPP 1A, the EACC's charging recommendation, or formal DPP approval, thereby justifying an inference that the decision to charge was capricious and intended to intimidate. Access to legal counsel at the investigative stage, as affirmed in **Kiprop v Republic**, is essential to a fair trial, and its denial fatally undermined the process.
54. On the merits, the charges lack factual and legal foundation. The contracts underlying the conflict-of-interest counts predated his tenure as Governor, and there is no evidence of direct or indirect pecuniary benefit, defeating the essential elements of Section 42(3) of ACECA. The alleged unlawful acquisition via M-Pesa transactions concerns lawful per diem and travel allowances disbursed under the Public Finance Management Act and Regulations, properly documented and accounted for. Moreover, his M-Pesa data was accessed without court order or consent, contrary to Section 28 of ACECA and Article 31 of the Constitution. Evidence obtained in violation of constitutional rights cannot sustain criminal proceedings, as held in **Anthony Watuku Kibandi v Republic** and **Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others**, reinforced by the constitutional developments noted in **Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board**.

55. The Petitioner relies further on authorities affirming the Court's power to halt oppressive or malicious prosecutions, including ***Stanley Munga Githunguri v Republic, Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others, Jerald Wachira Gichuki v G. North & Sons Limited & another, Kuria & 3 others v Attorney General, and Dande & 3 others v Inspector General, National Police Service & 5 others.*** These confirm that where charges disclose no realistic prospect of conviction, are unsupported by evidence, or are motivated by ulterior purposes, judicial intervention is warranted.
56. The Petitioner contends that his prosecution is constitutionally infirm, procedurally defective, and factually unsustainable. The absence of mandatory charging documentation, inconsistencies between public statements and formal charges, and reliance on unlawfully obtained evidence demonstrate mala fides and abuse of prosecutorial discretion.

The 1st Respondent's Submissions

57. The 1st Respondent, the Office of the Director of Public Prosecutions (DPP), submits that the prosecution in **Milimani Anti-Corruption Case No. E024 of 2025, Republic v George Natembeya & Emmanuel Wafula Masungu**, is lawful, constitutional, and properly instituted.
58. On the question of authority, the DPP contends that the decision to charge was validly made pursuant to Article 157 of the Constitution. By virtue of Article 157(9) and section 22 of the Office of the Director of Public

Prosecutions Act, the DPP may exercise prosecutorial powers personally or through subordinate officers acting under his direction. It is therefore submitted that the prosecution counsel who signed the charge sheet did so under proper authority, and that the allegation that the decision was made by an unauthorised person is devoid of merit.

59. With regard to the Decision to Charge Form (ODPP 1A), the 1st Respondent submits that it is an internal administrative instrument utilised for prosecutorial decision-making and does not constitute evidentiary material subject to disclosure under Article 50(2)(j) of the Constitution. Reliance is placed on **James Mwangi & Others v Republic** for the proposition that such internal documents are not part of the evidence required to be furnished to an accused person.
60. On the substantive basis for the charges, the DPP submits that the decision followed a comprehensive review of the inquiry file forwarded by the 3rd Respondent. Applying the two-stage test prescribed in the ODPP Decision to Charge Guidelines, 2019 namely, the evidential test and the public interest test it was determined that there existed sufficient evidence establishing a realistic prospect of conviction and that prosecution was warranted in the public interest. In that regard, reliance is placed on **Benson Khwatenge Wafula v Director of Public Prosecutions & 3 Others**. The DPP maintains that the evidence disclosed receipt of funds linked to county transactions in circumstances amounting to conflict of interest and unlawful acquisition of public property, and that the prosecution of alleged corruption by a senior state officer serves the imperatives of accountability and deterrence.

61. The 1st Respondent further submits that this Court ought not to interfere with a lawful prosecution. Citing ***Republic v Commissioner of Police & Another ex parte Michael Monari & Another***, it is argued that investigative and prosecutorial authorities are only required to establish reasonable suspicion before preferring charges, while the sufficiency and weight of evidence are matters reserved for determination by the trial court. The Petition, it is contended, rests upon disputed factual issues including whether the impugned payments constituted unlawful benefits or legitimate per diem allowances which can only properly be resolved through viva voce evidence at trial. In this regard, reliance is placed on ***Praxidis Namoni Saisi & 7 Others v Director of Public Prosecutions & 2 Others***.
62. Responding to the allegations of political persecution and mala fides, the DPP submits that such claims are bare and unsubstantiated. It is contended that the Petitioner has failed to discharge the burden of proof incumbent upon a litigant in constitutional proceedings, as affirmed in ***Monica Wangu Wamwere & 5 Others v Attorney General***. In the absence of cogent evidence demonstrating improper motive, the Court is urged not to infer bad faith on the part of constitutionally mandated institutions.
63. On the legality of the search warrants and the acquisition of evidence, the 1st Respondent aligns itself with the position advanced by the 3rd Respondent, maintaining that the warrants were lawfully obtained under the Anti-Corruption and Economic Crimes Act and the Criminal Procedure Code. It rejects the contention that prior notice under section 29 of ACECA was

mandatory, relying on the Supreme Court decision in ***Ethics and Anti-Corruption Commission & Another v Tom Ojienda SC t/a Prof Tom Ojienda & Associates Advocates & 2 Others***. The M-Pesa statements, it is submitted, were obtained pursuant to valid court orders.

64. The DPP further argues that investigations and disclosure in criminal proceedings are continuing processes and need not be concluded before the institution of charges. Reliance is placed on ***Hussein Khalid & 16 Others v Attorney General & 2 Others*** for the proposition that disclosure is an ongoing obligation, provided the accused has not been called upon to present his defence and is afforded adequate opportunity to prepare.
65. As regards territorial jurisdiction, the 1st Respondent supports the position that the trial court, being presided over by a gazetted Special Magistrate under ACECA, possesses nationwide jurisdiction. The decision to conduct the trial in Nairobi, rather than in Kitale, is said to have been informed by security considerations arising during the execution of search warrants. In that connection, reliance is placed on ***Joram Opala Otieno v Director of Public Prosecutions & 15 Others***.
66. On the question of bail conditions, the DPP submits that the terms imposed fall within the lawful discretion of the trial court, provided they are reasonable and proportionate. Reference is made to ***Ferdinand Ndungu Baba Yao Waititu v Republic***, wherein conditions barring a sitting Governor from accessing office pending trial were upheld.

67. In conclusion, the 1st Respondent submits that the Petition constitutes an impermissible attempt to derail legitimate criminal proceedings through the vehicle of constitutional litigation. The issues raised, being largely evidentiary and factual in nature, are best ventilated before the trial court.

The 3rd Respondent's submissions

68. The 3rd Respondent, the Ethics and Anti-Corruption Commission (EACC), submits that the investigations culminating in the impugned prosecution were lawfully undertaken pursuant to its constitutional and statutory mandate under Article 79 of the Constitution, the Anti-Corruption and Economic Crimes Act, 2003 (ACECA), and the Ethics and Anti-Corruption Commission Act, 2011. In particular, reliance is placed on section 11(1)(d) of the latter Act, which empowers the Commission to investigate corruption and economic crimes and to recommend prosecution to the Director of Public Prosecutions.

69. It is contended that the Petitioner has not demonstrated that the Commission acted ultra vires, in bad faith, or at the behest of any external actor. The searches conducted at the Petitioner's premises, it is argued, were executed pursuant to valid court-issued warrants and in accordance with sections 23 and 29 of ACECA, sections 118, 118A and 119 of the Criminal Procedure Code, and sections 24(e) and (g) of the National Police Service Act. The 3rd Respondent rejects the contention that prior notice under section 29 of ACECA is a mandatory precondition to obtaining search warrants, placing reliance on ***Ethics and Anti-Corruption Commission & Another v Tom***

Ojienda SC t/a Prof Tom Ojienda & Associates Advocates & 2 Others, wherein the Supreme Court held that prior notice is not required in intelligence-gathering or investigative operations.

70. The 3rd Respondent further submits that a constitutional petition is not the proper vehicle through which to impugn the validity of search warrants, which ought to be challenged before the issuing court through the prescribed appellate or review mechanisms. In that regard, reliance is placed on ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others***. It is argued that allegations of abuse of power and ulterior motive are speculative and unsupported, and the Court is invited to be guided by the principles enunciated in ***Dande & 3 others v Inspector General National Police Service & 5 others***.
71. With respect to the alleged denial of access to counsel, the 3rd Respondent maintains that the Petitioner was treated in accordance with the law and was afforded legal representation. It is deposed that his detention was for purposes of recording statements and processing prior to arraignment, and that his overnight custody did not amount to a denial of bail but formed part of the ordinary investigative process.
72. The 3rd Respondent further submits that the right to fair hearing and fair trial under Articles 50(1) and 50(2) of the Constitution crystallises at the stage of trial, and not during the investigative phase. Reliance is placed on ***Hussein Khalid & 16 Others v Attorney General & 2 Others*** for the proposition that investigations and disclosure are continuous processes, and that any

grievances regarding evidentiary matters are best addressed within the trial forum.

73. On the evidentiary foundation of the charges, the 3rd Respondent submits that the prosecution is both legally and factually grounded. It asserts that documentary evidence including invoices, payment vouchers, bank statements, and M-Pesa records demonstrates that the Petitioner received funds from entities trading with the County Government of Trans Nzoia while serving as Governor. Whether such funds constituted unlawful benefits or legitimate per diem allowances, it argues, is a matter of contested fact to be resolved at trial. In this regard, reliance is placed on ***Praxidis Namoni Saisi & 7 Others v Director of Public Prosecutions & 2 Others***.
74. Concerning the acquisition of M-Pesa statements, the 3rd Respondent avers, in its Further Replying Affidavit sworn on 1st September 2025, that the records were obtained pursuant to court orders issued in **Miscellaneous Criminal Application Nos. E775 and E782 of 2025**. It therefore contends that the evidence was lawfully procured and that the Petitioner's assertion to the contrary is unfounded.
75. The 3rd Respondent maintains that the Director of Public Prosecutions consented to the charges in accordance with the law, and that internal administrative instruments such as the Decision to Charge Guidelines do not, in and of themselves, invalidate a prosecution. Reliance is placed on ***Okoiti v Portside Freight Terminals Limited & 12 others*** in support of that submission.

76. On jurisdiction, it is submitted that the trial court, being presided over by a gazetted Special Magistrate under section 4 of ACECA, possesses nationwide jurisdiction. The decision to conduct the trial in Nairobi, rather than in Kitale, is said to have been justified by security concerns arising during the execution of search warrants. In that regard, reliance is placed on section 13(2)(a) of the Magistrates' Courts Act and the decision in ***Joram Opala Otieno v Director of Public Prosecutions; Zachary Okoth Obado & 14 others***.
77. Finally, the 3rd Respondent submits that affidavits introducing new matters after the close of pleadings such as the Petitioner's Second Further Affidavit are generally inadmissible, though it filed a Further Replying Affidavit *ex abundanti cautela* to forestall any prejudice. It contends that no violation of constitutional rights has been demonstrated and that no basis has been laid for the award of damages.

The 4th and 5th Respondents' submissions

78. The 4th and 5th Respondents submit that the Petitioner's prosecution in Nairobi Anti-Corruption Criminal Case No. E024 of 2025 is lawful, constitutional, and properly instituted. They contend that this Court ought not to interfere with the constitutionally and statutorily conferred mandates of investigative and prosecutorial bodies charged with combating corruption and economic crimes.
79. In opposition to the prayers for orders of certiorari and prohibition to halt the proceedings before the Chief Magistrate's Anti-Corruption Court, the 4th and

5th Respondents argue that the Petitioner has failed to meet the well-established threshold for the grant of such prerogative relief. They maintain that the Petitioner was lawfully arrested and charged with the offence of conflict of interest contrary to section 42(3) as read with section 48 of the Anti-Corruption and Economic Crimes Act, upon the existence of reasonable and probable cause. Once such grounds existed, it is submitted, the investigative agencies were under a duty to arrest and arraign him, and the Director of Public Prosecutions, acting pursuant to Article 157 of the Constitution, was properly seized of the authority to institute charges.

80. The Respondents further submit that there is no evidence demonstrating that the prosecution was actuated by malice, bad faith, external influence, or ulterior motive. In support of the proposition that the High Court ought not to usurp the role of the trial court by engaging in an evaluation of evidence, reliance is placed on ***Total Kenya Limited & 9 Others v Director of Criminal Investigations Department & 3 Others, Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission & 3 Others***, and ***Kuria & 3 Others v Attorney General & 3 Others***. They submit that an order of prohibition will issue only where there is clear proof of abuse of process or a demonstrable threat to a fair trial, neither of which, in their view, has been established.
81. Placing reliance on ***Simon Macharia Njenga v Anti-Counterfeit Agency & 3 Others***, the Respondents emphasise that the power to halt a criminal prosecution must be exercised sparingly and only in exceptional circumstances involving manifest unfairness or violation of fundamental rights. They further contend that the criminal justice system provides

adequate procedural safeguards, including the right to challenge evidence, cross-examine witnesses, and pursue appellate remedies where necessary. In that regard, reference is made **to Republic v Director of Public Prosecutions & 4 others Ex-parte Simion Nyamanya Ondiba and Daniel Ndungu v Director of Public Prosecutions & Another** for the proposition that an accused person ought, in ordinary circumstances, to face trial and submit to the due process of the law.

82. On the alleged violations of constitutional rights, the 4th and 5th Respondents submit that the Petition fails to meet the threshold of precision required in constitutional litigation. They argue that the Petitioner has not pleaded with clarity the specific constitutional provisions alleged to have been infringed, the manner of their infringement, and the prejudice suffered. In support of this submission, reliance is placed on **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others**.
83. They further contend that allegations of denial of legal representation, media prosecution, harassment, and bad faith are unsupported by cogent evidence. Even where certain rights may be implicated, it is argued, constitutional rights are not absolute and may be reasonably limited by law where such limitation is justifiable. Reliance is placed on **Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 Others** for the proposition that where there exists reasonable and probable cause to arrest and prosecute, such action does not, without more, constitute a violation of constitutional rights.

84. In conclusion, the 4th and 5th Respondents submit that the Petitioner has failed to demonstrate any illegality, abuse of power, or constitutional infringement warranting this Court's intervention. They maintain that the prosecution was lawfully instituted, that any evidentiary disputes fall to be resolved at trial, and that the Petition is devoid of merit and ought to be dismissed with costs.

The Petitioner's Rebuttals

85. The Petitioner filed rebuttal submissions in response to both the 3rd Respondent's Further Replying Affidavit and the 1st Respondent's written submissions dated 5th September 2025. In rebuttal to the 3rd Respondent (EACC), the Petitioner emphasizes the chronology of events relating to the Mpesa evidence. He notes that he was arrested on 19th May 2025 and charged on 20th May 2025, yet the 3rd Respondent only applied for and obtained court orders to access his Mpesa data on 27th May 2025, the same date Safaricom supplied the information. He argues that this sequence demonstrates that, at the time of his arrest and charging, the Respondents did not possess the Mpesa evidence allegedly forming the basis of the charges. He further contends that bank statements exhibited by the investigator were also obtained after he had already been charged. Placing reliance on *Jackson Maine Wangui v Republic [2018] eKLR*, he submits that investigations are deemed complete when the decision to charge is made, and that charging him before gathering the impugned evidence evidences bad faith, improper motive, and a fundamentally flawed process. He reiterates his reliance on *Philomena Mbeti Mwilu v Director of Public*

Prosecutions & 3 Others [2017] eKLR to argue that illegally obtained evidence taints the prosecution.

86. In rebuttal to the 1st Respondent (DPP), the Petitioner challenges the failure to produce Form ODPP 1A under the ODPP Guidelines on the Decision to Charge. He argues that the Guidelines were developed pursuant to Article 47 of the Constitution and section 5(1)(c) of the ODPP Act to ensure fair administrative action, and that the decision to charge is both administrative and quasi-judicial in nature. He contends that Form ODPP 1A is not a private internal document but a constitutional safeguard, and that failure to process or produce it demonstrates non-compliance with mandatory policy requirements.
87. On the threshold test for charging, the Petitioner submits that his case fails both limbs of the two-stage test. On the evidentiary limb, he argues that the evidence was illegally procured and, in any event, relates to lawful per diem payments to which he was entitled. He contends that proper investigation would have revealed that the Mpesa payments corresponded with official entitlements supported by vouchers. He further faults the Respondents for failing to produce witness statements from the alleged source entities, arguing that this omission underscores the absence of a factual foundation. On the public interest limb, he submits that it cannot be in the public interest to rely on illegally obtained evidence, misapprehend financial transactions, and initiate what he characterizes as a sham prosecution. He argues that the 1st and 3rd Respondents thereby breached Articles 157(10) and 157(11) of the Constitution and misapplied the Supreme Court's interpretation of the

charging threshold in *Benson Khwatenge Wafula v Director of Public Prosecutions & 3 Others* [2019] eKLR.

88. The Petitioner further maintains that certain aspects of his evidence particularly the payment vouchers supporting lawful per diem remain uncontroverted. Placing reliance on *Praxidis Namoni Saisi & 7 Others v Director of Public Prosecutions & 2 Others* [2015] eKLR, he submits that this Court is entitled to undertake a merit review under Article 47 of the Constitution and the Fair Administrative Action Act, 2015, and should not defer uncontested constitutional violations to the trial court. He accordingly urges the Court to allow the Petition as prayed.

Analysis and Determination

89. Having carefully considered the parties' respective submissions, the annexures on record, and the applicable constitutional and statutory principles, the Court proceeds to determine the Petition. This court finds that the following issues commend themselves for determination;

- i. Whether the Petition meets the constitutional threshold of precision in pleading violations of fundamental rights and freedoms.*
- ii. Whether the arrest, detention, and prosecution of the Petitioner, and the denial of access to counsel, violated his constitutional rights under Articles 29, 31, and 49 of the Constitution.*
- iii. Whether the decision to charge the Petitioner by the 1st Respondent was procedurally fair, lawful, and in consonance with Article 157 of*

the Constitution and the Office of the Director of Public Prosecutions' own Guidelines on the Decision to Charge, 2019.

- iv. Whether the evidence, particularly the M-Pesa statements, was obtained illegally, and if so, whether its admission would render the trial unfair, warranting its exclusion under Article 50(4) of the Constitution and vitiating the prosecution.*
- v. Whether the criminal prosecution of the Petitioner in Milimani Anti-Corruption Case No. E024 of 2025 is an abuse of the court process, actuated by mala fides or political persecution, thereby justifying the grant of the orders of certiorari and prohibition sought.*
- vi. Whether the 4th Respondent has the requisite jurisdiction to hear and determine the criminal charges against the Petitioner.*
- vii. Whether the Petitioner is entitled to the reliefs sought, including declarations of unconstitutionality and damages.*

Whether the Petition meets the constitutional threshold of precision in pleading violations of fundamental rights and freedoms.

90. Before analysing the issues outlined above, this Court must first satisfy itself that the Petitioner has demonstrated a prima facie case meriting judicial intervention. It is a well-established principle in constitutional adjudication that the Court entertains only petitions that exhibit constitutional precision (*petitio iusta et determinata*). This requires the petitioner to identify clearly the constitutional provisions allegedly infringed, specify the acts or omissions constituting the breach, and demonstrate tangible prejudice or harm flowing

therefrom. As emphasized in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*, a constitutional petition must be pleaded with clarity, ensuring that respondents are adequately informed of the allegations and that the Court is not called upon to adjudicate abstract or hypothetical grievances. The principle of *specificatio iuris* thus functions as both a procedural and substantive safeguard, compelling petitioners to frame their claims with precision sufficient to engage judicial scrutiny.

91. The applicable test in Kenyan law for constitutional precision requires three cumulative elements: (i) the existence of a legal or constitutional right allegedly violated; (ii) a causal nexus (*nexus causalitatis*) between the respondents' conduct and the alleged violation; and (iii) demonstrable prejudice or harm suffered as a consequence. At this stage, the petitioner need not prove the case on the balance of probabilities or beyond reasonable doubt. However, they must adduce credible and substantiated allegations which, if proven, would entitle them to relief. This principle was affirmed in *Leonard Otieno v Airtel Kenya Limited [2018] eKLR*, where the High Court (Mativo J.) emphasized that while proof "beyond reasonable doubt" is not required initially, petitioners are nonetheless obliged to present credible, substantiated allegations.

92. In this matter, the Petitioner has satisfied this threshold. The Petition identifies the constitutional provisions allegedly infringed Articles 22, 23, 28, 49, and 50 and links each to concrete acts by the Respondents. The Petitioner presents a coherent chronology, arrest on 19th May 2025; detention

incommunicado; denial of access to legal counsel; issuance and execution of search warrants at Kitale and Rongai residences; and acquisition of M-Pesa and bank statements after he had already been charged on 20th May 2025. These assertions are supported by sworn affidavits and documentary evidence, establishing both the material facts and the causal connection between the Respondents' actions and the alleged violations, consistent with Leonard Otieno.

93. The Petitioner also demonstrates tangible prejudice. Deprivation of liberty without access to counsel violated Article 49(1)(c) and (d), which guarantees prompt access to a lawyer. The use of evidence obtained post-charging undermines Article 50(4) and the principles of *audi alteram partem*, threatening the fairness and integrity of the criminal proceedings. These rights are fundamental to justice, not abstract or technical. In ***Philomena Mbete Mwilu v Director of Public Prosecutions & 3 Others [2021] eKLR***, the Court held that evidence obtained in breach of constitutional safeguards is inadmissible, while in ***Kiprop v Republic [2024] KEHC 5478 (KLR)***, the High Court confirmed that denial of legal representation at the investigative stage vitiates subsequent proceedings.

94. This Court finds that the Petitioner has demonstrated a clear *prima facie* case of constitutional violations. The allegations are precise, cogent, and substantiated, establishing a credible causal nexus between the Respondents' conduct and the infringement of fundamental rights, with demonstrable prejudice arising therefrom. The Petitioner has discharged the requisite burden of showing *fumus boni iuris* and *periculum in mora*, thereby justifying

further judicial scrutiny and consideration of appropriate constitutional remedies.

95. The 4th and 5th Respondents raise a procedural objection, contending that the Petition is poorly pleaded and fails the precision threshold established in **Anarita Karimi Njeru v Republic (No. 1) [1979] KLR 154**. In that case, the Court held that a petitioner seeking constitutional redress must set out with reasonable precision the grievances, the provisions allegedly infringed, and the manner of infringement. This principle has been consistently reaffirmed, including in **Mumo Matemu** supra, which emphasized that the rule is substantive, ensuring respondents are adequately informed and that the Court's jurisdiction is properly invoked.
96. The Respondents assert that the Petition is a hotchpotch of grievances, citing Articles 3, 10, 19, 20, 21, 25(c), 27, 28, 29, 47, 50, 79, 157, and 249, without demonstrating how each was specifically violated. While a cursory reading may suggest complexity, precision must be evaluated alongside substance. Superior courts have clarified that the **Anarita Karimi Njeru** principle should not be applied to elevate form over substance, thereby barring genuine constitutional claims on technical grounds. As noted in **Mumo Matemu**, a petition should not be dismissed solely for lack of precision if the issues are discernible from the petition and supporting affidavits. The test is whether respondents are sufficiently informed to prepare a meaningful response.
97. Applying this standard, the Petition articulates the grievances clearly. The central theme is coherent: the criminal proceedings against the Petitioner are

a nullity, premised on a cascade of constitutional violations. The Petitioner particularizes each violation: unlawful arrest under Article 49 with denial of access to counsel; violation of privacy under Article 31 through unlawful seizure of M-Pesa data and breach of the right to fair administrative action under Article 47 due to failure to follow ODPP decision-to-charge guidelines, including non-production of Form ODPP 1A. The supporting affidavits provide detailed accounts of each event.

98. The invocation of broader Articles, such as Article 10 on national values, contextualizes the claim that Respondents acted contrary to the rule of law, human rights, and good governance, without undermining precision. The core allegations the legality of the search warrants, denial of counsel, admissibility of M-Pesa evidence, and propriety of the decision to charge are clearly identifiable. The Respondents' detailed affidavits addressing these issues confirm that they understood the case against them. Consequently, the objection on the ground of imprecise pleading is overruled.

Whether the arrest, detention, and prosecution of the Petitioner, and the denial of access to counsel, violated his constitutional rights under Articles 29, 31 and 49 of the Constitution

99. The Petitioner's account of his arrest on 19th May 2025 portrays a high-handed and procedurally flawed operation. He avers that he was arrested at his Kileleshwa residence at 8:02 am without being informed of the reasons for his arrest. For a significant part of the day, he was denied access to his

advocates of choice, Mr. Simiyu Murambi and Mr. Zack Alakonya, who were locked out of the EACC offices, while four other advocates, including Hon. Eugene Wamalwa, were also barred from seeing him. He contends that this constituted a gross violation of his rights under Article 49(1)(a) and (c) of the Constitution, which guarantee an arrested person the right to be informed promptly, in language they understand, of the reason for their arrest, and the right to communicate with an advocate or other persons whose assistance is necessary.

100. The 3rd Respondent, in reply, offers only a terse denial. In paragraph 22 of the Replying Affidavit sworn by Robert Ronoh, the deponent states that the Petitioner's claims regarding denial of access to legal representation are not true and that the Petitioner was treated in accordance with the law and was allowed access to legal counsel. This bare denial, however, lacks specificity and fails to rebut the Petitioner's detailed account. The Petitioner identifies the advocates who were denied access and provides a chronology of events. The 3rd Respondent does not provide a counter-narrative, nor does it state the times the advocates arrived, what transpired between them and EACC officers, or when access was eventually granted. The 3rd Respondent merely avers that the Petitioner was held for the purpose of recording his statement and being processed for court, which does not address the specific claim of denial of access to counsel.

101. The right to legal representation upon arrest is a cornerstone of a fair justice system. It is not a mere formality but a substantive safeguard ensuring that

an arrested person is not left vulnerable to the state's power during the critical pre-charge stage. In ***Joseph v Republic [2023] KEHC 24020 (KLR)***, the court underscored that the right to a fair hearing includes the right of an accused person to have adequate time and facilities for the preparation of his defence, which necessarily includes access to legal counsel. The purpose of this right is to enable the accused to receive advice on his rights, understand the implications of the process, and ensure that any statement made is voluntary and free from coercion or intimidation. The court had the following to say:

"...One of the tenets of fair trial is the right to know that you can have legal counsel as provided for by Article 50(2) (g) of the Constitution i.e. to choose, and be represented by, an advocate, and to be informed of this right promptly; This right is explained further in the Legal Aid Act which gives the court the mandatory duty to inform the accused of that right. At s. 43 where it states..."

102. The Petitioner alleges that during his incommunicado detention, he was intimidated and bullied by EACC officers to admit to the embezzlement of Kshs.1.4 billion. While the 3rd Respondent has not addressed this allegation specifically, the context of the denial of counsel renders it both plausible and concerning. The cautionary statement recorded at 10:00 pm on 19th May 2025, after hours of detention and without counsel, is a document whose voluntariness and reliability may be seriously impugned. The safeguards enshrined in the Constitution, particularly the right to counsel, are designed precisely to prevent such situations. In ***Dennis Edmond Apaa and others v***

Ethics and Anti-Corruption Commission, Nairobi Petition No. 317 of 2012, [2012] eKLR, the court emphasized that the right to a fair trial begins from the moment of arrest and continues throughout the trial. The court stated thus:

“26. The words of article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. article 50(2)(c) guarantees the accused the right, “to have adequate facilities to prepare a defence. 27]This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence The obligation to disclose was a continuing one and was to be updated when additional information was received.”

103. On the evidence, the Court finds that the Petitioner's right to access legal counsel under Article 49(1)(c) was violated. The 3rd Respondent's generalized denial is insufficient to displace the Petitioner's sworn account. The temporary barring of his advocates infringed his right to seek immediate legal advice and assistance before any questioning or statement-taking. This violation taints the subsequent cautionary statement and forms part of a

broader pattern of procedural irregularities. While this violation alone does not nullify the entire prosecution, its effect must be assessed alongside other breaches and the overall fairness of the trial.

104. On the issue of being informed of the reason for arrest, the Petitioner claims he was not told why he was being arrested, and the 3rd Respondent's affidavit is silent on this point. Article 49(1)(a) mandates that an arrested person be promptly informed of the reason for their arrest, enabling them to challenge the detention and seek release. While the officers may have identified themselves as EACC officials, the specific allegations were only disclosed the following day at the plea hearing. This failure constitutes a further violation of the Petitioner's rights.

105. Regarding the search warrants, the Petitioner argues that they amounted to a carte blanche for violating his constitutional rights, implicating his right to privacy under Article 31. He contends the warrants were irregular for lacking prior notice under Section 29 of ACECA. The Supreme Court in ***Ethics and Anti-Corruption Commission & another v Ojienda & 2 others [2022] KESC 59 (KLR)*** authoritatively settled this question, holding that EACC, when carrying out a police operation or intelligence-gathering exercise, cannot be inflexibly bound to issue prior notice to the intended targets. Such a requirement would defeat the purpose of the search and potentially lead to the destruction or concealment of evidence. The Supreme Court stated: ***"In view of the foregoing, we find it difficult to sustain the declaration by the Court of Appeal to the effect that, the 1st appellant is inflexibly bound***

to issue notice in the conduct of its investigations. Where the 1st appellant is acting under its police powers, it is bound by the laws pursuant to which the police conduct their investigations and connected purposes. Where it conducts investigations in circumstances where the law requires it to issue written notice, then it has to issue the notice. At the end of the day, the people expect that the law enforcement agencies established under the Constitution and the law are effective enough to protect them from crime and related dangers. By the same token, the people expect that such agencies will carry out their mandates in accordance with the Constitution and the law.”

106. This decision clarifies that the power to conduct searches under a warrant is a critical tool in the fight against corruption. Any argument that a notice to produce documents is a mandatory precondition is without legal foundation in light of this binding Supreme Court authority.

107. On the proper procedure for challenging a search warrant, the Court is guided by the doctrine of constitutional avoidance. In **Governors Balloon Safaris Limited v Attorney General & 2 others [2014] KEHC 3005 (KLR)**, the court struck out a petition as an abuse of process, being a collateral attack on proceedings in another court. The search warrants here were issued by a competent court (the 4th Respondent). If the Petitioner believed the warrants were improperly obtained or excessively broad, the appropriate remedy was to apply to that issuing court for discharge. Using a constitutional petition to collaterally attack the warrants without first seeking discharge

from the issuing court constitutes an abuse of process. Consequently, while the execution of the searches may have been aggressive, the challenge to the warrants' legal foundation cannot succeed in these proceedings.

Whether the decision to charge the Petitioner by the 1st Respondent was procedurally fair, lawful, and in consonance with Article 157 and the ODPP's Guidelines.

108. The Petitioner's challenge to the decision to charge him is multifaceted. He argues that the decision was not made personally by the DPP, that it was taken hastily and casually, and that the failure to disclose Form ODPP 1A constitutes a breach of his right to fair administrative action under Article 47. The 1st Respondent counters that its powers may be delegated, that the two-stage test was satisfied, and that Form ODPP 1A is an internal administrative document not subject to disclosure at the pre-charge stage.

109. The legal basis for the exercise of prosecutorial powers in Kenya is found in the Constitution of Kenya, 2010. Article 157 establishes the Office of the Director of Public Prosecutions (ODPP). The Office of the Director of Public Prosecutions Act No. 2 of 2013 (the ODPP Act) was enacted to give effect to Articles 157 and 158 of the Constitution, other relevant provisions of the law, and for connected purposes.

110. Section 4 of the ODPP Act provides the fundamental principles guiding the DPP in prosecuting cases. These principles include impartiality and gender equity respect for the diversity of the people of Kenya; adherence to rules of natural justice; promotion of public confidence in the integrity of the office;

service to the cause of justice; prevention of abuse of the legal process and safeguarding public interest; and promotion of constitutionalism. The ODPP Act, along with other statutes, sets out the manner in which the DPP ought to discharge its mandate. The exercise of prosecutorial powers has therefore been subject to legal scrutiny, and clear principles and guidelines have been developed.

111. I associate myself with the sentiments expressed in ***Nakusa vs Tororei & 2 others (No 2) Nairobi HCEP No 4 of 2003 [2008] 2 KLR (EP) 565*** to the effect that:

“The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms. In interpreting the Constitution, the court is called upon to uphold and given effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend.”

112. The High Court in ***Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others [2019] eKLR*** emphasized the constitutional oversight role of the courts in prosecutorial discretion:

“It is therefore clear that the current prosecutorial regime does not grant to the DPP a carte blanche to run amok in the exercise of his prosecutorial powers. Where it is alleged that the standards set out in the Constitution and in the aforesaid Act have not been adhered to, this court cannot shirk

its constitutional mandate to investigate the said allegations and make a determination thereon. To hold that the discretion given to the DPP to prefer charges ought not to be questioned by this court would be an abhorrent affront to judicial conscience and above all, the Constitution itself.”

113. The power of the DPP to institute criminal proceedings is constitutionally entrenched under Article 157. The Constitution allows this power to be exercised by subordinate officers acting under the Director’s instructions, ensuring efficiency in the office. Section 22 of the ODPP Act, 2013, formalizes this by empowering the Director to delegate any power in writing to a subordinate officer. Thus, the fact that the charge sheet was not personally signed by the DPP does not render it invalid. The prosecution counsel who signed it is presumed, absent evidence to the contrary, to have had the authority of the Director. The Petitioner has provided no such evidence, making this ground of attack without merit.

114. A more substantive issue is the allegation that the 1st Respondent breached its own Guidelines on the Decision to Charge, 2019, specifically by failing to file or disclose Form ODPP 1A. These Guidelines, which are public, ensure quality and transparency in prosecutorial decision-making. Chapter 3.1.1 mandates that prosecutors complete Form ODPP 1A and file it in the relevant prosecution file. The Petitioner contends that the failure to provide this form, even upon request, violates Article 47 and evidences a flawed process.

115. The 1st Respondent argues that the form is an internal administrative document, not part of the evidence to be supplied to an accused. It relies on ***James Mwangi & Others v Republic (High Court, Anti-Corruption & Economic Crimes Division***, Mumbi Ngugi, J (as she then was)), where the court held that an investigative report from EACC to the DPP is an internal communication, not evidence on which the prosecution will rely, and therefore not subject to pre-trial disclosure. Disclosure obligations under Article 50(2)(j) relate to evidence that will be used against the accused, not internal memoranda, advice, or preliminary assessments.

116. However, the present issue is distinct. The complaint concerns the mandatory Decision to Charge Form, which constitutes the formal record of the prosecutor's decision-making process and reflects the culmination of the evidential and public interest tests. While the form may not be "evidence" in the sense of a witness statement or document used to prove an element of an offence, its existence and contents are critical to assessing whether the decision-making process was lawful, fair, and reasonable. Failure to complete it, as mandated by the Guidelines, raises serious questions about whether internal scrutiny occurred.

117. In ***Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another [2019] KEHC 11665 (KLR)***, the Court, while not addressing Form ODPP 1A directly, emphasized the importance of public bodies adhering to their own published policies and guidelines. Such guidelines create a legitimate expectation of compliance, and failure to follow them without reasonable explanation can render a decision arbitrary and procedurally

unfair. The ODPP Guidelines are a framework to ensure that decisions to charge, which affect liberty, reputation, and livelihood, are taken with due care. By mandating completion and filing of Form ODPP 1A, the Guidelines create a transparent record of the decision.

118. In *Republic v Director of Public Prosecution & Another ex parte Kamani, Nairobi Judicial Review Application No 78 of 2015*, while quoting *R v Attorney General ex Kipngeno Arap Ngeny High Court Civil Application No 406 of 2001*, the Court held:

“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper ... there must be in existence material evidence on which the prosecution can say with certainty that it has a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and in actionable.”

119. In this case, the 1st Respondent has not explicitly stated, either in its Replying Affidavit or submissions, that Form ODPP 1A was completed and filed as required. Its defense focuses solely on the form’s internal nature. The Petitioner’s grievance is that the process was so hurried that this critical internal step may have been omitted. While non-compliance with a procedural requirement does not automatically invalidate the decision, it is a factor the Court must consider in assessing whether the prosecution constitutes an abuse of process. It certainly lends credence to the

Petitioner's claim that the decision was taken with uncharacteristic haste, potentially without the requisite internal checks and balances.

Whether the evidence, particularly the M-Pesa statements, was obtained illegally, and if so, whether its admission would render the trial unfair, warranting its exclusion under Article 50(4).

120. Perhaps the most legally intricate and consequential issue in this Petition concerns the admissibility of the Petitioner's M-Pesa statements. The Petitioner's argument is stark and compelling. The charges against him, particularly those in Count III, are fundamentally based on M-Pesa transactions showing money transfers from Emmanuel Wafula Masungu to him. Yet, the 3rd Respondent has admitted, through its Further Replying Affidavit, that the court orders to obtain these statements from Safaricom were issued on 27th May 2025, seven days after he had already been charged on 20th May 2025. The Petitioner contends that the Respondents, therefore, must have accessed this highly private financial data before 27th May 2025, without any lawful warrant or order, in flagrant violation of his right to privacy under Article 31 of the Constitution. He submits that evidence obtained through such unlawful access must be excluded under Article 50(4).

121. The 3rd Respondent asserts that the M-Pesa statements were obtained pursuant to court orders (**Miscellaneous Criminal Application Numbers E775 of 2025 and E782 of 2025**). They argue that the warrants were dated 27th May 2025, and the statements were lawfully acquired on that date. This response, however, does not fully address the core of the Petitioner's

temporal argument. The charge sheet, dated 20th May 2025, particularizes the M-Pesa transactions with remarkable specificity. How could the investigators and prosecutors have known the precise details of these transactions the dates, the amounts, and the sending parties to include them in the charge sheet on 20th May 2025, if the official statements were only obtained on 27th May 2025?

122. The irresistible inference is that they had access to this data through some other means, which the Petitioner claims was not authorized by a court order. The 3rd Respondent has not provided any explanation for this temporal anomaly. It has not deposed to obtaining the information from another source, such as the Petitioner's seized mobile phone, nor has it presented a court order authorizing such access prior to 20th May 2025.

123. Article 50(4) of the Constitution provides: "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice." This provision marks a departure from the common law position, famously encapsulated in *Kuruma, Son of Kaniu v. The Queen [1955] AC 197*, which held that the test for admissibility of evidence is solely its relevance, regardless of how it was obtained. The Kenyan Constitution, however, has constitutionalized a qualified exclusionary rule.

124. The interpretation of Article 50(4) was significantly developed by the High Court in *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3*

others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae). In that case, the Deputy Chief Justice and another faced corruption charges. It was discovered that the DCI had investigated the Honorable Deputy Chief Justice bank accounts at IBL based on a court order that did not pertain to her accounts. The court, after exhaustive analysis of Article 50(4) and comparative jurisprudence, held that the evidence had been illegally obtained and that its admission would be detrimental to the administration of justice. The court quashed the criminal proceedings against the DCJ, stating:

“349. The answer to this question must be in the negative. Whereas, on the material before us, we cannot fault the decision of the DPP to prosecute the Petitioner in respect of counts I and II, the same cannot be said of the conduct of the DCI. We have held that the manner in which the DCI obtained access to the Petitioner’s accounts with IBL was through acts of misrepresentation and misuse of a court order that rendered the evidence thereby obtained, and which formed the bedrock of the charges against the Petitioner, illegal in a manner that is detrimental to the administration of justice. The DCI violated the Petitioner’s right to privacy contrary to Article 31 of the Constitution. While this violation was not pleaded by the Petitioner, we deem it critical to assert that in light of Article 50(4), the conduct of the DCI has irredeemably broken the foundation on which the criminal case against the Petitioner was built, and the Petition must, to that extent, succeed.”

125. This decision underscores the principle that a prosecution founded on evidence obtained in violation of the Constitution cannot stand. It affirms that the ends of justice cannot justify unconstitutional means.

126. The Supreme Court of Kenya has also addressed illegally obtained evidence, notably in ***Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR)***. There, the petitioners sought to rely on documents obtained from undisclosed whistleblowers. The Supreme Court affirmed the lower courts' decision to expunge the documents, holding that the petitioners had not lawfully accounted for how they accessed them. Admission of such documents would condone a violation of the law and be detrimental to the administration of justice. The Court emphasized that a litigant cannot rely on evidence obtained in violation of the Constitution while alleging violations of the same Constitution, stating:

“We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of the Constitution . Allowing such documents is akin to sanitising illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of article 31 of the Constitution on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such

documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the Evidence Act or requested for information under article 35 of the Constitution , the documents are inadmissible, we so declare.”

127. Applying these principles to the present case, the evidence strongly suggests a prima facie violation of the Petitioner's right to privacy under Article 31. The right to privacy protects an individual's personal and financial information from unwarranted state intrusion. The state cannot access such information without lawful authorization, which in this context would require a court order. The unexplained temporal gap between the drafting of the charge sheet, which details the M-Pesa transactions, and the obtaining of the court orders for the M-Pesa statements after the charge was filed, points to a breach of this right. The 3rd Respondent has not provided any lawful explanation for how it acquired the transaction details prior to 27th May 2025.

128. Under Article 50(4), the question is whether admitting this evidence would render the trial unfair or be detrimental to the administration of justice. The answer is affirmative. Trial fairness encompasses not only courtroom procedure but the entire process of bringing an individual to justice. A trial founded on evidence obtained through unlawful invasion of privacy is inherently unfair and undermines public confidence in the criminal justice system. As observed in *Philomena Mbete Mwilu (supra)*, allowing such evidence incentivizes unconstitutional conduct by state agencies and signals that the ends justify the means. The admission of these M-Pesa transaction

records would therefore be profoundly detrimental to the administration of justice. The evidence is central to the charges; without it, the prosecution's case is severely weakened, if not entirely undermined. Its exclusion under Article 50(4) is thus essential to uphold trial fairness.

Whether the criminal prosecution of the Petitioner is an abuse of the court process, actuated by mala fides or political persecution, thereby justifying the grant of the orders of certiorari and prohibition sought

129. The Petitioner's overarching narrative is that the prosecution is a manifestation of lawfare the use of legal systems and institutions to harass, intimidate, and silence political opponents. He points to his public criticism of the national government on a range of issues and the dramatic timing and nature of his arrest as evidence of this ulterior motive. The Respondents counter that these are bare allegations and that they have demonstrated a sufficient factual and legal basis for the charges.

130. The power of the High Court to stop a criminal prosecution is extraordinary and must be exercised sparingly, only in the clearest cases. In *Kuria & 3 Others vs Attorney General [2002] 2 KLR 69*, the court articulated the guiding principle: the court has the power and duty to prohibit the continuation of a criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. The court stated:

“The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score- settling or

vilification on issues not pertaining to that which the system was even formed to perform.....A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.....The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far that which the courts indeed the entire system is constitutionally mandated to administer..."

131. The court's processes must not degenerate into tools for personal score-setting or vilification. In *Rono v Director of Public Prosecution & 2 others; Sawe (Interested Party)* [2024] KEHC 15072 (KLR), it was held that a prosecution constitutes an abuse of process if it is initiated for an improper purpose, such as to pressure an accused to settle a civil dispute, or if it is based on a manifestly false complaint or where no prima facie case exists.

132. The test for this court is not whether the Petitioner is guilty or innocent, that is for the trial court. The test is whether the decision to prosecute was made in bad faith, for an ulterior purpose, or is otherwise so lacking in reasonable foundation that to allow it to continue would affront justice. In ***Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)***, the Supreme Court, citing the Supreme Court of India in *RP Kapur v State of Punjab*, set out guidelines for when a court may quash proceedings. These include (i) Where institution or continuance of criminal proceedings may amount to abuse of the process of the court or quashing would secure the ends of justice; (ii) Where there is a legal bar against the institution or continuance, e.g., want of sanction; (iii) Where allegations in the First Information Report or complaint, taken at face value, do not constitute the offence alleged; and (iv) Where allegations constitute an offence, but no legal evidence is adduced or the evidence clearly fails to prove the charge.

133. Applying these principles, several factors indicate abuse of process. First, there is the finding on the violation of the right to counsel and the unlawful or unexplained acquisition of the M-Pesa evidence. These are not minor procedural irregularities; they are grave constitutional violations striking at the heart of a fair trial.

134. Second, there is a striking and unexplained discrepancy between the 3rd Respondent's public pronouncement on 19th May 2025 and the charges eventually filed. The EACC's press statement announced alleged irregular procurement and fictitious payments of Kshs.1.4 billion, naming the Petitioner among those arrested. Yet, the charges filed the next day involved

sums of Kshs.1,127,900; Kshs.2,124,668; and Kshs.3,252,568. While not insignificant, these amounts are far smaller than the sensational Kshs.1.4 billion headline. This dramatic reduction suggests that the initial statement was designed for maximum reputational damage rather than reflecting the evidence, indicative of bad faith and disregard for the Petitioner's rights.

135. Third, the substantive core of the charges, when weighed against the Petitioner's detailed rebuttal with contemporaneous documents, appears weak. The contracts were entered into before the Petitioner took office. Payments from Emmanuel Masungu, as detailed with reference to work tickets, imprest forms, and SRC guidelines, bear the hallmarks of legitimate per diem payments. They are regular, periodic, and correspond to official duties. The Petitioner has also shown that the county government still owes him unpaid per diem.

136. In *Peter George Anthony Costa v Attorney General & another Nairobi petition No 83/2010*, the court stated:

“The process of the court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.”

137. Similarly, in *Rosemary Wanja Mwagiru & 2 others v Attorney General & 2 others*, Mumbi J (as she then was), the court stated:

“The process of the court must not be misused or otherwise used as an avenue to settle personal scores. The criminal process should not be used to harass or oppress any person through the institution of criminal proceedings against him or her. Should the court be satisfied that the criminal proceedings being challenged before it have been instituted for a purpose other than the genuine enforcement of law and order, then the court ought to step in and stop such maneuvers in their tracks and prevent the process of the court being used to unfairly wield state power over one party to a dispute.”

138. In *Karmali & another v Chief Magistrate’s Court Nairobi & another [2006] KEHC 3433 (KLR)*, the court emphasized that criminal law should not be used oppressively to punish acts that may be technically criminal but are essentially lawful. The charges against the Petitioner, on his plausible and documented account, do not appear to disclose a prima facie case of corruption. Subjecting him to a full criminal trial on such a basis, compounded by constitutional violations and sensationalized publicity, would be oppressive and vexatious.

139. Considering the combination of constitutional violations, apparent bad faith in public communication, and the substantive weakness of the charges, I

conclude that the criminal proceedings against the Petitioner are an abuse of the court process. They are not a bona fide attempt to enforce the law but bear the hallmarks of misuse, possibly for political purposes, to harass and intimidate an outspoken Governor. The decision to charge him was unreasonable in the **Wednesbury** sense a decision no reasonable prosecutorial authority acting in good faith could have made.

Whether the 4th Respondent has the requisite jurisdiction to hear and determine the criminal charges

140. Given the finding that the prosecution is an abuse of process, the question of the trial court's jurisdiction may be moot. However, for completeness, I will address it. The Petitioner argues that the 4th Respondent lacks territorial jurisdiction because the alleged offences were committed in Kitale. The Respondents counter that the 4th Respondent is a gazetted Special Magistrate with countrywide jurisdiction under Section 4 of ACECA, and that the decision to charge in Nairobi was justified by security concerns in Kitale.

141. Section 4(2) of ACECA provides:

"Every offence specified in this Act shall be tried by the special Magistrate for the area within which it was committed, or, as the case may be, by the special Magistrate appointed for the case, or where there are more special Magistrates than one for such area, by one of them as may be specified in this behalf by the Chief Justice."

142. It does not explicitly limit the magistrate's jurisdiction to the district where the offence occurred. Section 75 of the Criminal Procedure Code allows a trial in the place where the offence was committed, where the accused resides or carries on business, where he was apprehended, or elsewhere as the court deems expedient for justice. In *Joram Opala Otieno (supra)*, the court affirmed that a trial may be held outside the *locus delicti* where a fair trial may not be possible locally.

143. The 3rd Respondent justified the venue due to destruction of its vehicles and injury to staff by hooligans during searches in Kitale, creating a reasonable apprehension of public disorder, intimidation of witnesses, or interference. On this basis, charging and trying the Petitioner in Nairobi was not irrational or unlawful. This ground of the Petition therefore fails.

Whether the Petitioner is entitled to the reliefs sought, including declarations of unconstitutionality and damages

101. Having found that the Petitioner's constitutional rights were violated through unlawful arrest and detention, denial of access to legal counsel, procedural impropriety in the execution of warrants, and an abusive, mala fide, and constitutionally infirm prosecution, this Court must now determine the full spectrum of appropriate remedies, including declaratory relief, orders of certiorari and prohibition, exclusion of unlawfully obtained evidence, and awards of damages. Articles 22 and 23 of the Constitution confer broad remedial powers on this Court, empowering it to grant compensation or any other redress as it deems just and equitable.

102. Such remedial jurisdiction is purposive and protective in character, intended not merely to correct individual wrongs but to uphold the supremacy of the Constitution, vindicate rights, and deter future abuse of power. The Supreme Court in *Monica Wangu Wamwere & 5 Others v Attorney General* [2023] **KESC 3** emphatically held that constitutional remedies must restore the dignity of the injured, vindicate infringed rights, and deter future violations.

103. In the present matter, declaratory relief is not symbolic but necessary. A declaration that the Petitioner's arrest, detention, denial of access to counsel, execution of search warrants, and institution of criminal proceedings were unconstitutional formally affirms the supremacy of the Constitution under Article 2 and underscores that state power must always operate within constitutional boundaries. Declaratory orders are particularly appropriate where violations are systemic and implicate the conduct of public authorities, as they clarify legal obligations and guide future conduct. Accordingly, declarations as prayed for are warranted to affirm breaches of Articles 22, 23, 47, 49, and 50.

104. An order of certiorari is warranted to uphold the rule of law and ensure that public authorities act within the bounds of their lawful authority. Certiorari lies to quash decisions that are made without jurisdiction, in excess of jurisdiction, or in breach of the rules of natural justice, thereby protecting individuals from arbitrary or unlawful exercise of power. This Court has found that the decision to charge the Petitioner was procedurally defective,

irrational, and undertaken in flagrant disregard of Article 157(11) of the Constitution and the guidelines of the Office of the Director of Public Prosecutions. The Court of Appeal in ***Diamond Hasham Lalji & Another v Attorney General & 4 Others supra*** affirmed that where a prosecution is instituted without reasonable or probable cause, or for collateral purposes, the High Court is empowered to quash it to prevent abuse of process.

105. In the present case, the impugned prosecution was initiated prematurely, prior to the completion of investigations, and in contravention of constitutional safeguards. In these circumstances, an order of certiorari quashing the decision to charge the Petitioner and the proceedings in **Milimani Anti-Corruption Case No. E024 of 2025** is both necessary and fully justified.

106. Equally, an order of prohibition is warranted to prevent the Respondents from re-instituting or continuing criminal proceedings founded on the same constitutionally tainted process. Prohibition lies to restrain public authorities from acting unlawfully or exceeding jurisdiction. The Supreme Court in ***Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others*** recognised that courts are duty-bound to halt prosecutions amounting to abuse of process or violations of constitutional guarantees. Having found the foundation of the prosecution to be irredeemably flawed, its continuation would perpetuate illegality; an order of prohibition is therefore appropriate to safeguard the integrity of the judicial process.

107. On the issue of unlawfully obtained evidence, Article 50(4) of the Constitution provides that evidence obtained in violation of any right or fundamental freedom shall be excluded if its admission would render the trial unfair or be detrimental to the administration of justice. The Mpesa and bank statements obtained post-charge, under circumstances already found to contravene constitutional safeguards, fall squarely within this prohibition. As held in ***Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 Others supra***, reliance on evidence secured in violation of constitutional rights undermines the legitimacy of the criminal process. Consequently, such evidence is excluded by operation of Article 50(4).

108. Turning to the question of relief, Article 23(3) of the Constitution vests this Court with wide and efficacious remedial authority, including the power to award compensation where a violation of the Bill of Rights is established. That jurisdiction is not ornamental, it is an essential incident of constitutional supremacy. As the Supreme Court pronounced in ***Monica Wangu Wamwere & 5 Others v Attorney General supra***, remedies for constitutional infractions must be effective, just and proportionate to the injury suffered, and must vindicate the infringed right. The Court emphasised that constitutional damages are primarily compensatory, directed at redressing the injury occasioned by the violation, while at the same time affirming the normative force of constitutional guarantees.

109. The same principle was reiterated by the Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR*** where the Court underscored that awards for breach of constitutional rights are not to be approached as

windfalls, nor as instruments of punishment, but as measured recompense for the loss and injury proved. The Court cautioned that quantum must be assessed on the basis of the gravity of the violation, its duration, and its impact upon the claimant, bearing in mind comparable awards in analogous cases so as to ensure consistency and proportionality in the development of constitutional jurisprudence.

110. Similarly, in *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County*, the Court of Appeal recognised that while exemplary damages may in appropriate cases be available where conduct is oppressive, arbitrary or unconstitutional, such relief remains exceptional. It is reserved for circumstances where the impugned conduct discloses a conscious and contumelious disregard of constitutional norms warranting punitive censure beyond compensatory redress. Even then, the Court stressed that the overarching objective of constitutional remedies is vindication and restoration, not punishment for its own sake.

111. In the present matter, this Court has found that the Petitioner was subjected to unlawful arrest and detention, denied timely access to legal counsel, and exposed to a prosecution that was procedurally infirm and constitutionally unsustainable. These violations implicate Articles 29, 49 and 50 of the Constitution and strike at the heart of the rule of law. The deprivation of liberty, even for a limited duration, is a grave intrusion upon personal autonomy and dignity. The denial of access to counsel at a critical stage compounds that injury and undermines the fairness of the criminal process. The cumulative effect of these breaches cannot be trivialized.

112. The evidence further demonstrates that the Petitioner endured anxiety, reputational harm and public opprobrium arising from a prosecution that ought not to have been initiated in the manner it was. Such injury, though largely non-pecuniary, is real and compensable. In keeping with the guidance of the superior courts, this Court must fashion a remedy that is fair, proportionate and reflective of the totality of the circumstances, while remaining within the bounds of principled constitutional adjudication.

113. Upon careful and deliberate consideration of the record, the applicable constitutional principles, and the governing jurisprudence of the superior courts, this Court is not persuaded that the circumstances of this case meet the stringent threshold for the award of exemplary or punitive damages. Although the Respondents' conduct was procedurally flawed and constitutionally deficient, the material before the Court does not disclose such calculated malice, fraud, or oppressive and high-handed abuse of power as would justify a punitive award within the strict parameters articulated by the Court of Appeal in ***Mbogori (supra)***. Constitutional damages must not be converted into a vehicle for retribution against the State, their primary function remains compensatory and vindicatory.

114. Equally, while the conduct of the Respondents aggravated the injury suffered, the elements of aggravation are sufficiently addressed within a robust award of general damages. To superimpose a separate head of exemplary damages in the circumstances of this case would risk departing from the settled principle that such awards are exceptional and sparingly granted.

115. Guided by the principles in the jurisprudence of the Supreme Court and the Court of Appeal, and taking into account the gravity of the violations, their duration, the cumulative prejudice to the Petitioner's dignity and reputation, and comparable awards for unlawful deprivation of liberty and breach of fair trial rights, this Court finds that a global award of **Kenya Shillings Two Million Five Hundred Thousand (KShs 2,500,000)** constitutes fair and just compensation.

116. The said sum is awarded as general damages for the unlawful arrest and detention, denial of access to counsel, and the institution of a constitutionally infirm prosecution, together with the attendant psychological distress and reputational harm. The claim for exemplary or punitive damages is declined. The award shall attract interest at court rates from the date of this Judgment until payment in full.

Conclusion

144. This Petition exposes a profound tension between the state's duty to investigate and prosecute corruption and the individual's right to be free from an oppressive and unconstitutional process. The Respondents are powerful constitutional organs entrusted with weighty mandates. Their work is vital for upholding the rule of law and ensuring accountability. Yet, this authority is not a license to disregard the Constitution or fundamental rights.

145. In this case, the Respondents overstepped their constitutional authority. The Petitioner's right to legal counsel upon arrest was violated, and his private financial information, protected under Article 31, was accessed without lawful justification, as evidenced by the unexplained timeline of the M-Pesa data acquisition. These are not technical breaches, they strike at the core of a fair trial and the integrity of the criminal justice process.

146. The decision to charge the Petitioner, when viewed holistically, lacked a proper foundation. The sensationalized public announcement of a Kshs.1.4 billion loss, followed by charges involving sums that, on the Petitioner's contemporaneous documentation, were lawful per diem, indicates a process driven by considerations extraneous to the even-handed pursuit of justice. Taken together with the Petitioner's unchallenged evidence, the allegations fail to establish a prima facie case of corruption. Allowing the prosecution to continue would constitute an abuse of the court's process and risk weaponizing the criminal justice system for purposes it was never intended to serve, undermining both justice and public confidence in the rule of law.

147. Having considered the gravity, nature, and cumulative effect of the constitutional violations, this Court finds that the Petitioner's rights under Articles 22, 23, 47, 49, and 50 were flagrantly violated through unlawful arrest and detention, denial of access to legal counsel, procedural impropriety in the execution of warrants, and the institution of an abusive, mala fide, and constitutionally infirm prosecution. These infringements were systemic and deliberate, reflecting a disregard for the rule of law, natural justice, and human dignity. The Respondents' conduct premature charging,

reliance on post-facto evidence, denial of legal representation, and publicizing unverified allegations constitutes a clear abuse of power and mala fides under Article 157(11).

148. Constitutional rights are the cornerstone of democratic governance, and breaches thereof strike at the heart of the nation's legal and moral order. Where there is a right, there must be an effective remedy *ubi jus ibi remedium*. Accordingly, this Court grants remedies that are restorative, protective, and deterrent: declarations, judicial review orders, exclusion of unlawfully obtained evidence, and an award of fair and proportionate damages. These measures vindicate the Petitioner's rights, restore his dignity, and signal that abuse of prosecutorial and investigatory powers will attract judicial sanction.

149. In sum, this judgment affirms that constitutional guarantees are enforceable rights, not theoretical abstractions. It seeks to uphold the rule of law, protect human dignity, and reinforce public confidence in the administration of justice. The remedies granted are necessary and just to vindicate the Petitioner's rights and preserve the integrity of the constitutional order.

150. Finally, having regard to the principle of costs following the event, the Petitioner, having succeeded in demonstrating clear, substantial, and systemic constitutional violations, is entitled to the full costs of and incidental to this petition. The Respondents' actions occasioned unnecessary litigation, compelling the Petitioner to seek redress before this Court.

117. Accordingly, this Court makes the following orders:

- a. A declaration be and is hereby issued that the arrest, detention, and the denial of access to legal counsel to the Petitioner on 19th May 2025 violated his fundamental rights and freedoms under Articles 49(1)(a) and (c) of the Constitution.
- b. A declaration be and is hereby issued that the evidence underpinning the intended prosecution of the Petitioner in **Nairobi Chief Magistrate's Court Anti-Corruption Criminal Case No. E024 of 2025**, particularly the M-Pesa statements, was obtained in a manner that violated the Petitioner's right to privacy under Article 31 of the Constitution, and that the admission of this evidence would render his trial unfair and be detrimental to the administration of justice, contrary to Article 50(4) of the Constitution.
- c. A declaration be and is hereby issued that the institution and continuation of criminal proceedings in **Milimani Anti-Corruption Case No. E024 of 2025: Republic v. George Natembeya and Emmanuel Wafula Masungu** is an abuse of the court process, is unlawful, and is unconstitutional.
- d. The interim and conservatory orders issued by this Court on 5th June, 2025 restraining the Respondents from taking any further steps in Milimani Anti-Corruption Case No. E024 of 2025, or from acting in any manner inconsistent with the constitutional rights of the Petitioner, be and are hereby confirmed and made permanent.
- e. An order of certiorari be and is hereby issued to bring into this court and quash the charge sheet dated 20th May 2025 and all subsequent

proceedings in ***Milimani Anti-Corruption Case No. E024 of 2025: Republic v. George Natembeya and Emmanuel Wafula Masungu.***

- f. An order of prohibition be and is hereby issued prohibiting the 1st, 2nd, and 3rd Respondents from investigating, recommending the prosecution, or commencing or continuing any prosecution of the Petitioner on account of the same facts or any facts arising from or related to the subject matter of ***Milimani Anti-Corruption Case No. E024 of 2025: Republic v. George Natembeya and Emmanuel Wafula Masungu.***
- g. An award of General damages to the Petitioner in the total sum of Kenya Shillings Two Million Five Hundred Thousand only (KShs 2,500,000) is awarded to the Petitioner; and the same shall attract interest at court rates from the date of this judgment until payment in full.
- h. Costs shall be borne by the Respondents

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF MARCH 2026.

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for the Petitioner – Mr. Elijah Mwangi, Mr. Simiyu, Mr. Alakonya, Mr. Echesa, Mr. Buhega and Mr. Wanyoike

Counsel for the 1st Respondent – Ms. Kihara

Counsel for the 4th and 5th Respondent – Ms. Kongo h/b Mr. Marwa

Court Assistant – Ms. Lwambia

ORIGINAL