

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. E538 OF 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(C), 27, 29 (A), 41 (1), 50 AND ARTICLE 157 (11) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE CASE NO. 174 OF 2020 AT MILIMANI, REPUBLIC VS ISAIAH KABUGU GITHINJI & 4 OTHERS**

**BETWEEN**

**ISAIAH KABUGI GITHINJI.....1<sup>st</sup>  
PETITIONER KEN MURITU  
WAIRIMU.....2<sup>nd</sup> PETITIONER DORCAS  
WANJUGU NJUGUNA.....3<sup>rd</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT INSPECTOR  
GENERAL.....2<sup>ND</sup> RESPONDENT DIRECTOR**

**JUDGMENT**

1. The Petitioners, Isaiah Kabugi Githinji, Ken Muritu Wairimu and Dorcas Wanjugu Njuguna, filed a constitutional petition dated 1<sup>st</sup> October 2024 and later amended on 17<sup>th</sup> February 2025, against the Attorney General, the Inspector General of Police, the Director of Criminal Investigations and Faulu Microfinance Bank Limited.
  
2. In the amended petition, the petitioners challenge their arrest and prosecution in Chief Magistrates Court Criminal Case No 174 of 2020 at Milimani and contend that their constitutional rights and fundamental freedoms were violated. Seeking orders that: -
  - a. *A declaration that Milimani chief magistrate’s criminal case number 174 of 2020 in which the petitioners were tried and acquitted of the offences of conspiracy to commit a felony, misrepresentation and stealing was instituted without any factual foundation or basis and was malicious and an abuse of police powers and prosecutorial powers vested in the DPP.*
  
  - b. *A declaration be and is hereby issued that the prosecution of the petitioners in Milimani chief magistrate’s criminal case number 174 of 2020 was commenced without any factual basis.*



5. The Petitioners pleaded that the prosecution was founded on what they described as fabricated and trumped-up allegations connected to funds said to be in the region of Ksh 35,292,244, and that consequently they were subjected to stringent bond terms which they state they were unable to meet for a period, leading to custodial detention.
6. The Petitioners further pleaded reputational and economic harm, including publication of the allegations in the media, loss of employment by the 1<sup>st</sup> Petitioner, business disruption affecting the 2<sup>nd</sup> Petitioner, and health related effects on the 3<sup>rd</sup> Petitioner.
7. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents maintains that they acted within their constitutional and statutory mandates, and that the Petitioners failed to establish constitutional violations, malice, or any basis for attributing the prosecution to improper motive by the state agencies.
8. The 4<sup>th</sup> Respondent avers that it is a regulated financial institution entrusted with customer funds and that it detected suspicious transactions, conducted internal inquiries, and reported the matter to investigative authorities, maintaining that it acted in good faith and in compliance with regulatory and statutory obligations.

### **Parties' submissions**

9. The Petitioners submit that their arrest and prosecution were arbitrary, malicious, and without factual foundation. They state that they were

arrested without a warrant, charged with conspiracy to commit a felony involving KSh 35,292,244, and subjected to a humiliating trial that culminated in acquittal. They contend that the prosecution lacked evidence and that the Respondents knew or ought to have known that the case had no reasonable prospect of conviction.

10. They argue that their prosecution violated Articles 25(c) and 50 of the Constitution, asserting that the right to a fair trial extends beyond the courtroom to investigations and charging decisions. They rely on ***Samson John Nderitu v Attorney General [2010] eKLR***, where the court observed: *“before an accused person is taken to court... the prosecuting authority... carry out investigations... to determine if the facts disclose an offence before arraigning such a person in a court of law.”*
11. The Petitioners contend that the failure to conduct proper investigations rendered the prosecution oppressive and unconstitutional. The Petitioners rely on ***Samuel Muchiri W. Njuguna v Attorney General & 6 Others (HCCC No. 838 of 2003)***, quoted in their submissions, where the court held *“the defendants unlawfully and wrongfully arrested the plaintiff... compensation must be made in the form of general damages.”*
12. They argue that wrongful arrest and prosecution by state officers constitute a constitutional violation warranting compensation.

13. The Petitioners assert that they were selectively prosecuted while bank officials who verified the transactions were not charged. They submit that this violated Article 27 on equality before the law. They rely on ***Karanja v Director of Public Prosecutions & 3 others [2022] KEHC 11095***, arguing that selective prosecution is arbitrary and unconstitutional.
14. They submit that the unlawful prosecution caused loss of employment, reputational harm, financial distress, and health complications. They urge the court to find that the Respondents violated their constitutional rights and to award general and exemplary damages as compensation for malicious prosecution and violation of fundamental rights.
15. The 1<sup>st</sup> -3<sup>rd</sup> Respondents submit that the criminal case was lawful and instituted following investigations triggered by a complaint from the 4<sup>th</sup> Respondent. They maintain that the Petitioners failed to prove malice or constitutional violations and that the police acted within their statutory mandate.
16. They rely on ***Murunga v Attorney General (1979) eKLR***, stating: “(1) that a prosecution was instituted... (2) that the prosecution was terminated in the plaintiff’s favour, (3) that the prosecution was instituted without reasonable and probable cause and (4) that it was actuated by malice.” They argue that although the Petitioners were acquitted, they failed to prove lack of reasonable cause or malice.

17. They argue that the Petition fails the precision test under **Anarita Karimi Njeru v Republic (1979) eKLR** requiring constitutional violations to be pleaded with specificity. They also cite **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** on the importance of precise claims. Further, relying on **Abdilwahab Ibrahim Ali & another v Inspector General of Police & 3 others [2017] eKLR**, they contend that damages are unavailable where no constitutional violation is proven.
18. The 4<sup>th</sup> Respondent submits that, as a regulated financial institution, it is obligated to safeguard customer funds and report suspicious transactions. It states that discrepancies detected internally led to reporting to the Banking Fraud Investigation Unit in compliance with legal and regulatory duties.
19. It argues that the Petitioners failed to establish the essential elements of malicious prosecution. Relying on **Murunga v Attorney General (1976-1980) KLR 125**, the Respondent emphasizes that all elements must be proved conjunctively. It also cites **Secretary, Board of Management Lugulu Mixed & Boarding Primary School v Mutanda (2023)** affirming that failure to prove the elements defeats the claim.
20. The 4<sup>th</sup> Respondent contends that a corporation cannot harbour malice absent evidence against its officers. Citing **Nzoia Sugar Company Ltd v Fungututi [1988] KLR 399**, it submits that spite must be attributable to a servant of the entity. It further relies on **Susan Mutheu Muiu v Joseph Makau Mutua (2018) eKLR**, which held “Even if a complainant... makes a

*malicious complaint... malice cannot automatically be transferred to the prosecutor..."*

21. The 4<sup>th</sup> Respondent maintains that it merely reported suspicious transactions and did not control the decision to prosecute. It argues that the police and prosecution acted independently, and that acquittal does not negate the existence of reasonable and probable cause at the time charges were instituted.

### **Analysis and Determination**

#### ***Whether the petitioners proved their case and is therefore merited.***

22. This court's jurisdiction to determine alleged violations of the Bill of Rights is from Articles 22 and 23 of the Constitution. Where a petitioner alleges that a right or fundamental freedom has been denied, violated, infringed, or threatened, the court must consider whether the violation is pleaded and proved, and if so, what relief is appropriate.
23. The Court of Appeal has emphasized the centrality of precision in constitutional litigation. In ***Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)***, the Court of Appeal stated: "*We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court.*"
24. Even where a petition cites constitutional articles, a court must still interrogate whether the pleadings and evidence demonstrate the manner of

violation attributed to each respondent, and whether the alleged breach is proved on the applicable standard.

25. The Petitioners' core issue is that their arrest and prosecution in Criminal Case No 174 of 2020 was commenced without any factual basis, thereby amounting to misuse of state power, malicious prosecution, and consequent constitutional violations.
26. In ***Robert Okeri Ombeka v Central Bank of Kenya [2015] KECA 464 (KLR)***, the Court of Appeal held : *"That a suspect was acquitted of a criminal case is not sufficient ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment."*
27. In the same decision, the Court of Appeal restated that a claimant must establish, among other elements, absence of reasonable and probable cause, and malice, and it is not enough to rely on acquittal alone.
28. Similarly, in ***Nzoia Sugar Company Ltd v Fungututi [1988] KECA 93 (KLR)***, Apaloo JA stated: *"It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious prosecution."*
29. Further, on the distinct burden in malicious prosecution, the Court of Appeal stated in ***James Karuga Kiiru v Joseph Mwamburi & 2 others [2001] KECA 354 (KLR)***: *"To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is."*

30. From the present petition, it is not in dispute that the Petitioners were charged and prosecuted, and that the criminal proceedings terminated in their favour by acquittal. The contest lies in whether the prosecution was mounted without reasonable and probable cause and whether it was actuated by malice, as well as whether any constitutional wrong was thereby established.
31. The Petitioners urged the court to infer malice and lack of factual foundation from the trial court's acquittal and what they described as the trial court's findings, including that the prosecution evidence did not establish conspiracy, and that some bank officials were not charged.
32. However, applying the Court of Appeal's binding guidance, the Petitioners were required to go beyond acquittal and show, by evidence before this court, that the Respondents acted without reasonable and probable cause and that their actions were actuated by malice.
33. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents' position is that they acted within mandate upon a complaint and that the Petitioners did not demonstrate malice or constitutional violation attributable to them. The Petitioners did not place before this court material demonstrating that the investigative process was undertaken outside the law, that relevant facts were knowingly ignored, or that the investigators acted dishonestly or unreasonably within the meaning described by the Court of Appeal.

34. On the 4<sup>th</sup> Respondent, the 4<sup>th</sup> Respondent's affidavit and submissions maintained that it conducted internal inquiries, reported suspicious transactions to investigators, and that the decision to charge was made by investigative and prosecutorial authorities based on the investigations. The Petitioners, on their part, asserted that the complaint was fabricated, and that the prosecution was instigated at the instance of the 4<sup>th</sup> Respondent.
35. In the absence of evidence demonstrating that the 4<sup>th</sup> Respondent's report was false, made dishonestly, or made with an improper motive, the authorities caution against liability being imposed merely because a report led to prosecution.
36. Beyond malicious prosecution, the Petitioners framed their case as a constitutional grievance, pleading violations under articles 25(c), 27, 29(a), 41(1), 47, 50 and invoking article 157(11).
37. The court has considered whether, on the material before it, the Petitioners proved specific constitutional violations by the Respondents.
38. On the right to a fair trial and fair hearing, the Petitioners' case was that the prosecution itself, being baseless, violated their constitutional rights. The Respondents' position was that the Petitioners were tried in court, and the prosecution ended in acquittal, and that the Petitioners did not demonstrate how their fair trial rights were infringed.

39. Here, the Petitioners largely anchored their constitutional claim on the outcome of the criminal trial and on assertions about the lack of evidence, without placing before this court sufficient material to demonstrate that the constitutional threshold for proving violation is met as against each Respondent.
40. On equality and freedom from discrimination, the Petitioners pleaded selective prosecution, arguing that other persons, including some bank officials, were not charged. The Respondents rejected that as a basis for constitutional violation and maintained the actions were in mandate.
41. Selective charging, without more, does not automatically translate into unconstitutional discrimination. A Petitioner must demonstrate the differential treatment and connect it to the constitutional standard in Article 27 as pleaded and proved. On the material placed before the court in this petition, that threshold was not met.
42. On freedom and security of the person, including the complaint that the Petitioners were arrested without a warrant, the Petitioners asserted arbitrariness; the Respondents maintained lawfulness within their investigative mandate. In the absence of sufficient material placed before this court to demonstrate unlawfulness or arbitrariness within the applicable constitutional and statutory framework, I am not persuaded that the

Petitioners proved the alleged violations on the balance required in constitutional petition.

43. The totality of the foregoing leads me to the conclusion that the Petitioners did not discharge the burden of proving that the Respondents violated their constitutional rights and fundamental freedoms in the manner pleaded, nor did they prove, on evidence, the essential ingredients that would sustain the gravamen of their case as framed around malicious prosecution.

***Whether the Petitioners are entitled to reliefs sought***

44. Reliefs under article 23, including compensation, are available where a violation is proved. In determining the nature of constitutional damages, the Supreme Court in ***CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR)*** stated that –

*“Under common law principles, an injured party was entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. Compensation for personal loss depended on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable were broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in article 23 of the Constitution.”*

45. The Supreme Court also underscored that the availability of compensation flows from proof of violation, and that the grant of constitutional relief is an exercise of judicial discretion anchored on known legal principles.
46. In the present matter, having found that the Petitioners did not establish the alleged constitutional violations, the foundation for grant of compensatory reliefs under Article 23 is not laid.
47. As regards exemplary damages, such relief is not automatic and is not available in the absence of proof of violation and an evidential basis justifying a punitive or deterrent award within the legal framework.

**Conclusion and Orders**

48. For the reasons set out above;
  - a. The Amended Petition dated 17<sup>th</sup> February 2025 is not merited and is dismissed.
  - b. Each party to bear its own costs.
49. Orders Accordingly. File Closed Accordingly.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF FEBRUARY 2026.**

.....  
**BAHATI MWAMUYE MBS**  
**JUDGE.**

In the presence of :

Counsel for the Petitioners: Mr. Otieno hb Mr. Mugoi

Counsel for the 1<sup>st</sup> - 3<sup>rd</sup> Respondents: No appearance

Counsel for the 4<sup>th</sup> Respondent: Mr. Chebon h/b Mr. Macharia